

Pretrial Injustice: The Need for Reform

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I. Overview

In New Mexico and throughout most of the United States, courts rely heavily on a wealth-based, instead of a risk-based, system to determine whether accused defendants will be held in jail or released before their trials that will determine their guilt or innocence with constitutional guarantees of fair adjudication and the bedrock principle that the accused is innocent until proven guilty. The result is a lack of any rational justice in our pretrial justice system, where clearly dangerous defendants or those who pose substantial flight risks can buy their way out of jail if they have access to the money required to secure their presumption of innocence, while large numbers of poorer defendants who are neither dangerous nor flight risks are held in jail simply for lack of money, with substantial harm done to them, their families, and the taxpayers who must pay for housing, feeding, guarding, medicating, and caring for them.

II. How Did We End up with a Money-For-Freedom System of Pretrial Justice?

The answers go back to origins before the founding of the United States, and even before the English Magna Carta of 1215 or the Norman Conquest of 1066. In *State v. Brown*, 2014-NMSC-038), the New Mexico Supreme Court explored how we got to where we are now, both in New Mexico and in most of the rest of the country. That history, as explained in *Brown*, has roots that extend back to medieval England, where bail originated “as a device to free untried prisoners.” Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964* 1 (1964); see IV William Blackstone, *Commentaries on the Laws of England in Four Books* 1690 (Rees Welsh & Co. 1902) (1769) (“By the ancient common law, before and since the [Norman] conquest, all felonies wereailable, till murder was excepted by statute; so that persons might be admitted to bail before conviction almost in every case.” (footnotes omitted)). See generally William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 *Alb. L. Rev.* 33, 34-66 (1977) (describing the origins and history of bail in England); Elsa de Haas, *Antiquities of Bail* 128 (1940) (concluding that the “root idea of the modern right to bail” came from “tribal custom on the continent of Europe”).

During the Anglo-Saxon period in England before the Norman Conquest, the penalty for most crimes was a monetary fine paid as compensation to the victim. See June Carbone, *Seeing Through the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 *Syracuse L. Rev.* 517, 519-20 (1983). Under this system of justice, the sheriff often required the accused to secure a third party, or surety, to guarantee the appearance of the accused for trial and the payment of the fine upon conviction. See *id.* at 520; see also *Bail: An Ancient Practice Reexamined*, 70 *Yale L.J.* 966, 966 (1961). The amount of money pledged as bail was identical to the penalty prospect upon a conviction, and the surety was required to pay the fine if the accused failed to appear for trial. Carbone, *supra*, at 520. This system of bail ensured victim compensation and deterred pretrial flight because the surety bore financial responsibility for payment of the penalty and had an incentive to produce the accused for trial. *Id.*

Following the Norman Conquest of 1066, capital and corporal punishment began gradually to replace monetary fines as the penalty for most offenses, and accused persons faced longer delays between accusation and trial as they waited for traveling judges to arrive and dispense local justice. See *id.* at 519, 521; see also Freed & Wald, *supra*, at 1 (“Disease-ridden jails and delayed trials by traveling justices necessitated an alternative to holding accused persons in pretrial custody.”). The development of corporal and capital punishment complicated the use of bail because the amount of money pledged no longer correlated directly to the potential punishment. Carbone, *supra*, at 522. The endowment of local sheriffs with discretion in setting bail led to rampant corruption and abuse. See *United States v. Edwards*, 430 A.2d 1321, 1326 (D.C. Cir. 1981) (en banc) (explaining that sheriffs “exercised a broad and ill-defined discretionary power to bail” prisoners and that this “power was widely abused by sheriffs who extorted money from individuals entitled to release without charge” and who “accepted bribes from those who were not otherwise entitled to bail”).

In response to historical abuses, the common law right to bail was codified into written English law. In 1215, the principles that an accused is presumed innocent and entitled to personal liberty pending trial were incorporated into the Magna Carta, which proclaimed that “no freeman shall be taken or imprisoned . . . [except by] the judgment of his peers or by the law of the land.” *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 186 (1963) (internal quotation marks and citation omitted). In 1275, the English Parliament enacted the Statute of Westminster, which defined bailable offenses and provided criteria for determining whether a particular person should be released, including the strength of the evidence against the accused and the accused’s criminal history. See *Bail: An Ancient Practice Reexamined*, *supra*, at 966; Carbone, *supra*, at 523-26. In 1679, Parliament adopted the Habeas Corpus Act to ensure that an accused could obtain a timely bail hearing; and in 1689, Parliament enacted an English Bill of Rights that prohibited excessive bail. See Carbone, *supra*, at 528. In crossing the Atlantic, American colonists carried concepts embedded in these documents that became the foundation for our current system of bail. See *id.* at 529.

The presumption that defendants should be released pending trial became widely adopted throughout the United States in both the state and federal systems. See *Bail: An Ancient Practice Reexamined*, *supra*, at 967. One commentator who surveyed the bail laws in each of the states found that forty-eight states have protected, by constitution or statute, a right to bail “by sufficient sureties, except for capital offenses when the proof is evident or the presumption great.” Matthew J. Hegreness, *America’s Fundamental and Vanishing Right to Bail*, 55 *Ariz. L. Rev.* 909, 916 (2013). States modeled these provisions on the Pennsylvania Constitution of 1682, which provided that “all Prisoners shall be Bailable by Sufficient Sureties, unless for capital Offenses, where proof is evident or the presumption great.” See Carbone, *supra*, at 531-32 (“[T]he Pennsylvania provision became the model for almost every state constitution adopted after 1776.”).

At the federal level, the first United States Congress established a statutory right to bail by enacting the Judiciary Act of 1789, which provided an absolute right to bail in noncapital cases and bail at the discretion of the judge in capital cases. See Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91; see also Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. Pa. L. Rev. 959, 971 (1965) (explaining that the “bail problem” was before the first Congress in the spring and summer of 1789). The first Congress also proposed that the states adopt the Eighth Amendment to the United States Constitution, which, like the New Mexico Constitution and English Bill of Rights, prohibits excessive bail. See U.S. Const. amend. VIII; N.M. Const. art. II, § 13; see also *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 294 (1989) (O’Connor, J., concurring in part and dissenting in part) (explaining that the first Congress based the Eighth Amendment “on Article I, § 9, of the Virginia Declaration of Rights of 1776, which had in turn adopted verbatim the language of § 10 of the English Bill of Rights”). But unlike the New Mexico Constitution, the United States Constitution does not contain an explicit right to bail clause and guarantees only that “[e]xcessive bail shall not be required.” U.S. Const. amend. VIII; see *Carlson v. Landon*, 342 U.S. 524, 545-46 (1952) (explaining that the United States Constitution can be construed only as a prohibition against excessive bail in those cases in which it is proper to grant bail because the Eighth Amendment does not provide a “right to bail”). The United States Supreme Court has held that “[b]ail set at a figure higher than an amount reasonably calculated to fulfill [the] purpose [of adequately assuring the presence of the accused] is ‘excessive’ under the Eighth Amendment.” *Stack v. Boyle*, 342 U.S. 1, 5 (1951). As the Court explained,

Beginning with the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. See *Hudson v. Parker*, 1895, 156 U.S. 277, 285 Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

Id. at 4.

Despite the ancient origins and broad recognition of the right to bail in this country, studies of the administration of bail in the twentieth century raised a number of concerns about its widespread misuse. See Field Study, *A Study of the Administration of Bail in New York City*, 106 U. Pa. L. Rev. 693 (1958); Note, *Compelling Appearance in Court: The Administration of Bail in Philadelphia*, 102 U. Pa. L. Rev. 1031 (1954); Arthur L. Beeley, *The Bail System in Chicago* (1927). See generally Wayne H. Thomas, Jr., *Bail Reform in America 3-19* (1976); Ronald Goldfarb, *Ransom* (1965); Foote, *supra*; Freed & Wald, *supra*, at 9-21. The studies all concluded that the system of money bail in the United States discriminates against indigent defendants who lack the financial resources to post bail. See, e.g., Thomas, *supra*, at 11, 19 (“The American system of bail allows a person arrested for a criminal offense the right to purchase his

release pending trial. Those who can afford the price are released; those who cannot remain in jail. . . . The requirement that virtually every defendant must post bail causes discrimination against defendants who are poor.”). Researchers also found that defendants incarcerated pending trial were held “under harsher conditions than those applied to convicted prisoners,” even though many of those defendants ultimately were either acquitted or given no sentence of imprisonment upon the disposition of their cases. Foote, *supra*, at 960.

These concerns were accompanied by criticism of the growing role commercial bail bond agents played in determining whether defendants would be released pending trial. See Notes, *Preventive Detention Before Trial*, 79 Harv. L. Rev. 1489, 1490 (1966). No commercial bail bond industry existed in medieval England, where pretrial release was conditioned upon the accused securing a reputable friend or relative to personally assure the accused’s appearance for trial. See Thomas, *supra*, at 11-12; see also F.E. Devine, *Commercial Bail Bonding* 5 (1991) (explaining that sureties in eighteenth-century England “were viewed as actively exercising a friendly custody of the accused”). To the contrary, the English judicial system has always found the concept of commercial sureties repugnant. See generally Devine, *supra*, at 37 (explaining that, in the nineteenth century, the English common law treated an agreement to pay a surety for bail as an “unenforceable illegal contract contrary to the public interest” and, in the twentieth century, as a “crime of conspiracy to effect a public mischief” or a crime of “conspiracy to obstruct the court of justice”); *id.* at 45 (explaining that the English Bail Act of 1976 sets forth criminal penalties for agreeing to indemnify a surety in a criminal proceeding, effectively barring any commercial bail bond industry). England is not alone in its rejection of the commercial bail bond industry. “Viewed from an international perspective, the commercial bail bonding system has provoked an almost universally unfavorable reaction” in common law judicial systems, and “only one country, the Philippines, has adopted a commercial bail bonding system similar to the American system.” *Id.* at 15.

Contrary to this international trend, a commercial bail bond industry emerged in the United States. Contributing factors included the near-absolute right to bail set forth in the Judiciary Act of 1789 and in most state constitutions, the unavailability of friends and relatives who might serve as personal sureties, and the ability of defendants to flee into the vast American frontier. See Thomas, *supra*, at 11-12. By the middle of the twentieth century in the United States, commercial bail bond companies who charged defendants a nonrefundable fee for their services, typically ten percent of the bond amount, frequently posted money bail. See *id.* at 11; Freed & Wald, *supra*, at 22-24.

A commercial bail bond may enable a defendant to post money bail required by the court as additional assurance that the defendant will appear for trial. See *Stack v. Boyle*, 342 U.S. at 5 (“Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused.”). But critics argued that the commercial bail bond industry inappropriately delegated to private agents the

power to determine which defendants get released. See *Preventive Detention Before Trial*, *supra*, at 1490. As one federal judge observed, the effect of the commercial bail bond industry

is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety—who in their judgment is a good risk. The bad risks, in the bondsmen’s judgment, and the ones who are unable to pay the bondsmen’s fees, remain in jail. The court [is] relegated to the relatively unimportant chore of fixing the amount of bail.

Pannell v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963) (Wright, J., concurring).

Some fifty years ago, widespread concerns about problems and inequities in bail practices sparked national interest in establishing new bail procedures and pretrial programs that would treat the rich and the poor more equitably by facilitating pretrial release without the requirement of monetary bonds. The modern bail reform movement began with the Manhattan Bail Project, conducted in the 1960s by the Vera Foundation in New York City. See Thomas, *supra*, at 3, 20-27; Goldfarb, *supra*, at 150-72. Through the Manhattan Bail Project, defendants were interviewed prior to their first appearance in court to evaluate whether they were good candidates for pretrial release on recognizance; that is, release “on one’s honor pending trial.” Goldfarb, *supra*, at 153-54. The standard interview questions included an inquiry into a defendant’s personal background, community ties, and criminal history. *Id.* The interviewer scored a defendant’s answers using a point-weighting system and verified answers for accuracy, usually over the telephone with references the defendant provided. *Id.* at 154-55, 174-75. The interviewers gave the resulting information to the court and made recommendations regarding which defendants should be released on recognizance. *Id.* at 155. The Manhattan Bail Project proved successful. During the first three years of the experiment, defendants released on recognizance at the recommendation of the Vera Foundation were about three times more likely to appear for trial than defendants in control groups deemed eligible for release on recognizance who instead were released on money bail. *Id.* at 155, 157. The Manhattan Bail Project “showed that defendants could be successfully released pretrial without the financial guarantee of a surety bail agent if verified information concerning their stability and community ties were presented to the court.” Thomas H. Cohen & Brian A. Reaves, *Pretrial Release of Felony Defendants in State Courts* 4 (U.S. Dep’t of Justice Nov. 2007). The success of the Manhattan Bail Project increased national interest in bail reform and triggered the creation of pretrial services programs across the country. See Timothy R. Schnacke et al., *Pretrial Justice Inst., The History of Bail and Pretrial Release* 10 (2010); see also Marie VanNostrand et al., *Our Journey Toward Pretrial Justice*, 71 *Fed. Probation*, no. 2, 2007, 20, 20 (discussing pretrial services agencies “as providers of the information necessary for judicial officers to make the most appropriate bail decision” and to “provide monitoring and supervision of defendants released with conditions pending trial”).

Driven by the same concerns that inspired the Manhattan Bail Project, Congress enacted the Bail Reform Act of 1966, the first major reform of the federal bail system since the Judiciary

Act of 1789. See Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (repealed 1984). The stated purpose of the Bail Reform Act of 1966 was “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.” Id. Sec. 2. The Act included the following key provisions to govern pretrial release in noncapital criminal cases in federal court: (1) a presumption of release on personal recognizance unless the court determined that such release would not reasonably assure the defendant’s appearance in court, (2) the option of conditional pretrial release under supervision or other terms designed to decrease the risk of flight, and (3) a prohibition on the use of money bail in cases where nonfinancial release options such as supervisory custody or restrictions on “travel . . . or place of abode” are sufficient to reasonably assure the defendant’s appearance. See id. Sec. 3, § 3146(a); see also VanNostrand et al., *supra*, at 20 (explaining that the 1966 Act “established a presumption of release by the least restrictive conditions, with an emphasis on non-monetary terms of bail”). By emphasizing nonmonetary terms of bail, Congress attempted to remediate the array of negative impacts experienced by defendants who were unable to pay for their pretrial release, including the adverse effect on defendants’ ability to consult with counsel and prepare a defense, the financial impacts on their families, a statistically less-favorable outcome at trial and sentencing, and the fiscal burden that pretrial incarceration imposes on society at large. See H.R. Rep. No. 89-1541 (1966), reprinted in 1966 U.S.C.C.A.N. 2293, 2299.

Congress again revised federal bail procedures with the Bail Reform Act of 1984, enacted as part of the Comprehensive Crime Control Act of 1984. See Bail Reform Act of 1984, Pub. L. No. 98-473, § 202, 98 Stat. 1837, 1976 (codified at 18 U.S.C. §§ 3141-3150 (2012)). The legislative history of the 1984 Act explains that Congress wanted to “address the alarming problem of crimes committed by persons on release” and to “give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released.” S. Rep. 98-225, at 3 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3185. The 1984 Act, as amended, retains many of the key provisions of the 1966 Act but “allows a federal court to detain an arrestee pending trial if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions ‘will reasonably assure . . . the safety of any other person and the community.’” *United States v. Salerno*, 481 U.S. 739, 741 (1987) (omission in original) (quoting the Bail Reform Act of 1984) (upholding the preventive detention provisions in the 1984 Act); see also 18 U.S.C. § 3142(a) (providing generally the current federal procedure for ordering either release or detention of a defendant pending trial), held unconstitutional on other grounds by, e.g., *United States v. Karper*, 847 F. Supp. 2d 350 (N.D.N.Y. 2011).

Despite sporadic reform efforts at the federal level and in some state jurisdictions, the administration of bail in the United States today is a subject of substantial concern. See John S. Goldkamp, *Judicial Responsibility for Pretrial Release Decisionmaking and the Information Role of Pretrial Services*, 57 *Fed. Probation* 28, 30 (1993) (“Even after decades of bail reform, serious

questions about the fairness and effectiveness of pretrial release in the United States have not been resolved.”). A recent United States Department of Justice report, which provides statistics about state court felony defendants in the nation’s seventy-five largest counties between 1990 and 2004, reflects some of the enduring inequalities in our nation’s system of bail. See Cohen & Reaves, *supra*. The report demonstrates that, in the last two decades, states have again increased their reliance on commercial surety bonds while decreasing the use of personal recognizance releases. See *id.* at 1-2 (“Beginning in 1998, financial pretrial releases, requiring the posting of bail, were more prevalent than non-financial releases.”). As a result, the number of pretrial inmates in jail populations has grown “at a much faster pace than sentenced inmates, despite falling crime rates.” Kristin Bechtel et al., *Pretrial Justice Inst., Dispelling the Myths: What Policy Makers Need to Know About Pretrial Research* 1-2 (Nov. 2012). Most of the defendants who remain in custody pending trial stay in jail because they cannot afford the bail set by the court, not because they have been denied bail altogether. See Cohen & Reaves, *supra*, at 1 (“Among [felony] defendants detained until case disposition, 1 in 6 had been denied bail and 5 in 6 had bail set with financial conditions required for release that were not met.”). “Hispanics were less likely than non-Hispanic defendants to be released, and males were less likely than females to be released.” *Id.* Twenty percent of these detained defendants “eventually had their case dismissed or were acquitted,” so many of them could have avoided imprisonment altogether if only they had the resources to post bail. *Id.* at 7.

To address the persistent inequities and inefficiencies in our current administration of bail, a number of national entities have promulgated standards and best practices for pretrial release programs. See, e.g., Am. Bar Ass’n, *ABA Standards for Criminal Justice: Pretrial Release* (3d ed. 2007) (hereinafter *ABA Standards*); Nat’l Ass’n of Pretrial Servs. Agencies, *Standards on Pretrial Release* (3d ed. 2004); Nat’l Dist. Attorneys Ass’n, *National Prosecution Standards, Standards 4-4.1 to 4-4.5*, at 56-57 (3d ed. 2009). Renewed interest in pretrial justice has led some commentators to suggest that the criminal justice system in the United States has begun to experience a new wave of bail reform in the twenty-first century. See Bechtel et al., *supra*, at 2 n.1; Schnacke et al., *supra*, at 21-27 (noting that “jurisdictions across the United States have become significantly more interested in the topic of bail and pretrial release”). But reform efforts have met a number of significant challenges, including the organized resistance of the bail-bonding industry that has grown up around our justice systems, and the inertia and resistance to change that results from having lived with a system for so long that people find it difficult to look at it with fresh and critical eyes.

III. National Reform Efforts

A. Attorney General’s Call for Reforming the Nation’s Costly Pretrial Detention System (By Ted Gest, Contr. Ed., The Crime Report, and president of Criminal Justice Journalists)

Offering judges a more scientific basis for deciding who can be released before trial was among the suggestions for changing the \$9 billion jail system at a blue-ribbon conference in

Washington, headed by Attorney General Eric Holder. A chorus of critics from Attorney General Eric Holder on down assailed the money bail system in the United States at a two-day pretrial justice conference that ended yesterday in Washington, D.C. Many of the hundreds of thousands of inmates in county jails awaiting trial are accused non-violent, nonfelony offenders who are behind bars only because they can't afford to post the bail required to get out—often just a few hundred dollars, Holder said. The conference was sponsored by Holder's Justice Department, along with the nonprofit Pretrial Justice Institute, partly in memory of a similar event organized by Attorney General Robert Kennedy in 1964.

The jail system costs 9 billion taxpayer dollars annually, much of which could be saved by using recognized tools to measure the risks that a defendant will not return for required court appearances if released, Holder and other speakers contended. Experiments in helping judges make better decisions on who can safely be released before trial are under way in several jurisdictions around the U.S., but the prevalent bail system based on money, in which insurance companies collect from defendants bail amounts set by judges in return for ensuring that the suspect returns to court are entrenched in most courts, "like a creature that will not die," complained Judge Truman Morrison of Washington, D.C. Morrison said the system is unscientific and that most judges "guess" in setting bail figures. "It's utterly random," he said.

About two-thirds of the nation's 3,000 counties lack organized pretrial services programs that use evidence-based approaches to handling pretrial releases, said Assistant Attorney General Laurie Robinson, whose agency supported the conference. Attendees represented a broad swath of the criminal justice system, including prosecutors, defense attorneys, and jail administrators. They made a long list of suggestions to improve the system, including thorough evaluations of new pretrial detainees and better decisions by prosecutors on filing appropriate criminal charges earlier in the process. Judge William Dressel, president of the Nevada-based National Judicial College, called for "transparent" decision making by judges-- "letting the accused offender know what happened [in setting bail] and why it happened." A representative of the bail bond industry, Dennis Bartlett of the Virginia-based American Bail Coalition, appeared on one panel but did not speak in the conference's concluding session.

Although funds for new criminal justice programs are scarce, some speakers suggested that the current economic picture should be an incentive to adopt more cost-efficient programs. "There is a moment here we should take advantage of," said Michael Jacobson, president of the Vera Institute of Justice, which advocates improved pretrial release programs. Jacobson urged advocates to focus public attention on "the unnecessary, harmful incarceration of people who can't afford" to gain release.

B. New Jersey Amends Constitution to Permit Denial of Release for Dangerous Defendants and to Promote Non-Monetary Release For Non-Dangerous Defendants

In June 2013, the Chief Justice of the New Jersey Supreme Court established the Joint Committee on Criminal Justice to focus on issues relating to bail and the delays in bringing criminal cases to trial. The Committee is comprised of judges, prosecutors, public defenders, private counsel, court administrators and staff from the Legislature and Governor's office.

Among the findings and recommendations of the Committee were the following:

-- Among other important precepts, our criminal justice system stands on two bedrock principles: that individuals accused of a crime are innocent until proven guilty, and that they are entitled to a speedy trial. Yet many defendants are detained in jail before and during trial -- while they are presumed innocent -- because they cannot post bail; and all too often defendants have to wait for more than a year to see their day in court. To address those serious problems, the Committee recommends significant changes to the current approach to bail

-- New Jersey's present system of pretrial release is, to a large extent, based on a defendant's ability to post money bail to secure his or her release after arrest. Because the system is dependent upon one's financial resources, it is likely to have an especially adverse impact upon poor defendants and members of racial and cultural minority groups.

-- In addition, New Jersey's present system for pretrial release fails to protect the community from defendants awaiting trial who may commit additional crimes or seek to obstruct justice through witness intimidation or retaliation. Because the New Jersey Constitution mandates that bail be set for all defendants, judges have no authority to detain even the most dangerous, violent individuals. Although courts may condition pretrial release on nonmonetary provisions that are designed to protect the public, such as a "no contact" restriction that bars a defendant from contacting an alleged victim, there are no mechanisms in place to supervise or enforce compliance.

In short, the current system presents problems at both ends of the spectrum: defendants charged with less serious offenses, who pose little risk of flight or danger to the community, too often remain in jail before trial because they cannot post relatively modest amounts of bail, while other defendants who face more serious charges and have access to funds are released even if they pose a danger to the community or a substantial risk of flight.

For those reasons, the Committee recommends a statutory change from our present "resource-based" system. In its place, we recommend a system that employs an objective, "risk-based" method of analysis to assess a defendant's risk of failure to appear and danger to the community.⁷ A risk-based instrument would consider objective factors such as current charge, prior arrests and convictions, history of failure to appear and substance abuse, amount of time at current residence, and employment status. It would aid judges as they craft conditions of release

--For some defendants, no condition or combination of conditions can reasonably ensure either the safety of the community or their appearance in court. In a resource-based system, judges

sometimes impose extremely high money bails on those defendants based on sub rosa considerations of dangerousness. But this approach can result in the release of affluent defendants who can afford to post bail but still present unmanageable safety risks.

A risk-based system, however, promotes public safety by expressly permitting judges to consider danger to the community while deciding whether to release or detain a particular defendant. If a judge determines that no conditions of release will protect the community, he or she may order a defendant detained pending trial. The Committee recommends that statutory authorization for a risk-based program of release must also provide for preventive detention of offenders who cannot safely be released into the community or pose a serious risk of flight.

Implementation of a risk-based approach in New Jersey will require constitutional and statutory amendments. The Committee believes that a properly designed and appropriately funded risk-based system, along with pretrial detention, would promote both the accused's liberty interests and the community's safety. The recommendations for a risk-based system of bail and pretrial detention are interdependent and should not be considered individually.

As a result of the committee's work and with the broad support of the Court, the Governor, the Legislature, and the public, in November 2014 New Jersey voters approved a proposal to amend the state constitution to provide: "No person shall, after acquittal, be tried for the same offense. All persons shall, before conviction, be [bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great] 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. It shall be lawful for the Legislature to establish by law procedures, terms, and conditions applicable to pretrial release and the denial thereof authorized under this provision." Statutory and rule changes are now underway to further the reform process.

IV. Reform Efforts in New Mexico

Following the 2014 decision in *State v. Brown*, the New Mexico Supreme Court realized that the New Mexico justice system was overly dependent on money-based-release, and the court created a broad-based task force, the Supreme Court's Ad Hoc Pretrial release Committee to assess the pretrial justice system in New Mexico and make recommendations to the Court on measures to bring the system into compliance with existing law and to recommend needed changes in practices, rules, statutes, and state constitutional provisions. Although the work of the committee is not yet concluded, the Supreme Court has undertaken the following actions as a result of the committee's recommendations:

A. Seeking a constitutional amendment to address the worst consequences of the wealth-based release and detention system.

On recommendation of the New Mexico Supreme Court, the legislature unanimously passed Senate Joint Resolution 1, which would allow voters to decide in this November's election whether to reform antiquated bail provisions in our state constitution. Currently, the constitution guarantees the right to get out of jail before trial for virtually all defendants, no matter how dangerous, if they can get their hands on enough money to post bond or if they can make payment arrangements with a bail bondsman.

As we have seen all too often, the ability of a dangerous defendant to post a bail bond does nothing to protect victims, witnesses, police officers, or anyone else from injury or death. Under existing law, neither the released defendant nor a bondsman can lose a penny if the defendant commits new crimes, no matter how violent, while out on bond. And the defendant will usually be entitled to get out of jail again simply by posting a new bond on the new crimes.

The old money-for-freedom guarantee in our law, which dates back to a seventeenth-century Pennsylvania constitution, not only endangers our communities, it results in packing our jails with low-risk defendants who pose no real threat to community safety but who do not have enough money to pay whatever price tag is set on their constitutional right to be presumed innocent until proven guilty. In addition to the unfair impact on low-risk defendants and their families, this imposes enormous costs on taxpayers who must pay for housing, guarding, feeding, and caring for people who do not need to be locked up.

The antiquated bail provisions of the current constitution make it impossible for our judges to both protect our communities against dangerous defendants and honor existing constitutional rights of the accused. If our judges enforce the law as it now stands, they must permit release on bail for defendants who predictably will prey on others – and incur the wrath of those who do not understand that judges must honor the law even when they believe the law should be changed. If judges were to misuse bondsetting to try to insure detention instead of to insure return to court after release, they would violate both the rights of the defendant and their own judicial oaths to uphold the law as it is written, all without the procedural safeguards that should be required for outright denial of pretrial release.

By replacing money-based-release with evidence-based-release, SJR 1 would continue to protect the pretrial presumption of innocence. It would guarantee that nondangerous defendants who are not a flight risk and otherwise entitled to release would not be jailed simply because they lack the financial resources to post a particular bond. Any monetary bond a judge sets simply has to be set at or adjusted to a level within a nondangerous defendant's means. This guarantee is already a part of federal law and the law of many states, and federal courts have squarely held that bond schedules denying pretrial release simply for lack of financial resources violate the federal constitution.

The new operative language, after several amendments during the legislative process, reads as follows:

[Existing language] All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great and in situations in which bail is specifically prohibited by this section. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

[New language] Bail may be denied by a court of record pending trial for a defendant charged with a felony if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community. An appeal from an order denying bail shall be given preference over all other matters.

A person who is not detainable on the grounds of dangerousness nor a flight risk in the absence of bond and is otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond. A defendant who is neither a danger nor a flight risk and who has a financial inability to post a money or property bond may file a motion with the court requesting relief from the requirement to post bond. The court shall rule on the motion in an expedited manner.

Constitutional language, of course, paints with a broad stroke and sets forth basic concepts that must be given effect by statutes, court rules, and caselaw. In New Mexico, unlike most states, it is the Supreme Court, rather than the Legislature, that has the authority to write rules relating to bail and other judicial procedures. The court is currently working on rules amendments to address a number of changes in our bail procedures, and will do so to implement the new constitutional language if SJR 1 is approved by the voters in November

B. Amending court rules to move toward an individual risk-based system of release and detention.

Whether or not the constitutional amendment is approved by the voters, there are a number of steps the court has initiated to change procedures within the confines of the current constitutional language. We are looking at the committee's recommendation to do away with fixed bail schedules currently used in a number of judicial districts and move toward individual risk assessments using standardized and validated risk assessment instruments. The 2016 Legislature has appropriated funding for the Department of Public Safety to staff and coordinate a centralized offender database that will collect and make available to law enforcement, detention centers and courts criminal histories in national and local databases that provide more effective individual risk assessments and early release of low-risk offenders, including releases by detention facilities before initial court appearances.

C. Amending court rules and forms to provide more accurate assessments of a defendant's financial ability to post bond.

More accurate information relating to a defendant's financial ability will be important to determinations of appropriate bond amounts in those instances when a financial bond may be in order, and to determinations of whether a particular bond may result in the unwarranted pretrial detention of a defendant. We are also considering proposed amendments to court rules to provide more timely and effective reviews when a defendant remains incarcerated for inability to meet financial or other bond conditions.

V. The Future

All those who have tried to tackle pretrial justice reform have learned from experience that the task is not an easy one.

One obvious obstacle to reform efforts is the opposition to reform efforts on the part of the lucrative commercial bonding industry that has become a significant growth around our pretrial justice system. The industry takes the position that it is a benign growth, and part of its opposition is based on that theory. The industry also heavily finances opposition efforts, spending money on media campaigns, lobbyists, and financial contributions to elected officials.

Another serious obstacle is the inertia that results from the familiarity of the money-for-release system, both in the justice system and in the community at large. We have gotten so used to the idea that releasing accused defendants from jail before their trials if they can come up with bond money and detaining them if they cannot, that challenges to the underlying theoretical justification of such practices are met with resistance and difficulty in looking at the system with fresh eyes.

But in a society that really believes that the kind of justice our courts provide should not depend on a party's wealth or poverty and that all should stand equally before the bar of justice, it is critically important that we be willing to reexamine whether what we are doing lives up to those ideals. If justice is not available to all, true justice cannot be provided to anyone, because unequal justice is simply not justice.

REFERENCES

1. *Clear and Convincing Evidence Standard.* Laws denying pretrial release to defendants who have been shown by clear and convincing evidence in a due process hearing to be dangerous to others have been held to be lawful under the federal constitution. In *United States v. Salerno*, 481 U.S. 739, 741 (1987), the United States Supreme Court cited procedural safeguards that included an evidentiary hearing where the government had to prove dangerousness by clear and convincing evidence and the availability of an expedited appeal as grounds for upholding the constitutionality of the federal detention statute.

The clear and convincing evidence hearing requirement for denial of pretrial release is prescribed by national standards such as the ABA Standards for Criminal Justice: Pretrial Release § 10-5.8 and the National Association of Pretrial Services Agencies, Standards on Pretrial Release § 2.10, federal law such as D.C. Code, § 23-1321 [applicable to courts in the District of Columbia] and 18 United States Code 18 U.S.C. § 3142(f)(2)(a)(b) [applicable to federal courts in the rest of the United States] States courts, and in the laws of other states permitting denial of pretrial release for dangerousness, such as Arizona [Ariz. Rev. Stat. § 13-3961], California [Cal. Const. Art. 1, § 12], Illinois [Ill. Rev. Stat. § 110-6.3] Louisiana [La. Const. Art. 1, ¶ 18], Massachusetts [Mass. Gen. Laws 276 § 58A], New Jersey [N.J. Stat. Ann. § 2A:162-18], Oregon [Or. Rev. Stat. § 135.240], Utah [Ut. Const. Art. 1, § 8], Vermont [Vt. Const. Art II, § 40], and Wisconsin [Wis. Stat. § 969.035].

2. *Denial of Release Based on Dangerousness Rather Than Lack of Money.*

Prohibiting detention solely because of financial inability to post a money or property bond is based on federal constitutional and statutory law, and is recognized by national standards and by the law of other states.

See 18 United States Code 18 U.S.C. § 3142 (a judge "may not impose a financial condition that results in the pretrial detention of the person"); D.C. Code, §. 23-1321 (a judge may impose a financial condition only if it "does not result in the preventive detention of the person"); ABA Criminal Justice Standards, Pretrial Release, § 10-1.4(e) (a judge "should not impose a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay"); Mass. Gen Laws Ch. 276, § 58A ("The judicial officer may not impose a financial condition that results in the pretrial detention of the person"); position statement filed by the United States Department of Justice in *Varden v. City of Clanton*, 2:15-cv-34-MHT-WC (M.D. AL 2015) ("Incarcerating individuals solely because of their inability to pay for their release, whether through the payment of fines, fees, or a cash bond, violates the Equal Protection Clause of the Fourteenth Amendment" of the United States Constitution); *Pierce v. Velda City*, No. 4:15-cv-570-HEA (E.D. Mo. June 3, 2015) (federal court judgment enjoining as unconstitutional detention of indigents for inability to post money bonds); *Cooper v. City of Dothan*, No. 1:15-CV-425-WKW (M.D. Al. June 18, 2015) (federal

court order barring detention of indigents for inability to post money bonds); *Jones v. City of Clanton*, 2:15-cv-34-MHT-WC (M.D. Ala. 2015) (federal court declaratory judgment and opinion holding that “[c]riminal defendants, presumed innocent, must not be confined in jail merely because they are poor”); *Thompson v. Moss City*, 1:15-cv-00182-LG-RHW (S.D. Miss. Nov. 6, 2015) (federal court declaratory judgment holding that “[n]o person may, consistent with the Equal Protection Clause of the Fourteenth Amendment Clause to the United States Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond.”); *Rodriguez v. Providence Community Corrections, Inc.*, 3:15-cv-01048 (M.D. Tenn. Dec. 17, 2015) (federal court injunction against jailing defendants for inability to afford money bail on federal constitutional grounds); see also <http://www.pretrial.org/the-problem/>

3. *Research Materials.* For further reading on pretrial release issues, both in New Mexico and in the United States generally, see the following resources available readily from internet sources:

a. *State v. Brown*, 2014-NMSC-038 (2014):

https://scholar.google.com/scholar_case?case=5601705540973491459&q=2014-nmsc-038&hl=en&as_sdt=4,32

[The New Mexico Supreme Court opinion that traces the history, legal underpinnings, and practice of bail from its origins in medieval England to the United States and New Mexico. Contrary to some inaccurate public statements, *Brown* created no new law in any respect, but simply repeated the mandates of existing constitutional law, statutory law, court rules, and case law.]

b. Report of the National Symposium on Pretrial Justice:

<http://www.pretrial.org/download/infostop/NSPJ%20Report%202011.pdf>

[2011 symposium under the auspices of the United States Justice Department documenting a “deeply flawed” national money bond system where “defendants who have access to money are able to purchase their release, regardless of the risks they may pose to the safety of the community; those defendants who do not, many of whom are low risk, must sit in jail until trial—at enormous public expense”]

c. Report of the Joint Committee on Criminal Justice:

http://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf

[the report of the study committee created by the New Jersey Supreme Court with membership including prosecutors, defense lawyers, and representatives of all three branches of government that recommended amending the bail provisions of New Jersey’s constitution, which was approved by voters in November 2014]

d. Reports and other resources from the Pretrial Justice Institute:

<http://www.pretrial.org/solutions/>

[aided with funding from the United States Department of Justice, the PJI studies and shares information about needed pretrial justice reforms]

e. Money as a Criminal Justice Stakeholder: The Judge's Decision to Release or Detain a Defendant Pretrial:

<http://www.pretrial.org/download/research/Money%20as%20a%20Criminal%20Justice%20Stakeholder.pdf>

[National Institute of Corrections study tracing the history and failings of the money bond system in most of the United States, and detailing why “states that do not allow detention based on risk are putting judges at a disadvantage” in making pretrial release decisions]

f. Resources from the Pretrial Justice Center, a project of the National Center for State Courts:

<http://www.ncsc.org/Microsites/PJCC/Home/Issues.aspx>

[provides links to resources and analyzes the comparative effectiveness of the payment of money as the primary pretrial release condition versus evidence-based assessments of the risk of flight or threat to public safety]

g. Conference of State Court Administrators Policy Paper on Pretrial Release:

<http://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/Evidence%20Based%20Pre-Trial%20Release%20-Final.ashx>

[study supports use of non-financial release conditions to the greatest degree consistent with evidence-based assessment of flight risk and threat to public safety]

h. Pretrial Justice Institute, Unsecured Bonds: The as Effective and Most Efficient Pretrial release Option:

<http://www.pretrial.org/download/research/Unsecured%20Bonds,%20The%20As%20Effective%20and%20Most%20Efficient%20Pretrial%20Release%20Option%20-%20Jones%202013.pdf>

[study concluding that secured bonds, requiring advance posting of money or security, are no more effective at achieving public safety or court appearance as unsecured bonds]