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Undoing the Bail Myth: Pretrial Reforms to End Mass Incarceration

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UNDOING THE BAIL MYTH: PRETRIAL REFORMS TO END MASS INCARCERATION

*Insha Rahman**

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INTRODUCTION

Your Honor, Mr. Jones will come back to court. He's lived in the same apartment with his family for years, works part-time, and is putting himself through school. He is not a flight risk. I ask that you release him and allow him to return to court on his own recognizance.

In five years as a public defender in the Bronx, I gave that pitch — or a variation of it — hundreds of times, trying to convince judges not to set bail on people I represented. The arraignment courtroom, where people were first brought within twenty-four hours of an arrest, was nothing short of chaos.¹ Within minutes of meeting a client, based on whatever little information I could gather in short order, I would appear in front of a judge to make a case for release. Sometimes I had strong facts on my side, such as a mother or family member in the courtroom to demonstrate that this person had ties to the community and wasn't a flight risk. Other times, especially in cases where the person was homeless, or had multiple prior arrests, I had a lot less to work with.

Why did this matter so much? Because, based on little information and no time to give it thorough consideration, the judge would make a decision about bail — a decision with tremendous legal and life consequences.² I would watch a judge set bail and wonder: does the judge think my client can afford this bail, and intends that they be released? Or does the judge know that posting bail is beyond their means, and intends for this person to remain in jail?

The arraignment decision to set bail or release someone dictates not only the course of that person's case, but also of his or her life.³

1. *See generally* ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* (2018) (describing the New York City criminal courts and the high volumes of cases processed daily, especially for low-level arrests as a result of “broken windows” policing, that result in a system designed to impose social control, rather than adjudicate).

2. *See generally* DAVID FEIGE, *INDEFENSIBLE: ONE LAWYER'S JOURNEY INTO THE INFERNO OF AMERICAN JUSTICE* (2006) (providing anecdotal insight into New York City's criminal justice system, particularly in the Bronx).

3. *See, e.g.*, Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 740 (2017) (finding that people detained pretrial on misdemeanor-level offenses are 25% more likely to plead guilty, 43% more likely to be sentenced to jail, and more likely to have future contact with the criminal justice system compared to individuals released pretrial): *see also Why Bail*. THE BAIL PROJECT, <https://bailproject.org/why-bail/> [<https://perma.cc/J7Z5-TYBZ>]

This is no hyperbole. When people are released, they are able to keep their jobs, go to school, be at home with their children and families, and help prepare in their defense. In short, they have a fighting chance at that much-hallowed presumption of innocence and the right to a day in court. If they are in jail, it is infinitely more likely that they will take a plea before seeing any evidence, often without the opportunity to properly investigate and consult with their family, loved ones, and their attorney about what to do. Over the years, I watched people I represented plead guilty not necessarily because they were guilty, but because they couldn't afford their freedom and taking a plea would get them out of jail faster than maintaining their innocence.

Those bail decisions and their life-altering consequences are not unique to that Bronx courthouse or even to New York City. It is a massive, nationwide problem that occurs every day across thousands of courtrooms in this country.⁴ Bail amounts of \$5,000, \$1,000, and sometimes even sums as low as \$250 or \$100, routinely stand in the way of a person's freedom.⁵ At arraignments, a judge has three options: to release someone on their own recognizance to come back to court without any bail necessary, to set bail, or, in cases involving serious charges or a warrant or hold, to remand the person to jail pending their next court date.⁶ In forty-nine states and the federal system, judges can legally set money bail or remand, also known as preventive detention, if: the person is considered a risk in terms of failure to appear at future court dates, or the person is considered a

(finding that people held on bail plead guilty 90% of the time, compared to only 50% of the time if they are released).

4. See, e.g., Katie Kannan, *A Broad Push for Pretrial Justice Reforms from the States*, BOSTON GLOBE (Aug. 8, 2017), <https://www.bostonglobe.com/metro/2017/08/08/broad-push-for-pretrial-justice-reforms-from-states/STJtFCEULXsajIXbxk8GDM/story.html> [<https://perma.cc/9BXC-W67J>] (quoting one expert as stating that bail reform "is very much a local problem that requires local solutions, but is national in scope . . .").

5. See Stephanie Wykstra, *Bail Reform, Which Could Save Millions of Unconvicted People from Jail, Explained: Hundreds of Thousands of Legally Innocent People Languish in Jails on Any Given Day Simply Because They Can't Afford Bail*, VOX (Oct. 17, 2018, 7:30 AM), <https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice-inequality> [<http://perma.cc/FDY3-8F88>].

6. CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCHOOL, MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 5 (2016), <http://cjpdp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf> [<https://perma.cc/3RUG-BN2J>].

risk to public safety, or both.⁷ In New York, judges can legally consider only failure to appear.⁸

The myth that perpetuates the money bail system — that having a financial stake in one's case will guarantee that people come back to court and mitigate any public safety concerns — is unfounded and unsupported by the reality of how money bail works.

In addition to anecdotes and stories, there is a growing body of evidence that money bail does not successfully fulfill its intended purpose. For one, the vast majority of people appear for their court dates without any financial stake in their case. In some jurisdictions, people appear in court at *higher* rates when released on nonfinancial conditions than on money bail.⁹ Second, the way money bail is used is fundamentally discriminatory and biased. It disproportionately impacts people who are poor and unable to afford the price of their freedom.¹⁰ More insidiously, it disproportionately impacts people of

7. Historically, courts have used money bail to incentivize appearance in court. Until the late 1960s, the only purpose of bail or detention was to manage flight risk. In the 1970s, many jurisdictions changed their statutes to allow judges to also consider public safety as a factor in the pretrial decision. Until recently, all fifty states allowed for money bail to be set to ensure future court appearance. The majority of states, but not all, allowed for preventive detention, money bail, or nonfinancial conditions of release to be imposed to mitigate a public safety risk. See *generally Pretrial Policy: State Laws*, NAT'L CONF. ST. LEGISLATURES (June 29, 2018), <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-policy-state-laws.aspx> [<https://perma.cc/X7LA-U4WT>] (collecting various reports on the subject, which were used by the Author, in conjunction with her personal experiences, to reach stated conclusions herein). Over the past five years, all but one of the remaining states — New York — did not allow judges to consider risk to public safety amended their statutes. Some jurisdictions are recent adopters of public safety; in 2014, following the Bail Reform and Speedy Trial Act, judges in New Jersey could consider, for the first time, public safety in a detention decision. See N.J. STAT. ANN. §§ 2A:162-15–26 (2014), https://www.njleg.state.nj.us/2014/Bills/PL14/31_01/PL14_31_01.htm [<https://perma.cc/C4Z6-S88U>]. In 2017, Connecticut passed the Pretrial Justice Reform Act that also allowed judges to consider risk to public safety for the first time. CONN. GEN. STAT. §54-64a (2017), <https://www.cga.ct.gov/2017/FC/2017HB-07044-R000695-FC.htm> [<https://perma.cc/G6JH-BPK2>].

8. N.Y. CRIM. PROC. LAW § 510.30 (2012).

9. *Supervised Release 2017*, NYC CRIM. JUST. (2018), <https://criminaljustice.cityofnewyork.us/wp-content/uploads/2018/05/SR-Annual-Scorecard-2017.pdf> [<https://perma.cc/JG2V-B4CX>].

10. This discriminatory impact, targeting the poor more than the wealthy, is true both nationally and on the municipal level. See Cherise Fanno Burdeen, *The Dangerous Domino Effect of Not Making Bail: America's Money-Bail System Mostly Traps Low-Level Offenders Who Can't Afford Their Freedom While Awaiting Trial*, ATLANTIC (Apr. 12, 2016), <https://www.theatlantic.com/politics/archive/2016/04/the-dangerous-domino-effect-of-not-making-bail/477906/> [<https://perma.cc/3HLR-H5HX>]; Arpit Gupta & Ethan Frenchman, *The U.S. Bail System Punishes the Poor and Rewards the Rich*, QUARTZ

color, who are more likely to have higher bail set than whites and less likely to be able to afford bail based on historic generational disparities in wealth.¹¹ The particular impact of money bail on women flies below the radar in most bail reform conversations, but research has shown that women in the justice system have less wealth than men and disproportionately bear the burden of paying bail for their loved ones.¹² Finally, the discriminatory use of money bail leads to the deeply troubling overuse of jail. A fundamental goal of bail reform must be to simply have fewer people in jail, given jail's deleterious impacts on a person's health, safety, and well-being. The number of deaths in jail each year across the U.S., especially within the first few days of a person's admission, is staggering. This is the

(Feb. 2, 2017), <https://az.com/900777/the-us-bail-system-punishes-the-poor-and-rewards-the-rich/> [<https://perma.cc/YX9X-B3CX>]; Malcolm Jenkins, *Punishing Poverty: How Philly's Cash Bail System Does More Harm Than Good*, INQUIRER (Dec. 3, 2018), <https://www.philly.com/philly/opinion/commentary/malcolm-jenkins-criminal-justice-reform-cash-bail-philadelphia-eagles-20181203.html> [<https://perma.cc/VP8V-5XBL>] (discussing the issue in the context of Philadelphia); Nick Pinto, *The Bail Trap*, N.Y. TIMES (Aug. 13, 2015), <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html> [<https://perma.cc/992E-RPC4>] (discussing the issue in the context of New York City). Prosecutors have also recognized the harms of money bail. See Casey Tolan, *Making Freedom Free: The Nation's District Attorneys Have the Power to End the Cash Bail System. Some of Them Have Started Using It.*, SLATE (Mar. 29, 2017), <https://slate.com/news-and-politics/2017/03/poor-defendants-get-locked-up-because-they-cant-afford-cash-bail-heres-an-easy-fix.html> [<https://perma.cc/GFQ5-MWAF>].

11. DAVID ARNOLD ET AL., NAT'L BUREAU ECON. RES., RACIAL BIAS IN BAIL DECISIONS 26 (2018), <https://www.princeton.edu/~wdobbie/files/racialbias.pdf> [<https://perma.cc/FN6Z-CEHA>].

On average, black defendants are 3.6 percentage points more likely to be assigned monetary bail compared to white defendants and receive bail amounts that are \$9,923 greater than white defendants. Conversely, black defendants are 2.0 percentage points and 1.6 percentage points less likely to be released on their own recognizance or to be assigned non-monetary conditions compared to white defendants, respectively. As a result, black defendants are 2.4 percentage points more likely to be detained pre-trial compared to white defendants.

Id.

12. BERNADETTE RABUY & DANIEL KOPF, PRISON POL'Y INITIATIVE, DETAINING THE POOR 12 (2016), <https://www.prisonpolicy.org/reports/DetainingThePoor.pdf> [<https://perma.cc/2M4Q-3HWV>]; GINA CLAYTON ET AL., ESSIE JUSTICE GRP., BECAUSE SHE'S POWERFUL: THE POLITICAL ISOLATION AND RESISTANCE OF WOMEN WITH INCARCERATED LOVED ONES 17 (2018), https://www.becauseshespowerful.org/wp-content/uploads/2018/05/Essie-Justice-Group_Because-Shes-Powerful-Report.pdf [<https://perma.cc/4HFQ-DEGN>] (stating that 54% of women are unable to afford money bail for a loved one).

same period of time that people are often scrambling to make bail. Sandra Bland, arrested and booked into jail on an alleged traffic infraction, was waiting for family to pay \$500 to a bail bondsman when she died in a Texas jail cell three days later. Within only one year following Sandra Bland's death, at least 810 additional people lost their lives in jail.¹³

In recent years, the call to end money bail has taken on an urgency and fervor unseen before in the fight to end mass incarceration.¹⁴ Without a doubt, there is growing recognition that money bail itself is a relic of an antiquated pretrial system that perpetuates inequity, bias, and oppression.¹⁵ Justice reform advocates and organizers have made eliminating money bail a central campaign in the fight to end mass incarceration and abolish jails and prisons.¹⁶ In response to advocacy,

13. Dana Liebelson & Ryan J. Reilley, *Sandra Bland Died One Year Ago*, HUFFINGTON POST HIGHLINE (July 13, 2016), <https://highline.huffingtonpost.com/articles/en/sandra-bland-jail-deaths/> [<https://perma.cc/TKE6-YSR7>].

14. Washington, D.C., was the first jurisdiction in the U.S. to come close to eliminating money bail in 1992 after passing the Bail Reform Act. *See* D.C. CODE §§ 23-1321–1333 (2019). The Act expanded the discretion of judges to impose preventive detention — no opportunity for release pretrial — and also mandated that judges could not set a money bail amount that would result in the person's pretrial detention. *See* PRETRIAL JUSTICE INST., THE PRETRIAL SERVICES AGENCY FOR THE DISTRICT OF COLUMBIA: LESSONS FROM FIVE DECADES OF INNOVATION AND GROWTH 5 (Aug. 22, 2018), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=46b516e0-5ea0-a9a3-b070-ecd6bacd9ed0&forceDialog=0%20p.%205> [<https://perma.cc/8VKJ-2Q44>]. More recently, New Jersey enacted the Bail Reform and Speedy Trial Act of 2014. *See* N.J. STAT. ANN. §§ 2A:162-15–26 (2014). These reforms, implemented statewide in 2017, resulted in a 29% decrease in the overall pretrial jail population in New Jersey from December 31, 2016, before bail reform took hold, to the most recent data available on December 31, 2018. *See Criminal Justice Reform Report 2018 – Chart C: Supplemental Graphs: Nonsentenced Pretrial Jail Population*, N.J. COURTS (Dec. 31, 2018), <https://www.nicourts.gov/courts/assets/criminal/cjrreport2018.pdf?c=aJS> [<https://perma.cc/Z5EN-4ZLR>].

15. Studies demonstrate the deleterious impact of money bail on people's ability to make bail and how the use of money bail disproportionately impacts people who are poor, people of color, and specific communities. The use of money bail negatively impacts not only a person's life, but also the outcome of their legal case. *See* Heaton et al., *supra* note 3, at 736–41; *see also* Arpit Gupta et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEGAL STUD. 471, 498–99 (2016) (concluding that money bail increases the likelihood that a defendant will be found guilty by 12%).

16. Peter Wagner, *Jails Matter. But Who Is Listening?*, PRISON POL'Y INITIATIVE (Aug. 14, 2015), <https://www.prisonpolicy.org/blog/2015/08/14/jailsmatter/> [perma.cc/7EJQ-6DF8] (noting that 99% of the growth in incarceration in the past fifteen years in the United States is a result of pretrial detention). Criminal justice advocacy groups — both national and local in nature — have made bail reform a

litigation, and public pressure, some jurisdictions across the country have overhauled laws to lessen or eliminate the use of money bail entirely.¹⁷ At the local level, rural and urban counties as well as cities have enacted policies to do the same.¹⁸ Yet in all this pretrial justice momentum to end money bail, two fundamental premises of our country's bail system have eluded any real scrutiny. The first is the idea that "failure to appear" is, by itself, a justifiable and valid basis for depriving someone of their pretrial freedom. Another important standard that is ripe for reform is the definition of *who* and *what* ought to be considered a risk to public safety, and when detention can be imposed to manage public safety concerns.

This Article argues in favor of three key reforms to bail. One is to end money bail entirely.¹⁹ This proposition is hardly novel or

signature campaign. *See Ending Mass Incarceration in New York State – Policy Demands: #FREEnewyork*, JUSTLEADERSHIPUSA (Oct. 10, 2017), <https://justleadershipusa.org/campaign/freenewyork/> [<https://perma.cc/PG3E-UGEF>]; *see also JusticeLA Issues Letter to L.A. County Board of Supervisors As Future of Bail Reform Hangs in the Balance with SB 10*, JUSTICELA CAMPAIGN (June 16, 2018), <http://justicelanow.org/justicela-issues-letter-to-l-a-county-board-of-supervisors-as-future-of-bail-reform-hangs-in-the-balance-with-sb-10/> [<https://perma.cc/3FSR-75NK>].

17. *See Pretrial Policy: State Laws*, *supra* note 7.

18. Many of the most important recent reforms to bail have happened at the local level, often as a result of a settlement from litigation or a rule or policy change made by local stakeholders. For example, in July 2017, Chief Judge Timothy Evans of Cook County, Illinois (Chicago) issued General Order 18.8A, which required the courts to consider nonfinancial conditions of release and, if setting money bail, to consider a person's ability to pay bail. Gen. Ord. Cook Co. Cir. Ct. 18.8A (Eff. Sept. 18, 2017), <http://www.cookcountycourt.org/Portals/0/Orders/General%20Order%20No.%2018.8a.pdf> [<https://perma.cc/PM4J-V8LJ>]. In Harris County, Texas (Houston), judges recently passed Rule 9, Initial Bail Schedule and Early Presentment, rescinding the county's bail schedule for misdemeanor offenses and requiring that the majority of people arrested on misdemeanor charges be released on personal bond (i.e., released on recognizance) or nonfinancial conditions of release and, if money bail is imposed, it must only be set after an individualized determination of ability to pay.

19. *See* Jessica Silver-Greenberg & Shaila Dewan, *When Bail Feels Less Like Freedom, More Like Extortion*, N.Y. TIMES (Mar. 31, 2018), <https://www.nytimes.com/2018/03/31/us/bail-bonds-extortion.html> [<https://perma.cc/3YEH-MXBC>]; CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCHOOL, *supra* note 6; Ann E. Marimow, *When It Comes to Pretrial Release, Few Other Jurisdictions Do It D.C.'s Way*, WASH. POST (July 4, 2016), https://www.washingtonpost.com/local/public-safety/when-it-comes-to-pretrial-release-few-other-jurisdictions-do-it-dcs-way/2016/07/04/8eb52134-e7d3-11e5-b0fd-073d5930a7b7_story.html?utm_term=.e3068409b8ed [<https://perma.cc/5Z2T-H87F>]; JUSTICE POL'Y INST., BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL 17 (2012), <http://www.iusticepolicv.org/uploads/justicepolicy/documents/bailfail.pdf> [<https://perma.cc/EA5G-8XNQ>].

controversial among pretrial justice advocates. The second reform is to eliminate risk of failure to appear entirely as a basis for imposing detention. To a limited degree, some jurisdictions have embraced this reform by eliminating both bail and jail on very low-level offenses, but I argue that this reform should be given real consideration on all levels of charges — both minor and serious — given what the research tells us about pretrial court appearance. The third recommendation is one that is truly novel and has not yet been broached in any jurisdiction: to redefine what constitutes a risk to public safety as only conduct that involves a specific threat to a person's physical safety, and to justify pretrial detention based on this factor only after an individualized, fact-specific hearing has been held on the potential threat of danger. This reform in particular has received relatively little attention in the bail reform debate, despite its potential to transform the pretrial process.

In subsequent sections, I provide a brief history of the money bail system and the goals of court appearance and public safety. I then turn to the problems of the current money bail system and challenge the premise that money bail mitigates either failure to appear or public safety concerns. I provide an account of public safety and bail, highlighting the ethical and practical problems with predicting future risk to public safety, and how these concerns are compounded by the use of money bail. Finally, I offer solutions — and cautionary advice — based on lessons learned from California and New York, the two most prominent examples of bail reform in recent times.

I. A BRIEF HISTORY OF MONEY BAIL

For centuries, the purpose of money bail was to ensure pretrial court appearance.²⁰ Yet, given research that suggests money has little impact on court appearance, should this premise still stand? What if courts, judges, and magistrates no longer use either money bail or detention to manage risk of failure to appear? And, with the changes in the law in recent decades that allow judges to consider risk to public safety as well as failure to appear, should the purpose of detention only be to manage and mitigate danger? Put another way, if a person poses no danger or risk to public safety, regardless of charge, should they always be released? I would argue yes, and a growing number of experts, practitioners, and advocates would agree.

To eliminate the idea of failure to appear would be a radical shift in both the purpose and practice of bail, upending centuries of legal

20. JUSTICE POL'Y INST., *supra* note 19, at 6.

tradition in this country.²¹ If implemented, it would mean that the only basis for depriving people of their pretrial liberty would be if they pose a danger or a risk to public safety. Importantly, under this new bail regime, money could not sensibly continue to play a role in the American pretrial system, as it has even less meaningful relevance to managing risk to public safety than it does to managing failure to appear.

If risk to public safety were to become the only factor in the calculus of bail and detention, there would need to be careful formulation of *what* is a risk to public safety. In other words, what kinds of charges indicate that someone is a danger? How should that risk or danger be assessed? And what due process safeguards are necessary to prevent overreach?

Before diving into these arguments, it is important to understand a brief history of the money bail system, including the original purpose of securing court appearance and mitigating against failure to appear, and, more recently, the use of bail and preventive detention to manage risk to public safety. I explain how these concepts developed and the role they have played in driving mass incarceration as we know it today. This historical perspective is necessary to understanding the crisis of the current bail system, the urgency of reform, and the basis for potential solutions that focus on eliminating failure to appear from the schema of bail and transforming the notion of danger and public safety.

A. The Role of Money in Securing Pretrial Appearance

For centuries, guaranteeing court appearance was the *only* basis for setting money bail in the United States.²² Modeled on the use of bail in English law, the early American bail system was based on a simple premise — people must appear for future court dates, and a financial stake in one's case was, at that time, the best way to guarantee they appear in court.²³ Importantly, bail was historically used as a

21. See, e.g., TIMOTHY R. SCHNACKE, NAT'L INST. OF CORR., FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM 38 (2014), <https://s3.amazonaws.com/static.nicic.gov/Library/028360.pdf> [<https://perma.cc/B2NL-42XB>] [hereinafter SCHNACKE, FUNDAMENTALS OF BAIL].

22. See *id.*

23. See *Stack v. Boyle*, 342 U.S. 1, 5 (1951) (“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. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is

mechanism for release.²⁴ Until the 1800s, the typical kind of bail set was what amounted to an unsecured bond vouched for by a surety, either the accused themselves, or a friend or family member.²⁵ Essentially, the bond was an oath, a promise to appear in court, and if the accused absconded or failed to appear the surety would be liable for the amount of bail attached to that unsecured bond.²⁶

The late 1800s saw the birth of the commercial bail industry — bail bond agents, bail bondsmen, and bail bond companies.²⁷ By the early twentieth century, commercial bail agencies had established a stronghold in the American bail system and usurped the role traditionally played by personal sureties.²⁸ In addition to replacing personal sureties — the family members, friends and the like that would guarantee bail — the commercial bail industry introduced the concept of profit into the bail decision.²⁹ If a personal surety posted some amount of bail to the court, that money would be returned as long as the person made all their court appearances.³⁰ In contrast, commercial bail agencies required an upfront payment, usually 10% of the total bail amount, and kept that deposit regardless of whether the person appeared and even if the charges were ultimately dismissed.³¹

Today, bail bond companies are one of the driving forces behind the current money bail system and the fight against bail reform. Despite being regulated by government agencies,³² the vast majority

‘excessive’ under the Eighth Amendment.” (internal citations omitted)). Chief Justice Vinson, writing for the Court, continued, “[s]ince the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.” *Id.*

24. See TIMOTHY R. SCHNACKE, NAT’L INST. CORR., MONEY AS A CRIMINAL JUSTICE STAKEHOLDER: THE JUDGE’S DECISION TO RELEASE OR DETAIN A DEFENDANT PRETRIAL 30 (2014), <https://s3.amazonaws.com/static.nicic.gov/Library/029517.pdf> [<https://perma.cc/7AML-PR89>] [hereinafter SCHNACKE, MONEY AS A CRIMINAL JUSTICE STAKEHOLDER].

25. *See id.* at 12.

26. *See id.*

27. *See id.*

28. *See id.* at 27.

29. See COLOR OF CHANGE, ACLU, SELLING OFF OUR FREEDOM: HOW INSURANCE CORPORATIONS HAVE TAKEN OVER OUR BAIL SYSTEM, COLOR OF CHANGE & ACLU CAMPAIGN FOR SMART JUSTICE 2, 14 (2017), https://www.aclu.org/sites/default/files/field_document/059_bail_report_2_1.pdf [<https://perma.cc/8C68-9HR8>].

30. *See id.* at 3.

31. *Id.* at 2.

32. *See id.* at 36.

of bail bond agencies and bail bondsmen are backed by private insurance companies that insulate them against loss and operate with a certain lawlessness exemplified in shows like *Dog the Bounty Hunter*.³³ Moreover, bail bond companies exercise influence by routinely donating to local elections for judges and district attorneys. Each year, the U.S. bail bond industry underwrites *\$14 billion* in bonds.³⁴ The most surprising fact about the commercial bail industry? The United States and the Philippines are the only two countries in the world to have a commercial money bail system that operates for profit.³⁵

B. Historical Context for Risk to Public Safety in the Pretrial Decision

The rise of the money bail system and bail bondsmen was justified by the specter of failure to appear and the need to incentivize court appearance, otherwise the judicial process would grind to a halt.³⁶ It was not until the 1970s and into the 1980s, when the U.S. Supreme Court decided *United States v. Salerno* and upheld the federal Bail Reform Act of 1984, that the notion of public safety became part of the rubric of pretrial release and detention.³⁷ The passage of the Bail Reform Act — along with several states changing their bail laws to consider if a person posed a danger if released — fundamentally changed the landscape of pretrial release in a seismic and profound way. Suddenly, two valid pretexts existed to set bail or impose pretrial detention — failure to appear *and* risk to public safety.³⁸

Today, in the federal legal system and all states except New York, judges routinely can and do consider risk to public safety in pretrial decisions.³⁹ Normatively speaking, allowing for public safety to influence the pretrial decision makes sense. After all, one of the stated goals of the criminal justice system is to deliver safety to people and communities harmed by crime. Indeed, the introduction of

33. *Id.* at 14, 33.

34. *Id.* at 21.

35. *Id.* at 17.

36. SCHNACKE, MONEY AS A CRIMINAL JUSTICE STAKEHOLDER, *supra* note 24, at 24–26.

37. *See* SCHNACKE, FUNDAMENTALS OF BAIL, *supra* note 21, at 50; *see also* *United States v. Salerno*, 481 U.S. 739, 750 (1987).

38. *See* SCHNACKE, FUNDAMENTALS OF BAIL, *supra* note 21, at 49.

39. *See generally* *Pretrial Policy: State Laws*, *supra* note 7.

public safety into the money bail framework came as a response to perceived and real increases in crime during the 1970s and 1980s.⁴⁰

However, danger and public safety are loaded and subjective terms. On June 17, 1971, in a now-famous speech, Richard Nixon declared a war on drugs, calling them “public enemy number one.”⁴¹ Throughout the 1970s, state and local law enforcement cracked down on drug enforcement, the most prominent example of which was the passage of the Rockefeller drug laws in New York that imposed mandatory prison sentences for most drug offenses.⁴² But the “tough on crime” rhetoric was not limited to enforcement and sentencing. In 1982, Congress passed the Pretrial Services Act to enhance monitoring and supervision for people released pretrial in the federal system.⁴³ In 1984, Congress passed another pretrial-related piece of legislation, the Bail Reform Act, which formally introduced the provision of public safety into the pretrial decision of release or detention.⁴⁴ In the backdrop of these changes was a phrase filled with fear, “crime-on-bail” — the concern that someone already out on bail would commit new crimes while released pretrial.⁴⁵ It is clear from the legislative history that what constituted risk to public safety was not only conduct that involved physical violence or danger.⁴⁶ Acts such as drug trafficking or economic fraud could, the courts held, constitute a risk to public safety.⁴⁷

40. See TOBORG ASSOC. & NAT’L ASSOC’N OF PRETRIAL SERVS. AGENCIES, PUBLIC DANGER AS FACTOR IN PRETRIAL RELEASE 17–20 (1986), <https://www.ncjrs.gov/pdffiles1/Digitization/107930NCJRS.pdf> [<https://perma.cc/W2N7-NUQU>].

41. Richard Nixon Foundation, *President Nixon Declares Drug Abuse “Public Enemy Number One”*, YOUTUBE (Apr. 29, 2016), <https://www.youtube.com/watch?v=y8TGLLQID9M> [<https://perma.cc/ZXJ3-V6JB>].

42. See Brian Mann, *The Drug Laws that Changed How We Punish*, NAT’L PUB. RADIO (Feb. 14, 2013), <https://www.npr.org/2013/02/14/171822608/the-drug-laws-that-changed-how-we-punish> [<https://perma.cc/UY3K-GPTH>].

43. Donald P. Lay & Jill De La Hunt, *The Bail Reform Act of 1984: A Discussion*, 11 WM. MITCHELL L. REV. 929, 930 (1985).

44. See *id.*

45. PUBLIC DANGER AS FACTOR IN PRETRIAL RELEASE, *supra* note 40, at 1.

46. See DAVID N. ADAIR, JR., FED. JUD. CTR., *THE BAIL REFORM ACT OF 1984* 8 (3d ed. 2006), <https://www.fjc.gov/sites/default/files/2012/BailAct3.pdf> [<https://perma.cc/5C8D-EPQ4>].

47. See *id.*

II. PROBLEMS WITH MONEY BAIL

A. How History Informs Bail Reform Efforts

The current momentum for bail reform is driven by a growing consensus over the harms of money bail and by research demonstrating its inefficacy. Recent pretrial justice models, such as those used in Washington, D.C., New Jersey, and New York City, demonstrate that people return to court even without a financial stake in their case if, instead, pretrial supports and services are provided as needed.⁴⁸ These models illustrate the point that risk of failure to appear can be mitigated with reminders of upcoming court dates, assistance with transportation and childcare, and, in cases where necessary, more onerous conditions such as pretrial monitoring or intensive supervision.⁴⁹ If we know failure to appear is not a rampant problem, and certainly not one that cannot be addressed with pretrial services and supports, logic suggests that depriving someone of their liberty — by setting a bail amount beyond their reach, or by imposing remand or preventive detention — should no longer be a valid means of ensuring court appearance pending trial.

If failure to appear, which is one of two justifications for imposing bail or detention, is jettisoned from the calculus, the only basis left to take away a person's liberty is risk to public safety. From a public policy perspective, delivering safety is a valid goal of a pretrial system. Yet the current, ubiquitous standard of risk to public safety

48. Washington, D.C. and New Jersey both have a pretrial system that predominantly relies on release or detention, with money bail used in exceptionally rare instances. Their recent statistics demonstrate that people released pretrial with no bail set return to court at high rates. In FY 2018, Washington, D.C.'s Pretrial Services Agency reported a court appearance rate of 89%. PRETRIAL SERVS. AGENCY FOR THE DISTRICT OF COLUMBIA, CONGRESSIONAL BUDGET JUSTIFICATION AND PERFORMANCE BUDGET REQUEST: FISCAL YEAR 2020 15 (2019), <https://www.csosa.gov/wp-content/uploads/bsk-pdf-manager/2019/03/PSA-FY-2020-CBJ-Performance-Budget-Request-3-18-19.pdf> [<https://perma.cc/A9Z4-S7BD>]. In New Jersey, the courts reported an 89.4% court appearance rate in 2017. N.J. JUDICIARY, JAN 1. – DEC. 31 2018 REPORT TO THE GOVERNOR AND THE LEGISLATURE 14 (2019), <https://njcourts.gov/courts/assets/criminal/2018cjrannual.pdf?c=dSE> [<https://perma.cc/Z5EN-4ZLR>]. New York City still relies on money bail far more heavily than either Washington, D.C., or New Jersey, but in recent years has increasingly released people without any bail. In 2017, in New York City, the court appearance rate for people released pretrial with no money bail was 86%. CRIMINAL JUSTICE AGENCY, PRETRIAL RELEASE WITHOUT MONEY: NEW YORK CITY, 1987–2018 9 (2019), https://issuu.com/csdesignworks/docs/cja_rwm_final/2 [<https://perma.cc/LPH2-ET5Q>].

49. *See, e.g.*, N.J. JUDICIARY, *supra* note 48, at 41–42; PRETRIAL SERVS. AGENCY FOR THE DISTRICT OF COLUMBIA, *supra* note 48, at 15.

considered in forty-nine states and the federal system — typically embodied by vague and sweeping language such as, “will endanger the safety of any other person or the community”⁵⁰ — leaves too much to discretion and can be wielded in harmful ways.⁵¹ This overly broad standard of public safety has been subject to much recent scrutiny in the context of risk assessment instruments that profess to predict future dangerousness.⁵² Yet, little has been said, much less actively done, to redefine public safety itself so that vague and broad notions are not the legal standard for bail decisions across the vast majority of jurisdictions in this country. If valid concerns about overreach, bias, and racism in assessing a public safety risk are not addressed, even a new approach to bail based solely on public safety stands to replicate, or perhaps only further entrench, the problems and biases that plague our existing money bail system.

In this Part, I question the premise that money bail is needed to assure court appearance, and highlight recent research from jurisdictions that do not exclusively rely on money bail. I then turn to the issue of public safety and the ethical dilemma of prediction, especially in an age of big data and algorithms that could potentially guide judges to use their discretion for release, but could also help to justify judicial decisions about detention without allowing for individualized consideration. Finally, I highlight the absurdity of expecting a money bail system to deliver public safety, even assuming *arguendo* that it serves some purpose of court appearance.

50. See 18 U.S.C. § 3142 (b) (2008); see also SCHNACKE, FUNDAMENTALS OF BAIL, *supra* note 21, at 33 (“The second generation of bail reform (from the 1960s to the 1980s) focused on the ‘no bail’ side, with a wave of research indicating that there were some defendants whom society believed should be detained without bail (rather than by using money) due to their perceived dangerousness through documented instances of defendants committing crime while released through the bail process. That generation culminated with the United States Supreme Court’s approval of a federal detention statute, and with states across America changing their constitutions and statutes to reflect not only a new constitutional purpose for restricting pretrial liberty — public safety — but also detention provisions that followed the Supreme Court’s desired formula.”).

51. See *supra* note 7 and accompanying text.

52. See, e.g., *The Use of Pretrial “Risk Assessments” Instruments: A Shared Statement of Civil Rights Concerns*, LEADERSHIP CONF. EDUC. FUND, <http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf> [<https://perma.cc/Z7VW-VNEZ>].

B. Does Money Bail Even Matter to Court Appearance?

The idea that money bail mitigates the risk of failure to appear has long been axiomatic within this country's bail system.⁵³ The logic is simple — a financial stake in a person's case means they have an incentive to come back to court, otherwise they risk losing their or someone else's money or property. If that were true, however, one would expect dramatically different rates of court appearance when people are released under financial conditions versus when they are released on their own recognizance or under non-financial conditions.

New York City has been collecting robust statistics on pretrial outcomes for decades. A look at this data challenges the basic assumption that a financial stake necessarily improves the likelihood of court appearance.

Almost a decade ago, New York City's Criminal Justice Agency (CJA) published a study comparing court appearance rates for people who paid bail versus those released on their own recognizance.⁵⁴ Both cohorts — those who made bail and those released without bail — were split into three categories: "recommended," denoting individuals deemed as low risk for failure to appear, "moderate risk," and "not recommended," denoting individuals who were deemed high risk of failure to appear.⁵⁵ These categories were determined by the same factors as those used in New York City courts to guide judges' pretrial decisions: prior criminal history, prior failures to appear, having stable housing, employment, a working phone number, if the person expected someone to be in court during arraignment, amongst others.⁵⁶ The individuals in each risk bracket, both those released on their own recognizance and those who made bail, were tracked over time to measure their actual court appearance.⁵⁷

53. See SCHNACKE, FUNDAMENTALS OF BAIL, *supra* note 21, at 59. "At the time, the function of bail was limited to setting conditions of pretrial freedom designed to provide reasonable assurance of court appearance. Bail is still limited today, although the purposes for conditioning pretrial freedom have been expanded to include public safety in addition to court appearance." *Id.*

54. See *generally* MARY T. PHILLIPS, N.Y.C. CRIMINAL JUSTICE AGENCY, RESEARCH BRIEF: HOW RELEASE TYPE AFFECTS FAILURE TO APPEAR (2011).

55. *Id.* at 6.

56. RUSSELL F. FERRI ET AL., N.Y.C. CRIMINAL JUSTICE AGENCY, ANNUAL REPORT 2016 13 (2018), https://issuu.com/csdesignworks/docs/cia_annual_report_2016_27c96a3bf59f13?e=2550004/59194620 [<https://perma.cc/G5FH-24A2>] (featuring the most recent annual report available).

57. PHILLIPS, *supra* note 54, at 2.

At first blush, the results seem to support the axiom that money bail has an impact on court appearance. Overall, it was predicted that 17% of people released on their own recognizance failed to appear, compared to 11% of people released after posting cash bail and 10% on commercial bail bonds.⁵⁸ However, a closer look at the data reveals that for people assessed to be low risk, the failure to appear rate was 9% for those released on recognizance versus 8% for those who made bail.⁵⁹ In other words, for that cohort, having a financial stake in the case had a negligible impact on court appearance. As a person's assessed risk level increased, there was, unsurprisingly, more deviation between failure to appear rates for people released on recognizance versus those who made bail. The data showed 16% versus 12% for the "moderate risk" of failure to appear category, respectively, and 27% versus 18% for those considered high risk.⁶⁰ The takeaway from these statistics is that the factors utilized to assess whether someone was "low," "moderate" or "high risk," factors such as the stability of their housing, having a working phone number, employment, and family ties, were a far more meaningful measure of one's likelihood to appear in court than the amount of money at stake.⁶¹ In effect, it was risk, not money, that drove the court appearance rates. Money was essentially irrelevant in preventing against failure to appear.

A more recent series of experiments in New York City further undermines the notion that money bail impacts court appearance. Take the Bronx Freedom Fund and the Brooklyn Community Bail Fund, both community-based nonprofit organizations in New York City that pay bail on behalf of people charged with misdemeanor offenses.⁶² Both bail funds utilize a "revolving" financial model: they pay bail for people who need it, get the money back once their cases are over, and then re-use those funds to pay bail for others.⁶³ They do not charge a fee, require any financial contribution, or ask for a

58. *Id.* at 4–5.

59. *Id.* at 6.

60. *Id.* at 6.

61. FERRI ET AL., *supra* note 56, at 13. To learn more about the Criminal Justice Agency's assessment of pretrial risk of failure to appear, see generally *id.*

62. See generally BRONX FREEDOM FUND, <http://www.thebronxfreedomfund.org/> [<https://perma.cc/5ZZT-FJ8J>]; BROOKLYN CMTY. BAIL FUND, <https://brooklynbailfund.org/> [<https://perma.cc/EQ77-YVPG>].

63. BRONX FREEDOM FUND, *supra* note 62; *How the Fund Works*, BROOKLYN CMTY. BAIL FUND, <https://brooklynbailfund.org/how-it-works> [<https://perma.cc/H25J-XAY4>].

deposit from their clients.⁶⁴ Even accounting for selection bias — that the funds only pay bail for people they feel relatively assured will return to court — the results are impressive. Ninety-six percent of people served by the Bronx Freedom Fund come back to court for all their court dates.⁶⁵ Of people served by the Brooklyn Community Bail Fund, 95% return to court.⁶⁶ How can the funds explain these high rates of court appearance? They maintain it is the slew of other services they provide, such as reminders to appear in court, assistance with transportation, or voluntary referrals to address other needs, such as housing or public benefits.⁶⁷

In 2016, New York City launched a citywide pretrial services program called Supervised Release.⁶⁸ The program serves as an alternative to money bail, and provides supervision and monitoring for people facing misdemeanor and nonviolent felony charges who otherwise may have had bail set.⁶⁹ Again, no financial conditions of release are imposed — people are interviewed at arraignment and, if accepted into the program, have a set of requirements to complete, such as phone and in-person check-ins.⁷⁰ Thousands of people have benefitted from this program since its beginnings in 2016; over 4,000 people were served in 2017 alone.⁷¹ The New York City Mayor's Office of Criminal Justice, the agency responsible for the Supervised Release program, released data comparing the court appearance rates of people who were released on recognizance, released after paying

64. See generally BRONX FREEDOM FUND, *supra* note 62; *How the Fund Works*, BROOKLYN CMTY. BAIL FUND, *supra* note 63.

65. See *Our Work*, BRONX FREEDOM FUND, <http://www.thebronxfreedomfund.org/> [<https://perma.cc/5ZZT-FJ8J>].

66. See BROOKLYN CMTY. BAIL FUND, *supra* note 62.

67. *Why Bail*, BAIL PROJECT, <https://bailproject.org/why-bail/> [<https://perma.cc/M46S-G27T>].

68. See *Services: Supervised Release*, N.Y.C. CRIM. JUST. AGENCY, <https://www.nycja.org/supervised-release/> [perma.cc/B6MJ-WP5J]. It is noteworthy that the program began in Queens in 2009, and has been operating successfully there ever since. See *id.*

69. See generally MDRC, VERA INST. JUST., NEW YORK CITY'S PRETRIAL SUPERVISED RELEASE PROGRAM: AN ALTERNATIVE TO BAIL (2017), https://storage.googleapis.com/vera-web-assets/downloads/Publications/new-york-citys-pretrial-supervised-release-program/legacy_downloads/Supervised-Release-Brief-2017.pdf [<https://perma.cc/DG6S-W4ZT>].

70. *Id.* at 3 fig.2.

71. See N.Y.C. MAYOR'S OFFICE OF CRIMINAL JUSTICE, SUPERVISED RELEASE 2017 YEAR IN REVIEW SCORECARD (2017), <https://criminaljustice.cityofnewyork.us/wp-content/uploads/2018/05/SR-Annual-Scorecard-2017.pdf> [perma.cc/JG2V-B4CX].

bail, and released under the Supervised Release program.⁷² The results are nothing short of fascinating. People released on their own recognizance appeared in court 88% of the time.⁷³ With money bail, 91%.⁷⁴ And for people released under Supervised Release, 92% appeared in court on their given date.⁷⁵ The data suggests no demonstrable difference between people on Supervised Release versus those who made bail. If anything, Supervised Release resulted in a slight improvement in court appearance.⁷⁶ The data also suggests that people released on recognizance only had a slightly lower rate of court appearance, by merely 3%, than people who had a financial incentive to appear.⁷⁷ One explanation could be the ubiquitous nature of cell phones and the greater ease of maintaining contact with people through social media and email compared to over a decade ago, when CJA released its study that found a greater difference in court appearance between people who paid bail versus those who did not.⁷⁸ Either way, a financial stake is not as relevant to court appearance as history and precedent have led us, wrongly, to believe. It is high time to undo the bail myth linking money and failure to appear.

C. The Problem of Predicting Violence and the Resort to Pretrial Detention

If money bail were no longer in use and failure to appear were no longer a basis for detention, whether a person posed a risk to public safety would be the one basis left to determine pretrial release and detention.

But what amounts to a public safety risk and who poses a danger is highly fraught, both in its historical implications and practical assessment. The generic formulation for “predicting” violence in the federal system, and in most state bail laws, follows three factors: (1) the circumstances of the present charge; (2) the accused’s past

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. See BRICE COOKE ET AL., USING BEHAVIORAL SCIENCE TO IMPROVE CRIMINAL JUSTICE OUTCOMES: PREVENTING FAILURES TO APPEAR IN COURT 16–18 (2018), <http://www.ideas42.org/wp-content/uploads/2018/03/Using-Behavioral-Science-to-Improve-Criminal-Justice-Outcomes.pdf> [https://perma.cc/CDX9-WU5M].

criminal history and conduct; and (3) the accused's character.⁷⁹ Courts have historically used some version of the sum total of these factors to label a person as potentially low, medium, or high risk of future danger to the community or to another individual, should they be released.⁸⁰

The problem with prediction, however, is the ever-present uncertainty about whether the assessment is accurate. No one can see into a crystal ball and predict the future. Accuracy has been the main basis of criticism against a system of pretrial release that factors in risk to public safety using the above approach. However, even if a system tolerated some degree of inaccuracy with calculating risk and predicting the future, there remains another criticism — the vagueness with which we define risk to public safety. Concerns over bigotry and unfairness in *who* poses a danger or risk to public safety, *how* that risk is assessed, and the ways in which danger is understood cannot be overlooked.⁸¹

Nowhere is this concern more fraught than in the growing use of pretrial risk assessment instruments.⁸² Generally, the critique of them is based in an inaccuracy challenge: we cannot predict the future and our attempts to do so merely reify existing bias and racism in the criminal justice system. But there is another critique of pretrial risk assessment instruments: that the risk to public safety they do purport to measure is too vague and too broad to meaningfully predict anything about future conduct, and that the right calculus is in fact an

79. Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 507 (2012).

80. *Id.*

81. See Tina Luongo & Cherise Fanno Burdeen, Letters to the Editor, *Setting Bail and Assessing Risk to Public Safety*, N.Y. TIMES (Apr. 3, 2017), <https://www.nytimes.com/2017/04/03/opinion/setting-bail-and-assessing-risk-to-public-safety.html> [<https://perma.cc/Y2FV-XH5F>]; see also Curtis E.A. Karnow, *Setting Bail for Public Safety*, 13 BERKELEY J. CRIM. L. 1, 11–12 (2008); DAVID ARNOLD ET AL., NAT'L BUREAU ECON. RESEARCH, RACIAL BIAS IN BAIL DECISIONS 26 (2018), <https://www.princeton.edu/~wdobbie/files/racialbias.pdf> [<https://perma.cc/FN6Z-CEHA>].

82. The literature on pretrial risk assessment is far too vast and complex to do it any measure of justice in this Article. For a good and balanced overview about pretrial risk assessment instruments, see Brandon Buskey & Andrea Woods, *Making Sense of Pretrial Risk Assessments*, NAT'L ASS'N CRIM. DEF. LAW. (June 2018), <https://www.nacdl.org/PretrialRiskAssessment/> [<https://perma.cc/W667-7QKU>]. See also Press Release, Pretrial Justice Inst., New PJI Report Answers Questions About Pretrial Assessment (Oct. 4, 2017), <https://www.pretrial.org/new-pji-report-answers-questions-about-pretrial-assessment/> [<https://perma.cc/7MLM-LDUP>]. For a scholarly and interesting take on the value of risk assessment instruments, despite their shortcomings, see Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. (forthcoming 2019).

individualized consideration of an *immediate* and *imminent* threat of physical harm to someone.

Pretrial risk assessment tools — questionnaires based on anywhere from six or seven factors to over seventy — are weighted algorithms that attempt to predict a person’s likelihood for certain pretrial events: court appearance, re-arrest, and, importantly, for potential violence.⁸³ A now ubiquitous study released by ProPublica in 2016, “Machine Bias,”⁸⁴ set off a maelstrom of debate over the potential for exacerbating bias in the system by relying on these tools. Proponents of the tools see them as a potentially imperfect but useful means for guiding judicial discretion away from unfettered and inconsistent decision-making. Notably, some studies showed that risk assessment instruments are better at predicting pretrial outcomes, such as failure to appear and re-arrest, than judges on their own.⁸⁵ Others, however, note that even if risk assessment instruments had some measurable impact on pretrial release initially, over time judges reverted to the status quo. In a study of one of the most well-known pretrial risk assessment instruments, the Public Safety Instrument (“PSA”), a researcher found that despite an initial increase in pretrial release after the PSA was introduced, judges in Kentucky soon reverted to their pre-PSA practices and their bail decisions were no longer driven, or even guided, to any great extent by the tools.⁸⁶ Certainly, from a standpoint of equity, transparency, and due process, many of these tools leave much to be desired.⁸⁷

But concerns about bias, predictive parity, and other concepts typically associated with the risk assessment debate cloud the real

83. See, e.g., *Risk Factors and Formula*. PUB. SAFETY ASSESSMENT, <https://www.psapretrial.org/about/factors> [<https://perma.cc/96J5-MZGL>].

84. Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [<https://perma.cc/N8VR-3SPX>].

85. See generally Jon Kleinberg et al., *Human Decisions and Machine Predictions* (Nat’l Bureau of Econ. Research, Working Paper No. 23180, 2017), <https://www.nber.org/papers/w23180.pdf> [<https://perma.cc/5SWN-EWVA>].

86. See, e.g., Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 318 (2018).

87. See *More than 100 Civil Rights, Digital Justice, and Community-Based Organizations Raise Concerns About Pretrial Risk Assessment*, LEADERSHIP CONF. ON CIVIL & HUM. RTS. (July 30, 2018), <https://civilrights.org/2018/07/30/more-than-100-civil-rights-digital-justice-and-community-based-organizations-raise-concerns-about-pretrial-risk-assessment/> [<https://perma.cc/K266-XKYV>]; see also *The Use of Pretrial “Risk Assessment Instruments: A Shared Statement of Civil Rights Concerns*, LEADERSHIP CONF. ON CIV. & HUM. RTS., <http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf> [perma.cc/Z7VW-VNEZ].

anxiety that either is, or should be, at the heart of the debate about risk assessment tools — that these instruments move us away, far away, from an individualized consideration of facts to assess if a person poses an immediate and imminent physical safety threat. The use of risk assessment tools, like the Compas in the ProPublica article or the PSA in over forty jurisdictions in the U.S., reifies a definition of risk to public safety that is overly broad and vague and doesn't hone in on the kind of danger that really matters.

D. The Messiness of Considering Public Safety Within a Money Bail System

The second myth of America's bail system — that money mitigates against risk to public safety — has been decried often by bail reformers.⁸⁸ It seems obvious that a wealthy person accused of the same conduct as a poor one is no more or less likely to be a danger to society, simply because the wealthy can pay for their freedom while the poor cannot.⁸⁹ Yet this myth is baked into our current money bail system when bail is set based on amorphous public safety standards. Consider a stark example of this reality: Robert Durst, a real estate scion charged with murder in Texas, easily posted his \$300,000 bail, a tiny sum compared to his vast fortune, and then fled the jurisdiction upon release.⁹⁰ Durst was then accused in subsequent years of gun possession in New Orleans, and another murder in Los Angeles.⁹¹ For Durst, a financial stake neither mitigated risk of flight and failure to appear, nor did it have any bearing on the threat he posed to public safety, which was obviously severe.

Certainly, Durst is an extreme example, but his story illustrates the absurdity of our continued reliance on money bail, especially if risk to public safety is a priority. Research shows that the use of money bail has only *increased* since the introduction of the public safety principle, despite no meaningful correlation between money and danger.⁹² According to a study by the U.S. Bureau of Justice

88. *See, e.g.*, Stevenson, *supra* note 86, at 318.

89. *See id.*

90. Jill Leovy, *Texas Murder Suspect Skips Bail*, L.A. TIMES (Oct. 17, 2001), <https://www.latimes.com/archives/la-xpm-2001-oct-17-me-58096-story.html> [<https://perma.cc/Y2LV-WDBU>].

91. *Id.*

92. Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, in 3 REFORMING CRIMINAL JUSTICE 21, 25 (Erik Luna ed., 2017), http://academyforjustice.org/wp-content/uploads/2017/10/2_Reforming-Criminal-Justice_Vol_3_Pretrial-Detention-and-Bail.pdf [<https://perma.cc/Q4CC-KA9J>].

Statistics, money bail was set in 37% of felony cases in 1990; by 2009, that rate rose to 61% of all felony cases.⁹³ Historically, the end result of considering risk to public safety as a factor in pretrial bail decisions, alongside failure to appear, was a massive boom in jail populations across the United States. In 1970, approximately 160,000 people were in local county jails.⁹⁴ By 2010, that number had skyrocketed to almost 750,000 on any given day.⁹⁵ The vast majority of that increase was due to pretrial detention.⁹⁶

The correlation between having more people in jail and legislation allowing judges to consider risk to public safety is uncanny. As data on pretrial decisions do not provide the underlying reasons why money bail was set or pretrial detention was imposed, it is impossible to tell whether the main driver of this jarring boom in the jail population was attributable to concerns over public safety, concerns about failure to appear, or both, or something else entirely. What is reasonable to assume, however, is that the permission to consider yet another basis for depriving someone of their liberty before trial signaled to judges that money bail and preventive detention can and should be imposed more often.

Risk to public safety is as fraught and as complex a standard for the pretrial decision as any, and the way pretrial systems have defined danger and public safety to date is deeply flawed. Yet, in the face of research, history, and public policy, I believe risk to public safety — defined and calculated much more narrowly and precisely than the status quo — is the only justifiable basis for depriving someone of their liberty pretrial. Below, I will briefly offer a solution for how public safety can be refined to avoid some of the pitfalls we have seen.

III. ENDING MASS INCARCERATION BY REFORMING BAIL

So how does one thread the needle between money bail, failure to appear, and public safety? There is a cautionary tale from recent

93. *Id.* at 25 n.20.

94. MARGARET WERNER CAHALAN, U.S. DEP'T OF BUREAU OF JUSTICE STATISTICS, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850–1984 76 (1986), <https://www.bjs.gov/content/pub/pdf/hcsus5084.pdf> [<https://perma.cc/9UEH-R3QZ>].

95. ZHEN ZENG, U.S. DEP'T JUSTICE, BUREAU JUSTICE STATISTICS, JAIL INMATES IN 2016 1 (2018), <https://www.bjs.gov/content/pub/pdf/ji16.pdf> [<https://perma.cc/XGW8-VGNK>].

96. PETER WAGNER & WENDY SAWYER, PRISON POLICY INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2018 (2018), <https://www.prisonpolicy.org/reports/pie2018.html> [<https://perma.cc/W75B-MLWH>].

history in California of a bail bill signed into law in August 2018,⁹⁷ and some potentially hopeful lessons from a legislative proposal that was introduced but did not pass in the 2019 legislative session in New York.⁹⁸ Both pieces of legislation proposed a full elimination of money bail. On that note alone, they both went further than the legislation passed in the two other jurisdictions considered to have “ended” money bail — Washington, D.C., thirty years ago, and New Jersey just recently — as neither actually banned money bail entirely.⁹⁹

But eliminating money bail was one of few areas of common ground in California and New York’s proposed legislation.

In California, Senate Bill 10, originally introduced in 2016, promised to eliminate money bail and presume release on recognizance or non-monetary conditions, such as pretrial supervision and supports, for most cases.¹⁰⁰ From the start, risk assessment instruments were written into the legislation to assess low, medium, and high risk of both failure to appear and risk to public safety. But in summer 2018, at the eleventh hour, the framework of the bill was changed to allow judges far greater discretion to impose detention on a much broader swath of offenses and circumstances.¹⁰¹ Many

97. S.B. 10, 2017–2018 S. Reg. Sess. (Cal. 2018).

98. S.B. S3579A, 2017–2018 Reg. Sess. (N.Y. 2017).

99. Neither Washington, D.C., nor New Jersey fully eliminated the use of money bail. Rather, both require judges to first consider nonfinancial conditions of release and, only if nonfinancial conditions cannot satisfy concerns about risk of flight or to public safety, then can preventive detention be imposed. Both statutes also expressly prohibit the use of money bail to impose pretrial detention. In practice, this has resulted in very few money bails being set in either jurisdiction in recent history. See Maddie Hanna, *What Happened When New Jersey Stopped Relying on Cash Bail*, INQUIRER (Feb. 16, 2018), https://www.philly.com/philly/news/new_jersey/new-jersey-cash-bail-risk-assessment-20180216.html [perma.cc/VLW9-29XD].

100. The first version of SB10, introduced on December 5, 2016, had enumerated provisions that mandated release for certain misdemeanor and low-level offenses without any risk assessment, and required other more serious offenses to be subject to risk assessment but with a presumption of release. Compared to the high rates of people held in jail in California on unaffordable bail amounts, fueled by the use of bail schedules where judges automatically set bail based on charge and prior history, many progressive advocates and policymakers initially supported SB10 as a means to end mass incarceration. *SB-10 Pretrial Release or Detention: Pretrial Services, Compare Current 2018 Version to 2016 Introduced Version*, CAL. LEGIS. INFO. (2018),

https://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=201720180SB10&cversion=20170SB1099INT [https://perma.cc/2Z42-PY9F].

101. Alexei Koseff, *Bill to Eliminate Bail Advances Despite ACLU Defection*, SACRAMENTO BEE (Aug. 20, 2018), <https://www.sacbee.com/news/politics-government/capitol-alert/article217031860.html> [https://perma.cc/56YV-YBVA] [hereinafter Koseff, *Bill to Eliminate Bail*].

progressive groups who had originally championed the legislation withdrew their support.

In New York, Governor Cuomo introduced a bill in the 2019 legislative session that would not only eliminate money bail, but also remove discretion from judges to impose detention on most misdemeanors, nonviolent felonies, and even some select violent felony offenses.¹⁰² In other words, the legislation went beyond a presumption to a mandate of release in the vast majority of cases. The legislation did not require the use of risk assessment instruments and even included safeguards and limitations if they were to be used by local courts. With respect to public safety, a factor that is not a part of New York's current bail statute, the Governor proposed the following basis for detention: if the person poses a "current risk to the physical safety of a reasonably identifiable person or persons." This consideration of public safety only applied in cases involving some violent felony charges, domestic violence, and a handful of other serious offenses.

The legislation that passed in California is a prime example of the type of reform to avoid if the central goal of bail reform is decarceration, or fewer people in jail. The proposal introduced in New York, even though it ultimately failed, is in many ways the first real model legislation to both eliminate the use of failure to appear as a basis for detention and carefully narrow what constitutes a danger or risk to public safety. While not perfect, it is the kind of bail reform that will meaningfully end mass incarceration.

A. California and the Cautionary Tale of Senate Bill 10

In August 2018, then Governor Jerry Brown signed into law Senate Bill 10, hailed by many as the first bill nationally to fully eliminate cash bail.¹⁰³ The crisis of bail in California, as in much of the country, is one of epic proportions. On a single day in 2015, California had over 200,000 people in jail, with two-thirds held pretrial.¹⁰⁴ Judges

102. FY 2020 New York State Executive Budget, Public Protection and General Government Article VII Legislation, Part AA, 182, <https://www.budget.ny.gov/pubs/archive/fy20/exec/artvii/ppgg-artvii.pdf> [<https://perma.cc/24W4-SS4B>].

103. Alexei Koseff, *Jerry Brown Signs Bill Eliminating Money Bail in California*, SACRAMENTO BEE (Aug. 28, 2018), <https://www.sacbee.com/news/politics-government/capitol-alert/article217461380.html> [<https://perma.cc/8WL3-Y8R4>].

104. JAMIE FELLNER ET AL., HUMAN RIGHTS WATCH, "NOT IN IT FOR JUSTICE": HOW CALIFORNIA'S PRETRIAL DETENTION AND BAIL SYSTEM UNFAIRLY PUNISHES POOR PEOPLE 5-6 (2017),

traditionally set bail according to a schedule, a predetermined amount of money bail imposed based upon charge, prior criminal history, and other narrow factors.¹⁰⁵ The vast majority of people who do make bail in California's courts do so using a bail bondsman.¹⁰⁶

Senate Bill 10 was originally introduced in December 2016¹⁰⁷ to much fanfare and support from a wide cross-section of stakeholders, including traditional criminal justice policy makers, advocates, grassroots organizations, and legislators.¹⁰⁸ Unlike New York, California's statutory scheme allowed judges to set bail on the basis of both factors — risk of flight and public safety — and neither of those grounds were contested or challenged in and of themselves.¹⁰⁹ From the beginning, to win the full elimination of money bail a concession was made by some opponents of risk assessment instruments that those tools would be explicitly written into the new bail legislation. That concession was made with the understanding that the risk assessment tools would be used to justify and inform conditions of

https://www.hrw.org/sites/default/files/report_pdf/usbail0417_web_0.pdf
[<https://perma.cc/8925-VJ9D>].

105. Each county in California creates its own bail schedule that is voted upon by local judges. *See 2019 Bail Schedule*, SUPERIOR CT. CAL., COUNTY SAN DIEGO, http://www.sdcourt.ca.gov/pls/portal/docs/PAGE/SDCOURT/CRIMINAL2/CRIMINALRESOURCES/BAIL_SCHEDULE.PDF [<https://perma.cc/BH36-DX6Y>]; *see also 2019 Bail Schedule for Infractions and Misdemeanors*, SUPERIOR CT. CAL., COUNTY L.A., <http://www.lacourt.org/division/criminal/pdf/misd.pdf> [<https://perma.cc/3Y2D-QRRG>].

106. *See* ISAAC BRYAN ET AL., *THE PRICE FOR FREEDOM: BAIL IN THE CITY OF L.A.: A MILLION DOLLAR HOODS REPORT* (2017), http://milliondollarhoods.org/wp-content/uploads/2017/10/MDH_Bail-Report_Dec-4-2017.pdf [<https://perma.cc/2TGN-3QVN>] (analyzing bail settings and bail making over five years between 2012 and 2016 in Los Angeles). Of people who did make bail, almost all did so by going to a bail bondsman.

107. *California SB-10 Pretrial Release or Detention: Pretrial Services (History)*, CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201720180SB10 [<https://perma.cc/DZ6F-C3TP>].

108. Michael McGough, *The Fate of California's Cash Bail Industry Will Now be Decided on the 2020 Ballot*, SACRAMENTO BEE (Jan. 17, 2019, 11:58 AM), <https://www.sacbee.com/news/state/california/article224682595.html>.

109. PRETRIAL DETENTION REFORM WORKGROUP OF THE JUDICIAL BRANCH OF CALIFORNIA, *PRETRIAL DETENTION REFORM: RECOMMENDATIONS TO THE CHIEF JUSTICE* (Oct. 2017), https://newsroom.courts.ca.gov/internal_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20179/PDRReport-FINAL%2010-23-17.pdf [<https://perma.cc/U8FS-5ASK>].

release, not to impose or require detention, and that release was mandated on low-level charges regardless of potential risk level.¹¹⁰

All appeared to be going to plan until, at the last minute, several amendments were added to Senate Bill 10 that limited the categories of charges mandated for release and gave judges close to unfettered discretion to impose detention, especially on cases deemed medium or high risk, as determined by the risk assessment instrument now required by law. These amendments caused much consternation and dismay among original champions of Senate Bill 10, and ultimately led to many withdrawing support.¹¹¹ Central to their concerns was the potential for Senate Bill 10 to actually result in more, not fewer, people in jail because of the broad detention eligibility net and the unchecked discretion to impose detention under the revised proposal.¹¹²

Senate Bill 10 passed and was signed into law by then Governor Jerry Brown on August 28, 2018. Yet the reaction to it from advocates and many supporters of bail reform ranged from muted to downright critical. Today, Senate Bill 10 is facing repeal in a ballot referendum in November 2020 and the money bail system California has known for decades still exists.¹¹³ What should have been an

110. SV De-Bug, *Silicon Valley De-Bug's Letter of Opposition to California's False Bail Reform Bill (SB10)*, SV DE-BUG (Aug. 14, 2018), <https://siliconvalleydebug.org/stories/silicon-valley-de-bug-s-letter-of-opposition-to-california-s-false-bail-reform-bill-sb10> [https://perma.cc/U8FS-5ASK] (“Risk assessment instruments can amplify racial disparities inherent to the criminal justice system. As such, any implementation of the tool should be transparent, have rigorous oversight and data collection based on race, and be limited in scope of use. The bill relies heavily upon risk assessments, but without the safeguards and tools that would mitigate its harm. The original SB10 language only allowed risk assessment instruments to inform conditions of release, but the current version allows risk assessment instruments to be a key determinant of release or detention. Mandatory data collection with a racial lens and transparency of the tool as well have also been stripped from SB10, rendering any of the dangers of the tool to be codified as law. The problem of the risk assessment is magnified under the structure of the current bill. The tool will be wielded by law enforcement as described in SB10, and allows for local courts to not only detain those identified as high risk, but moderate risk as well. We anticipate the result of these various factors layered on top of each other will equate to more people being incarcerated pretrial in California.”).

111. *Id.*; see also Press Release, Essie Justice Grp., Statement on Gov. Brown Signing SB10 (Aug. 29, 2018), <https://essiejusticegroup.org/2018/08/essie-justice-group-statement-on-gov-brown-signing-sb10/> [https://perma.cc/ZRS4-TWYN]; Press Release, ACLU, ACLU of California Statement on Changes to Bail Reform Legislation (Aug. 16, 2018), <https://www.aclunc.org/news/aclu-california-statement-changes-bail-reform-legislation> [https://perma.cc/2PTG-2BAW].

112. Press Release, Essie Justice Grp., *supra* note 111.

113. McGough, *supra* note 108.

overwhelming success for bail reform ended up serving as a cautionary tale for others.

B. New York and the Hope of a Narrower Standard of Detention and Public Safety

From the beginning, learning from the mistakes of California's Senate Bill 10, Governor Cuomo's proposed 2019 legislation to reform bail in New York took a very different approach to the contours and precepts underlying pretrial release and detention.

For one, the Governor's proposal mandated release, not simply a presumption of release, for a significant swath of offenses — from misdemeanors, to nonviolent felonies, and even some common violent felonies such as assault, robbery, and burglary in the second degree.¹¹⁴ A mandated approach that eliminates prosecutorial and judicial discretion to detain is a significant departure from the kinds of bail legislation that have passed, not just in California, but in places like New Jersey, which required a presumption, but not a mandate, of release.

A second difference is that the Governor's proposed approach to public safety only applied to a limited number of charges — some violent felonies, domestic violence, and other serious offenses — and did not depend on the use of a risk assessment instrument. In fact, the legislation explicitly prohibited risk to public safety from being determined by an assessment tool.¹¹⁵ Rather, the proposed standard, if triggered by a serious charge of a violent felony, domestic violence, and the like, was a narrow consideration — if a person posed an immediate threat to the physical safety of another.¹¹⁶

Why this different approach? One key substantive distinction is that, again, unlike California, New York's existing bail statute started from a unique place of only allowing judges to consider risk of failure to appear, and not risk to public safety, as all forty-nine other states

114. *New York Bail Reform Law: Summary of Major Components*, CTR. FOR COURT INNOVATION (Apr. 1, 2019), https://www.courtinnovation.org/sites/default/files/media/document/2019/Bail_Reform_NY_Summary.pdf [<https://perma.cc/EF5B-7HLB>]

115. See DIVISION OF THE BUDGET, N.Y. STATE, FY 2020 NEW YORK STATE EXECUTIVE BUDGET 196 (2019), <https://www.budget.ny.gov/pubs/archive/fy20/exec/artvii/ppgg-artvii.pdf> [<https://perma.cc/24W4-SS4B>] (“Any criteria, instrument or tool used may consider risk of failing to appear in court and shall not contain a measure of a person's general risk to public safety.”).

116. *Id.* at 207.

and the federal bail system do.¹¹⁷ The introduction of a dangerousness provision in Governor Cuomo's proposed bill, however carefully crafted and limited, was hugely controversial among New York's advocates and policy makers¹¹⁸ and was ultimately shelved in favor of a bill that left in cash bail for serious offenses but still did not include public safety.¹¹⁹

Regardless of the outcome, New York's unique starting point for bail reform helped to drive a conversation about the merits of considering failure to appear and what constitutes danger and a risk to public safety well beyond what anyone had seen before in previous bail reform efforts. As the very last state to consider adding risk to public safety to the bail statute, New York had the benefit of learning from other jurisdictions and thereby avoiding their mistakes. Another substantive distinction is that New York had its own proof of concept, in New York City, as an example that more pretrial release can in fact result in more public safety.¹²⁰ In New York City, the use of bail overall has declined tremendously in recent years, creating momentum and support for provisions that go beyond what any other state had proposed to end mass incarceration and limit the use of pretrial detention.¹²¹

Learning from the cautionary tale of California, Governor Cuomo's proposed legislation not only eliminated money bail entirely, but took jail off the table as an option for a majority of offenses, especially lower-level ones.¹²² As a starting point, that alone would guarantee decarceration as judges routinely set bail at amounts

117. See *Pretrial Policy: State Laws*, *supra* note 7.

118. Tina Luongo et al., *Albany Must Reject Any 'Dangerousness'-Based Preventative Detention Scheme*, N.Y. L.J. (Mar. 20, 2019), <https://www.law.com/newyorklawjournal/2019/03/20/albany-must-reject-any-dangerousness-based-preventative-detention-scheme/> [<https://perma.cc/SCC6-MTR8>].

119. Dan M. Clark, *Cash Bail Will Remain in Reform Legislation While 'Dangerousness' Provision Is Out*, N.Y. L.J. (Mar. 29, 2019), <https://www.law.com/newyorklawjournal/2019/03/29/cash-bail-will-remain-in-legislation-while-dangerousness-provision-is-out/> [<https://perma.cc/XK5R-E643>].

120. Judith A. Greene & Vincent Schiraldi, *Better by Half: The New York City Story of Winning Large-Scale Decarceration While Increasing Public Safety*, 29 FED. SENT'G REP. 22, 23 (2016).

121. AUBREY FOX & STEPHEN KOPPEL, N.Y.C. CRIMINAL JUSTICE AGENCY, *PRETRIAL RELEASE WITHOUT MONEY: NEW YORK CITY, 1987-2018* (2019), https://issuu.com/csdesignworks/docs/cja_rwm_final/2 [perma.cc/LPH2-ET5Q].

122. *SB-10 Pretrial Release or Detention: Pretrial Services, Compare Current 2018 Version to 2016 Introduced Version*, CAL. LEGIS. INFO. (2018), https://leginfo.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=201720180SB10&cversion=20170SB1099INT [<https://perma.cc/2Z42-PY9F>].

beyond people's reach on misdemeanor and other low-level offenses in the fifty-seven counties outside of New York City.¹²³ Eliminating both money bail *and* jail meant that judges simply cannot detain people charged on those misdemeanors, nonviolent felonies, and select violent felony offenses, even if they are deemed a high risk of flight or likely to not appear in court. The idea was that pretrial services, including court notification, monitoring, and the like, would mitigate that particular risk. The radical notion underlying this mandate of release was, at its core, to eliminate pretrial discretion entirely from prosecutors and judges to detain on the vast majority of charges. New York clearly learned a lesson from California's much-criticized last minute amendments to Senate Bill 10 that further enhanced judicial discretion to impose detention.

Second, the Governor's proposal called for judges to be able to consider risk to public safety as a basis for detention in a unique, specific way, limited to only the most serious of offenses and only after an individualized, fact-specific hearing.¹²⁴ This proposal would have been deemed progressive in any other jurisdiction, but given that New York is the only state that continues to reject *Salerno* and a consideration of public safety, this part of the proposal was a third rail and ultimately derailed the Governor's effort.

A little bit of history about risk to public safety in New York is helpful context here. In 1970 and again in 1981, New York legislators considered adding risk to public safety to the bail statute but rejected it both times, noting the likely role of racial bias and bigotry in the determination of who was a threat to the public's safety.¹²⁵ In the Governor's 2019 proposal, he noted that under the current law judges considered public safety covertly and set high bail to detain people who they suspected were a danger.¹²⁶ These decisions were made *sub rosa* and subject to the whims, perceptions, and biases of individual

123. VERA INST. OF JUSTICE, EMPIRE STATE OF INCARCERATION (2017), <https://www.vera.org/state-of-incarceration/drivers-of-jail> [https://perma.cc/U523-9JAB] ("Across New York, the percentage of the total jail population held on misdemeanor charges varies by county, from as low as 6 percent in some counties to as high as 89 percent in others.").

124. *See generally* Koseff, *Bill to Eliminate Bail*, *supra* note 101.

125. NYU LAW CENTER ON THE ADMINISTRATION OF CRIMINAL LAW, PREVENTIVE DETENTION IN NEW YORK: FROM MAINSTREAM TO MARGIN AND BACK 12–23 (Feb. 2019), https://www.law.nyu.edu/sites/default/files/upload_documents/2017-CACL-New-York-State-Bail-Reform-Paper.pdf [https://perma.cc/JF6J-FYNS].

126. Corinne Ramey & Jimmy Vielkind, *Bail Remains Sticking Point in Talks on Criminal Justice Overhaul in New York*, WALL ST. J. (Mar. 27, 2019, 7:24 PM), <https://www.wsj.com/articles/bail-remains-sticking-point-in-talks-oncriminal-justice-overhaul-in-new-york-11553729057> [https://perma.cc/3C2K-NP6H].

judges. In support of his proposal, Governor Cuomo reasoned that explicitly introducing a consideration of public safety would eliminate the secrecy of those decisions now and help to balance the calculus of what and who was considered a public safety risk.¹²⁷ Setting aside the contentiousness of the proposal for a moment, the most important thing to note is that the Governor's proposal did what no other state has done before: formulate a very narrow, careful definition of public safety, which is not so broad as to encompass all kinds of behaviors, and is fact-specific enough to necessitate a real hearing and not be satisfied by some algorithmic assessment.¹²⁸ The specific language the Governor's proposal called for with respect to public safety was that someone be deemed "a current threat to the physical safety of a reasonably identifiable person or persons."¹²⁹ That language was notably different from what has been proposed and passed as legislation elsewhere. Compare it, for example, to "a credible threat to the safety of a person or community," the typical language adopted as the basis for determining risk to public safety in other jurisdictions.¹³⁰

Why is this important? Both bills in California and New York actually eliminate money bail. But, as these two examples demonstrate, that alone will not result in a more just pretrial system and fewer people in jail. California's elimination of money bail may have actually removed the one safety valve — being able to afford money bail — that saved people from unnecessary pretrial detention. New York's proposal, on the other hand, would have simply mandated release in most cases with debate only over the appropriate conditions to assure pretrial success in the community. Further, the

127. Dan M. Clark, *NY Criminal Justice Reform Delayed as Cuomo, Lawmakers Evaluate 'Dangerousness'*, N.Y. L.J. (Mar. 19, 2019), <https://www.law.com/newyorklawjournal/2019/03/19/ny-criminal-justice-reform-delayed-as-cuomo-lawmakers-evaluate-dangerousness/> [perma.cc/53XR-YZ3U].

128. The public safety standard proposed was if a person poses "a current threat to the physical safety of a reasonably identifiable person or persons." Importantly, this standard is specific in that it requires a fact-finding into: (1) a current and immediate threat; (2) the nature of that threat, and that it is in fact one of physical safety, and not some broadly construed threat; and (3) that there is a reasonably identifiable person or group of people who are at risk. Standard risk assessment instruments, built with data from prior criminal convictions, history, etc., are explicitly banned from use to assess public safety, under the proposal. See Press Release, New York State Unified Court System, New York Justice Task Force Issues Report on Bail Reform (Feb. 11, 2019), https://ww2.nycourts.gov/sites/default/files/document/files/2019-02/PR19_05.pdf [https://perma.cc/NE95-V9QV] (containing discussed report herein).

129. *Id.*

130. *Id.*

bail reform effort in California did nothing to attack California's overly broad and troubling definition of risk to public safety, leaving in place a vague standard that could sweep in a wide range of behaviors, both those that actually pose a real risk to someone's physical safety and the many acts that clearly do not. New York's proposed legislation, in contrast, consciously provided an explicit definition of this amorphous term. Even though it did not pass, this proposal can serve as a model for eliminating some of the potential for bias and harm in what has become a ubiquitous public safety standard in bail systems across the country.

CONCLUSION: A CALL FOR STATUTORY REFORM ELSEWHERE

There are dozens of other jurisdictions considering bail reform each year, and for them the lessons from California and New York are critically important to study, absorb and turn into concrete strategies on the ground.

For the forty-nine states and the federal system, this is first and foremost an opportunity to revisit the standard of public safety that was passed in the wake of our "tough on crime" and "war on drugs" era, and to narrow this standard carefully to a much more tailored, careful definition. For the forty-eight states left to eliminate money bail entirely, there is a model for eliminating money bail the right way — by mandating release for the vast majority of offenses and eliminating the role that risk of failure to appear plays in justifying decisions of detention.

For jurisdictions looking for the right way to assess release and detention, New York's proposed legislation provides two important lessons beyond the standards of risk of failure to appear and public safety. The first is to not be afraid to simply legislate away discretion and mandate release on as wide a swath of cases as politically possible. It is the only foolproof way to guarantee that a reform bill will be enacted as intended. Second, New York contended with the risk assessment debate by explicitly prohibiting its use for justifying detention, and by explicitly allowing its use to determine conditions of release.