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Death of a Bail Bondsman: The Implementation and Successes of Nonmonetary, Risk-Based Bail Systems

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DEATH OF A BAIL BONDSMAN: THE IMPLEMENTATION AND SUCCESSES OF NONMONETARY, RISK-BASED BAIL SYSTEMS

ABSTRACT

The Eighth Amendment to the United States Constitution provides that bail, when afforded to a criminal defendant, not be excessive. However, there is no provision as to what form bail must take or how it is to be determined. Starting in the twilight of the nineteenth century, monetary conditions of bail became increasingly prevalent throughout the United States. Yet, in recent years, there has been a movement to eliminate the requirement that defendants pay their way to pretrial freedom. States have taken measures to move away from cash bail, ranging from significantly limiting its use to outright prohibitions against monetary conditions on bail. The impetus behind such reform measures is that monetary conditions on bail discriminate against lower income defendants by disparately leading to pretrial detention of individuals who cannot afford to pay the required sum.

This Comment analyzes the relative success of the risk-based, nonmonetary bail systems that several states have implemented. This Comment begins by analyzing the history of the right to bail in the United States, starting with how such a right was understood at the time of the founding. Next, the evolution of the application of bail and the considerations behind pretrial release or detention determinations, are discussed. This Comment then proceeds to analyze how risk-based, nonmonetary bail systems have been codified and applied. Last, this Comment evaluates the impact that these schemes have had on the states of implementation and potential alterations that would allow for better administration of such legislation.

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INTRODUCTION

Through bail reform, New Jersey reduced its jail population by 25%¹ and saved millions of dollars² without an increased risk to public safety.³ At the same time, low income individuals were able to remain in good health⁴ and maintain employment. These positive outcomes resulted from nonmonetary, risk-based bail legislation in New Jersey,⁵ amongst other states. Despite their effectiveness, the adoption of nonmonetary bail systems has not been widespread, as only a limited number of states have implemented such schemes.⁶

When payments are made a condition of pretrial release, there is a stratification between those who can afford to pay for their release and those who cannot.⁷ Certain presumptively innocent defendants “languish[] in jail weeks, months, and perhaps even years before trial,” simply because they cannot pay for freedom.⁸ Racial and ethnic minorities are more likely to be adversely affected by monetary bail provisions.⁹

This Comment argues that risk-based bail provisions better protect the rights of pretrial defendants while imposing no additional costs—whether economic, administrative, or social—on the jurisdictions that administer them. This Comment proceeds in four Parts. Part I presents the history of the right to bail throughout Anglo-American law. The American understanding of the right to bail provides great discretion to the states in deciding how to afford their citizens the opportunity to pretrial release.¹⁰ Part II addresses shifting trends in the balance between the governmental interests in bail and the rights of pretrial

¹ N.J. COURTS, JAN. 1–DEC. 31, 2017 REPORT TO THE GOVERNOR AND THE LEGISLATURE 4 (2017).

² AM. BAR ASS’N CRIMINAL JUSTICE SECTION, STATE POLICY IMPLEMENTATION PROJECT, PRETRIAL RELEASE REFORM 5.

³ N. J. COURTS, *supra* note 1.

⁴ *See, e.g.,* Corinne Ramey, *NYC to Pay \$3.3 Million to Family of Teen Who Languished at Rikers Island*, WALL ST. J. (Jan. 24, 2019, 6:12 PM), <https://www.wsj.com/articles/nyc-to-pay-3-3-million-to-family-of-teen-who-languished-at-rikers-island-11548371523> (describing a pretrial defendant who committed suicide after he spent a long period of time in prison because his family could not afford his \$3,000 bail).

⁵ *See, e.g.,* N.J. STAT. ANN. § 2A:162-15 (West 2017).

⁶ States that have adopted risk-based approaches to bail include Alaska, and Kentucky. *See* ALASKA STAT. ANN. § 12.30.011 (West 2018); KY. REV. STAT. ANN. § 431.066 (West 2019); California passed such a bill, but it is currently being stayed pending a ballot proposition. *See* S. 10, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

⁷ *See* MARIE VANNOSTRAND, NEW JERSEY JAIL POPULATION ANALYSIS 11, 13 (2013).

⁸ President Lyndon B. Johnson, Remarks at the Signing of the Bail Reform Act of 1966 (June 22, 1966).

⁹ *See* Rakesh Kochhar & Richard Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession*, PEW RES. CTR.: FACTTANK (Dec. 12, 2014), <http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/>.

¹⁰ *See, e.g.,* United States v. Salerno, 481 U.S. 739 (1987) (upholding the constitutionality of the Bail Reform Act of 1984).

defendants. Namely, it presents the origins of modern bail systems that emerged following the federal Bail Reform Acts of 1966 and 1984.¹¹ Part III explains the reasons for the adoption of risk-based bail systems and the form that such provisions take. By analyzing the specific characteristics of the defendant and the charged offense, courts seek to predict that defendant's risk to public safety and likelihood of flight before trial.¹² Finally, Part IV analyzes the level of success of nonmonetary bail systems and addresses major criticisms to and concerns over adoption of such provisions.

I. HISTORY OF THE RIGHT TO BAIL

"For the law holds that it is better that ten guilty persons escape than that one innocent suffer."¹³ This prominent quote by William Blackstone embodies the perspective that Anglo-American law takes toward the punishment of criminals. However, this axiomatic principle is not applied to those accused of a crime who are awaiting trial. Despite the presumption of innocence present in American law,¹⁴ accused persons are detained before they are afforded their constitutional right to a trial.¹⁵ Yet, bail provides a mechanism to allow accused, non-convicted individuals to maintain their liberty. Bail balances a defendant's liberty interests with the government's interest in preserving public safety and assuring a defendant appears in court as required.¹⁶ The right to bail has long been debated in Anglo-American law, as its availability has shifted throughout history with numerous codifications altering the scope of the right.¹⁷

A. *The Right to Bail in English History*

The first provision of a right to bail can be found in the thirty-ninth chapter of the Magna Carta, which was promulgated in 1215.¹⁸ That chapter provided that "no freeman shall be arrested or detained in prison . . . unless lawful

¹¹ See Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended at 18 U.S.C. §§ 3141–50 (2012)); Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (amended 1984).

¹² See, e.g., N.J. STAT. ANN. § 2A:162-16(b) (West 2017).

¹³ 4 WILLIAM BLACKSTONE, COMMENTARIES *2596.

¹⁴ Coffin v. United States, 156 U.S. 432, 453 (1895) (holding that the "presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of . . . our criminal law").

¹⁵ See, e.g., N.J. COURTS, *supra* note 1, at 20 (stating that pretrial jail population accounts for roughly half of the total jail population in New Jersey).

¹⁶ See, e.g., N.J. STAT. ANN. § 2A:162-15 (West 2017); see also KY. REV. STAT. ANN. § 431.066 (West 2019); S. 10, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

¹⁷ See generally Holland v. Rosen, 895 F.3d 272, 288 (3d Cir. 2018); Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 965–89 (1965).

¹⁸ Foote, *supra* note 17, at 965–66.

judgment of his peers and by the law of the land.”¹⁹ This wording did not explicitly state whether it applied to pretrial defendants as well as post-conviction inmates. The Statute of Westminster, the First, partially clarified this ambiguity by setting forth a list of crimes for which pretrial bail had to be provided.²⁰ The division was predominately between felonies, which were not bailable, and noncapital crimes, which were bailable.²¹ Despite the provisions of this law, courts often refused to bail accused persons.²² Instead, judges relied on the Magna Carta, which allowed for more judicial discretion, even though the new statute sought to remove this leeway.²³ Such decisions were often motivated by the desire to appease the king by accepting the arguments of the attorney general over those of the accused individuals.²⁴ This judicial abuse prompted debate in the House of Commons over how to give force to the Statute of Westminster.²⁵ The House of Commons adopted the Petition of Right, which states that “no freeman in any such manner as is before mentioned, be imprisoned or detained.”²⁶ Despite these efforts, judges still found ways to refuse bail to those for whom it should have been afforded.²⁷ Most popular amongst these methods was either waiting extended periods before setting bail²⁸ or setting conditions of bail that were impossible for a person to meet.²⁹

A major advancement in the rights of the accused came with the passage of the Bill of Rights of 1689,³⁰ which marked the first appearance of language similar to what would become the Eighth Amendment to the United States Constitution.³¹ The pertinent provision of the Bill of Rights of 1689 stated, “That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”³² This enactment came out of the political

¹⁹ Magna Carta § 39 (1215), *reprinted in* ZECHARIAH CHAFEE, JR., DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS: THE ANGLO-AMERICAN TRADITION 249, 251 (1963).

²⁰ Statute of Westminster, the First 1275, 3 Edw., c. 15 (Eng.) (requiring sufficient surety for the release of those accused of a bailable offense).

²¹ *Id.*

²² Foote, *supra* note 17, at 966.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 966–67.

²⁶ House of Commons, Petition of Right (1628) (Eng.) (citing instances of judicial disregard for the Statute of Westminster).

²⁷ Foote, *supra* note 17, at 968.

²⁸ Judges would wait over a year before setting bail conditions. Jenkes’ Case, 6 How. St. Tr. 1189, 1208 (1676).

²⁹ Foote, *supra* note 17, at 967.

³⁰ Bill of Rights of 1689, 1 W. & M., st. 2, c. 2, pmbl., cl. 10.

³¹ See U.S. CONST. amend. VIII.

³² Bill of Rights of 1689, 1 W. & M., st. 2, c. 2, pmbl., cl. 10.

turmoil caused by the Glorious Revolution and abdication of the throne by King James II.³³ After the tumultuous rule of James II and social unrest caused by religious tensions, the British Parliament sought to assure certain rights for the people of England and to grow the power of the legislative body.³⁴ Consequently, the English system of pretrial detention had three components: (1) a legislative determination of which crimes were bailable; (2) a right to habeas corpus to determine the conditions of bail, where allowed; and (3) a provision that bail could not be excessive.³⁵ Each of these rights was seen as distinct and requiring legislative enactments to ensure them.³⁶ It was against this backdrop that the American colonies, and later the United States, developed their own independent laws in regard to bail.

B. The Right to Bail in the United States

In the American colonies, colonial governments were the first to adopt pretrial detention legislation.³⁷ Early forms of these provisions followed the English model by enacting separate legislation to provide a right to bail and protections from excessive bail.³⁸ The 1790 Constitution of Pennsylvania exemplified this approach. In one section, it stated that “all prisoners shall be bailable . . . unless for capital offences,”³⁹ thus creating a right to bail. A different section of that constitution established the right to be free from excessive bail by stating that “excessive bail shall not be required.”⁴⁰

The separate treatment of the right to bail and the ban on excessive bail demonstrated the understanding that these two rights associated with bail were separate before and at the founding of the United States.⁴¹ In fact, shortly before the drafting of the Bill of Rights, the Continental Congress passed the Northwest Ordinance, which included two separate clauses to ensure the two distinct rights.⁴² This law dictated that “all persons shall be bailable, unless for capital

³³ ANDREW BLICK, *BEYOND MAGNA CARTA: A CONSTITUTION FOR THE UNITED KINGDOM* 84 (2015).

³⁴ *Id.*

³⁵ Foote, *supra* note 17, at 968.

³⁶ *See id.*

³⁷ *See, e.g.*, MASS. BODY OF LIBERTIES § 18 (1641). Similar language was included in the laws of many of the early colonies. Foote, *supra* note 17, at 975.

³⁸ *Holland v. Rosen*, 895 F.3d 272, 289 (3d Cir. 2018).

³⁹ PA. CONST. art. ix, § 14 (1790).

⁴⁰ *Id.* § 13.

⁴¹ Foote, *supra* note 17, at 968.

⁴² NORTHWEST ORDINANCE art. 2.

offenses . . . all fines shall be moderate; and no cruel or unusual punishments shall be inflicted.”⁴³

Although the founders knew that the right to bail and the protection against excessive bail were separate concepts,⁴⁴ the United States Constitution does not afford a right to bail.⁴⁵ The Eighth Amendment provides that bail not be excessive,⁴⁶ thus codifying only one part of the understanding of bail. The founders’ omission of language guaranteeing a right to bail was not the result of a concern over federalism, as the first Congress addressed this apparent oversight by passing the Judiciary Act of 1789,⁴⁷ which provided that “for any crime or offense . . . the offender may . . . be arrested, and imprisoned or bailed”⁴⁸ However, this formulation presented certain issues. First, it merely provided that a pretrial defendant may be bailed, not a right to bail under certain circumstances.⁴⁹ Moreover, since the right to bail was statutorily passed, it was possible that the right could be eliminated or altered with relative ease.⁵⁰ Since no such efforts to eliminate bail in all cases have been undertaken,⁵¹ courts have not ruled on whether the Eighth Amendment ensures such a right; therefore, the debate over the scope of the rights ensured by the Eighth Amendment persists.⁵²

Similarly, since the right to bail is not constitutionally assured, it is not incorporated against the states through the Fourteenth Amendment.⁵³ Yet, while the specifics may vary in how it is administered, bail is allowed federally and in every state.⁵⁴ The common, modern American concept of bail is that of paying money, either to the court or a bail bondsman, to secure pretrial release.⁵⁵ However, when the bail provisions, both federal and state, were adopted, monetary bail was not in use.⁵⁶ Instead, the common practice was a personal

⁴³ *Id.*

⁴⁴ Foote, *supra* note 17, at 976–77.

⁴⁵ *See generally* U.S. CONST.

⁴⁶ U.S. CONST. amend. VIII (“Excessive bail shall not be required”).

⁴⁷ *See* Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73.

⁴⁸ *Id.*

⁴⁹ *See id.*

⁵⁰ *See* U.S. CONST. art. 1, § 7, cl. 2 (stating that Congress can pass bills by a majority vote of each house). Therefore, Congress could pass an updated version of the Judiciary Act that did not include the bail language.

⁵¹ There have been cases that have sought to invalidate certain bail provisions, but not to attack the right to bail in and of itself. *See, e.g.,* *United States v. Salerno*, 481 U.S. 739, 754 (1987).

⁵² *Holland v. Rosen*, 895 F.3d 272, 287–88 (3d Cir. 2018).

⁵³ *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971) (stating that only the Eighth Amendment’s prohibition on excessive bail is incorporated against the states).

⁵⁴ PRETRIAL JUSTICE INST., *THE STATE OF PRETRIAL JUSTICE IN AMERICA* 17 (2017).

⁵⁵ *See, e.g.,* 18 U.S.C. § 3142 (2012).

⁵⁶ A. HIGHMORE, JR., *A DIGEST OF THE DOCTRINE OF BAIL IN CIVIL AND CRIMINAL CASES*, at v–vi (Dublin, College-Green 1783).

surety, in which a third party would personally affirm that the accused would be present at trial.⁵⁷ The surety was normally a close acquaintance of the accused who would take personal responsibility for the accused's conduct while released on bail.⁵⁸ The only imposition of a monetary penalty would be if, despite the assurances of the surety, the accused did not appear at trial.⁵⁹ In such an instance, the court would demand payment from the surety.⁶⁰ This practice is quite different than that of commercial bail bondsmen and monetary bail that is prevalent in modern times, which require a monetary payment as a condition of release.⁶¹

Each state has considerable leeway to enact a bail system because the Supreme Court has put forth a broad definition of bail.⁶² The Court has defined bail as “the traditional right to freedom before conviction,” and “the right to release before trial, conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty.”⁶³ This definition does not mention what form those assurances must take.⁶⁴ The sole limitation on the states' bail provisions is the Eighth Amendment, which only guarantees that the “proposed conditions of release or detention not be excessive in light of the perceived evil” of the accused.⁶⁵ The federal and state governments have freedom in defining the purposes of bail and the “perceived evil” against which they seek to protect.⁶⁶ While due process protects against “detention or other forms of physical restraint prior to any determination of guilt,” an accused's liberty interests are “subordinated where there has been an adjudication that detention is necessary because an arrestee presents an identified and articulable threat to an individual or the community . . . or to ensure [the accused's] presence at trial.”⁶⁷ Consequently, the constitutional protections of the Eighth Amendment and the Due Process Clause do not place significant restraints on the states' ability to develop their own systems.

⁵⁷ *Id.* at 197.

⁵⁸ Comment, *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966, 967–68 (1961).

⁵⁹ June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 520–21 (1983).

⁶⁰ *Id.*

⁶¹ *Holland v. Rosen*, 895 F.3d 272, 289, 291 (3d Cir. 2018).

⁶² *See, e.g., Stack v. Boyle*, 342 U.S. 1, 4 (1951).

⁶³ *Id.*

⁶⁴ *See generally id.*

⁶⁵ *United States v. Salerno*, 481 U.S. 739, 754 (1987).

⁶⁶ *See, e.g., id.*

⁶⁷ *Steele v. Cicchi*, 855 F.3d 494, 502 (3d Cir. 2017).

The shift from personal surety to monetary bail in most states is traceable to the late nineteenth century.⁶⁸ As society shifted from the close-knit communities of the colonial period to the more transient culture of the frontier and American cities, the relationships necessary for a personal surety were eroded.⁶⁹ This deterioration gave rise to the paid bail system.⁷⁰ Pretrial defendants pay a portion of the monetary bail condition to a bail bondsman who assures the defendant's appearance in court.⁷¹ If the defendant fails to appear, the bail bondsman is liable for the remainder of the monetary bail.⁷² From the first bail bond business in 1898,⁷³ bail-bondsmen are still commonplace in many states.⁷⁴ While there is debate as to the right to bail in the United States, when bail is offered, the states are free to administer it as they see fit, so long as the conditions placed on it are not excessive in light of the circumstances.⁷⁵ With such discretion to administer bail, the states and federal government have vacillated between more lenient forms and systems that favor pretrial detention.

II. PRIOR SHIFTS IN THE AMERICAN BAIL SYSTEM

For roughly six decades, there have been expansions and contractions of both the rights of pretrial defendants and the power of courts.⁷⁶ The tension between these two interests has been at the core of bail legislation. In the 1960s, people involved in the criminal justice system began to take an evidence-based approach to analyzing the best practices of the bail system.⁷⁷ Congress passed the Federal Bail Reform Act of 1966,⁷⁸ which created a presumption of pretrial release that could be predicated, in many instances, on nonmonetary conditions.⁷⁹ After this expansion of pretrial defendants' rights, social unrest across the United States led many political actors to adopt law and order

⁶⁸ Comment, *supra* note 58, at 967–68.

⁶⁹ *Id.*

⁷⁰ See, e.g., ARTHUR L. BEELEY, *THE BAIL SYSTEM IN CHICAGO* 39–44 (1927).

⁷¹ See, e.g., *Holland v. Rosen*, 895 F.3d 279 (3d Cir. 2018).

⁷² See, e.g., *id.*

⁷³ *Id.* at 295 (referencing the article *The Old Lady Moves On*, TIME, Aug. 18, 1941).

⁷⁴ See, e.g., Rachel Smith, Comment, *Condemned to Repeat History? Why the Last Movement for Bail Reform Failed, and How This One Can Succeed*, 25 GEO. J. ON POVERTY L. & POL'Y 451, 456 (2018).

⁷⁵ *United States v. Salerno*, 481 U.S. 739, 754 (1987).

⁷⁶ See, e.g., Bail Reform Act of 1984, 18 U.S.C. §§ 3141–50 (2012); Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (amended 1984).

⁷⁷ See, e.g., SCOTT KOHLER, VERA INSTITUTE OF JUSTICE: MANHATTAN BAIL PROJECT (1962).

⁷⁸ See Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (amended 1984).

⁷⁹ *Id.*

rhetoric,⁸⁰ and ultimately tougher criminal procedures.⁸¹ The passage of the Federal Bail Reform Act of 1984 (hereinafter “the 1984 Act”) sparked preventative detention.⁸² This legislation led to an increase in pretrial detention,⁸³ expanding judicial power at the expense of pretrial defendants. Section A will address the research behind and legislative provisions of the Federal Bail Reform Act of 1966 (hereinafter “the 1966 Act”). Section B will discuss the rise of tough-on-crime rhetoric and the subsequent advent of preventative detention that resulted from the Federal Bail Reform Act of 1984.

A. Attempts at a Risk Factor Analysis Model that Led to the Federal Bail Reform Act of 1966

The trend toward monetary bail, rather than personal or nonsecured surety,⁸⁴ marked the dawn of perceived disparate treatment based on income of pretrial defendants.⁸⁵ The 1966 Act contained three separate indicia that a defendant’s income should not be a determinant of pretrial detention, namely, the purpose of the act, the factors considered for release, and the right to reconsideration of release conditions.⁸⁶ This Section discusses the key circumstances surrounding the adoption of the 1966 Act, including research into the treatment of pretrial defendants and risk factors that could predict a pretrial defendant’s likelihood of flight.⁸⁷ As a result of these conditions, Congress passed the 1966 Act to limit the use of monetary bail,⁸⁸ prompting states to adopt similar legislation.⁸⁹

The 1960s saw the first major attempts to address concerns over the monetary bail system.⁹⁰ Seeing issues with the criminal justice system, journalist Herbert Sturz investigated pretrial detention.⁹¹ Sturz sought to remedy the fact that much of New York City’s prison population was made up of pretrial

⁸⁰ See Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L. & POL’Y 3, 14–15 (2013).

⁸¹ See Bail Reform Act of 1984, 18 U.S.C. §§ 3141–50 (2012).

⁸² TIMOTHY R. SCHNACKE ET AL., PRETRIAL JUSTICE INST., THE HISTORY OF BAIL AND PRETRIAL RELEASE 17 (2010).

⁸³ U.S. GEN. ACCOUNTING OFFICE, CRIMINAL JUSTICE: IMPACT OF BAIL REFORM IN SELECTED DISTRICT COURTS 15–16 (1989).

⁸⁴ See Comment, *supra* note 58, at 967–68.

⁸⁵ Smith, *supra* note 74, at 454–55.

⁸⁶ See Bail Reform Act of 1966, Pub. L. No. 89-465, §§ 2–3, 80 Stat. 214, 214–15 (amended 1984).

⁸⁷ See SCOTT KOHLER, VERA INSTITUTE OF JUSTICE: MANHATTAN BAIL PROJECT (1962).

⁸⁸ See Bail Reform Act of 1966 § 3.

⁸⁹ Smith, *supra* note 74, at 455–66.

⁹⁰ KOHLER, *supra* note 87.

⁹¹ *Id.*

detainees.⁹² Sturz studied pretrial detention in hopes of arriving at an alternative to monetary bail.⁹³ After several months, Sturz developed a plan to eliminate monetary bail in favor of a risk-based model.⁹⁴ Under this system, Sturz evaluated the employment history, family ties, and prior criminal records of defendants to determine the risk of flight before trial.⁹⁵ Stronger employment history and ties to the community correlated with a lower risk of flight.⁹⁶ A longer criminal record increased the likelihood of pretrial flight.⁹⁷ Sturz made recommendations to judges to release or detain solely based on his factor analysis—recommendations with no monetary conditions.⁹⁸ Armed with this new method, Sturz established a yearlong experiment to evaluate the efficacy of his model.⁹⁹ This experiment used the risk-factor analysis on criminal defendants in New York City.¹⁰⁰ Defendants for whom Sturz recommended release were set free without monetary bail in 60% of cases, and appeared in court in almost 99% of cases.¹⁰¹

The success of Sturz’s program quickly gained national attention. The U.S. Department of Justice held the National Conference on Bail and Criminal Justice in 1964.¹⁰² This conference was to “focus nationwide attention on the defects in the bail system, the success of experiments in improving it, and the problems remaining in its reform.”¹⁰³ After examining the efficacy of Sturz’s program, the federal government adopted a similar scheme in the 1966 Act.¹⁰⁴ At the signing of this new law, President Lyndon B. Johnson stated that a poor pretrial detainee “languishes in jail weeks, months, and perhaps even years before trial. He does not stay in jail because he is guilty. . . . He does not stay in jail because he is any more likely to flee before trial. He stays in jail for one reason only—he stays in jail because he is poor.”¹⁰⁵

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* This success is slightly tempered by the fact that Sturz and his colleagues would contact defendants to remind them of the court dates and would even arrange for taxis to take them to court when needed.

¹⁰² *Id.*

¹⁰³ NAT’L CONFERENCE ON BAIL & CRIMINAL JUSTICE, PROCEEDINGS AND INTERIM REPORT, at iv (1965).

¹⁰⁴ KOHLER, *supra* note 87.

¹⁰⁵ Johnson, *supra* note 8. The President noted the sole purpose of bail was to assure the defendant’s appearance in court, which is in stark contrast to later bail provisions discussed in Part II.B of this Comment.

The 1966 Act provided safeguards against income discrimination in pretrial detention determinations.¹⁰⁶ The purpose of the act was to “revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges . . . when detention serves neither the ends of justice nor the public interest.”¹⁰⁷ Under this law, any defendant charged with a noncapital offense was presumed eligible for release on personal recognizance or an unsecured appearance bond.¹⁰⁸ Neither of these forms of pretrial release placed a monetary condition on release, as an unsecured appearance bond only required payment if the defendant failed to appear in court.¹⁰⁹ The presumption of pretrial release could be overcome only if a judge found, “in the exercise of his discretion, that such a release [would] not reasonably assure the appearance of the person as required.”¹¹⁰

In such an instance, the act provided a list of five additional conditions that may be imposed upon the defendant’s release.¹¹¹ The judge was to impose the first condition in the list that would “reasonably assure the appearance of the person for trial.”¹¹² The first two conditions, placing the defendant in the custody of a designated person or placing restrictions on travel and association, were nonmonetary.¹¹³ The third and fourth condition of release, an appearance bond and a bail bond, were the only ones that allowed judges to require a defendant to pay for release.¹¹⁴ Since a judge has to use the first condition in this list that would assure the defendant’s appearance,¹¹⁵ monetary conditions could only be imposed in limited cases. The final item listed in the act allowed the judge to impose any other condition that would assure the defendant’s appearance.¹¹⁶

To determine conditions of release, if any, a judge was to use a risk analysis that expanded upon Sturz’s factors.¹¹⁷ The 1966 Act included nine factors that

¹⁰⁶ *See id.*

¹⁰⁷ Bail Reform Act of 1966, Pub. L. No. 89-465, § 2, 80 Stat. 214, 214 (amended 1984).

¹⁰⁸ *Id.* § 3. If the defendant were charged with a capital offense, he was to be treated in the same manner as a non-capital offender unless the judge believed that no condition of release would assure his appearance in court or that the defendant posed a danger to the community. This is the bill’s only reference in the bill to a danger to public safety. *Id.*

¹⁰⁹ *See, e.g.,* GEN. COURT OF JUSTICE, SUPERIOR AND DISTRICT COURT DIVISIONS FOR ROCKINGHAM COUNTY NC, ADMINISTRATIVE ORDER 2–4 (2012) (outlining the distinction between an unsecured appearance bond and a secured bond).

¹¹⁰ Bail Reform Act of 1966 § 3.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *See id.*

judges were to consider in deciding whether to release a pretrial defendant: (1) “the nature and circumstances of the offense;” (2) “the weight of the evidence against the accused;” (3) the accused’s family ties; (4) the accused’s employment history; (5) the accused’s financial resources; (6) the accused’s “character and mental condition;” (7) the accused’s “length of . . . residence in the community;” (8) the accused’s criminal record; and (9) the accused’s record of appearance at past court dates.¹¹⁸ These factors add another protection against pretrial detention based on income. Since a judge was to consider the financial resources of the defendant,¹¹⁹ presumably the conditions placed on bail were not intended to detain individuals solely based on an inability to pay the monetary amount set by the judge. The bill also included the provision that any defendant who remained in detention for more than twenty-four hours, solely because he could not pay the monetary conditions for his release, was entitled to a reconsideration of those conditions.¹²⁰ Consequently, the purpose of the act, the factors considered in determining release, and the right to reconsideration of release conditions, provided three separate indications and protections that a defendant’s income should not be a determinant in his pretrial detention.

These federal reform measures prompted certain states to reexamine their own bail systems.¹²¹ States hoped to achieve the successes the federal government saw from release determinations based on risk, which relied less on monetary bail conditions.¹²² In fact, certain states were willing to go further than the reforms adopted by the federal government.¹²³ For example, a handful of states eliminated the commercial bail industry, and instead only allowed for secured appearance bonds, paid to the court.¹²⁴ As a result of these reforms, pretrial defendants were detained at drastically lower rates and were treated equally, regardless of financial status.¹²⁵ This expansion of the rights of pretrial defendants was short-lived, and there was a great retraction of them as tough-on-crime rhetoric emerged in the subsequent decades.¹²⁶

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Smith, *supra* note 74, at 455–56.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See, e.g., ADMIN. OFFICE OF THE COURTS, KY. COURT OF JUSTICE, PRETRIAL REFORM IN KENTUCKY 3 (2013).

¹²⁵ Smith, *supra* note 74, at 455–56.

¹²⁶ See MARC MAUER, RACE TO INCARCERATE 53 (1999).

B. *Tough-on-Crime Measures and Implementation of Preventative Detention*

The 1984 Act was the culmination of nearly two decades of criticism of the perceived leniency of its predecessor, the 1966 Act. As politicians sought votes, they adopted tough-on-crime rhetoric¹²⁷ that was then translated into federal legislation. The 1984 Act eroded the protections afforded to pretrial defendants.¹²⁸ Namely, adding a defendant's risk to public safety as a factor in bail determinations led to the rise of preventative detention, and an expansion of pretrial incarceration.¹²⁹ The Supreme Court upheld the practice of preventative detention,¹³⁰ despite persistent concerns over its implementation.¹³¹

In the decades following the 1966 Act, there was great social unrest in the United States, which led to an increased desire for the rule of law.¹³² This goal was achieved by granting courts a greater ability to punish defendants both pretrial and post-conviction.¹³³ With tense race relations, the beginning of the War on Drugs, and continuing resistance to the Vietnam War, politicians began appealing to the electorate's desire for stability and law and order.¹³⁴ This rhetoric was effective because 81% of Americans believed that law and order was declining.¹³⁵ In fact, that issue was reported to be the key concern in the 1968 presidential election.¹³⁶ These fears were illustrated most notably in the 1988 presidential campaign, in which Michael Dukakis was criticized for his policies on crime.¹³⁷ In that election cycle, George H. W. Bush launched a critical ad campaign which told the story of Willie Horton.¹³⁸ A television commercial detailed how Willie Horton, who was serving a life sentence without the possibility of parole for a brutal murder, was granted weekend furloughs, which allowed him to escape prison and rob, stab, and rape a couple.¹³⁹

¹²⁷ See, e.g., Newell, *supra* note 80, at 14–15.

¹²⁸ See Bail Reform Act of 1984, 18 U.S.C. §§ 3141–50 (2012).

¹²⁹ U.S. GEN. ACCOUNTING OFFICE, *supra* note 83, at 15–16.

¹³⁰ United States v. Salerno, 481 U.S. 739, 755 (1987).

¹³¹ AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE 32–33 (3d ed. 2007).

¹³² See Newell, *supra* note 80, at 14–15.

¹³³ See *id.* at 5.

¹³⁴ See, e.g., *id.* at 14–15.

¹³⁵ MAUER, *supra* note 126, at 53.

¹³⁶ MICHAEL FLAMM, LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S, at 162 (2005).

¹³⁷ Newell, *supra* note 80, at 16.

¹³⁸ See *id.*

¹³⁹ Erin Blakemore, *How the Willie Horton Ad Played on Racism and Fear*, HISTORY (Nov. 2, 2018), <https://www.history.com/news/george-bush-willie-horton-racist-ad>; Doug Criss, *This Is the 30-Year Old Willie Horton Ad Everybody Is Talking About Today*, CNN (Nov. 1, 2018), <https://www.cnn.com/2018/11/01/politics/willie-horton-ad-1988-explainer-trnd/index.html>.

Against this social backdrop, the government passed legislation that overhauled the criminal justice system, including pretrial detention.¹⁴⁰ Beginning in the 1970s, “a new era of the bail reform movement, one characterized by heightened public concern over crime, including crimes committed by persons released on bail,” emerged.¹⁴¹ While little evidence was cited to support the claim that released pretrial defendants were committing crimes at higher rates, tough-on-crime politicians validated their positions with sensationalized stories.¹⁴² Crimes committed by defendants on pretrial release were highly publicized, which led to “growing dissatisfaction with laws that did not permit judges to consider danger to the community” when making pretrial release determinations.¹⁴³ As a result, Congress passed the District of Columbia Court Reform and Criminal Procedure Act of 1970, applicable only in the nation’s capital, which allowed judges to consider public safety, not just risk of failure to appear at court, when determining whether to release or detain pretrial defendants.¹⁴⁴ The ability for judges to detain individuals to prevent a risk that they would reoffend while awaiting trial became known as preventative detention.¹⁴⁵

The overhaul of bail in the nation’s capital was expanded across the United States.¹⁴⁶ Over a decade after the change of bail considerations in the District of Columbia, Congress passed the Comprehensive Crime Control Act of 1984,¹⁴⁷ which contained the 1984 Act.¹⁴⁸ The first difference between the 1984 legislation and the 1966 Act is the addition of public safety as a purpose of bail for defendants in noncapital cases.¹⁴⁹ The 1984 version of the statute stated that a person is presumed to be eligible for release on personal recognizance or unsecured appearance bond “unless the judicial officer determine[d] that such release [would] not reasonably assure the appearance of the person as required or [would] endanger the safety of any other person or the community.”¹⁵⁰ Additionally, the 1984 statute eliminated the distinction between defendants

¹⁴⁰ See, e.g., Bail Reform Act of 1984, 18 U.S.C. §§ 3141–50 (2012); Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified as amended at 34 U.S.C. § 10101 (2012)).

¹⁴¹ PRETRIAL SERVS. RES. CTR., THE SUPERVISED PRETRIAL RELEASE PRIMER 5 (1999).

¹⁴² See, e.g., Criss, *supra* note 140.

¹⁴³ PRETRIAL SERVS. RES. CTR., *supra* note 141.

¹⁴⁴ SCHNACKE ET AL., *supra* note 82, at 17.

¹⁴⁵ *Id.*

¹⁴⁶ See 18 U.S.C. §§ 3141–3150.

¹⁴⁷ Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified at 18 U.S.C. § 1).

¹⁴⁸ 18 U.S.C. §§ 3141–3150.

¹⁴⁹ *Id.* § 3142(b).

¹⁵⁰ *Id.*

charged with capital and non-capital offenses.¹⁵¹ The 1966 Act considered risk to public safety for defendants charged with capital offenses.¹⁵² However, since public safety was now a consideration, in all cases, even for noncapital offenses, there no longer existed a need for a differentiation between the two categories of crimes.

Under the 1984 Act, there was an expansion of potential conditions of release that a judge could place upon a pretrial defendant.¹⁵³ If these conditions were not met, then the defendant was not eligible for bail, and thus the judge's analysis would stop.¹⁵⁴ In addition to the conditions listed in the 1966 Act,¹⁵⁵ which were designed to assure the defendant's appearance in court, the 1984 legislation contained nine additional potential release conditions that would assure public safety.¹⁵⁶ Such conditions included avoiding contact with the victim of the charged crime, reporting to a parole officer, refraining from possession of a firearm, and refraining from alcohol or other intoxicants.¹⁵⁷ The 1984 Act also appeared to have increased the protections against judicial discrimination against lower-income defendants.¹⁵⁸ It mandated that judges "not impose a financial condition [of release] that results in the pretrial detention" of the defendant.¹⁵⁹ Despite this bar on detaining defendants pretrial solely due to an inability to pay monetary conditions of bail, many defendants who had a monetary condition imposed on their release were nonetheless held in prison for that exact reason, whether under the federal statute or state equivalents.¹⁶⁰

However, the 1984 Act allowed a judge to detain pretrial defendants in a greater number of cases.¹⁶¹ Under the 1966 version of the bail statute, a judge could only subject an individual to pretrial detention if the judge found that no condition of release would assure the individual's presence in court.¹⁶² The 1984

¹⁵¹ Compare *id.* § 3142, with Federal Bail Reform Act of 1966, Pub. L. No. 89-465, § 3, 80 Stat. 214, 214-16 (amended 1984).

¹⁵² Federal Bail Reform Act of 1966 § 3.

¹⁵³ See 18 U.S.C. § 3142(c)(1)(B). This version of the federal bail statute still required that a judge use the least restrictive condition or combination of conditions that would achieve the listed purposes of bail. *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Federal Bail Reform Act of 1966 § 3; see *supra* notes 113-116 (discussing the possible conditions that a judge could impose on a pretrial defendant's release).

¹⁵⁶ See 18 U.S.C. § 3142(c)(1)(B).

¹⁵⁷ *Id.*

¹⁵⁸ See *id.* § 3142(c)(2).

¹⁵⁹ See *id.*

¹⁶⁰ See, e.g., VANNOSTRAND, *supra* note 7, at 13 (noting that nearly forty percent of New Jersey's jail population was comprised of pretrial detainees who had the option for release on monetary conditions but lacked the resources to do so).

¹⁶¹ See 18 U.S.C. § 3142(e).

¹⁶² Bail Reform Act of 1966, Pub. L. No. 89-465, § 3, 80 Stat. 214, 214 (amended 1984).

Act allowed judges to temporarily detain individuals who committed an offense while awaiting trial for a felony, while awaiting imposition of a sentence, while on probation or parole, or who were not citizens of the United States.¹⁶³ Such detention was not to exceed ten business days, so as to allow the court presiding over the new offense to notify the court or probation officer overseeing the prior crime.¹⁶⁴ Additionally, judges were permitted to detain defendants until and through their trial if “the judicial officer [found] that no condition or combination of conditions [would] reasonably assure the appearance of the person as required and the safety of any other person and the community.”¹⁶⁵ Moreover, if the defendant had previously been convicted of a crime of violence, a crime involving a firearm, certain drug offenses, or a crime against a minor, there was a rebuttable presumption that no conditions of release would assure the purposes of bail, and thus the defendant should be detained while awaiting trial.¹⁶⁶

In arriving at a decision of pretrial release or detention, a judge, under the 1984 Act, was to consider four factors, which related to both the risk of flight and the danger to the public posed by the defendant.¹⁶⁷ First, the judge was to evaluate the “nature and circumstances of the offense charged.”¹⁶⁸ Detention was more likely for crimes of violence, crimes of terrorism, crimes involving a minor victim, or crimes involving controlled substances, firearms, or other destructive devices.¹⁶⁹ Second, the judge was to consider the weight of evidence against the defendant.¹⁷⁰ The greater the evidence against the defendant, the more likely he was to attempt to flee while awaiting trial.¹⁷¹ Third, the judge was to weigh the history and characteristics of the defendant.¹⁷² This factor had two parts, one which relates to the risk of flight and one that corresponds to public safety.¹⁷³ The person’s family ties, employment history, financial ties, and community connection¹⁷⁴ relate to the likelihood that he will attempt to flee before trial. If the defendant, at the time of the charged offense, was on

¹⁶³ 18 U.S.C. § 3142(d)(2).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* § 3142(e)(1).

¹⁶⁶ *Id.* § 3142(e)(3)(A)–(E).

¹⁶⁷ *Id.* § 3142(g).

¹⁶⁸ *Id.* § 3142(g)(1).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* § 3142(g)(2).

¹⁷¹ Telephone Interview with Stuart A. Minkowitz, Assignment Judge, Vicinage 10 Superior Court of New Jersey (Nov. 16, 2018).

¹⁷² 18 U.S.C. § 3142(g).

¹⁷³ *Id.* § 3142(g)(3)(A)–(B).

¹⁷⁴ *Id.* § 3142(g)(3)(A).

probation, parole, or awaiting trial or sentencing for another offense,¹⁷⁵ it is more likely that he would reoffend, thus increasing the chance that a judge would use preventative detention to ensure the public safety. Last, the judge was to consider the nature and seriousness of the danger to any person or the community as a whole.¹⁷⁶ This factor directly embodies the public safety purpose of bail under the 1984 legislation.¹⁷⁷ The 1984 Act led to concerns, both administrative and constitutional, within court systems.

C. Implementation of the Federal Bail Reform Act of 1984

The great discretion and power that judges had to detain pretrial defendants under the 1984 Act was the subject of litigation on the grounds that it violated the constitutional provisions of the Due Process Clause and the Eighth Amendment.¹⁷⁸ The Supreme Court considered these arguments in *United States v. Salerno*.¹⁷⁹ In that case, Anthony Salerno and Vincent Cafaro were charged in a twenty-nine count indictment for RICO violations, conspiracy to commit murder, mail and wire fraud, extortion, and several gambling violations.¹⁸⁰ At their arraignment hearing, the court found that no condition of release would assure the public safety.¹⁸¹ The defendants appealed the determination of pretrial detention by the District Court for the Southern District of New York, claiming that allowing judges to detain defendants “on the ground that the arrestee is likely to commit future crimes” was facially unconstitutional.¹⁸²

The United States Court of Appeals for the Second Circuit found that the provisions of the 1984 Act that allowed for pretrial detention to protect public safety were “repugnant to the concept of substantive due process” because they allowed for the “total deprivation of liberty simply as a means of preventing future crimes.”¹⁸³ The Supreme Court, however, reversed the Second Circuit, holding that “extensive safeguards” in the 1984 Act “suffice to repel a facial challenge.”¹⁸⁴ Such safeguards include the right to counsel, the right of the defendant to testify, the right to confront witnesses, the statutorily enumerated

¹⁷⁵ *Id.* § 3142(g)(3)(B).

¹⁷⁶ *Id.* § 3142(g)(4).

¹⁷⁷ *Id.* § 3142(e)(1).

¹⁷⁸ SCHNACKE ET AL., *supra* note 82, at 18.

¹⁷⁹ 481 U.S. 739 (1987) (upholding the constitutionality of the Federal Bail Reform Act of 1984).

¹⁸⁰ *Id.* at 743. At the hearing, evidence was presented that “Salerno was the ‘boss’ of the Genovese crime family of La Cosa Nostra and that Cafaro was a ‘captain’” of that crime ring. *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 744.

¹⁸³ *Id.* (citing *United States v. Salerno*, 749 F.2d 64, 71–72 (2d Cir. 1986)).

¹⁸⁴ *Salerno*, 481 U.S. at 752.

factors that a judge can consider, the burden of proof of clear and convincing evidence, and the mandate that the arraignment judge includes written findings of fact in his final decision.¹⁸⁵ Additionally, the Supreme Court held that, “given the legitimate and compelling regulatory purposes of the Act and the procedural protections it offers . . . the Act [was] not facially invalid under the Due Process Clause of the Fifth Amendment.”¹⁸⁶ The Supreme Court also found no basis to the Eighth Amendment challenge that preventative detention is an excessive form of bail.¹⁸⁷ The Eighth Amendment’s Excessive Bail Clause does not contain any language that “limits permissible Government considerations [for bail] solely to questions of flight.”¹⁸⁸ So long as the purposes and factors underlying bail determinations are not excessive in light of the perceived threat posed by the defendant, the Eighth Amendment is not violated.¹⁸⁹ Therefore, with the compelling governmental interest in public safety, preventative detention is not excessive.¹⁹⁰

Following the Supreme Court’s ruling in *Salerno*, many jurisdictions expanded their use of preventative detention.¹⁹¹ Before the *Salerno* ruling, the American Bar Association (ABA) Prosecution Standards called for limited use of preventative detention.¹⁹² However, once preventative detention was ruled constitutional, the National Adult Protective Services Association (NAPSA)¹⁹³ and the ABA Prosecution Standards recommended that increased weight be placed on public safety when making pretrial release or detention decisions.¹⁹⁴ Much like after the 1966 Act,¹⁹⁵ state legislatures followed the example of Congress in enacting new bail statutes comparable to the federal legislation.¹⁹⁶ Within roughly a decade of the *Salerno* decision, forty-four states and the District of Columbia had added public safety as a factor to weigh in pretrial release decisions.¹⁹⁷

¹⁸⁵ *Id.* at 751–52.

¹⁸⁶ *Id.* at 752.

¹⁸⁷ *Id.* at 754–55.

¹⁸⁸ *Id.* at 754.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 754–55.

¹⁹¹ See SCHNACKE ET AL., *supra* note 82, at 18.

¹⁹² *Id.*

¹⁹³ NAPSA is a nonprofit organization that gathers and shares information on best practices for protecting victims of elder abuse. *About NAPSA*, NAT’L ADULT PROTECTIVE SERVICES ASS’N, <http://www.napsa-now.org/about-napsa/overview/> (last visited Mar. 24, 2020).

¹⁹⁴ SCHNACKE ET AL., *supra* note 82, at 18.

¹⁹⁵ Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (amended 1984).

¹⁹⁶ SCHNACKE ET AL., *supra* note 82, at 18.

¹⁹⁷ *Id.*

Despite the federal and state governments' embrace of preventative detention, concerns persisted with its implementation.¹⁹⁸ The 1984 Act mandated that judges not impose a financial condition that resulted in the pretrial detention of an individual.¹⁹⁹ Compliance with this requirement necessitated a "careful scrutiny of information about the defendant's background and financial circumstances," but allegedly, as of 2007, "no states [had] yet adopted a system" to effectively comply with this obligation.²⁰⁰ In many jurisdictions, "decisions about pretrial detention or release were made with little or no information about the financial circumstances."²⁰¹ More striking is that the lack of knowledge of the defendants' circumstances was not limited to their financial resources.²⁰² Courts often lacked information about any risk a defendant posed to public safety or flight.²⁰³ Arraignment hearings were "hurried initial appearance proceedings in which the defendant is without counsel."²⁰⁴ With such limited knowledge of the nature of and circumstances surrounding each defendant, courts could not meaningfully promote the purposes of preventing flight and protecting the public safety without detaining a large number of pretrial defendants.²⁰⁵

In 1989, when preventative detention was still growing, the United States General Accounting Office (GAO) completed a report comparing the effects of the Bail Reform Act of 1966 to that of 1984.²⁰⁶ The report's findings evinced the greater power to detain pretrial defendants under the 1984 legislation.²⁰⁷ The total detention rate for pretrial defendants rose from 26% to 31%.²⁰⁸ This increase in detention rate, however, was not attributable to a failure to pay a monetary condition for release, as that figure decreased.²⁰⁹ The increase in pretrial detention was due to risks of flight or danger to the public safety.²¹⁰ The report also found that the 1984 Act was more effective in ensuring its purposes

¹⁹⁸ See AM. BAR ASS'N, *supra* note 132, at 32–33.

¹⁹⁹ Bail Reform Act of 1984, 18 U.S.C. § 3142(c)(2) (2012).

²⁰⁰ The ABA did not cite any support for this assertion, nor did it mention any legal challenges to these deficiencies. See AM. BAR ASS'N, *supra* note 132, at 32.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ VANNOSTRAND, *supra* note 7, at 11, 13.

²⁰⁶ SCHNACKE ET AL., *supra* note 82, at 19.

²⁰⁷ See U.S. GEN. ACCOUNTING OFFICE, *supra* note 83, at 15–16.

²⁰⁸ *Id.*

²⁰⁹ Pretrial defendants who remained in custody for failure to pay monetary bail dropped by nearly 10%. *Id.* at 16–17.

²¹⁰ *Id.* at 16.

than the 1966 version.²¹¹ The number of defendants released before trial who failed to appear in court decreased.²¹² Additionally, the number of released pretrial defendants who committed another offense declined from 1.8% to just 0.8%.²¹³ A chief complaint that the GAO found with regard to the 1984 bail legislation was the amount of time required for detention hearings.²¹⁴ With more factors and evidence to consider regarding each defendant's risk of flight or danger to public safety,²¹⁵ detention hearings were more time-consuming.

Many states still rely on preventative detention.²¹⁶ While some jurisdictions do not place monetary conditions of bail as often as others,²¹⁷ detention due to a risk to public safety persists.²¹⁸ With the continued lack of information about pretrial defendants' risk of flight or danger to public safety,²¹⁹ issues continue over the detention of individuals solely on the basis of financial resources.²²⁰ It is against this backdrop that a new wave of reform movements have emerged in states such as New Jersey, California, Kentucky, and Alaska.²²¹

III. NONMONETARY BAIL SCHEMES

As a result of the concerns raised over the 1984 Act and its state counterparts, certain states have sought to adopt alternatives that more closely align with the 1966 federal enactment. In addition to the growth of prison populations, concerns over disparate treatment based on income level catalyzed these bail reforms.²²² To respect the rights of pretrial defendants, certain states have adopted legislation to limit or eliminate monetary condition on bail.²²³ These new bail provisions, known as risk-based systems, use certain factors that are predictive of a defendant's risk of flight and danger to public safety.²²⁴ Eligible

²¹¹ *See id.*; *see also* SCHNACKE ET AL., *supra* note 82, at 19.

²¹² Under the 1966 bail statutes, 2.1% of defendants failed to appear, while under the 1984 enactment, only 1.8% did so. U.S. GEN. ACCOUNTING OFFICE, *supra* note 83, at 16; *see also* SCHNACKE ET AL., *supra* note 82, at 19.

²¹³ SCHNACKE ET AL., *supra* note 82, at 19.

²¹⁴ *Id.*

²¹⁵ *See* Bail Reform Act of 1984, 18 U.S.C. § 3142(g) (2012).

²¹⁶ *See, e.g., id.* § 3142.

²¹⁷ SCHNACKE ET AL., *supra* note 82, at 19.

²¹⁸ *See, e.g.,* NEW JERSEY COURTS, *supra* note 1, at 8.

²¹⁹ SCHNACKE ET AL., *supra* note 82, at 19 (noting that Illinois, Kentucky, Oregon, and Wisconsin outlawed commercial bail bonds).

²²⁰ *See, e.g.,* VANNOSTRAND, *supra* note 7, at 11, 13.

²²¹ *See* ALASKA STAT. ANN. § 12.30.011 (West 2018); KY. REV. STAT. ANN. § 431.066 (West 2019); S. 10, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

²²² *See generally* N.J. COURTS, *supra* note 1, at 7.

²²³ *See, e.g.,* S. 10, 2017–2018; Leg., Reg. Sess. § 1320.10(d) (Cal. 2018).

²²⁴ *Initiatives: Pretrial Justice*, LAURA & JOHN ARNOLD FOUND., <https://www.arnoldfoundation.org/>

defendants are classified based perceived risk, and then assigned certain nonmonetary conditions of release.²²⁵

A. *Jurisdictions and Purposes of Adoption of Risk-Based Models*

Critics maintained that under the preventative detention statutes that followed the 1984 Act, the rights of pretrial defendants were not respected.²²⁶ Further, defendants detained while awaiting trial suffer a number of negative effects,²²⁷ and monetary conditions on bail disproportionately impact lower income individuals and minorities.²²⁸ To address these concerns, certain states have transitioned from resource-based bail determinations to a risk-based analysis.²²⁹

Monetary bail systems permeate throughout the criminal justice process, not only the pretrial stage.²³⁰ The detention itself costs people their jobs while detained, causing negative health effects, and depriving individuals of their liberty interests.²³¹ These negative aspects of pretrial detention lead a number of accused individuals to plead guilty to escape pretrial detention.²³² As the adjudication process progresses, those who are detained pretrial are convicted at higher rates, sentenced to prison more often, and receive longer sentences than those who are released pretrial.²³³ A portion of the increased conviction rates for defendants detained before trial may be attributable to the fact that they were found to pose a greater risk of flight or danger to public safety. Yet, since a large number of defendants remain in prison solely due to an inability to pay a monetary condition,²³⁴ economic standing plays a significant role in determining the ultimate outcome of a criminal case.

One aspect that reform proponents find most troubling about the money-bail system is the disparate treatment of accused individuals based on income levels. In many instances, those who are released on bail are those who can afford to

initiative/criminal-justice/pretrial-justice/ [https://web.archive.org/web/20181124200444/https://www.arnoldfoundation.org/initiative/criminal-justice/pretrial-justice/].

²²⁵ See, e.g., S. 10, 2017–2018; Leg., Reg. Sess. § 1320.10 (Cal. 2018).

²²⁶ *Initiatives: Pretrial Justice*, *supra* note 225.

²²⁷ *Id.*

²²⁸ *Holland v. Rosen*, 895 F.3d 272, 279 (3d Cir. 2018).

²²⁹ See, e.g., S. 10, 2017–2018; Leg., Reg. Sess. § 1320.9 (Cal. 2018).

²³⁰ *Initiatives: Pretrial Justice*, *supra* note 225.

²³¹ *Id.*

²³² *Holland*, 895 F.3d at 280 (stating that defendants plead guilty to non-jail sentences rather than remain in jail and argue their case at trial).

²³³ *Id.*

²³⁴ VANNOSTRAND, *supra* note 7, at 11, 13.

pay for their release.²³⁵ Individuals with greater resources can pay for their release, even if their crime is of a more serious nature and they pose a greater danger to the community.²³⁶ The more serious the crime, the higher monetary amount the defendant has to pay in order to secure his pretrial release.²³⁷ The monetary conditions are set regardless of the defendant's financial resources,²³⁸ thus if a defendant has greater wealth, he can meet such conditions. However, lower-income defendants are detained pretrial because they cannot afford their bail, even for less serious or nonviolent crimes.²³⁹ In New Jersey in 2012, 38.5% of the total jail population had the option to post bail, but did not have the resources to do so.²⁴⁰ More striking is the fact that one-third of the individuals who remained in prison pretrial, even though they were eligible for bail, did so because they could not pay \$2,500 or less.²⁴¹ Many who support reform want to move from this "resource-based" model to a "risk-based" model, as a risk-based model would better assure the purpose of bail.²⁴² As a result of the troubling statistics regarding pretrial detention, New Jersey proposed an amendment to its constitution, which was ultimately approved through a ballot measure vote in the 2014 election.²⁴³ Other states, including Kentucky and California, have taken similar measures, by passing legislation, to transition from resource-based to risk-based bail practices.²⁴⁴

Risk-based models, as the name indicates, make detention decisions based on the risk posed by the specific defendant. Risk, as defined in certain statutes, has multiple components.²⁴⁵ The California, Kentucky, and New Jersey provisions include likelihood of appearance in court and probability of the accused committing a crime while on pretrial release.²⁴⁶ New Jersey's statute

²³⁵ *Holland*, 895 F.3d at 279.

²³⁶ *Id.* at 280.

²³⁷ *See, e.g.*, SUPERIOR COURT OF CAL., CTY. OF ORANGE, 2018 UNIFORM BAIL SCHEDULE: FELONY AND MISDEMEANOR 3–10 (2018).

²³⁸ *See, e.g., id.* at 14.

²³⁹ *Holland*, 895 F.3d at 280.

²⁴⁰ VANNOSTRAND, *supra* note 7, at 11, 13.

²⁴¹ *Id.*

²⁴² *Holland*, 895 F.3d at 280.

²⁴³ DIV. OF ELECTIONS, DEP'T OF STATE, OFFICIAL LIST: PUBLIC QUESTION RESULTS FOR 11/04/2014 GENERAL ELECTION PUBLIC QUESTION NO. 1, at 1 (2014) (stating that the measure passed by a margin of 61.8% to 38.2%).

²⁴⁴ *See, e.g.*, KY. REV. STAT. ANN. § 431.066 (West 2019) (taking effect on June 8, 2011); S. 10, 2017–2018 Leg., Reg. Sess. (Cal. 2018) (this bill was supposed to take effect on Oct. 1, 2019, but is currently stayed pending a referendum vote).

²⁴⁵ *See, e.g.*, N.J. STAT. ANN. § 2A:162-25 (West 2017); S. 10, 2017–2018 Leg., Reg. Sess. (Cal. 2018)

²⁴⁶ KY. REV. STAT. ANN. § 431.066 (West 2019); N.J. STAT. ANN. § 2A:162-15 (West 2017); S. 10, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

adds, as a third component of risk, the chance that the accused will “obstruct or attempt to obstruct the criminal justice process.”²⁴⁷ To determine whether to release or detain an individual while awaiting trial, courts in risk-based states weigh the risk of the defendant under each of these purposes.

There are multiple states that have adopted legislation to move to risk-based pretrial detention decisions. Among the early adopters are Arizona, Kentucky, and New Jersey.²⁴⁸ These states rely on an algorithm created by the Laura and John Arnold Foundation (now Arnold Ventures) to help judges assess the risk that the accused will commit a new crime or will not appear at scheduled court dates.²⁴⁹ This algorithm, known as a public safety assessment, was developed through a survey of 750,000 cases from roughly 300 jurisdictions²⁵⁰ to determine the data points that best predict an accused’s risk to public safety and likelihood of flight.²⁵¹ The new bail systems in these states still retain monetary bail, but “only when it is determined that no other conditions of release will reasonably assure the eligible defendant’s appearance in court.”²⁵² In practice, however, monetary bail is hardly used because judges are hard pressed to find that no combination of nonmonetary release conditions would fail to ensure the purposes of bail.²⁵³ According to the Assignment Judge for Vicinage Ten Superior Court of New Jersey, from January 2017 through October of 2018, there have been only a dozen instances where monetary conditions have been imposed under the risk-based bail system.²⁵⁴ Moreover, money bail is used only against defendants with greater resources because with greater wealth, those individuals are more capable of fleeing the jurisdiction and evading the judicial process.²⁵⁵

In August 2018, California’s Governor Brown signed into law a bill that will make California the first state to fully eliminate monetary bail.²⁵⁶ While the amendments to the pretrial detention statutes do not specify whether California will adopt the Laura and John Arnold Foundation’s algorithm, the wording of

²⁴⁷ N.J. STAT. ANN. § 2A:162-15 (West 2017).

²⁴⁸ *Initiatives: Pretrial Justice*, *supra* note 225 (noting that Arizona adopted this system in 2014, Kentucky in 2011, and New Jersey in 2017).

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *See infra* notes 294–299 (discussing the specific criteria that are used in this evaluation).

²⁵² N.J. STAT. ANN. § 2A:162-15 (West 2017).

²⁵³ Telephone Interview with Stuart A. Minkowitz, *supra* note 172.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ Thomas Fuller, *California Is the First State to Scrap Cash Bail*, N.Y. TIMES (Aug. 28, 2018), <https://www.nytimes.com/2018/08/28/us/california-cash-bail.html>.

the bill is fairly analogous to the states that have implemented that metric.²⁵⁷ The differentiating characteristic of the California statute is that it eliminates the wording that allows for monetary bail as a fallback in extraordinary conditions.²⁵⁸

B. Procedures and Implementation of Nonmonetary Bail

Under risk-based bail systems, there is a multi-step process from the time a suspected criminal is arrested until a final determination of release or detention is made.²⁵⁹ This Section analyzes the purposes of bail, to whom the risk-based bail schemes apply within the states of adoption, and then walks through the process of an ultimate release. These processes begin with a public safety assessment, discussed below, and five other factors that a judge weighs in considering an ultimate decision of release or detention.²⁶⁰ Once these considerations are weighed, California, Kentucky, and Alaska have fairly straightforward methods for determining whether to release or detain the accused.²⁶¹ New Jersey, however, has a more defined and regimented scheme that requires a judge to essentially work through a checklist to arrive at the ultimate decision, considering any and all possible conditions on release and their potential efficacy.²⁶²

The states that have adopted a risk-based approach to bail have fairly similar procedures for implementing such systems. The stated purposes for bail are to “reasonably assure an eligible defendant’s appearance in court when required” and “the protection of the safety of any other person or the community.”²⁶³ New Jersey’s statute is unique in that it includes preventing the accused from obstructing, or attempting to obstruct, the criminal justice processes.²⁶⁴ However, unless there is a specific showing by the prosecution, there is a presumption that the defendant will not obstruct in the judicial process.²⁶⁵ The

²⁵⁷ Compare S. 10, 2017–2018 Leg., Reg. Sess. (Cal. 2018), with N.J. STAT. ANN. § 2A:162-15 (West 2017).

²⁵⁸ See generally S. 10, 2017–2018 Leg., Reg. Sess. § 1320.7 (Cal. 2018).

²⁵⁹ See, e.g., N.J. STAT. ANN. § 2A:162-16 (West 2017). See also S. 10, 2017–2018 Leg., Reg. Sess. § 1320.15 (Cal. 2018).

²⁶⁰ See, e.g., N.J. STAT. ANN. § 2A:162-20 (West 2017) (these factors, discussed below, include the weight of the evidence against the defendant, as well as the mental and physical characteristics of the accused).

²⁶¹ See ALASKA STAT. ANN. § 12.30.011 (West 2018); KY. REV. STAT. ANN. § 431.066 (West 2019); S. 10, 2017–2018 Leg., Reg. Sess. § 1320.11 (Cal. 2018).

²⁶² N.J. STAT. ANN. § 2A:162-17 (West 2017).

²⁶³ *Id.* See also KY. REV. STAT. ANN. § 431.066 (West 2019); S. 10, 2017–2018 Leg., Reg. Sess. § 1320.15 (Cal. 2018).

²⁶⁴ N.J. STAT. ANN. § 2A:162-20 (West 2017).

²⁶⁵ *Id.* § 2A:162-17(e).

New Jersey statute does not provide examples of how a defendant would obstruct the judicial process;²⁶⁶ the lack of detail, coupled with the presumption that obstruction will not occur, seems to indicate that this is not a major concern of the courts. Yet, one could imagine that jury or witness tampering, as well as destruction of evidence, would be considerations under this purpose.

To oversee the pretrial release or detention process, the states with risk-based systems have created pretrial assessment commissions.²⁶⁷ These commissions are comprised of members from various aspects of the state government, such as members from the state legislature, the attorney general's office, prosecutor's offices, and public defender's offices.²⁶⁸ The purpose of these commissions is to ensure that the pretrial release and detention provisions adequately accomplish the stated purposes.²⁶⁹ Additionally, the commission conducts research into such provisions in other states to identify best practices and recommend necessary amendments to their own states' legislation.²⁷⁰

The nonmonetary bail systems apply to all eligible defendants, which has varying definitions amongst the states.²⁷¹ Taken in conjunction, New Jersey, Kentucky, and California provide that any accused person who is subject to detention is entered into the nonmonetary bail system.²⁷² In New Jersey, an "eligible defendant" is one who has been issued "a complaint-warrant . . . for an initial charge involving an indictable offense or a disorderly persons offense."²⁷³ In contrast, complaint-summons do not render an accused eligible for a pretrial release or detention hearing under the new statutory framework because a summons does not carry with it the possibility of detention.²⁷⁴ Kentucky provides that "verified and eligible defendants," those whom "pretrial services is able to interview and assess, and whose identity pretrial services is able to confirm," are eligible for the risk assessment practices.²⁷⁵ California delineates who is eligible for nonmonetary bail by making it the default and exempting

²⁶⁶ See, e.g., *id.* § 2A:162-15.

²⁶⁷ See, e.g., *id.* § 2A:162-26.

²⁶⁸ See, e.g., *id.*

²⁶⁹ See, e.g., *id.*

²⁷⁰ See, e.g., *id.*

²⁷¹ See, e.g., *id.* § 2A:162-18-19; KY. REV. STAT. ANN. § 431.066 (West 2019).

²⁷² See N.J. STAT. ANN. § 2A:162-18 (West 2017); KY. REV. STAT. ANN. § 431.066 (West 2019); S. 10, 2017-2018 Leg., Reg. Sess. §§ 1320.8-1320.10 (Cal. 2018).

²⁷³ N.J. STAT. ANN. § 2A:162-15 (West 2017).

²⁷⁴ *Id.* § 2A:162-16. A complaint-warrant is the issuance of both a criminal complaint and an arrest warrant, while a complaint-summons is merely a criminal complaint and a court date for adjudication. Since a defendant is not detained pursuant to a summons, there is no need for a bail determination. See, e.g., N.J. MUNICIPAL COURT RULE 7:2-1 (2019).

²⁷⁵ KY. REV. STAT. ANN. § 431.066 (West 2019).

certain classes of offenses.²⁷⁶ The California bill states that a person “arrested or detained for a misdemeanor” must be “booked and released without being taken into custody.”²⁷⁷ All other accused individuals are subject to the provisions of the new bail system.²⁷⁸

The procedure leading to a pretrial release or detention decision begins with an analysis of the risk the defendant poses to public safety.²⁷⁹ First, the defendant needs to be detained.²⁸⁰ Once the eligible defendant is detained, a public safety assessment is conducted.²⁸¹ In Arizona, Kentucky, and New Jersey, this public safety assessment employs the algorithm developed by the Laura and John Arnold Foundation.²⁸² However, the states remain free to adopt any other system that they see fit because their legislatures have not designated a specific metric the state must rely on.²⁸³ Instead, the New Jersey statutory language only requires that the public safety assessment be “objective, standardized, and developed on analysis of empirical data and risk factors.”²⁸⁴ The requirement for objectivity entails that the assessment not factor in race, ethnicity, gender, or socio-economic status.²⁸⁵

The next step in the pretrial release or detention process is that the public safety assessment returns a score and recommendations for release or detention.²⁸⁶ The “score” created by the assessment takes different forms in the various states. In California and Kentucky, the defendants are categorized as “low risk,” “medium-risk,” or “high-risk,”²⁸⁷ whereas New Jersey relies on numeric scores.²⁸⁸ Once the assessment categorizes the defendant and gives the associated recommendations, the court weighs certain considerations, which include the public safety assessment, to issue a pretrial release decision.²⁸⁹ To avoid judicial abuse, both California and New Jersey place a timing requirement

²⁷⁶ S. 10, 2017–2018 Leg., Reg. Sess. §§ 1320.8, 1320.10 (Cal. 2018).

²⁷⁷ *Id.* § 1320.8.

²⁷⁸ *Id.* § 1320.9.

²⁷⁹ *See, e.g.*, N.J. STAT. ANN. § 2A:162-16(a) (West 2017); S. 10, 2017–2018 Leg., Reg. Sess. § 1320.20 (Cal. 2018).

²⁸⁰ *See, e.g.*, N.J. STAT. ANN. § 2A:162-16(a) (West 2017); S. 10, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

²⁸¹ *See, e.g.*, N.J. STAT. ANN. § 2A:162-16(a) (West 2017); S. 10, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

²⁸² *Initiatives: Pretrial Justice*, *supra* note 225; *see infra* notes 295–300 (discussing the specific criteria that are used in this evaluation).

²⁸³ *See, e.g.*, N.J. STAT. ANN. § 2A:162-16 (West 2017).

²⁸⁴ *Id.* § 2A:162-25.

²⁸⁵ *Id.*

²⁸⁶ *See, e.g., id.* § 2A:162-16.

²⁸⁷ KY. REV. STAT. ANN. § 431.066 (West 2019); S. 10, 2017–2018 Leg., Reg. Sess. § 1320.7 (Cal. 2018).

²⁸⁸ *Holland v. Rosen*, 279 F.3d 272, 281 (3d Cir. 2018).

²⁸⁹ *See, e.g.*, N.J. STAT. ANN. § 2A:162-20 (West 2017); *see also infra* notes 305–311 (discussing the considerations employed).

on when the order of pretrial release or detention must be rendered.²⁹⁰ New Jersey's statute requires that the decision be rendered within forty-eight hours of the defendant's "commitment to jail,"²⁹¹ and California's legislation puts in place a limit of three court days.²⁹² These limits are to ensure that a judge does not unreasonably delay a determination, effectively ordering the defendant's detention.

The public safety assessment employs nine factors that are associated with the risk of failure to appear, the risk of new criminal activity, and the risk of new violent criminal activity if the defendant is released.²⁹³ The following risk factors are included within the assessment: (1) the defendant's age at the time of arrest; (2) whether the charged offense involved violence; (3) whether the defendant has another pending charge at the time of arrest; (4) whether the defendant has a prior misdemeanor conviction; (5) whether the defendant has a prior felony conviction; (6) whether the defendant has any prior convictions for violent crimes; (7) whether the defendant has failed to appear in court within the past two years; (8) whether the defendant has failed to appear in court over two years in the past; and (9) whether the defendant has previously been sentenced to incarceration.²⁹⁴ Each of these factors is weighted depending on the predictive correlation it has with the possibility of the defendant's failure to appear, the risk of new criminal activity, and the risk of new violent criminal activity.²⁹⁵ For instance, if a defendant is under twenty-three years of age at the time of the current arrest, that factor is given two points under the risk for new criminal activity.²⁹⁶ Prior instances of failure to appear can receive zero, two, or four points, depending on the number of times that the defendant has missed a court date.²⁹⁷ A maximum of twenty-seven possible points can be attributed to a defendant; the higher the score, the riskier it is to allow the individual to be released pretrial.²⁹⁸

²⁹⁰ N.J. STAT. ANN. § 2A:162-16(b) (West 2017). "Commitment to jail" means a temporary detention between arrest and the date of the bail hearing. *Id.* § 2A:162-16(a).

²⁹¹ N.J. STAT. ANN. § 2A:162-16(a) (West 2017).

²⁹² S. 10, 2017–2018 Leg., Reg. Sess. § 1320.19 (Cal. 2018).

²⁹³ *Risk Factors and Formula*, PUBLIC SAFETY ASSESSMENT, <https://www.psapretrial.org/about/factors> (last visited Apr. 3, 2020).

²⁹⁴ *Id.*

²⁹⁵ *Id.* (containing a table that depicts how each factor is weighted).

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

The information for the public safety assessment comes from electronic court records.²⁹⁹ This source limits the quality of the information that can be considered, as not all divisions within the judicial system are fully integrated.³⁰⁰ As a result, the public safety assessment might not factor in the totality of the defendant's past criminal convictions, or whether the accused has failed to appear in court, since such information may be contained in the records of other divisions. This limitation hampers the efficacy of the assessment and may have a particular impact if the court records of other states are not available to the judge presiding at the arraignment hearing. Due to the ease with which individuals can travel between states, and potentially engage in criminal activity while in another state,³⁰¹ if those records are not factored into the public safety assessment, then courts do not have a full picture of the circumstances surrounding the defendant. Integrating all criminal records within the state, and amongst the states, would help better promote the purposes of bail.³⁰²

The public safety assessment is only the first of six elements that a judge is to consider in reaching an ultimate decision on release or detention.³⁰³ Since the public safety assessment is mathematically based, it cannot take into account certain intangible facts or circumstances of the situation; thus, there is judicial discretion in reaching an ultimate decision on pretrial release. For the first of the additional factors, the presiding judge considers the nature and circumstances of the offense charged.³⁰⁴ If the charged crime is more violent or poses a greater danger to public safety, a judge has discretion to increase his determination of release conditions or detention. Second, the judge considers the weight of the evidence against the accused.³⁰⁵ If the evidence is substantial, there is a greater likelihood that the defendant will be detained.³⁰⁶ Third, the defendant's history and characteristics are weighed.³⁰⁷ These characteristics include physical and mental conditions, family and community ties in the area, employment, and

²⁹⁹ Holland v. Rosen, 279 F.3d 272, 281 (3d Cir. 2018).

³⁰⁰ Telephone Interview with Stuart A. Minkowitz, *supra* note 172.

³⁰¹ See, e.g., *Report: Some Authorities Stop Search for Suspects at State Line*, CBS NEWS (Mar. 12, 2014, 10:18 AM), <https://www.cbsnews.com/news/usa-today-reports-criminals-cross-state-lines-to-elude-police-capture/> (stating that criminal suspects cross state lines to avoid arrest).

³⁰² See *infra* Part V.C for a greater discussion of this subject.

³⁰³ See, e.g., N.J. STAT. ANN. § 2A:162-20 (West 2017).

³⁰⁴ N.J. STAT. ANN. § 2A:162-20 (West 2017); S. 10, 2017–2018 Leg., Reg. Sess. § 1320.20 (Cal. 2018) (noting that certain violent offenses, such as crimes in which a weapon is used, should require greater conditions for release).

³⁰⁵ N.J. STAT. ANN. § 2A:162-20 (West 2017); S. 10, 2017–2018 Leg., Reg. Sess. § 1320.20 (Cal. 2018).

³⁰⁶ Telephone Interview with Stuart A. Minkowitz, *supra* note 172 (stating that if the evidence is substantial, there is more of a likelihood that the defendant will abscond so as to avoid conviction and prolonged detention in prison).

³⁰⁷ N.J. STAT. ANN. § 2A:162-20 (West 2017).

whether the defendant has a history of drug or alcohol abuse.³⁰⁸ The fourth relevant consideration is the nature and seriousness of the danger to a person or the community as a whole posed by the defendant.³⁰⁹ For instance, cases of domestic violence pose a higher risk to another person, the victim, due to the relationship between victim and defendant. Fifth, the court considers the risk of obstruction of the judicial process.³¹⁰ While these five factors overlap with the public safety assessment, they allow for judicial discretion to diverge from the recommendations of the strictly numerically based assessment. These considerations are similar and traceable to the risk factors that originated in the Federal Bail Reform Acts of 1966 and 1984.³¹¹ Taken in conjunction, these considerations allow a judge to make a final determination of what course of action to take.

Once all these considerations are evaluated, the defendant is placed into a certain category based on the relative risk of not appearing in court and the danger posed to the public.³¹² Alaska, California, and Kentucky have three tiers in which a defendant can be placed: low-risk, moderate-risk, and high-risk.³¹³ New Jersey has four categories: levels one through three and level three plus.³¹⁴ These classes inform the judge on what strategy to adopt with each defendant.³¹⁵ There are four possible outcomes from a pretrial release or detention hearing: (1) release the accused on his own recognizance; (2) release him on one or more nonmonetary conditions; (3) release him on monetary bail or combination of monetary bail and nonmonetary conditions; or (4) detain him.³¹⁶ California's approach, currently being stayed pending a ballot proposition, would offer only three of these outcomes since there is no option to impose monetary bail.³¹⁷

³⁰⁸ *Id.*; see also Telephone Interview with Stuart A. Minkowitz, *supra* note 172 (noting that in cases where the defendant suffers from drug addiction, judges are likely to require the defendant to attend treatment programs as a condition of release).

³⁰⁹ N.J. STAT. ANN. § 2A:162-20 (West 2017); S. 10, 2017–2018 Leg., Reg. Sess. § 1320.10 (Cal. 2018) (for instances of domestic violence, a judge may impose a restraining order that forbids the defendant from contacting the victim of the charged crime).

³¹⁰ N.J. STAT. ANN. § 2A:162-20 (West 2017); see *supra* note 265 and accompanying text.

³¹¹ For a discussion on the considerations used under those enactments, see *supra* Part II.

³¹² ALASKA STAT. ANN. § 12.30.011 (West 2018); KY. REV. STAT. ANN. § 431.066 (West 2019); Holland v. Rosen, 279 F.3d 272, 281 (3d Cir. 2018). S. 10, 2017–2018 Leg., Reg. Sess. § 1320.07 (Cal. 2018);

³¹³ ALASKA STAT. ANN. § 12.30.011 (West 2018); KY. REV. STAT. ANN. § 431.066 (West 2019); S. 10, 2017–2018 Leg., Reg. Sess. § 1320.07 (Cal. 2018).

³¹⁴ *Holland*, 279 F.3d at 281.

³¹⁵ *Id.*

³¹⁶ See, e.g., N.J. STAT. ANN. § 2A:162-16 (West 2017).

³¹⁷ S. 10, 2017–2018 Leg., Reg. Sess. § 1320.10 (Cal. 2018). California's nonmonetary bail legislation, which was passed and signed into law, was slated to take effect in October 2019, but was later stayed until the voters of California could vote on it. See, e.g., John Myers, *California Voters Are Divided Over Bail Reform, Poll Finds*, L.A. TIMES (Oct. 1, 2019, 5:36 PM), <https://www.latimes.com/california/story/2019-10-01/>

Each state that has adopted a risk-based bail system differs in how to apply the risk factor evaluations to decisions on pretrial release. California would adopt a straightforward approach that is directly keyed to the category in which the defendant is placed. If the accused is determined to be low-risk, he is released on his own recognizance.³¹⁸ Medium-risk defendants are released on supervised recognizance, which is defined by local court rules.³¹⁹ If the defendant is classified as high-risk, the court orders pretrial detention.³²⁰

Kentucky's provisions are nearly identical to those of California, with the additional option of monetary bail.³²¹ Low-risk individuals are released on their own recognizance in Kentucky, and medium-risk individuals are released subject to global position system monitoring, controlled substance testing, or increased supervision.³²² Individuals who are high-risk may be detained or released subject to conditions, which include monetary bail.³²³ However, Kentucky also provides that any individual who has monetary bail imposed as a condition of release receives a credit toward that sum of one hundred dollars per day spent in pretrial detention.³²⁴

In contrast, Alaska uses a hybrid of a risk-based and a resource-based model. Alaska's statute calls for the release of any defendant not accused of certain crimes, namely violent crimes, sexual crimes, or domestic violence.³²⁵ Any combination of nonmonetary bail conditions can be imposed on these defendants to ensure that they will appear in court and will not pose a threat to the public.³²⁶ However, Alaska maintains monetary bail for any high-risk individual.³²⁷ For low- and moderate-risk individuals, Alaska uses a risk-based model, but high-risk individuals who have not seen a change in bail are still subject to monetary bail.³²⁸

New Jersey's framework for pretrial release determinations is the most thorough and requires working through a sequence of alternatives that become

california-voters-divided-future-of-cash-bail-2020-election-poll.

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ KY. REV. STAT. ANN. § 431.066 (West 2019).

³²² *Id.*

³²³ *Id.*; *id.* § 431.520.

³²⁴ *Id.* § 431.066.

³²⁵ ALASKA STAT. ANN. § 12.30.011 (West 2018).

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

increasingly severe.³²⁹ There appear to be two competing approaches at play. First, there is a clearly delineated rubric that follows the categorization of the classes under the public safety assessment.³³⁰ Under this approach, Level One defendants are released and required to telephonically report to either a probation officer or member of pretrial services once a month.³³¹ Level Two individuals report telephonically as well, but they also must report in person once a month and are subject to some monitoring conditions, such as a curfew.³³² Individuals classified as Level Three have the same conditions as Level Two with the addition of increased monitoring, such as designated areas where the defendant is not allowed to go.³³³ Level Three Plus defendants typically must wear a global positioning system as a condition of release, or are placed under house arrest.³³⁴

However, under New Jersey's statutory language, the determinations of conditions of release or detention progress mechanically as if through a checklist that appears to allow for great judicial discretion. Under this scheme, judges start by evaluating whether releasing the defendant on his own recognizance will reasonably assure that he will appear in court, will not pose a threat to public safety, and will not obstruct the judicial process.³³⁵ If the court finds that this lesser measure will not achieve the stated objectives, then it must evaluate whether release with certain conditions would do so.³³⁶ As possible conditions of release, the court may require that the defendant: (1) not commit any new offense while released; (2) avoid contact with the alleged victim; (3) avoid contact with any and all witnesses; and (4) comply with any other nonmonetary conditions the court finds necessary.³³⁷ The statute suggests other conditions of release that the judge may place on the defendant, including one or a combination of, (1) requiring that the accused remain in the custody of a designated person;³³⁸ (2) maintain employment, or if unemployed, seek a job; (3) maintain or commence an educational program; (4) refrain from associating with certain individuals; (5) comply with a curfew and report to a designated

³²⁹ Holland v. Rosen, 279 F.3d 272, 281 (3d Cir. 2018).

³³⁰ *Id.* at 282.

³³¹ *Id.*

³³² *Id.*

³³³ *Id.* at 282–83.

³³⁴ David Reimel III, Comment, *Algorithms & Instruments: The Effective Elimination of New Jersey's Cash Bail System and Its Replacement*, 124 PENN. ST. L. REV. 193, 206 (2019).

³³⁵ N.J. STAT. ANN. § 2A:162-17(a) (West 2017).

³³⁶ *Id.* § 2A: 162-17(b).

³³⁷ *Id.*

³³⁸ This appears to be a form of personal surety. *See supra* notes 57–60 and accompanying text (discussing personal surety).

law enforcement agency; (6) be placed on house arrest.³³⁹ In addition to enumerated conditions, the judge has the discretion to impose any other condition he finds necessary to reasonably assure court appearance and public safety.³⁴⁰ The sole constraint is that the combination of conditions must be “the least restrictive . . . that the court determines will reasonably assure” the stated interests.³⁴¹ However, there is no language in the statute guiding judges on how to determine what constitutes a least restrictive approach.

Since these conditions are broken into three separate groups in the statutory language, it appears that the judge is meant to assess whether the conditions of the first group would assure the purposes of bail before progressing to the second or third subsection.³⁴² This approach would be analogous to the 1966 Act, which had tiered conditions of release.³⁴³ That version of the federal statute required that a judge “impose the first of the [listed] conditions of release which will reasonably assure the appearance” of the defendant at trial.³⁴⁴ Following the 1966 Act, the more liberal federal bail system, would comport with the motives behind New Jersey’s bail reform.

Judges may only impose monetary bail, either independently or in addition to any nonmonetary conditions necessary, when they find that no possible combination of nonmonetary conditions will ensure appearance in court.³⁴⁵ This provision for monetary bail is limited by the statutory language and in practice. The statute states that monetary bail is only allowed to ensure appearance in court and cannot be used as a condition to ensure public safety or prevent obstruction with the judicial process.³⁴⁶ This language imposes a safeguard against judicial abuse in that it does not allow a judge to order detention by imposing monetary bail that the defendant cannot afford.³⁴⁷ Moreover, in practice, judges are able to identify a combination of nonmonetary conditions that will ensure a defendant’s appearance in court, and thus they do not resort to monetary bail.³⁴⁸

³³⁹ N.J. STAT. ANN. § 2A:162-17(b)(2) (West 2017).

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *See id.* § 2A:162-17(a)–(c).

³⁴³ Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214, 214 (amended 1984).

³⁴⁴ *Id.* § 3.

³⁴⁵ N.J. STAT. ANN. § 2A:162-17(c) (West 2017).

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ Telephone Interview with Stuart A. Minkowitz, *supra* note 172.

Under New Jersey's framework, a defendant can be detained while awaiting trial in two ways. First, a defendant charged with a crime involving domestic violence or certain felonies may be detained.³⁴⁹ To order pretrial detention, the prosecution must submit to the court clear and convincing evidence that no combination of nonmonetary conditions will protect public safety.³⁵⁰ There is a "rebuttable presumption that some amount of . . . nonmonetary conditions of pretrial release . . . will reasonably assure" the purposes of bail.³⁵¹ Second, a defendant may be detained if he is charged with certain violent crimes,³⁵² including any crimes subject to life imprisonment.³⁵³ Under this set of crimes, there is a "rebuttable presumption that the eligible defendant shall be detained pending trial"³⁵⁴

New Jersey's bail system provides safeguards for the accused, even if they are detained while awaiting trial. The defendant is not to be imprisoned for more than ninety days³⁵⁵ while trial is pending.³⁵⁶ If no trial is commenced within that time, the defendant must be released unless the court finds an unjustifiable risk to public safety posed by release.³⁵⁷ Additionally, if the defendant is charged or indicted with another crime while detained, the ninety-day limits are to run simultaneously, not consecutively.³⁵⁸ This provision appears to be self-defeating. If the defendant were detained initially, it was likely due to a danger to public safety.³⁵⁹ Thus, whether at the time of arrest or ninety days after, release would pose an unjustifiable risk to public safety. This is increasingly true when the initial detention decision was made with the possibility of imposing conditions of release. The provisions for the ninety-day limit, however, do not mention the possibility of release conditions.³⁶⁰ Therefore, the danger posed at the initial detention hearing that could not be mitigated through any combination of conditions would still be present at a later point where such conditioned release is not available.

³⁴⁹ N.J. STAT. ANN. § 2A:162-19 (West 2017).

³⁵⁰ *Id.*

³⁵¹ *Id.* § 2A:162-18(b).

³⁵² Namely homicide, aggravated assault, aggravated sexual assault, or robbery. *Id.* § 2A:162-19.

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.* § 2A:162-22 (not including reasonable delays).

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *See, e.g., id.* § 2A:162-19.

³⁶⁰ *Id.* § 2A:162-22.

IV. NONMONETARY BAIL SYSTEMS SHOULD BE ADOPTED

Among the states that have taken significant measures to substantially reduce or eliminate the use of monetary bail conditions, evidence of the successes or drawbacks of each scheme is available in varying degrees. Both Alaska and Kentucky still maintain monetary bail conditions for defendants who are found to be high-risk by the public safety assessment.³⁶¹ Further, since the implementation of California's bail reform legislation has been delayed, there is no current information on the impact it will have.³⁶² Consequently, it is difficult to determine which changes in pretrial detention, decrease in recidivism while on bail, and increased flight are attributable to defendants released on monetary conditions versus nonmonetary ones. However, New Jersey's new bail scheme has been in effect since 2017,³⁶³ and monetary bail conditions are practically nonexistent.³⁶⁴ As a result, the most illustrative statistics of the efficacy of nonmonetary, risk-based bail procedures come from New Jersey. Below, this Comment will discuss the arguments for and against nonmonetary bail reform. Section A addresses perceived drawbacks to nonmonetary bail systems. Section B rebuts those contentions and presents arguments in support of nonmonetary bail systems. Section C proposes certain alterations to current nonmonetary bail schemes that would allow states to more effectively implement and administer nonmonetary bail procedures.

A. *Perceived Failures and Deficiencies of Nonmonetary Bail*

Arguments against the shift toward risk-based, nonmonetary bail address three potential harmful effects: (1) economic loss to the state and certain industries therein; (2) increased administrative cost to the court systems that implement these schemes; and (3) decreased protection of public safety. Critics contend that the elimination of monetary bail costs the state court systems money since they no longer collect revenue from monetary bail.³⁶⁵ Additionally,

³⁶¹ See ALASKA STAT. ANN. § 12.30.011 (West 2018); KY. REV. STAT. ANN. § 431.520 (West 2019).

³⁶² See Jazmine Ulloa, *Fate of Bail System Is Up to Voters; A Law to Abolish the State's Cash System Is Put on Hold After Bond Companies Get a Ballot Referendum Certified*, L.A. TIMES, Jan. 17, 2019, at B1.

³⁶³ See *Holland v. Rosen*, 279 F.3d 272, 278 (3d Cir. 2018).

³⁶⁴ Telephone Interview with Stuart A. Minkowitz, *supra* note 172 (stating that from January 2017 through October 2018, there have only been roughly a dozen instances in which monetary bail conditions were imposed on a New Jersey pretrial defendant).

³⁶⁵ See, e.g., Bill Armstrong, *California Passed a Law to Put Me Out of Business—And Taxpayers Will Get the Bill*, MARSHALL PROJECT (Dec. 5, 2018), <https://www.themarshallproject.org/2018/12/05/california-passed-a-law-to-put-me-out-of-business-and-taxpayers-will-get-the-bill> ("The California Assembly Appropriations Committee has estimated that the elimination of bail will cost the state hundreds of millions of dollars annually.").

industries that center around monetary bail, such as bail-bondsmen, are no longer necessary, thus imposing a further cost to state residents.³⁶⁶ With regard to administrative costs, court systems now have to analyze and consider an increased amount of facts and evidence for each defendant at arraignment hearings,³⁶⁷ which in some states must occur in a limited timeframe following arrest.³⁶⁸ Such procedures may place a strain on the court system to comply with the requirements of these new bail enactments. Last, some argue that the new bail system is not as effective at protecting the public safety as prior schemes.³⁶⁹

First, critics of the nonmonetary bail systems point to increased economic expenditures by states as a reason to maintain cash bail. Such financial burdens arise from two sources. One source of economic expenditures is the increased costs to the court that result from the need to monitor more released pretrial defendants and from the need to render release decisions within forty-eight hours.³⁷⁰ Next, states are no longer receiving revenue from defendants released on monetary conditions who forfeit their bail by not appearing in court or reoffending while released.³⁷¹

The New Jersey Pretrial Services Program consists of 267 supervisors, managers, and staff who administer the Public Safety Assessments necessary for pretrial release decisions.³⁷² While there is not exact information on the salaries of these employees, such a large number of employees clearly places an economic cost on the state. Moreover, as a result of the increased number of defendants released while awaiting trial,³⁷³ there is a large expense associated

³⁶⁶ See *id.*; see also Christine Stuart, *Murder Victim's Mother Sues Chris Christie Over NJ Bail Reform*, COURTHOUSE NEWS SERV. (Aug. 1, 2017), <https://www.courthousenews.com/murder-victims-mother-sues-chris-christie-nj-bail-reform/> (stating that a lawsuit to strike down New Jersey's bail reform is funded by Duane Chapman, famous as "Dog the Bounty Hunter" on a television show by the same name). The residual impact to a state's citizens is politically relevant as such residents can lobby state legislatures and vote in elections. See, e.g., Dustin Racioppi & Trenton Bureau, *Special Interest Money Dominating in New Jersey*, COURIER-POST, Sept. 14, 2018, at A16 (stating that interest groups fueled higher non-PAC spending in New Jersey's 2018 elections).

³⁶⁷ See AM. BAR ASS'N, *supra* note 131, at 32–33; Telephone Interview with Stuart A. Minkowitz, *supra* note 171.

³⁶⁸ See N.J. STAT. ANN. § 2A:162-16(b) (West 2017) (imposing a forty-eight-hour deadline from arrest until arraignment); S. 10, 2017–2018 Leg., Reg. Sess. § 1320.19(a) (Cal. 2018) (establishing a three-court day limit from arrest until final disposition of an arraignment hearing).

³⁶⁹ See, e.g., Thomas Moriarty, *Murder Suspect Was Set Free Twice in Domestic Violence Cases, Records Show*, NJ.COM (Feb. 6, 2018), https://www.nj.com/essex/index.ssf/2018/02/murder_suspect_was_released_twice_on_domestic_viol.html; Stuart, *supra* note 366.

³⁷⁰ N.J. COURTS, *supra* note 1, at 9–10, 25.

³⁷¹ See Telephone Interview with Stuart A. Minkowitz, *supra* note 171 (stating that cash bail is rarely used since the passage of bail reform measures).

³⁷² N.J. COURTS, *supra* note 1, at 1, 3.

³⁷³ *Id.* at 4 (showing that the total jail population in New Jersey has decreased by roughly one-third since

with monitoring those individuals. Such monitoring can be, among others, GPS tracking, reporting to a law enforcement officer, or complying with a curfew.³⁷⁴ There is an estimated cost to the state of \$37.4 million per year for monitoring released pretrial defendants.³⁷⁵ Additional costs arose when New Jersey created twenty new judgeships solely to comply with the requirement that release or detention decisions be made within forty-eight hours.³⁷⁶ The existing judiciary was unable to keep pace with the number of hearings. The increased number of judges costs the state an additional \$9.3 million a year.³⁷⁷ Despite these high expenses, the state judiciary only collects between \$40 million and \$45 million a year.³⁷⁸ These revenues come from court fees, filing fees, and defendants' payments for monitoring services.³⁷⁹ As a result, pretrial services is running a deficit since it only raises, at maximum, \$45 million and expends over \$46 million.³⁸⁰ The costs associated with monitoring released pretrial defendants are only expected to increase in the coming years as more technological monitoring systems are available and being imposed as a condition of release.³⁸¹

Moreover, courts are not receiving income from forfeited bail payments. Under monetary bail schemes, defendants pay money to courts to secure their pretrial release. If the defendants do not appear in court or have their release revoked for breaking a condition thereof, these payments are retained by the court systems. However, when monetary conditions are not allowed, or rarely used, the court does not receive this income. Therefore, there is an additional cost to the courts in lost revenue from bail payments.³⁸²

In addition to the court systems, certain citizens, namely bail bondsmen, of states that have adopted nonmonetary bail are suffering economic hardship. Bail bondsmen operate as third-party surety for the defendant.³⁸³ By paying the pretrial defendant's monetary condition for release and charging the defendant a premium for doing so, the bondsmen assume the potential liability from the

the implementation of the nonmonetary bail system).

³⁷⁴ N.J. STAT. ANN. § 2A:162-17(b)(2) (West 2017).

³⁷⁵ N.J. COURTS, *supra* note 1, at 9.

³⁷⁶ *Id.* at 10.

³⁷⁷ *Id.*

³⁷⁸ *Id.* at 9.

³⁷⁹ *Id.*

³⁸⁰ *Id.* at 25 (stating that pretrial services was expected to run a deficit in 2018).

³⁸¹ *Id.*

³⁸² *But see id.* at 4 (showing that New Jersey has a decreased pretrial jail population, leading to great economic savings, therefore there is no need to draw from other areas of the budget or for the courts to run a deficit).

³⁸³ *See, e.g.,* Holland v. Rosen, 895 F.3d 279 (3d Cir. 2018).

defendant for forfeiture of the bail.³⁸⁴ The risk of forfeiture of the monetary bail lasts until the resolution of the case, and potentially a probationary period.³⁸⁵ Therefore, when New Jersey eliminated monetary bail conditions, it deprived bail bondsmen of their livelihood.³⁸⁶ Yet, New Jersey did not cancel monetary conditions that were imposed before the law was enacted.³⁸⁷ As a result, bail bondsmen must stay in business until the last defendant for whom they paid bail completes the judicial process.³⁸⁸ Bail bondsmen now operate businesses that only lose money. They monitor the defendants for whom they paid bail, but do not, and will not, receive any new business.³⁸⁹ This economic reality leaves many New Jersey bail bondsmen in a precarious position. They must seek to find other means of earning a living, while simultaneously maintaining a failing business.

Opponents of nonmonetary bail also criticize the administrative cost to the state judiciary in implementing these systems. These stresses are present in New Jersey where there is a forty-eight hour time limit for rendering a pretrial release decision,³⁹⁰ and will be present in California which places a three-court-day limit to render a decision.³⁹¹ To comply with this requirement, New Jersey's court system added judges and employees of the Pretrial Services Program.³⁹² Since the requisite timeframe is forty-eight hours, regardless of when the defendant is issued a complaint-warrant, pretrial release and detention hearings must be held on weekends and holidays.³⁹³ In fact, pretrial hearings are held six days a week, every week.³⁹⁴ With 142,663 pretrial defendants subject to New Jersey's new nonmonetary bail system in 2017,³⁹⁵ the court systems needed to analyze and consider an incredibly large amount of information in order for the judges to render release decisions. The workload proved too great for the existing judges, which led to the creation of twenty new judgeships.³⁹⁶ The administrative costs do not stop when a pretrial release decision is reached, as those defendants who

³⁸⁴ See, e.g., *id.*

³⁸⁵ See, e.g., Michaelangelo Conte, *Bondsmen's Lament: No Bail, No Livelihood*, STAR LEDGER (N.J.), Nov. 25, 2018, at A21 (on file with author).

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ N.J. STAT. ANN. § 2A:162-16(b) (West 2017).

³⁹¹ S. 10, 2017–2018 Leg., Reg. Sess. § 1320.19(a) (Cal. 2018).

³⁹² N.J. COURTS, *supra* note 1, at 9–10.

³⁹³ *Id.* at 3.

³⁹⁴ *Id.*

³⁹⁵ *Id.* at 16.

³⁹⁶ *Id.* at 10.

are released often must be monitored.³⁹⁷ With increasing numbers of defendants being released while awaiting trial,³⁹⁸ the resources and time required to monitor those individuals will only continue to place greater administrative costs on the state.

The last main criticism of nonmonetary bail schemes is that they create an increased risk to public safety.³⁹⁹ Some argue that with fewer pretrial detainees, there are more dangerous individuals who are able to reenter society and commit further crimes. There are many sensational headlines and stories reported that help push this narrative. Such articles include one about a young man who was shot twenty-two times by an individual who had been released while awaiting his trial for possession of a firearm by a felon.⁴⁰⁰ Another describes a man who had twice been charged with domestic violence against his ex-girlfriend. While released pending that trial, he allegedly killed her.⁴⁰¹ Those who oppose nonmonetary bail systems point to instances such as these to demonstrate that releasing more pretrial defendants will only lead to an increased risk to public safety.

B. Successes of Nonmonetary Bail Systems

On the other side of the argument, those who support the implementation of nonmonetary bail point to reasoning that falls into three main categories: (1) there is a greater respect for the rights of the accused; (2) the economic loss of monetary bail payments is outweighed by savings on other expenses; and (3) the administration of these schemes does not hamper the court systems. Respect for the rights of the accused stem from preserving their liberty interests and an equal application of the law, regardless of race or economic status.⁴⁰² The increased economic costs of administering nonmonetary bail systems is more than made up for when by decreased expenditure on housing detained pretrial defendants.⁴⁰³ Additionally, courts have been able to implement

³⁹⁷ *Id.* at 9.

³⁹⁸ *Id.* at 4 (showing that the total jail population in New Jersey has decreased by roughly one-third since the implementation of the nonmonetary bail system).

³⁹⁹ *See, e.g.,* Moriarty, *supra* note 369; Stuart, *supra* note 366.

⁴⁰⁰ Stuart, *supra* note 366.

⁴⁰¹ Moriarty, *supra* note 369.

⁴⁰² *Initiatives: Pretrial Justice*, *supra* note 225.

⁴⁰³ *See* Annual Determination of Average Cost of Detention, 83 Fed. Reg. 18,863 (Apr. 30, 2018) (stating that an estimate of the average cost per inmate per day is \$99.45); *see also* N.J. COURTS, *supra* note 1, at 4 (showing that the total jail population in New Jersey has decreased by roughly one-third since the implementation of the nonmonetary bail system).

these new bail schemes, using greater information, without much strain on the court systems.⁴⁰⁴

While the arguments against adoption of nonmonetary bail systems, on their face, appear compelling, they are unfounded, misleading, or are outweighed by other considerations. First, concerns over the economic impact to the court system do not factor in the amount of money that states save by incarcerating fewer pretrial defendants. Next, the disappearance of the bail bondsman industry in such states is outweighed by the greater respect given to the rights of pretrial defendants. Additionally, while there are greater administrative costs associated with nonmonetary bail schemes, the court systems have been able to adapt and efficiently render detention decisions and monitor released defendants. Last, instances of defendants committing crimes while released before trial, while compelling and saddening, are rare and are also present under compensatory bail conditions.

While New Jersey's Pretrial Services Program itself is running a deficit from monitoring released defendants and creating new judgeships,⁴⁰⁵ the state as a whole is saving money as a result of its nonmonetary bail system. In administering the new bail system, New Jersey's Pretrial Services Program has revenues between \$40 million and \$45 million a year while expending over \$46 million.⁴⁰⁶ However, the number of pretrial defendants who are detained decreased by one-third, which equates to roughly 3,000 fewer pretrial defendants.⁴⁰⁷ Assuming the average length of pretrial detention of twenty-three days⁴⁰⁸ with the average cost per day of incarceration of \$99.45,⁴⁰⁹ New Jersey saves over \$2,015 per inmate released while awaiting trial. Multiplied by the almost 3,000-person decrease in pretrial jail population, New Jersey saves over \$6 million a year on incarceration costs under the nonmonetary bail system. While Pretrial Services Program may run a deficit of \$1 million to \$5 million,⁴¹⁰ that figure is more than made up for by the decreased costs associated with detention. Additionally, predictions of increasing monitoring costs as more defendants are released with the condition of GPS monitoring will not overcome these savings. The daily cost of a GPS ankle monitor is \$3 to \$4, which is

⁴⁰⁴ Telephone Interview with Stuart A. Minkowitz, *supra* note 171.

⁴⁰⁵ N.J. COURTS, *supra* note 1, at 25.

⁴⁰⁶ *Id.* at 9–10.

⁴⁰⁷ *Id.* at 20. The decrease occurred over the two-year period, from one year before through one year after implementation of New Jersey's bail system. *Id.*

⁴⁰⁸ VERA INST., INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 10 (2015).

⁴⁰⁹ Annual Determination of Average Cost of Detention, 83 Fed. Reg. 18,863 (Apr. 30, 2018).

⁴¹⁰ N.J. COURTS, *supra* note 1, at 9–10.

negligible when compared to the over \$87 it costs per day to incarcerate a pretrial defendant.

Beyond merely the daily cost of incarcerating a pretrial defendant, New Jersey is saving additional costs. With the great reduction in prison population, overcrowding in prisons is no longer a pressing issue.⁴¹¹ In fact, in some prisons, there are entire wings that are empty.⁴¹² This reduction in detainees allows the state to decrease expenditures on prison guards, utility costs for unused portions of the prison, among other incidental costs.⁴¹³ Potentially the greatest savings to the state with regard to prison population is that there is no foreseeable need to construct additional prisons or additional cells in existing prisons.⁴¹⁴ Such economic benefit to the state is not limited to New Jersey, who has abolished cash bail in nearly all instances. Kentucky, which allows for monetary conditions on pretrial release in more cases, has been able to save over \$161 million associated with projected needs to expand and staff correctional facilities within the state.⁴¹⁵ The ability of states to save money by not housing pretrial defendants runs counter to the trend of increased corrections spending in the United States over the past two decades. In the previous twenty years, state funding for corrections has risen from \$12.9 billion to \$48 billion, which represents an increase of approximately 272%.⁴¹⁶

The concerns raised by bail bondsmen, with regard to the disappearance of that profession in New Jersey, are greatly outweighed by the increased rights afforded pretrial defendants. The most obvious right that is protected is the defendant's liberty interest. An individual's interest in freedom from restraint has long been recognized as a fundamental right under the United States Constitution.⁴¹⁷ However, this fundamental right is constrained under cash bail systems. Under monetary bail systems, low-income defendants are disproportionately affected.⁴¹⁸ Such defendants cannot afford to pay even the lowest of monetary conditions placed on their release, so they remain in detention while awaiting trial.⁴¹⁹ Many of these defendants are fired if they miss

⁴¹¹ Telephone Interview with Stuart A. Minkowitz, *supra* note 171.

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ See AM. BAR ASS'N CRIMINAL JUSTICE SECTION, *supra* note 2.

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ See *Meyer v. Nebraska*, 262 U.S. 390, 398 (1923) (overturning the incarceration of a man convicted for teaching German).

⁴¹⁸ See, e.g., VANNOSTRAND, *supra* note 7, at 13.

⁴¹⁹ *Id.*

a single day of work, thus their detention results in their unemployment.⁴²⁰ More striking is the disparate impact that pretrial detention has on minority populations. Black and Hispanic Americans have a median net worth that is between 8% and 10% of that of White Americans.⁴²¹ Consequently, it is the racial and ethnic minorities who are more likely to be unable to pay the monetary conditions of bail. With the elimination of monetary bail, there is a decrease in the likelihood of disparate impacts on racial minorities associated with bail conditions. Additionally, defendants who are released while awaiting trial are less likely to be convicted.⁴²² Since all defendants are presumed innocent until proven guilty,⁴²³ it is important to guard against wrongful convictions. Defendants who are detained before trial plead guilty more often than those who are released.⁴²⁴ In certain cases, pleading comes with no additional time in jail due to a credit for time served.⁴²⁵ If a greater number of defendants are released before trial, there is less of a risk that they will be convicted of a crime they did not commit.

Criticisms of increased administrative costs in implementing nonmonetary bail systems are not supported by the evidence. The initial implementation of New Jersey's bail reform measures necessitated hiring more judges and holding pretrial release or detention hearings six days a week.⁴²⁶ However, after these adjustments were made, the courts were able to comply with the forty-eight-hour limit for a release determination in 99.5% of cases.⁴²⁷ In fact, courts were able to reach a decision in under twenty-four hours in over 81% of cases.⁴²⁸ If the administrative costs associated with complying with this timeframe were so great, then courts would not be able to reach their decisions so efficiently. In order to expedite the pretrial detention decision process, courts have adopted unique and innovative ways to conduct such hearings. Some judges in New

⁴²⁰ *Initiatives: Pretrial Justice*, *supra* note 225. A pretrial defendant who becomes unemployed creates ancillary costs to the state through increased likelihood of the need for welfare assistance, leaving the tax base, and the potential need for care for dependents. *See generally* Michael McLaughlin et al., *The Economic Burden of Incarceration in the U.S.* (Wash. Univ. Concordance Inst. for Advancing Soc. Justice, Working Paper No. CI072016, 2016), <https://joinnia.com/wp-content/uploads/2017/02/The-Economic-Burden-of-Incarceration-in-the-US-2016.pdf>.

⁴²¹ Kochhar & Fry, *supra* note 9.

⁴²² *See, e.g.*, Smith, *supra* note 74, at 455. From the data, it is unclear whether there is a causation between pretrial detention and conviction or whether the link is merely a correlation. A pretrial defendant who is released may have better resources to pay for a private lawyer, or other variables that contribute to this connection.

⁴²³ Coffin v. United States, 156 U.S. 432, 453 (1895).

⁴²⁴ *Initiatives: Pretrial Justice*, *supra* note 224.

⁴²⁵ *Id.*

⁴²⁶ N.J. COURTS, *supra* note 1, at 3, 10.

⁴²⁷ *Id.* at 13.

⁴²⁸ *Id.* at 14.

Jersey have begun using virtual courtrooms to conduct the hearings needed for their bail decisions.⁴²⁹ These virtual courtrooms allow judges, translators, defendants, and prosecutors to use teleconferencing technology rather than being present in a physical courtroom.⁴³⁰ Doing so makes it more convenient to hold detention hearings on weekends and holidays because there is no need to coordinate opening the courthouse, having bailiffs present, and the travel of all necessary parties to the hearings. With these innovative, technological ways to reach pretrial detention decisions, and the high rate of decisions reached within forty-eight hours, any concerns about administrative costs are without basis.

Finally, the data shows that there is no increased danger to public safety under nonmonetary bail systems; and such schemes may actually lower the rate of recidivism amongst pretrial defendants.⁴³¹ Under the federal monetary bail system, 19% of defendants released before trial commit some form of pretrial misconduct.⁴³² However, that figure is substantially lower under New Jersey's nonmonetary bail system. Of the over 134,000 pretrial defendants who were released in 2017, only 698 violated the terms of their release to the extent that prosecutors sought to revoke their bail.⁴³³ That equates to roughly 0.5% of released pretrial defendants who committed actionable violations of their conditions of bail. Likewise, in Kentucky, 90% of pretrial defendants who were released did not commit new crimes while awaiting trial.⁴³⁴ When compared to the 13% from the federal statistics, it is clear that there is not a greater threat to public safety under nonmonetary bail systems than monetary systems. In fact, the risk factor analysis may in fact lead to less of a risk to the general public.

C. *Suggested Changes to Nonmonetary Bail Systems*

The perceived risks of nonmonetary bail are definitively outweighed by the actual impacts that such systems have had in the states that have adopted these schemes. While pretrial services programs may be running deficits,⁴³⁵ that difference is more than overcome by the money states save through decreased costs of incarceration of pretrial defendants.⁴³⁶ Moreover, the argument that

⁴²⁹ *Id.* at 24.

⁴³⁰ *Id.*

⁴³¹ AM. BAR ASS'N CRIMINAL JUSTICE SECTION, *supra* note 2.

⁴³² U.S. DEP'T OF JUSTICE, SPECIAL REPORT: PRETRIAL RELEASE AND MISCONDUCT IN FEDERAL DISTRICT COURTS 2008–2010, at 1 (2012). This figure was calculated from a sample size of 283,358 defendants in federal courts, 36% of which were released before trial. *Id.* at 3.

⁴³³ N.J. COURTS, *supra* note 1, at 18.

⁴³⁴ AM. BAR ASS'N CRIMINAL JUSTICE SECTION, *supra* note 2.

⁴³⁵ *See supra* notes 371–380 and accompanying text.

⁴³⁶ *See supra* notes 400–409 and accompanying text.

nonmonetary bail systems deprive bail bondsmen of a right to earn a living is outweighed by the greater protection of the presumptively innocent pretrial defendants. In addition, while implementing the risk-factor analysis requires greater administrative costs, courts have been able to effectively adapt to their new responsibilities.⁴³⁷ Last, there has been no increase in released pretrial defendants committing new crimes under the nonmonetary schemes; and, in fact, there may even be a reduction of such recidivism.⁴³⁸ Since the most cited criticisms of the elimination of cash bail are not actually present in states that have adopted nonmonetary bail, it is better to allow for greater respect of the rights of pretrial defendants. Basing release decisions on nonmonetary conditions does just that because such conditions do not discriminate based on income or racial lines. Allowing lower-income defendants to maintain their employment and mount better defenses,⁴³⁹ while they remain innocent in the eyes of the law, helps protect their liberty interests.

That is not to say that the current nonmonetary bail systems cannot be improved upon to better promote the purposes of bail of assuring the defendant's appearance in court and protecting the public safety.⁴⁴⁰ There are six areas in which risk-factor based bail systems can be improved. First, adjusting the time limit for pretrial release decisions would help alleviate certain stresses and administrative costs on the judiciary, especially when a state implements nonmonetary bail provisions.⁴⁴¹ Second, by allowing pretrial detention for certain crimes that are not currently listed as acceptable detainable offenses, the public safety would be better protected.⁴⁴² Moreover, a greater emphasis should be placed on crimes involving weapons in detention decisions as those offenses pose a great risk to the safety of others. Next, ensuring that judges have discretion in determining appropriate release conditions or making detention decisions would better account for the unique facts of each case to minimize any danger to the public.⁴⁴³ In addition, establishing a larger database of court records for the public safety assessment would allow judges to more accurately determine the risk of release of each defendant.⁴⁴⁴ Finally, using the weight of

⁴³⁷ See *supra* note 427 and accompanying text.

⁴³⁸ See *supra* notes 431–434 and accompanying text.

⁴³⁹ See *supra* notes 420–422.

⁴⁴⁰ See, e.g., Bail Reform Act of 1984, 18 U.S.C. § 3142(b) (2012).

⁴⁴¹ See N.J. COURTS, *supra* note 1, at 3 (discussing the administrative costs associated with the adoption of nonmonetary bail systems).

⁴⁴² See, e.g., Moriarty, *supra* note 3.

⁴⁴³ See U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 103 (2018) (describing the rise in gang violence and the crime rates of gang members, which is not currently a factor considered in a public safety assessment).

⁴⁴⁴ See Telephone Interview with Stuart A. Minkowitz, *supra* note 171 (stating that many court records

evidence against a defendant as a factor in a risk analysis seems to place a gradation on the absolute presumption of innocence afforded all defendants in the United States.⁴⁴⁵ These suggested improvements will be discussed below.

First, as was seen in New Jersey, placing strict deadlines to reach pretrial release and detention decisions can have a large impact on the state judiciary. New Jersey's requirement that, within forty-eight hours of a defendant's arrest, a decision must be made about his pretrial release, forced that state to create twenty new judgeships and hold arraignment hearings six days a week, regardless of holidays.⁴⁴⁶ Over the course of implementation of the nonmonetary bail provisions, the court system was able to find new and innovative methods for holding arraignment hearings, such as virtual courtrooms,⁴⁴⁷ but such adaptations came after the court system added judges and incurred great expense to comply with the time limit.⁴⁴⁸ California's approach may prove more effective. The California law, should it go into effect, would create a three court day deadline.⁴⁴⁹ This would alleviate the need for courts to hold arraignment hearings on weekends or holidays. However, detaining an individual for three days could have great detrimental impacts on the presumptively innocent defendant's health and employment.

A better approach may be to institute a tiered implementation of time limits on release and detention decisions, which would afford courts the ability to gradually change their practices to work more efficiently. Legislation could call for a three-court-day limit within the first few months that the law takes effect. After that period, the deadline could be lowered to two court days, before being lowered to twenty-four or forty-eight hours. Courts should continually strive to lower the time from arrest to detention decision so as to limit the negative effects suffered by each defendant. With each step in this accelerating process, courts would have the ability to identify and implement best practices to ensure compliance with the deadlines, while simultaneously not unduly taxing their resources. Within one year of New Jersey implementing its forty-eight-hour requirement, courts were able to render decisions within that timeframe in nearly every case, and within twenty-four hours in 81% of cases.⁴⁵⁰ States can strive to continually shorten the time allowed for release decisions, but by gradually

cannot be accessed for a public safety assessment).

⁴⁴⁵ Coffin v. United States, 156 U.S. 432, 453 (1895) (describing the presumption of innocence).

⁴⁴⁶ N.J. COURTS, *supra* note 1, at 3.

⁴⁴⁷ *Id.* at 24.

⁴⁴⁸ *Id.* at 10.

⁴⁴⁹ S. 10, 2017–2018 Leg., Reg. Sess. § 1320.19(a) (Cal. 2018).

⁴⁵⁰ N.J. COURTS, *supra* note 1, at 14.

reducing them, courts will have the opportunity to adjust without the need for an ever-expanding judiciary.

Next, by adjusting the crimes that render a defendant eligible to be detained, states can better protect the public safety. States that have adopted risk-based bail systems allow detention of defendants charged with certain felonies and domestic violence.⁴⁵¹ Such crimes involve a great deal of violence and risk to vulnerable members of society. In order to effectively protect members of society who cannot defend themselves, such as children, the list of crimes for which a defendant should be eligible for detention should be expanded. Moreover, these crimes should carry more weight in the detention decision as they pose higher risks to the safety of vulnerable members of society. For example, in New Jersey, the leader of a child pornography distribution network was released under the risk-based bail system.⁴⁵² Children are unable to fend off the predatory tendencies of adults.⁴⁵³ Allowing for greater detention of defendants accused of crimes against children and other especially susceptible members of society would benefit public safety.

Similarly, the metrics used to evaluate a defendant's risk of flight or danger to public safety must be continually evaluated and adjusted as necessary to ensure the success of nonmonetary bail schemes. As more pretrial release and detention decisions are reached under risk-based bail systems, states should continually analyze the relative success of the considerations used in reaching those decisions. States must see whether there is, for example, a correlation between defendants who are charged with certain crimes and failure to appear or recidivism, or between other characteristics of a defendant that are not currently factored into the analysis and the purposes of bail. If the data shows that certain classes of defendant's pose greater risk if released, there needs to be a commensurate adjustment in how pretrial release decisions are made.

In addition, there must be a preservation of judicial discretion in pretrial release decisions. There is a unique set of facts and circumstances that surround each defendant and each offense. These infinite permutations are incapable of being reduced to a solely mathematical algorithm to determine the risk posed in

⁴⁵¹ See, e.g., ALASKA STAT. ANN. § 12.30.011 (West 2018); N.J. STAT. ANN. § 2A:162-19 (West 2017).

⁴⁵² Joseph McCormick, *Leader of Child Porn Distribution Network Free to Go Under NJ Bail Reform*, U.S. BAIL REFORM NEWS (Mar. 30, 2018), <https://www.usbailreform.com/leader-child-porn-distribution-network-free-go-nj-bail-reform/>.

⁴⁵³ See, e.g., Jessica Snyder Sachs & Melissa Bykofsky, *How to Protect Your Child from a Predator: Recognizing the Warning Signs*, PARENTS.COM, <https://www.parents.com/kids/safety/other-safety-issues/protect-your-child-from-a-predator/> (last visited Mar. 26, 2020) (stating that children are less likely to report crimes due to confusion, fright, or a sense of guilt).

every case. The role of the judge is to account for the unique facts. For example, the algorithm used in many states, the one promulgated by the Laura and John Arnold Foundation,⁴⁵⁴ does not factor in known gang affiliation. If a defendant is involved in gang activity, there is a greater risk that he will engage in criminal behavior while on pretrial release.⁴⁵⁵ Judicial discretion must supplement the purely mathematical approach of the public safety assessment. By factoring in the additional characteristics of the defendant and the offense, the judge's discretion will better protect public safety and assure a defendant's appearance in court.

Further, there must be greater integration of court records, both within each state and among the states. Currently, not all court records within a state are included in the database that supplies information for the public safety assessment.⁴⁵⁶ This issue is not limited to risk-based bail systems. In fact, it has been present for decades.⁴⁵⁷ In order to gain a complete picture of each defendant's risk upon release, all available information must be evaluated. The lack of information shared amongst the states is potentially more important given the relative ease with which individuals can cross state lines and commit crimes.⁴⁵⁸ A defendant might be charged with his first offense in a state using risk-based bail, but that same defendant may have a long criminal record with multiple missed court dates in another state.⁴⁵⁹ Since the public safety assessment only has access to court records of one state, it is not possible to determine the precise danger each defendant poses if released; but, with additional information, courts will be able to more accurately assess the risk. By integrating court records throughout the state and amongst the states, courts can more effectively decide the conditions of release, if any release is warranted, for each defendant.

The last area of change is that the weight of evidence against a defendant should not be a factor in pretrial release decisions. In the United States, there is a presumption of innocence for criminal defendants.⁴⁶⁰ This presumption applies to all defendants, not merely defendants against whom the government has a weak case. The weight of evidence against a defendant is used as a factor in risk-based bail decisions because if a defendant believes it is more likely he will be

⁴⁵⁴ *Initiatives: Pretrial Justice*, *supra* note 224.

⁴⁵⁵ *See*, U.S. DEP'T OF JUSTICE, *supra* note 443.

⁴⁵⁶ *See, e.g.*, Telephone Interview with Stuart A. Minkowitz, *supra* note 171.

⁴⁵⁷ *See supra* note 204 and accompanying text.

⁴⁵⁸ *See, e.g.*, *Report: Some Authorities Stop Search*, *supra* note 301.

⁴⁵⁹ *Id.*

⁴⁶⁰ *Coffin v. United States*, 156 U.S. 432, 453 (1895).

found guilty, there is a greater chance that he will attempt to flee before trial.⁴⁶¹ However, there are other ways to measure a defendant's risk of flight that do not negate the fundamental presumption of innocence that has been present since the writing of the Book of Deuteronomy.⁴⁶² In fact, there are factors already contained within the public safety assessment and judicial considerations that account for the likelihood a defendant will flee. The public safety assessment accounts for past missed court dates.⁴⁶³ Additionally, the judge is to consider the characteristics of the defendant.⁴⁶⁴ These characteristics include family ties, employment, financial resources, and other ties to the community.⁴⁶⁵ All of these factors have a bearing on whether the defendant will attempt to flee the jurisdiction of the court. The fewer the ties to the community around the presiding court, the more likely the defendant will escape the jurisdiction. However, if the defendant is connected to and engrained in the community, there is less of a likelihood that he will flee. Moreover, nonmonetary conditions on bail can assure a defendant's appearance in court. State statutes already allow for GPS monitoring of a defendant.⁴⁶⁶ Such monitoring does not carry with it the negative effects associated with pretrial detention, but it does help assure the purposes of bail. Since there are already factors designed to account for the risk of flight, there is not a need to disregard or qualify a fundamental presumption of the American criminal justice system.

CONCLUSION

Nonmonetary bail systems have greatly advanced the rights of pretrial criminal defendants while at the same time reducing state expenditures on incarceration and better protecting public safety. Bail is intended to protect public safety and assure that the defendant will appear at all requisite court dates. At its advent, bail never required a defendant to pay for his freedom. That practice only emerged over a century after the founding of the United States, and subsequently expanded so that bail and cash payments became synonymous. There are numerous other conditions or measures that can be imposed on a defendant so as to assure public safety and presence in court.

⁴⁶¹ Telephone Interview with Stuart A. Minkowitz, *supra* note 171.

⁴⁶² *See Coffin*, 156 U.S. at 454 (tracing the presence of the presumption of innocence from Biblical times, through antiquity, to the American judicial system).

⁴⁶³ *Risk Factors and Formula*, *supra* note 293.

⁴⁶⁴ *See, e.g.*, N.J. STAT. ANN. § 2A:162-20 (West 2017).

⁴⁶⁵ *See, e.g., id.*

⁴⁶⁶ *See, e.g., id.* § 2A:162-17(b)(2).

Several states have taken steps to substantially eliminate, or outright abolish, monetary conditions of bail. The success of nonmonetary bail can be seen throughout the states that have implemented such schemes. Whether economic benefit, stable or decreased rates of recidivism by pretrial defendants, or smooth and efficient application of such legislation, nonmonetary bail has many positives, and limited discernible pitfalls that can be overcome with slight adjustments to existing provisions. The trend of eliminating monetary conditions of bail will only continue to expand as states recognize the benefits. With certain minor alterations, the systems employed by states such as New Jersey and Kentucky can serve as exemplars for states who hope to adopt similar measures.

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