PRETRIAL RELEASE, RISK ASSESSMENT, AND THE FAILING MOVEMENT TOWARDS A CASHLESS BAIL SYSTEM: THE NEED TO TARGET THE SOURCE

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I. INTRODUCTION

When Azairian Cartman was twenty four years old, he was a student at Northern Michigan University, an Army Reserves member, and an aspiring Chicago police officer who was preparing for a spring semester abroad in Morocco—then, suddenly, an arbitrary pretrial release decision from a Michigan judge changed the course of his life.[1] Cartman was arrested after

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[1] *Stories From a Broken Bail System*, AM. C.L. UNION MICH., https://www.aclumich.org/en/stories-broken-bail-system (last visited Apr. 1, 2023).

two women accused him of stealing $150 and an Xbox gaming device from them, and was subsequently brought before the court for a bail hearing.[2] In addition to the theft accusations leveled against Cartman during his preliminary court hearing, one of the women claimed he had also threatened and abused her, despite the fact that this accusation had already been deemed baseless by two other judges who had previously denied her requests for a personal protection order.[3] Still, without any substantial evidence presented by the woman to support these accusations, the judge set Cartman's bond at $250,000—an amount he could not pay.[4] As a result, Cartman sat in jail for six months before he reluctantly decided he had no other choice but to accept a plea offer for felony larceny so he could finally regain his freedom and move on with his life.[5] The time he spent held in pretrial detention caused him to lose his job, apartment, enrollment in school, and dream of becoming a police officer.[6]

The story of Azairian Cartman is unfortunately not an anomaly but the norm for many of those who are held in jail while awaiting trial, either because they could not afford to pay bail, or because they were denied bail and pretrial release.[7] In addition to these long-term life-changing consequences that may result from pretrial detention, there is also the potential for immediate, life-threatening consequences.[8] These problems are highlighted by the current crisis that New York City is facing with Riker's Island, the primary jail complex for the city, which encompasses a population made up of eighty-five percent of pretrial detainees.[9] In just 2021 alone, twelve individuals imprisoned in Riker's Island died because of the conditions, treatment, and mental and physical impacts of their pretrial detention in the overpopulated and largely unregulated facility.[10] The imminent and physical threats of pretrial detention, like those fueling the crisis at Riker's Island, as well as the potential detrimental aftermath to one's life (like that of Azairian Cartman's) are not isolated issues that can be targeted and fixed directly. These issues are the product of a much larger practice within the criminal justice system that continues to be applied

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[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] See Michael Schwirtz, *What is Rikers Island?*, N.Y. TIMES (Apr. 5, 2017), https://www.nytimes.com/2017/04/05/nyregion/rikers-island-prison-new-york.html.

[8] *Id.*

[9] *Id.*

[10] Nick Pinto, *Judge Tried to Send Immunocompromised Homeless Man Accused of Stealing Blankets to Rikers*, THE INTERCEPT (Sept. 28, 2021, 5:35 PM), https://theintercept.com/2021/09/28/rikers-island-crisis-judges-bail/.

arbitrarily and abused to defy the fundamental notion of innocence until *proven* guilty: the bail system.

The problems surrounding pretrial detention and an unsettled bail system—including the discriminatory application, overcrowding of jails, and mass incarceration,—are becoming widely recognized and accepted.[11] What has proven less clear is how to *actually address* these issues and create a pretrial release system that balances both the rights and protection of those accused with the safety of the community. As expressed by Supreme Court Justice William Rehnquist, "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[12] However, when there are over 400,000 people in the United States in pretrial detention,[13] contributing to the ninety-nine percent growth in the total jail population from the years 1999 to 2014,[14] it is hard to say that the criminal justice system has treated detention prior to trial as a "carefully limited exception."[15]

The overwhelmingly high number of individuals in pretrial detention, especially those being held for non-violent offenses and other misdemeanors, has sparked proponents of criminal justice reform to take a closer look at the policies and practices that contribute to the pretrial detention population problem.[16] In return, these proponents advocate for a change in current pretrial practices, specifically through bail reform that would eliminate the traditional use of cash bail; instead, release decisions would be premised on an individualized, risk-to-community based approach relying on an automated, computerized decision system designed to objectively predict the likelihood of a person's future criminal actions.[17] Opponents of bail reform argue that the cash bail system currently in place is necessary and justified in order to maintain community safety.[18] These competing views are reflected in the continually changing legislative actions different states are considering or implementing in regard to bail reform: examples include the proposal by

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[11] *Stories From a Broken Bail System*, *supra* note 1.

[12] United States v. Salerno, 481 U.S. 739, 755 (1987).

[13] Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL'Y INITIATIVE (Mar. 14, 2023), https://www.prisonpolicy.org/reports/pie2023.html.

[14] Peter Wagner, *Jails Matter. But Who is Listening?*, PRISON POL'Y INITIATIVE (Aug. 14, 2015), https://www.prisonpolicy.org/blog/2015/08/14/jailsmatter/.

[15] *Salerno*, 481 U.S. at 755.

[16] *See* Sawyer & Wagner, supra note 13.

[17] Tiana Herring, *Releasing People Pretrial Doesn't Harm Public Safety*, PRISON POL'Y INITIATIVE (Nov. 17, 2020), https://www.prisonpolicy.org/blog/2020/11/17/pretrial-releases/; see also *The Problems With Pretrial Risk Assessment Tools*, N.Y. C.L. UNION (Mar. 9, 2020), https://www.nyclu.org/en/publications/problems-pretrial-risk-assessment-tools.

[18] Herring, *supra* note 17.

the Illinois legislature that would rid its system of monetary bail entirely,[19] versus Georgia, which has only reformed its bail system to the extent that it requires judges to consider a defendant's financial circumstances when setting cash bail.[20]

This Note will focus on varying bail reform efforts among different states, whether these efforts address the racial and economic discriminatory effects and overarching consequences of pretrial detention, and how these directives have succeeded or failed in reaching these goals in practice. Part II of this Note will provide a historical overview of the bail system in the United States. It will begin by examining the source of bail within the Constitution and its scope as initially defined by the Supreme Court and further discuss how the bail system operated after its initial implementation, in addition to the recognizable problems it posed at that time. Part III of this Note will then address those early problems that fueled subsequent legislation and reform efforts taken by activists and legislators in order to address these initial apparent issues, and how these imperfect solutions drastically failed in addressing the imperfect system that continues to exist as of this writing. Additionally, it will discuss how the cash bail system operates today, and specifically, how societal and technological changes have made this already ineffective system not only less practical, but more consequential to those facing racial bias and/or socioeconomic disadvantages.

After a discussion of varying reform measures taken in different jurisdictions, Part IV of this Note will argue that the root issue with pretrial release systems centers around the grant of broad judicial discretion that enables individual judges to justify pretrial detention decisions on undefined standards that result in decisions that are internally founded upon implicit biases and individual moral judgements.[21] As follows, this Note will propose that without a more definite and stringent standard that will limit the amount of judicial discretion in making pretrial release decisions—like that of New Jersey's constitutionally mandated presumption of release—[22] the issues that encompass pretrial detention will continue to distort the concept of "justice" within the criminal justice system. Further, it will propose that, based on the success of New Jersey's bail reform implementation—including its demonstrated decrease in racial and economic inequities, pretrial jail

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19 ILLINOIS SUPREME COURT COMMISSION ON PRETRIAL PRACTICES FINAL REPORT (Apr. 2020), https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/227a0374-1909-4a7b-83e3-c63cdf61476e/Illinois%20Supreme%20Court%20Commission%20on%20Pretrial%20Practices%20Final%20Report%20-%20April%202020.pdf.

20 Marc Hyden, *Georgia Must Tackle Cash Bail Reform*, R. ST. INST. (Nov. 2, 2018), https://www.rstreet.org/2018/11/02/georgia-must-tackle-cash-bail-reform-2/.

21 Zamir Ben-Dan, *When True Colors Come Out: Pretrial Reforms, Judicial Bias, and The Danger of Increased Discretion,* 64 HOW. L.J. 83, 86 (2020).

22 N.J. CONST. art. I, § 11 (amended 2014).

population, and overall incarceration rates—the New Jersey Criminal Justice Reform Act should serve as a model for all other states in adopting bail reform legislation and procedures.

Finally, this Note will conclude and reiterate that the underlying source driving the issue of pretrial detention population growth and the racial disparities within it is not solely the result of pretrial release risk-assessment instruments themselves, but also the uncertainty and lack of a more defined standard for judges regarding how much they can or cannot use these risk-assessment scores to justify a pretrial release decision.

II. BACKGROUND

A. Historical Context

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[23] Under English Common Law, the King's Bench had absolute and unquestionable discretion in issuing bail to all defendants for all crimes, and the English Courts of general jurisdiction could only exercise this discretion through the guidance of legal precedent and rules.[24] Recognizing the inherent need to ensure surety and a level of authority within the criminal justice system, and guided by the principal endorsed by the English Bill of Rights and Common Law that, "pre-trial release was a system designed to balance the interests of the accused with the interest of society in ensuring that wrongful acts be punished, and criminals be prevented from absconding," the Framers of the United States Constitution unanimously added the prohibition against excessive bail via the Eighth Amendment.[25]

Even before its official adoption in the United States however, the theory underlying the imposition of bail for those accused of crimes dates all the way back to pre-revolution colonial America.[26] Typically, one judge was assigned to preside over circuit courts that were located in across many different counties.[27] Due to the lack of efficient and speedy travel during that era, the judge would travel from county to county to hear months' worth of cases in each jurisdiction, while the other counties were left without a judge

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[23] U.S. CONST. amend. VIII.

[24] Thos. F. Davidson, *The Power of Courts to Let to Bail*, 24 U. PA. L. REV. 1, 1 (1876).

[25] U.S. CONST. amend. VII.

[26] Guy Ruggiero, Jr., *How Corporate Surety Has a Place in the Bail Industry v. Pre-Trial Release*, ASS'N OF LA. BAIL UNDERWRITERS (2019), https://www.albula.org/files/ALBU%20CE_How%20Corporate%20Surety_Course%20Material%20(UPDATED).pdf.

[27] *Id.*

for extended periods of time.[28] Recognizing the inefficiency, expense, and need for a great number of resources resulting from the county sheriff holding accused criminals in county jails while awaiting the judge's return, settlers found ways to implement informal mechanisms to minimize the impact of these issues.[29] These informal mechanisms acted as a surety to the county and allowed for those accused to be released from the sheriff's custody until the judge returned.[30]

One of these mechanisms—and that most analogous to the cash bail system in place today—was the relationship between tenant farmers and their landlords when the farmer was arrested for a crime.[31] In the interest of maintaining the continued operation of the landlord's farmland, which was largely dependent on the labor of tenant farmers, landlords would offer a promise to the sheriff in exchange for the farmer's release that, "if the [farmer] did not appear for trial when [the] judge returned, he would give the county livestock, crops, and other valuable goods."[32] This system was widely accepted, as it was viewed as a bargain that was beneficial for all involved.[33] The sheriff would release the tenant-farmer back to the landlord, who benefited from the return of their laborer to work. The county, in turn, no longer had to expend money, food, and other resources to care for the tenant as a prisoner during this pretrial period and was guaranteed these promised goods and resources that could be used for the care of other prisoners or sold for county revenue in the case that the tenant-farmer did not return.[34]

As the early colonies began to evolve and become more established, differences in colonial customs, beliefs about criminal justice, and crime rates led some of the colonies to establish their own laws regarding bail.[35] In 1641, Massachusetts passed its Body of Liberties, which was essentially its own constitution, creating an indisputable right to bail for non-capital cases and re-classifying the list of capital cases within their borders.[36] Four decades later, in 1682, Pennsylvania adopted a provision in its constitution, which provided that, "all prisoners shall be Bailable by Sufficient Sureties, unless

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[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] Timothy R. Schnacke, Michael R. Jones, & Claire M. B. Brooker, *The History of Bail and Pretrial Release*, PRETRIAL JUST. INST. (Sept. 23, 2010), https://cdpsdocs.state.co.us/ccjj/Committees/BailSub/Handouts/HistoryofBail-Pre-TrialRelease-PJI_2010.pdf.
[36] *Id.*

for capital Offenses, where proof is evident or the presumption great."[37] This provision, largely viewed as the most liberal bail law of that time,[38] was quickly adopted by the other colonies, and almost a century later, became the model for virtually every other state's constitution adopted upon America's independence in 1776.[39]

However, when drafting the United States Constitution, the Framers did not explicitly confer an absolute right to bail.[40] Instead, this absolute right to bail within the federal system was established when the first Congress enacted Section 33 of the Judiciary Act of 1789,[41] passed contemporaneously with the Bill of Rights, which included the Eighth Amendment's prohibition against excessive bail.[42] Specifically, the Act provided that for "all arrests in criminal cases, bail shall be admitted, except where the punishment may be death."[43] While it appears that the basic right to bail was granted only through the statute, and the Eighth Amendment merely protected the extent of that right, read collectively, these two sources actually created three distinctive features that set the groundwork for how the right to bail in the United States is largely viewed today: (1) bail should not be excessive; (2) a right to bail exists only in non-capital cases; and (3) bail is meant to assure the appearance of a defendant at trial.[44]

Unsurprisingly, even with the guarantee of the Eighth Amendment[45] and the enactment of the Judiciary Act of 1789,[46] which codified the right to bail, the first major problems the American bail system faced were rooted in the ability of criminal defendants to easily evade the criminal justice system and, essentially, escape from prosecution because of "America's expansive and unexplored frontier."[47] Additionally, during these early times, bail amounts were determined solely based on the alleged offense, and not by the financial means of the specific defendant.[48] Due to this, many defendants were unable to make bail, and the need for an alternative device to secure the

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[37] *Id.* at 4.

[38] *Id.*

[39] *Id.*

[40] Nicholas P. Johnson, *Money Bail System: The Effect of Cash-Only Bail on Indigent Defendants in America's Money Bail System*, 39 BUFF. PUB. INTEREST L.J. 29 (2019).

[41] John-Michael Seibler & Jason Snead, *The History of Cash Bail*, HERITAGE FOUND. (Aug. 25, 2017), https://www.heritage.org/sites/default/files/2017-08/LM-213.pdf.

[42] AUTHENTICATED U.S. GOV'T INFO., EIGHTH AMENDMENT: FURTHER GUARANTEES IN CRIMINAL CASES (2016), https://www.govinfo.gov/content/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-10-9.pdf.

[43] First Judiciary Act, ch. 20, § 14, 1 Stat. 73 (1789).

[44] Schnacke, Jones, & Brooker, *supra* note 35.

[45] U.S. CONST. amend. VIII.

[46] First Judiciary Act, ch. 20, § 14, 1 Stat. 73.

[47] Seibler & Snead, *supra* note 41.

[48] Schnacke, Jones, & Brooker, *supra* note 35.

surety of the bail bond became essential, leading to the creation of the commercial money bail bond industry.[49] Generally, commercial bail bondsmen are persons who act as sureties by "pledging money or property to fulfill money bail bond conditions for a criminal defendant in court."[50] The bail bond industry is thought by historians to have first started around the 1880s, and by the 1920s, it was flourishing in the United States and became a very profitable business that many would soon join.[51]

Viewing this industry as problematic from very early on, Arthur Lee Beeley, a sociologist and scholar, published a study regarding the bail system in Chicago, Illinois, arguing that professional bondsmen played too great of a role in the administration of the criminal justice system.[52] Beeley concluded that "in too many instances, the present system . . . neither guarantees securities to society nor safeguards the right of the accused. It is lax with those with whom it should be stringent, and stringent with those whom it could safely be less severe."[53] Beeley's findings seemingly foreshadowed the economic inequalities that the cash bail system would only continue to exacerbate through to today.[54]

B. Bail and the Supreme Court

It was not until 1951 that the first case concerning issues with the administration of bail, *Stack v. Boyle*, reached the Supreme Court.[55] There, a class of federal defendants moved to have their varying bail amounts reduced, arguing that their money bail amounts were excessive and in violation of the Eighth Amendment.[56] After these motions were denied, the petitioners filed writs of habeas corpus that were similarly denied, until, after another appeal, the Supreme Court granted certiorari; finally, the Supreme Court held that the government's actions in imposing the bail were unconstitutional.[57] For each of the defendants, the bail amount set was much higher than what had usually been imposed for similar offenses, and the government had offered no evidence to support the amount proposed other than the fact that four other people who were previously convicted of the same crimes had forfeited their bail during their cases.[58] The Court explained, "to infer from the fact of indictment alone a need for bail in an

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[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] ARTHUR L. BEELEY, THE BAIL SYSTEM IN CHICAGO (U. Chi. Press, 2nd ed. Jan. 1, 1966).

[53] *Id.*

[54] Schnacke, Jones, & Brooker, *supra* note 35.

[55] *Id.*

[56] Stack v. Boyle, 342 U.S. 1 (1951).

[57] *Id.*

[58] Schnacke, Jones, & Brooker, *supra* note 35.

unusually high amount is an arbitrary act"[59] and "bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment."[60]

The Supreme Court's holding in *Stack* had a substantial impact on how judges would administer bail moving forward. The Court's ruling appeared to suggest that bail amounts were no longer to be determined solely by the crime charged, but instead based upon the financial means of each individual defendant.[61] In adherence to the principle that the function of bail was only for the limited and narrow purpose of ensuring a defendant's return to court,[62] the Court specified that the fixing of bail "must be based upon standards relevant to the purpose of assuring the presence of that defendant."[63]

Only four months later, the Supreme Court provided even further context concerning the right to have bail set within the federal criminal justice system.[64] In *Carlson v. Landon*, the defendants were non-citizens charged with being members of the Communist Party in violation of the Subversive Activities Control Act of 1950, and were ordered to be held without bail, pending final determination of their deportability in reliance on the discretion conferred upon the Attorney General from the Internal Security Act of 1950.[65] Holding that the Attorney General did not abuse its discretion in denying bail to the defendants and that the denial itself was not in violation of the Eighth Amendment, the Court explained that "[t]he Eighth Amendment has not prevented Congress from defining the classes or cases in which bail shall be allowed in the country."[66] In affirming the extent to which bail is or is not an absolute right for all criminal defendants, the Court further wrote that, "in criminal cases, bail is not compulsory where the punishment may be death . . . the very language of the [Eighth] Amendment fails to say all arrestees must be bailable."[67]

Taken together, these two cases established two fundamental principles of the United States bail system that set the stage for the subsequent legislation that would follow the 1950s. First, the Court established that the right to bail is not absolute and can be reasonably narrowed and defined by federal and state legislation.[68] Second, where the right to bail does exist, the

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[59] *Stack*, 342 U.S. at 6.

[60] *Id.* at 5.

[61] *Id.*

[62] Schnacke, Jones, & Brooker, *supra* note 35.

[63] *Stack*, 342 U.S. at 5-6.

[64] Schnacke, Jones, & Brooker, *supra* note 35.

[65] Carlson v. Landon, 342 U.S. 524, 530 (1952).

[66] *Id.* at 545-46.

[67] *Id.*

[68] Schnacke, Jones, & Brooker, *supra* note 35.

amount must be determined by an individualized assessment of what is reasonably necessary to assure that specific defendant's return to court.[69] While these cases provided principles that laid the groundwork for the parameters of how bail was to be administered within the U.S., challenges to bail laws and determinations would continue to arise all over the country, leading to the this Note's general conclusion that bail within the criminal justice system is still an area that is continuing to develop.

III. PROBLEM

A. The First Bail Reform: Movement of the 1960s

Following these landmark Supreme Court cases, in 1954, a law professor at the University of Pennsylvania, Caleb Foote, conducted an empirical study of the Philadelphia bail system, focusing primarily on the inequalities associated with the setting of bail bond amounts.[70] Foote found that for most major offenses, bail was set solely based on the recommendation of the District Attorney almost ninety-five percent of the time, and those who were unable to post their bail were more likely to receive a more severe sentence than those who were able to pay their bail amount.[71] Foote's study, as well as similar empirical studies surrounding bail in the United States at that time,[72] collectively lead to the conclusion that bail was being used as a mechanism to punish defendants, contrary to its intended and permissible purpose: to assure a defendant's return to court.[73]

Inspired by these findings, in October of 1961, the Vera Foundation and the New York University Law School conducted a study known as the Manhattan Bail Project (the "Project"), which was the first of many to explore the problems associated with monetary bail and discuss potential alternatives in the pursuit of a system that does not depend on financial means to secure pretrial release.[74] The study was designed to "provide information to the court about a defendant's ties to the community and thereby hope that the court would release the defendant without requiring a bail bond,"[75] and its findings showed that most people charged with a crime were generally

[69] *Id.*
[70] *See id.*
[71] Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia,* 102 U. PA. L. REV. 1031 (1954).
[72] Schnacke, Jones, & Brooker, *supra* note 35.
[73] *Id.*
[74] *Id.*
[75] *Id.*

reliable to return to court even without posting a bail bond.[76] Specifically, after the first year of the Bail Project, forty-five percent of arrestees were recommended for release, and after three years, the amount of recommended release rose to sixty-five percent.[77] Additionally, in those first three years of its successful operation, the Project reported that less than one percent of those who were recommended for release failed to appear for trial.[78] The Project's findings further affirmed the increasingly apparent issue that the bail system was not only being abused, but was also not even operating effectively, as it was not contributing to its intended purpose of ensuring a defendant's return to court.

B. Modern Day Cash Bail System

Generally, in jurisdictions that operate on a cash bail system, when an individual is arrested and charged with a crime, the judge determines an amount of money that the accused must pay to the court in order to be released from detention while awaiting resolution of their case.[79] This system revolves around the assumption that the defendant will want the cash they pay to the court returned to them, so the bail money they pay will serve as collateral to ensure they appear in court for their trial.[80] However, if a defendant is unable to pay the amount set for their bail—usually because they do not have that amount of cash personally or they cannot obtain a commercial bail bondsman—they will remain incarcerated from the time of their arrest until their case is resolved or dismissed.[81]

The glaring problem stemming from this type of system is that it criminalizes the poor during the stage of a criminal proceeding where, under the law, an accused individual is still supposed to possess the presumption of innocence for the crime alleged.[82] As of 2020, nearly 400,000 people in the United States were being held in jail pretrial, even though they were still legally considered innocent.[83] Out of those being held in jail pretrial, over thirty percent of individuals were being held solely because they could not

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[76] New York City Magistrates' Court, *Manhattan Bail Project: Official Court Transcripts October 1961 – June 1962*, VERA INST. JUST. (May 1962), https://www.vera.org/publications/manhattan-bail-project-official-court-transcripts-october-1961-june-1962.

[77] Schnacke, Jones, & Brooker, *supra* note 35.

[78] *Id.*

[79] Lea Hunter, *What You Need To Know About Ending Cash Bail*, CTR. AM. PROGRESS (Mar. 16, 2020), https://www.americanprogress.org/article/ending-cash-bail/.

[80] *Id.*

[81] Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How Money Bail Perpetuates An Endless Cycle of Poverty and Jail Time*, PRISON POL'Y INITIATIVE (May 10, 2016), https://www.prisonpolicy.org/reports/incomejails.html.

[82] *See* Stack v. Boyle, 342 U.S. 1, 5-6 (1951).

[83] *Pretrial Detention*, PRISON POL'Y INITIATIVE (Mar. 3, 2023, 2:04 PM), https://www.prisonpolicy.org/research/pretrial_detention/.

afford to pay their bail. Further, over sixty percent of those who are unable to post bail fall within the poorest one-third of society, and eighty percent fall within the bottom half.[84] It is also important to note that seventy-five percent of individuals in pretrial detention have only been charged with drug or property crimes, which are generally low-level offenses.[85] Taken together, it is apparent that that the cash bail system is a system of injustice designed to favor the rich and punish the poor, irrespective of innocence or guilt.[86]

Consequentially, the cash bail system does not operate in practice the way it was intended to when initially implemented across the states. If the goal is to ensure the return of defendants to court and keep those deemed potentially dangerous away from the community, then the ability of one to purchase their freedom in the form of a cash payment does not logically ensure that either of those goals are met. The criminal justice system is supposedly designed to protect the innocent, punish the guilty, provide justice to victims, and maintain societal order. However, the operation of a cash bail system largely contradicts these principles and denies these fundamental notions of justice. Specifically, research has found that people are more likely to be acquitted of a crime if they can pay their bail, as opposed to those who cannot and are detained pretrial.[87] This is largely because those who are unable to post bail are more likely to take plea deals just to get out of jail, even if they are not truly guilty of the crime charged.[88] This leads to the overarching question fueling the bail reform movement: is the criminal justice system punishing the most guilty, or just those who cannot afford to pay for their freedom?

i. The Racially Discriminatory Impact of the Cash Bail System

In addition to the economic class discrimination within the cash bail system, the system also largely targets Black and Hispanic individuals at much higher rates than other races within the United States.[89] The last time the federal government collected and published this data nationally was in 2002, and at that time out of the 182,752 individuals being held in pretrial detention, 43% were Black, 19.6% were Hispanic, and only 31% were white.[90] Notably, to put these numbers into perspective in regard to the overrepresentation of racial minorities in pretrial detention, in 2002, the

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[84] *See* Rabuy & Kopf, *supra* note 81.

[85] John Matthews II & Felipe Curiel, *Criminal Justice Debt Problems*, 44 HUM. RTS. MAG. 3 (2019).

[86] *Id*.

[87] *Id.* ("One study suggests that those people are 'over three times more likely to be sentenced to prison' and 'over four times more likely to be sentenced to jail' than those who are not detained pretrial.").

[88] *Id*.

[89] Wendy Sawyer, *How Race Impacts Who Is Detained Pretrial*, Prison Pol'y Initiative (Oct. 9, 2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/.

[90] *Id.*

general U.S. population was composed of 68.1% white, 12.2% Black, and 13.4% Hispanic citizens.[91] Since 2002, the pretrial detention population has continued to grow substantially larger, reaching over 400,000 as of 2020,[92] and the racial discrepancies remain just as disproportionate as they did twenty years ago.[93]

More recent studies suggest that in large urban areas, Black defendants accused of felonies are "twenty-five percent more likely than white defendants to be held pretrial even though charged with similar crimes."[94] Additionally, on a national level, young Black men are about fifty percent more likely to be detained pretrial than white defendants, and on average, are given bail amounts almost twice as high as white defendants.[95] While the direct correlation between race and bail decisions cannot be specifically identified, much of the evidence suggests that these racial discrepancies are driven by judges' implicit biases and inaccurate stereotypes "that exaggerate the relative danger of releasing [B]lack defendants[.]"[96] There is also a strong likelihood that many of these discrepancies are an additional result of the system's attack on the poor.[97] For example, in 2015, the average income of Black men in jail pretrial because they were unable to make bail was $11,275, while white men held in jail pretrial had an average income of $18,283.[98] However, courts set bail amounts about $10,000 higher for Black defendants on average, even though Black defendants are statistically less likely to be able to afford it than their white counterparts.[99]

These disproportionate outcomes based on economic class and race are likely interconnected, as the Prison Policy Initiative observed that "the typical Black man, Black woman, and Hispanic woman detained for failure to pay a bail bond were living below the poverty line before incarceration."[100] Additionally, as the average bail bond amount in the United States is $10,000, representing approximately eight months of income for the typical detained defendant,[101] it seems unreasonable to conclude that the cash bail system is

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[91] *Id.*

[92] Sawyer & Wagner, *supra* note 13.

[93] Sawyer, *supra* note 89.

[94] *Id.*

[95] *Id.*

[96] David Arnold, Willie Dobbie, & Crystal S. Yang, *Racial Bias In Bail Decisions*, Nat'l Bureau Econ. Rsch. (May 2017), https://www.nber.org/system/files/working_papers/w23421/w23421.pdf.

[97] Sawyer & Wagner, *supra* note 13.

[98] Rabuy & Kopf, *supra* note 81.

[99] Sawyer, *supra* note 89.

[100] *See* Rabuy & Kopf, *supra* note 81.

[101] *See id.*

not primarily operating in violation of the Eight Amendment's prohibition against *excessive* bail.[102]

C. Modern Day Bail Reform

In recognition of these problems and in response to criminal justice reform advocates, many bail reform efforts implemented by different states focus primarily on eliminating the use of cash bail. In theory, the system works to ensure that a defendant will return to court for trial and other hearings by paying a monetary amount to the court that is ultimately determined by the broad discretion of judges.[103] However, contrary to its theoretical purpose, in practice, the cash bail system has drastically discriminated against the poor and people of color.[104] In recognition of its unequal application within the criminal justice system, and in response to the societal outcry for reform, states that have engaged in substantial bail reform efforts have turned primarily to the implementation of a non-monetary, risk-based pretrial release approach.[105] While these more recently implemented systems operate differently than those within the initial states that took the first steps towards this type of reform, the different systems are all primarily aimed towards the same goal: to make pretrial detention decisions "based on the risk posed by the *specific* defendant,"[106] to the community, and not on defendants' ability to purchase their freedom.

This risk-based approach aims to guarantee complete fairness in pretrial release decisions, regardless of an individual's race or economic class, which is not the case within the cash bail system. The approach is a way to determine an accused individual's actual, potential danger to society if released, as opposed to simply evaluating their financial resources.[107] However, just as the traditional cash bail system was accepted as effective and functional—as evidenced by its long-standing use and the generous support it still receives today—the newer, risk-based system that several jurisdictions have now implemented still produces similar discriminatory and inequitable outcomes that it was specifically intended to eliminate.[108]

States that have taken the steps towards a cashless bail system by implementing risk-based approaches in their pretrial justice practices have

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[102] U.S. CONST. amend. VIII.

[103] Adureh Onyekwere, *How Cash Bail Works*, BRENNAN CTR. FOR JUST. (Feb. 24, 2021), https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works.

[104] *Id.*

[105] William M. Carlucci, *Death Of A Bail Bondsman: The Implementation And Successes Of Nonmonetary, Risk-Based Bail Systems*, 69 EMORY L. J. 1205, 1207 (2020).

[106] *Id.*

[107] *Id.*

[108] Carlucci, *supra* note 105.

shown to be widely unsuccessful in both maintaining community safety and eliminating the glaring biases towards the poor and minority groups from which the advocacy for bail reform stemmed.[109] For instance, in an effort to release more people from pretrial detention without monetary bail, Kentucky introduced a requirement for judges to use a risk assessment tool as part of their pretrial decision-making determinations, as part of a criminal justice reform package.[110] While initially successful—increasing the number of individuals released without posting bail by thirteen percent—it only took several months after the implementation of this practice before judges began disregarding the findings of these risk assessment tools and returning to simply imposing monetary bail amounts, including for defendants who were given low risk scores.[111] As supported by findings of a research director at the Kentucky Center for Economic Policy, the overriding issue causing these risk-based, bail reform measures to fail is the lack of "oversight for how judges use the [risk assessment] scores and [lack of] penalties for ignoring them."[112] In other words, beyond the potential inaccuracies or problems that may be prevalent in the tools themselves, it is how they are being *used and enforced* that is causing the failure we continue to see, even in the more progressive criminal justice reform jurisdictions.[113]

IV. PROPOSAL

A. New Jersey Bail Reform: A Functional Model for Bail Reform Ahead

The New Jersey bail reform model should be implemented more widely amongst the states because it minimizes racial and socioeconomic disparate impacts, protects defendants' Eighth Amendment rights, and maintains the safety and wellbeing of the community. In March of 2013, an organization known as the Drug Policy Alliance ("DPA") conducted a jail population analysis of all New Jersey detention facilities.[114] The study found that twelve percent of the entire New Jersey jail population was being held solely because of their inability to afford $2,500 or less in bail amounts.[115]

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[109] Bryce Covert, *A Bail Reform Tool Intended To Curb Mass Incarceration Has Only Replicated Biases In The Criminal Justice System*, THE INTERCEPT (July 12, 2020, 8:00 AM), https://theintercept.com/2020/07/12/risk-assessment-tools-bail-reform/.

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] Meredith Kleykamp, Jake Rosenfeld, & Roseanne Scotti, *Wasting Money, Wasting Lives: Calculating the Hidden Costs of Incarceration in New Jersey*, DRUG POL'Y ALL. (Sept. 2008), https://drugpolicy.org/sites/default/files/WMWL_Final_2012.pdf.

[115] *Id.*

Even more alarming, the study also found that, out of that twelve percent of the jail population, eight hundred of those individuals were being held because they were unable to pay just $500 to post their bail.[116] When these findings were published, New Jersey officials and reform advocates came together in a non-partisan effort and recognized that a major change to the pretrial system was needed.[117]

One year later, in 2014, the New Jersey legislature passed the Criminal Justice Reform Act ("CJRA") along with an amendment to Article I of the New Jersey Constitution.[118] With the principles of these reform measures intended to "embod[y] principles of fairness in [the] justice system"[119] and "balance an individual's right to liberty with the State's responsibility of assuring community safety,"[120] the New Jersey Constitution was amended to remove the requirement that "[a]ll persons, before conviction, be bailable by *sufficient sureties*."[121] Instead, the amended provision now specifies that, "[a]ll persons, before conviction, be *eligible for pretrial release*."[122]

In addition to the 2014 constitutional amendment, the CJRA was officially enacted in January of 2017.[123] In the interest of solidifying these major bail reform efforts, the CJRA was designed to promote three distinct goals in the consideration of pretrial release conditions: (1) provide reasonable assurance of the defendant's return to court; (2) protect the community; and (3) prevent the obstruction of justice by persons awaiting trial.[124] With these goals at the forefront, the CJRA drastically changed New Jersey's pretrial justice system.[125] First and foremost, it shifted New Jersey's bail system from one that was resource and monetary based, towards one of objectivity that based pretrial release decisions on an overall evaluation of an

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[116] *Id.*

[117] Covert, *supra* note 109.

[118] *Council Decisions*, STATE N.J. COUNCIL LOCAL MANDATES, https://www.nj.gov/localmandates/decisions/NJAC-COLM-0004-16.html (last visited Apr. 24, 2023) ("…the [New Jersey] Legislature enacted implementing legislation, the Criminal Justice Reform Act, C. 2A:162-15 to -26 (CJRA).").

[119] GLENN A. GRANT, NEW JERSEY JUDICIARY, 2018 REPORT TO THE GOVERNOR AND THE LEGISLATURE 3 (2018), https://www.njcourts.gov/sites/default/files/2018cjrannual.pdf.

[120] *Id.*

[121] N.J. CONST. art. I, § 11.

[122] *Id.* (The amended Constitution states:

> All persons shall, before conviction, be eligible for pretrial release. Pretrial release may be denied to a person if the court finds that no amount of monetary bail, non-monetary conditions of pretrial release, or combination of monetary bail and non-monetary conditions would reasonably assure the person's appearance in court when required or protect the safety of any other person or the community, or prevent the person from obstructing or attempting to obstruct the criminal justice process.).

[123] N.J. REV. STAT. § 2A:162-15 (2014).

[124] *Id.*; *see also* Holland v. Rosen, 277 F. Supp. 3d 707, 716 (D.N.J. 2017).

[125] N.J. REV. STAT. § 2A:162-15; see also *Holland*, 277 F. Supp. at 716.

individual defendant's level of risk.[126] Second, it permitted judges to order the pretrial detention of certain defendants if the court finds "clear and convincing evidence that no condition or combination of conditions can reasonably assure the effectuation of [the act's] goals."[127] Finally, it established firm speedy trial deadlines for defendants who are in fact detained pretrial.[128]

Under the new procedure promulgated by the CJRA, once an individual is arrested they are temporarily detained for no more than forty-eight hours, to allow the Pretrial Services Program (the "Program") to conduct a risk assessment evaluation and prepare a report with recommendations for conditions of the defendant's release based on the risk assessment score they received.[129] In preparing this report, the Pretrial Services Program utilizes a risk assessment tool known as the Public Safety Assessment ("PSA").[130] The PSA uses nine factors to determine a defendant's risk of new criminal activity and failure to appear at future court hearings: (1) age at current arrest; (2) current violent offense; (3) charges pending at the time of the offense; (4) prior disorderly persons convictions; (5) prior indictable convictions; (6) prior violent convictions; (7) prior failure to appear pretrial in the past two years; (8) prior failure to appear pretrial beyond the past two years; and (9) prior sentence to incarceration.[131] After the PSA considers and computes all of these factors, it generates an individual score ranging from one (the lowest risk level) to six (the highest risk level).[132] Based on the level of risk indicated by the PSA score produced together with the type of specific crime charged, the Program prepares and writes a recommendation for the court to consider when making its pretrial release decision.[133]

As required by the CJRA, the recommendation prepared by the Pretrial Services Program must include its findings on whether the defendant should be released in one of several ways and if so, under which conditions, if any.[134] The first category of release conditions it may recommend include release on the defendant's own personal recognizance or on an unsecured appearance bond.[135] The second category provides for release with

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[126] *Holland*, 277 F. Supp. at 716.

[127] *Id.*; *see also* N.J. REV. STAT. § 2A:162-15.

[128] *Holland*, 277 F. Supp. at 716.

[129] N.J. REV. STAT. § 2A:162-16(a).

[130] N.J. COURTS, PUBLIC SAFETY ASSESSMENT NEW JERSEY RISK FACTOR DEFINITIONS – DECEMBER 2018 (Dec. 2018), https://www.njcourts.gov/sites/default/files/psariskfactor.pdf.

[131] *Id.*

[132] GRANT, *supra* note 119, at 12.

[133] N.J. REV. STAT. § 2A:162-16(b)(1).

[134] N.J. REV. STAT. § 2A:162-25(b).

[135] *Id.*

> [T]he least restrictive [non-monetary] condition or combination of conditions that . . . will reasonably assure the . . . defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the . . . defendant will not obstruct or attempt to obstruct the criminal justice process.[136]

While not limited to solely the list promulgated in the statute, some of the conditions set forth in the statute include an order for the defendant to remain in the custody of a designated person, maintain or actively seek employment, comply with a set curfew, undergo alcohol or drug treatment, report on a regular basis to a designated law enforcement agency, or agree to avoid contact with an alleged victim.[137] The last two categories of recommendations that the Pretrial Services Program may make include release on monetary bail or a combination of monetary and non-monetary conditions described above.[138] However, while the Program is still permitted to recommend to the court a release condition that involves monetary bail, the court may only impose monetary bail if the prosecutor has shown by *clear and convincing evidence* that there is no combination of non-monetary conditions of release that would reasonably assure the eligible defendant's appearance in court when required, the protection of the public, or the prevention of the defendant from obstructing the criminal justice process.[139]

Following the completion of the Pretrial Services Program's report, and during the defendant's pretrial release hearing, the judge considers the risk assessment score and recommendations on conditions of release, in addition to any information that the prosecutor or defendant puts forth, in order to determine whether release would reasonably assure the eligible defendant's appearance in court, the safety of the community, and the protection of the criminal justice process.[140] In making this determination, the judge has discretion over the non-monetary conditions to impose on the defendant's release so long as it is for the purpose of assuring that the goals described in the initial determination are met.[141]

Notably, while judges have moderate discretion in determining release *conditions*, they do not have independent discretion to detain defendants pretrial due to the presumption of release established in the CJRA.[142] Specifically, unless there is sufficient probable cause that a defendant committed murder or a crime that carries a potential life sentence, there is a

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[136] N.J. REV. STAT. § 2A:162-17(b)(2).

[137] N.J. REV. STAT. §§ 2A:162-17(b)(1)(a)-(d), (2)(a)-(I).

[138] *Id.*

[139] State v. Lopez-Carrera, 245 N.J. 596, 601, 247 A.3d 842 (N.J. 2021); *see also* N.J. REV. STAT. §§ 2A:162-25(b), 162-17(c).

[140] N.J. REV. STAT. § 2A:162-17.

[141] *Id.*

[142] GRANT, *supra* note 119, at 30; see also N.J. REV. STAT. §§ 2A:162-18(b), 162-19(b).

mandatory presumption of release and the defendant must be released pretrial, with no ability for the judge to exercise their discretion and detain them otherwise.[143]

In certain cases, however, whether due to the serious nature of the alleged offense or the risk score generated by the PSA, a prosecutor can file a pretrial detention motion and attempt to rebut the presumption of release in a detention hearing before the court.[144] In order to rebut the presumption of release, the prosecutor must show by clear and convincing evidence that: no amount of monetary bail, non-monetary conditions of pretrial release, nor any combination of the two would reasonably assure the defendant's appearance in court when required; a risk to the safety of any other person or the community; and the potential for the obstruction or the attempted obstruction of the criminal justice process.[145] The CJRA provides a list of factors that the court may consider in making this determination, including (1) the nature and circumstances of the offense charged; (2) the weight of the evidence against the defendant; (3) the history and characteristics of the defendant; (4) the nature and seriousness of the danger to any other person or the community that would be posed by the defendant's release; (5) the nature and seriousness of the risk of obstructing or attempting to obstruct the criminal justice process that would be posed by the defendant's release; and (6) the release recommendation of the pretrial services program.[146]

To even further limit the ability of a judge's individual discretion to influence a pretrial determination and to maintain as much objectivity as possible, in 2018 the New Jersey Supreme Court in *State v. Mercedes* made clear that a recommendation by pretrial services against the release of a defendant, by itself, cannot justify detention if it is based *only* on the type of offense charged.[147] In recognizing that these recommendations from the Program are founded solely on the scores generated by computer algorithmic formulas, the New Jersey Legislature and Supreme Court sought to not only minimize human error and biases by mandating release in the majority of cases, but also potential technological errors as well by not allowing judges to justify a grant of a detention motion solely on high PSA score indicating high risk alone.

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[143] N.J. REV. STAT. § 2A:162-19(b).

[144] GRANT, *supra* note 119, at 33.

[145] N.J. REV. STAT. § 2A:162-20; *see also* State v. Lopez-Carrera, 245 N.J. 596, 247 A.3d 842 (N.J. 2021).

[146] N.J. REV. STAT. § 2A:162-20(a)-(f).

[147] State v. Mercedes, 233 N.J. 152, 155, 183 A.3d 914 (N.J. 2018).

B. Success of New Jersey's Bail Reform

In just the first year following the implementation of CJRA, New Jersey's pretrial jail population decreased by 20.3%.[148] Additionally, in comparison to the old monetary bail system, defendants spent at least half as much time in jail from the time of their arrest to when they were initially released, pretrial.[149] More specifically, this decrease was even greater for Black defendants, whose time between arrest and pretrial release dropped from 10.7 days in 2014, to 5 days in 2018.[150] For white defendants, the number of days until initial release dropped from 5.3 to 2.9 days; this difference reflects the drastic racial inequities that existed prior to the implementation of New Jersey's bail reform and CJRA within their pretrial system, and that still exist today.[151] Moreover, jail population studies that compared the old and new pretrial systems found that in just the first year of the CJRA, there were about 3,000 fewer Black defendants and 1,300 fewer Hispanic defendants incarcerated within the state's justice system.[152]

V. CONCLUSION

Based on the demonstrated success of New Jersey's bail reform implementation, the CJRA should serve as a model for all other states to adopt bail reform legislation and procedures. The comparison of New Jersey's new pretrial release system[153] with other states, such as Kentucky[154]—which has attempted to adopt a pretrial system more geared towards a risk-based approach—show that the overriding factor separating these different approaches' success may be highly dependent on the constraint, or lack thereof, of judicial discretion.[155]

If the future implementation of cashless bail systems is going to involve a heavier reliance on risk-assessment tools to determine whether an individual is "objectively" safe to return to the community, the problems already existing within current systems will not be fixed until the subjectivity of judges is eliminated or highly constrained,[156] as was done in New Jersey.[157]

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[148] Frank Crivelli, *Bail Reform Reduces Jail Population Across New Jersey by 20.3%*, N.J. PUB. SAFETY OFFICERS L. BLOG (Feb. 19, 2018), https://www.njpublicsafetyofficers.com/2018/02/articles/bail-reform-reduces-jail-population-across-new-jersey-by-20-3/.

[149] GRANT, *supra* note 119, at 33.

[150] *Id.* at 20.

[151] *Id.*

[152] *Id.* at 6.

[153] N.J. REV. STAT. § 2A:162-16 (2014).

[154] Covert, *supra* note 109.

[155] *See generally id*.

[156] Ben-Dan, *supra* note 21, at 88.

[157] *See* N.J. CONST. art. I, § 11 (amended 2014).

The presumption of release included within the New Jersey Constitution,[158] and additionally codified and guided by the CJRA,[159] does not provide any avenue for judges to "undermin[e] the reforms in the courtroom,"[160] by interpreting the reform law in a manner that contradicts its intended purpose. Reforming pre-trial bail procedures is an essential step towards a more equitable and working criminal justice system.

[158] *Id.*

[159] N.J. REV. STAT. § 2A:162-16 (2014).

[160] Ben-Dan, *supra* note 21, at 159.