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STATE COURTS AND THE PROMISE OF PRETRIAL JUSTICE IN CRIMINAL CASES

HON. ERIC T. WASHINGTON*

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INTRODUCTION

Two generations ago, the U.S. Department of Justice decried the way money distorted the pretrial process, giving succor to wealthier defendants while unduly penalizing the poor. In 1964, then Attorney General Robert F. Kennedy, in testimony before the Senate Judiciary Committee, stated:

[T]he legislation you consider today is new evidence of the deep concern of Congress that all Americans receive equal treatment in our courts, whatever their wealth. . . . Th[e] problem, simply stated, is the rich man and the poor man do not receive equal justice in our

* Copyright © 2016 by Eric T. Washington, Chief Justice, Washington D.C. Court of Appeals. An earlier version of this speech was delivered as the 22nd Justice William J. Brennan Jr. Lecture on State Courts and Social Justice at the New York University School of Law on February 24, 2016. I want to thank Professors Chase, Estreicher, and McKenzie for their very kind invitation to join the distinguished list of speakers who have been part of this lecture series. I also want to thank New York University School of Law and the Dwight D. Opperman Institute of Judicial Administration for providing opportunities for state court leaders to publically address the fundamental role that state courts play in addressing social problems and in delivering equal justice.

courts. And in no area is this more evident than in the matter of bail. . . . We presume a person to be innocent until he is proven guilty, and thus the purpose of bail is not punishment. . . . It is not to keep people in jail. It is simply to guarantee appearance in court. . . . In practice, however, bail has become a vehicle for systematic injustice. Every year in this country, thousands of persons are kept in jail for weeks and even months following arrest. They are not yet proven guilty. They may be no more likely to flee than you or I. But, nonetheless, most of them just stay in jail because, to be blunt, they cannot afford to pay for their freedom.¹

He then goes on to describe the other costs to the accused and to society, pointing to the millions of dollars that were being spent on food, care, clothing, and what he refers to as “constantly growing detention facilities.”² He focuses most powerfully, in my opinion, on the human cost which he states is incalculable: “The man who must wait in jail before trial often will lose his job. He will lose his freedom to help prepare his own defense. And he will lose his self-respect.”³ His conclusion—citing to the findings of a national conference he helped to convene in Washington, D.C. in conjunction with the Vera Foundation—was that “the system was in drastic need of overhauling.”⁴

Here we are, more than fifty years later and the ills and injustices discussed so eloquently by Attorney General Kennedy are as true today, in many jurisdictions around the country, as they were in 1964. Unfortunately, the numbers that Attorney General Kennedy used to highlight the magnitude of the problem pale, and I use that term advisedly, in comparison to the numbers of individuals being held pre-trial in our jails and prisons today, merely because they are poor. As of 2013, approximately 62% of jail populations consist of unconvicted defendants.⁵ Nationally, it is estimated that pretrial detention costs the United States \$14 billion every year.⁶ The unconvicted individuals

¹ *Federal Bail Procedures: Hearings Before the Subcomm. on Constitutional Rights and the Subcomm. on Improvements in Judicial Mach. of the Comm. on the Judiciary*, 88th Cong. 27 (1964) [hereinafter *1964 Hearings on Bail Procedures*] (statement of Hon. Robert F. Kennedy, Att’y Gen. of the United States).

² *See id.* at 29.

³ *Id.*

⁴ *See id.* at 31.

⁵ *See* TODD D. MINTON & DANIELA GOLINELLI, U.S. DEP’T OF JUSTICE BUREAU OF JUSTICE STATISTICS, *JAIL INMATES AT MIDYEAR 2013—STATISTICAL TABLES 11*, app. tbl.3 (2014) (discussing the statistical findings on jail inmates).

⁶ *See* Jane Wiseman, *Dealing Fairly with Pretrial Detainees*, COMMONWEALTH (Oct. 13, 2015), <http://commonwealthmagazine.org/criminal-justice/dealing-fairly-with-pretrial-detainees/> (arguing that decreasing crime, while saving taxpayers’ money is possible using risk-based assessments).

being held are disproportionately people of color who have been arrested for non-violent and/or quality of life crimes and are primarily low level, low risk individuals from large urban areas.⁷

However, regardless of the race of those being held in jails pre-trial, the common thread amongst almost all of them is that they are too poor to pay a money bond.⁸ This raises the question: Why, in 2016, are we having to mount yet another campaign to reform this key part of our criminal justice system when the injustices associated with that system were well known more than 50 years ago? Perhaps it is because the concept of money bail is broadly misunderstood.⁹ Or perhaps it is because judges—uneasy about the presumption of innocence and the limited authority and resources at their disposal to otherwise address issues of dangerousness—decided to use the authority they did have in a way that was inconsistent with the purpose of money bail. Regardless of the motivation, and despite at least two generational efforts to reform the system,¹⁰ recent calls for reform have become more urgent and insistent.¹¹ More and more state court leaders are beginning to heed the call recognizing that the law is committed to protecting the basic rights of both the accused and the accusers.¹²

The impacts of this kind of pretrial justice reform go well beyond those discussed by Attorney General Robert Kennedy in his Senate testimony. We know now that pretrial detention decisions affect nearly every aspect of the case that follows much more than was previously imagined. Compared to similar defendants who are released pretrial, detained defendants are more likely to be found guilty, more likely to be sentenced to incarceration, and more likely to receive longer sentences of incarceration.¹³ It is well known and widely

⁷ See RAM SUBRAMANIAN ET AL., VERA INST. OF JUSTICE, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 20–21 (2015) (describing the increase of zero-tolerance policing policies, which lead to more “misdemeanor or non-criminal arrests”).

⁸ See *id.* at 32 (“[O]nly one in ten [felony defendants who spend all of their pretrial periods in jail] is detained because he or she is denied bail. The rest simply cannot afford the bail amount the judge sets.”).

⁹ See TIMOTHY R. SCHNACKE, U.S. DEP'T OF JUSTICE NAT'L INST. OF CORRECTIONS, FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM 4 (2014) (“[T]he administration of bail in America is unfair and unsafe, and the primary cause for that condition [is]: (1) a lack of bail education that helps to illuminate solutions to a number of well-known bail problems; and (2) a lack of the political will to change the status quo.”).

¹⁰ See *infra* Part I.

¹¹ See *infra* Part III.

¹² See *infra* Part III.

¹³ See LAURA AND JOHN ARNOLD FOUND., PRETRIAL CRIMINAL JUSTICE RESEARCH 2–4 (2013) http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief_FNL.pdf.

accepted that pretrial detention drives up false guilty pleas from those who simply want to get out of jail and return to their families and their jobs.¹⁴ Every false guilty plea equals an individual unnecessarily saddled with a criminal record and, in cases of property or violent crime, an actual perpetrator who has evaded justice.

I HISTORY OF BAIL REFORM

In the 1960s, the Vera Institute of Justice conducted the Manhattan Bail Project. Its findings led Attorney General Kennedy to convene a national symposium on ways to solve the problem of pretrial over-incarceration.¹⁵ That study found that many defendants being held on money bonds presented a low risk of failing to appear for court and that those defendants performed well on pretrial release, sometimes needing only a minimal amount of support by way of court date reminders and occasional check-ins.¹⁶

That ground-breaking work led to passage of the Bail Reform Act of 1966.¹⁷ This federal legislation was the first real attempt to standardize the individual factors that should be considered in pretrial release decisions; those factors included consideration of a defendant's background and community ties.¹⁸ The Act also made clear that the pretrial release decision should be made with the presumption of release and release under the least restrictive conditions necessary to reasonably assure that the defendant would show up to court.¹⁹

¹⁴ See Charlie Gerstein, Note, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 MICH. L. REV. 1513, 1528, 1532 (2013) ("Many convictions following pretrial detention are guilty pleas only made to get out of jail pretrial. For these pleas, guilt has not been reliably determined at all.")

¹⁵ See U.S. DEP'T OF JUSTICE, INTERIM REPORT OF THE NAT'L CONFERENCE ON BAIL AND CRIMINAL JUSTICE, at xiv, xv (1965).

¹⁶ See *id.* at xxii ("During the [Manhattan Bail Project], 3505 accused persons were released on recognizance on the recommendations of its staff. Of these, 98.4% returned to court when required. . . . [T]he forfeiture rate on bail bonds during the same period was 3%."); see also *id.* at 54 (noting the high appearance rate among defendants released on pretrial money bonds).

¹⁷ Pub. L. No. 89-465, 80 Stat. 214 (1966) (codified as amended at 18 U.S.C. §§ 3141-3151 (2012)).

¹⁸ See *id.* § 3146(b) ("In determining which conditions of release will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.")

¹⁹ See *id.* § 3146(a).

Almost twenty years after Attorney General Kennedy's call for reform, the Federal Bail Reform Act of 1984 was passed and for the first time dangerousness was added as a valid pretrial release factor in federal bail decisions.²⁰ It seems like common sense to us now, but prior to 1984, only factors that addressed the likelihood of a defendant returning for his or her next scheduled court appearance could legally be considered in the context of bail in the federal system.²¹ At that time, several states had already adopted language that allowed its judges to consider both flight and danger as part of their bail decisions.²² A few states, like New York, still do not have the consideration of dangerousness written into their state bail statutes.²³

It was not until a few years later, in 1987, that the United States Supreme Court in *United States v. Salerno* affirmed the decision of a federal trial court to detain dangerous individuals without the opportunity for release as long as certain due process protections were observed.²⁴ Despite upholding the detention of dangerous individuals, Chief Justice Rehnquist made it perfectly clear that “[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”²⁵

Recently, Timothy R. Schnacke, the Executive Director of the Center for Legal and Evidence-based Practices, authored a publication entitled the “Fundamentals of Bail.”²⁶ In his introduction, he discusses what he describes as a “paradox of criminal justice” that was created by this evolution in our system of bail.²⁷ Bail was created and molded over the centuries in England and in America primarily to

²⁰ See Bail Reform Act of 1984, Pub. L. No. 98-473, § 3142(b), 98 Stat. 1976, 1977 (1984) (codified as amended at 18 U.S.C. § 3142(b) (2012)) (“The judicial officer shall order the pretrial release of the person . . . unless the judicial officer determines that such release . . . will endanger the safety of any person or the community.”).

²¹ See H.R. REP. NO. 98-1121, at 1 (1984) (“The Committee on the Judiciary [recommends] amend[ing] the Bail Reform Act of 1966 to permit consideration of danger to the community in setting pretrial release conditions . . .”).

²² By 1978, twenty-three states and the District of Columbia had passed legislation including danger as a factor. See, e.g., District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473, 646 (1970) (codified at D.C. Code Ann. § 23-1322(e) (West 2013)) (“The judicial officer may detain” a person if it appears “that such person may flee or pose a danger to any other person or the community if released.”); see also JOHN S. GOLDKAMP, TWO CLASSES OF ACCUSED: A STUDY OF BAIL AND DETENTION IN AMERICAN JUSTICE 67–69 (1979) (“Thus, in addition to contributing to inferences about risk of flight, the popularity of the offense seriousness criterion—state by state the most common criterion of all—may be due to its use in assessing dangerousness in defendants and in meting out pretrial punishment.”).

²³ See N.Y. CODE CRIM. PROC. LAW § 510.30 (McKinney 2012).

²⁴ 481 U.S. 739 (1987).

²⁵ *Id.* at 755.

²⁶ See SCHNACKE, *supra* note 9.

²⁷ See *id.* at 1.

facilitate the release of criminal defendants from jail as they await their trials, but today those same practices often operate to deny that release.²⁸ Schnacke points to the frequent taglines that appear in newspaper articles like: “The defendant is being held on \$50,000 bail.”²⁹ The statement is outwardly false, given that bail was created to facilitate the release of defendants.³⁰ But upon closer examination, the statement turns out to be absolutely true. While he is content to point out the paradox, it may be that this fundamental misconception, one that is perpetuated daily through the news and social media,³¹ contributes to the difficulty faced by those who want to move forward on pretrial justice reform.

Because of the tension between the purpose of bail as a way of releasing those accused of a crime pretrial and the desire of judges to protect the community from any further harm by an accused, whether for personal or political reasons, courts over time defaulted to using bail schedules to determine release.³² The use of criminal jurisprudential mechanisms—like preliminary hearings, habeas corpus, and prohibitions on pretrial detentions without charge—to protect the due-process rights of an accused being detained helped mask the problems of using money bail schedules to improperly detain criminal defendants before trial. I cannot overstate the degree of comfort that is enjoyed by trial judges whose pretrial release decisions are based almost exclusively on the severity of the crime with which a defendant has been charged and not on a consideration of factors that can later be questioned and criticized. In essence, courts transferred pretrial release decisions that had historically been committed to judicial discretion to the discretion of the charging official. Judges are keenly aware that the public quickly forgets the old adage “to err is human, to forgive, divine”³³ when someone whom the court may have found was a good candidate for release is subsequently accused of committing another crime while awaiting trial. Judges who are elected to

²⁸ See *id.*

²⁹ *Id.*

³⁰ See *id.*

³¹ See, e.g., Christina Carrega-Woodby, *Brooklyn Woman Accused of Robbing News 12 Reporter Held on \$5,000 Bail*, N.Y. DAILY NEWS (July 6, 2016), <http://www.nydailynews.com/new-york/brooklyn-woman-robbed-reporter-held-5k-bail-article-1.2700982>; Lee V. Gaines, *Chicago Woman Held on \$250K Bail in Explosion in Evanston Target Bathroom*, CHI. TRIB. (June 11, 2016), <http://www.chicagotribune.com/suburbs/evanston/crime/ct-evr-evanston-target-bathroom-explosion-tl-0616-20160611-story.html>; David Zahniser, *Businessman Held on \$1-Million Bail in Supergraphic Case*, L.A. TIMES (Feb. 28, 2010), <http://articles.latimes.com/2010/feb/28/local/la-me-billboard28-2010feb28>.

³² See, e.g., BAIL SCHEDULE (SUPERIOR COURT OF CAL., CTY. OF SAN DIEGO 2016); UNIFORM FINE/BAIL FORFEITURE SCHEDULE (STATE OF UTAH 2016).

³³ ALEXANDER POPE, AN ESSAY ON CRITICISM 114 (1711).

office are especially sensitive to this potential outcome. In recent years, as awareness has risen about the enormous impact the often quickly made pretrial decision has on the criminal justice system, members of the judiciary are re-examining their reluctance to advocate for reform in this area.³⁴ State court chief justices and state court administrators have begun playing pivotal roles in developing policies regarding how best to handle individuals accused of a crime between arrest and the disposition of their cases. This willingness to tackle issues of bail reform is being driven by a new understanding on the part of judges about the actual risks involved in releasing people back into the community pending trial. This new understanding, fueled by evidence-based and validated social science, has empowered judicial leaders to take the lead in promoting reforms in their states, which resulted in significantly lowering the number of people detained pre-trial while better ensuring the long-term safety of their communities. In Part II, I describe the reform efforts taken by the District of Columbia and report the great progress we have made. In Part III, I discuss the new social science that has led the way for state level bail reform across the country.

II

THE DISTRICT OF COLUMBIA'S PATH

Years ago, the District of Columbia took a lead role in promoting pretrial social justice by reforming its pretrial justice system. The District was one of the places prominently criticized by Attorney General Kennedy in 1964 for the improper use of money bonds.³⁵ At that time in D.C., like in most states, money bonds were a judge's tool of choice in making pretrial release decisions, and often those decisions did not consider much more than the seriousness of the charged offense.³⁶ This was the case despite the fact that we were given a first-in-the-nation pretrial detention statute when our court system was

³⁴ See WILLIAM F. DRESSEL & BARRY MAHONEY, NAT'L JUDICIAL COLLEGE, PRETRIAL JUSTICE IN CRIMINAL CASES: JUDGES' PERSPECTIVES ON KEY ISSUES AND OPPORTUNITIES FOR IMPROVEMENT (2013) (identifying key obstacles to improving pretrial justice and suggesting practical ways to undertake improvements at the local level); see also Lorelei Laird, *Court Systems Rethink the Use of Financial Bail, Which Some Say Penalizes the Poor*, A.B.A. J. (Apr. 2016), http://www.abajournal.com/magazine/article/courts_are_rethinking_bail (reporting that bail has negative effects on people of modest means).

³⁵ See *1964 Hearings on Bail Procedures*, *supra* note 1, at 28 (statement of Hon. Robert F. Kennedy, Att'y Gen. of the United States).

³⁶ See *id.*

reorganized in 1970.³⁷ The statute provided that a judicial officer could order pretrial detention of:

(1) a person charged with a dangerous crime, as defined [in the statute], if the Government certifies by motion that based on such person's pattern of behavior consisting of his past and present conduct . . . there is no condition or combination of conditions which will reasonably assure the safety of the community; (2) . . . (i) if the person has been convicted of a crime of violence within the ten-year period immediately preceding the alleged crime of violence for which he is presently charged; or (ii) the crime of violence was allegedly committed while the person was, with respect to another crime of violence, on bail or other release or on probation, parole, or mandatory release pending completion of a sentence; or (3) a person charged with any offense if such person, for the purpose of obstructing or attempting to obstruct justice, threatens, injures, intimidates, or attempts to threaten, injure, or intimidate any prospective witness or juror.³⁸

Unfortunately, instead of using the statute to detain dangerous individuals, prosecutors rarely filed motions seeking detention by certification, and trial judges continued to use money bonds to set release conditions in felony cases.³⁹ Bail bondsmen continued to flourish, and their offices lined the streets adjoining our courthouses.

And why wasn't the pretrial detention statute used instead of money to hold those individuals who were accused of a crime and considered dangerous? The short answer is that the law changed, but the culture did not. Moreover, under the statute, the government's burden was substantial. It had to prove by a "substantial probability," very early in the process, that the accused had committed the crime for which he or she had been arrested.⁴⁰ Then, if the government met that burden, the criminal trial had to begin within sixty days of the detention decision.⁴¹ Because compliance with the statute placed a very heavy burden on the government, and because judges in the District were still setting money bonds that were effectively acting as detainers for most of the detention-eligible defendants, the government chose not to seek to detain eligible defendants on a regular basis. It is no wonder that as late as 1990, two-thirds of the defendants

³⁷ See District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473, 644 (1970) (codified at D.C. Code Ann. § 23-1322 (West 2013)).

³⁸ *Id.*

³⁹ Comment from John A. Carver, Dir., D.C. Pretrial Servs. Agency, on Proposed Amendments to Bail Laws to John P. Bond, City Adm'r (Oct. 3, 1991) (on file with author).

⁴⁰ See § 23-1322(b)(2)(C).

⁴¹ See § 23-1322(d)(2)(A).

statutorily eligible for preventive detention in the District were being held on money bonds instead.⁴² Some might ask what difference it makes if judges use money bonds that end up holding large numbers of individuals accused of committing crimes, instead of putting the government to its burden of proving dangerousness in individual cases. The answer is that some very dangerous persons with access to resources were able to purchase their freedom pretrial while many low risk, low income offenders, who were the vast majority of those being detained on money bonds, were likely to remain in jail while awaiting trial and, guilty or not, could lose their jobs, homes, and children, merely because they could not pay to be free while awaiting trial.⁴³

In the early 1990s, after a rash of highly visible and serious crimes were committed by persons released on money bonds,⁴⁴ growing concern about the often random and unsafe character of our money-based pretrial decisionmaking led the then-Director of the District's Pretrial Services Agency, Jay Carver, to form a coalition to reform our pretrial justice system practices.⁴⁵ The coalition included both the United States Attorney for the District of Columbia, our local prosecutor, and the director of the District's public defender service.⁴⁶ Through the efforts of those individuals and others, the District of Columbia Council was convinced to pass reform legislation, including a revised preventive detention statute, which made pretrial detention presumptively appropriate for only a limited class of criminal

⁴² See PRETRIAL JUSTICE INST., *The D.C. Pretrial Services Agency: Lessons from Five Decades of Innovation and Growth* 5, <http://www.pretrial.org/download/pji-reports/Case%20Study-%20DC%20Pretrial%20Services%20-%20PJI%202009.pdf> (last visited Oct. 26, 2016) (“[I]nnovations gave the court the confidence to expand non-financial release, but there was still significant use of money bail in cases of defendants who were eligible for detention.”).

⁴³ See *id.* (“While many of these defendants remained in jail because they could not post the bail, many others of these potentially dangerous defendants were able to purchase their release.”).

⁴⁴ See Nancy Lewis, *Bail Law's Results Mixed*, WASH. POST (Sept. 4, 1992) (“The Bail Reform Act was targeted at armed, violent and dangerous offenders . . . [It] has given an increased level of protection to law-abiding citizens. Before passage of the law, 21 percent of individuals who were released while awaiting trial on armed, dangerous offenses, committed another violent crime.” (quoting then-U.S. Attorney Jay B. Stephens)); see also, e.g., Beth Schwartzapfel & Bill Keller, *Willie Horton Revisited*, THE MARSHALL PROJECT (May 13, 2015), <https://www.themarshallproject.org/2015/05/13/willie-horton-revisited> (discussing and interviewing convicted murderer, who was released on weekend furlough program, escaped, and went on to commit more violent crimes).

⁴⁵ See PRETRIAL JUSTICE INST., *supra* note 42, at 5 (“In 1991, during the height of a crack cocaine epidemic in D.C., there were a number of highly-publicized drive-by shootings that focused attention on the bail system.”).

⁴⁶ See *id.* (“The resulting legislation, passed in 1992, expanded the scope of pretrial detention and included several rebuttable presumptions for detention.”).

offenses.⁴⁷ The statute also rebalanced the respective responsibility of the prosecutor and the trial judge. Instead of making bail decisions based almost exclusively on the severity of the charges brought by the prosecutor, the revised statute required the judicial officer to find by “clear and convincing evidence” that “no condition or combination of conditions will reasonably assure the appearance of the person, as required, and the safety of any other person and the community.”⁴⁸ Only under those circumstances can the judicial officer order that the person be detained before trial.⁴⁹ A person detained after such a hearing may immediately appeal the decision to the Court of Appeals for prompt resolution.⁵⁰ If the detention order is not properly supported by evidence in the record, the appellate court can order that the person be released.⁵¹ As importantly, the legislation also included language from the 1984 Federal Bail Reform Act that prevented judges from setting money bonds if those bonds would “result[] in the pretrial detention of the person.”⁵² The addition of this language was critical because it reaffirmed the purpose of bail as a mechanism to release persons rather than hold them. It commanded that no bail be set that a defendant could not pay. Given that the vast majority of those accused of a crime are poor, it effectively eliminated the setting of money bonds based on the seriousness of the crime.

Because preventive detention eligible offenses were specified by law and money bonds could no longer be used to detain those accused based on the nature of the offense, judges in the District of Columbia had to begin determining what level of risk an individual presented and order the appropriate level of community supervision to reasonably assure both that the accused would return for his or her court dates and that they would not reoffend—the twin goals of bail. With the passage of that reform legislation, money bonds began to lose their efficacy in our courthouse and consequently, bail bondsmen disappeared from the streets of Washington, D.C.⁵³ Judges became comfortable relying on risk assessment information developed by the District’s Pretrial Services Agency and on its recommendations regarding effective schemes for community supervision.

⁴⁷ See *id.* (“Carver was also successful in getting language inserted in the bill that prohibited the court from setting a financial bail that resulted in the defendant remaining in jail.”).

⁴⁸ 18 U.S.C. § 3142(e)–(f) (2012).

⁴⁹ See *id.* § 3141(a).

⁵⁰ *Id.* § 3145(b).

⁵¹ *Id.* § 3145(c).

⁵² *Id.* § 3142(c)(2).

⁵³ PRETRIAL JUSTICE INST., *supra* note 42, at 5.

I am pleased to report that over the last three years, more than 91% of persons arrested in the District of Columbia have been released on their own personal recognizance or under the supervision of the District's Pretrial Services Agency.⁵⁴ As of September 2015, the D.C. jail was at less than 50% capacity.⁵⁵ Of those defendants who were released back into the community during this past year, 89% remained arrest free during the pretrial period, and only 1% were arrested for participation in a violent crime.⁵⁶ Further, fully 90% of those who were released pretrial made all of their scheduled court appearances during the pretrial period,⁵⁷ and no one accused of a crime in the District of Columbia is being forced to await their trial in the D.C. jail simply because they cannot afford to pay a money bond.⁵⁸

III

NEW RESEARCH AND NEW STATE-LEVEL REFORM

The new research about pretrial detention is eye-opening because it confirms much of what we have suspected for some time, but may have accepted as the cost of public safety. We understand now that these practices don't serve public safety at all. Oftentimes, it is just the opposite. The Arnold Foundation recently applied an empirically based risk-assessment tool to disposed-of cases. Two key findings of their research have given us more information on the fallacy of using money to determine bail. First, nearly half of those who were released pretrial on money bonds provided by bail bondsmen were found to score as "high risk" for pretrial failure, that is, missing court or being re-arrested.⁵⁹ So the folks we should be holding in jail pretrial are getting out and usually with minimal or no supervision because they have access to money. Second, the Arnold research showed that keeping low-and-moderate-risk defendants incarcerated pretrial,

⁵⁴ 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.

⁵⁵ See *DOC Official Population Counts by Facility, August 29 Through September 4 2015*, DC.GOV, <https://web.archive.org/web/20150908104807/http://doc.dc.gov/node/307122> (last visited Aug. 17, 2016).

⁵⁶ *Performance Measures*, PRETRIAL SERVS. AGENCY FOR D.C., https://web.archive.org/web/20160405004424/http://psa.gov/?q=data/performance_measures (last visited Aug. 17, 2016).

⁵⁷ *Id.*

⁵⁸ Marimow, *supra* note 54.

⁵⁹ LAURA & JOHN ARNOLD FOUND., *DEVELOPING A NATIONAL MODEL FOR PRETRIAL RISK ASSESSMENT 1* (2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary_PSA-Court_4_1.pdf.

merely because they can't afford to pay a money bond, increases the likelihood of their future criminality.⁶⁰

The Arnold Foundation is not alone in creating research that helps support pretrial judicial decisionmaking. Other philanthropic organizations, such as the Public Welfare Foundation and the MacArthur Foundation have also committed large sums of money to fund research and support advocacy in the area of pretrial justice reform because they well understand the connection between the indiscriminate detention of poor people and its impact on families living at or near the poverty line.⁶¹ They also understand the importance of spreading the word that pretrial justice can no longer be an afterthought if we want to meaningfully address chronic poverty in our country. The federal government has also invested in such research. The Bureau of Justice Assistance and the National Institute of Corrections are seeding programs to test and demonstrate alternatives to traditional bail practice.⁶² With all of this activity, it's fair to say that there is a *movement* of pretrial reform, and it is one that I am quite pleased to say the state courts are helping to lead.

In 2012, the Conference of State Court Administrators (COSCA) released a policy paper, entitled *Evidence-Based Pretrial Release*, and conducted some judicial outreach and education about their findings and conclusions.⁶³ COSCA laid out the essential components of an evidence-based pretrial practice, and those findings were later

⁶⁰ *Id.* at 2.

⁶¹ See Press Release, MacArthur Found., MacArthur Launches \$75M Initiative to Reduce America's Use of Jails (Feb. 10, 2015), <https://www.macfound.org/press/press-releases/macarthur-launches-75m-initiative-reduce-americas-use-jails/> (describing establishment of The Safety and Justice Challenge, a nationwide initiative to reduce incarceration and pretrial detention of nonviolent offenders); *Public Welfare Foundation Announces \$3.9 Million in Grants*, PHILANTHROPY NEWS DIG. (Jan. 15, 2014), <http://philanthropynewsdigest.org/news/public-welfare-foundation-announces-3.9-million-in-grants> (noting \$600,000 grant awarded to the Pretrial Justice Institute).

⁶² See *Department of Justice Announces Recipients of New "Smart" Grant to Reform Pretrial Justice Practices*, PRETRIAL JUST. INST. BLOG (Sept. 29, 2014), <http://www.pretrial.org/department-justice-announces-recipients-new-smart-grant-reform-pretrial-justice-practices/> (praising Bureau of Justice and Assistance's "Smart Pretrial Demonstration Initiative," which awards grants to explore "cost savings and public safety enhancements that can be achieved by improving pretrial policies and practices"); *Updated: Cooperative Agreement - National Pretrial Diversion Symposium*, NAT'L INST. OF CORRECTIONS BLOG (Apr. 7, 2016, 8:50 AM), <http://community.nicic.gov/blogs/nic/archive/2016/04/07/cooperative-agreement-national-pretrial-diversion-symposium.aspx> (soliciting applicants for grant program that funds organizations that pledge to educate criminal justice stakeholders and policymakers on pretrial diversion programs).

⁶³ See ARTHUR W. PEPIN, CONFERENCE OF STATE COURT ADM'RS, 2012–2013 POLICY PAPER: EVIDENCE-BASED PRETRIAL RELEASE (2012), <http://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/Evidence%20Based%20Pre-Trial%20Release%20Final.ashx>.

adopted in a resolution issued by the Conference of Chief Justices. The white paper was a call to action to state court leaders to improve their pretrial justice systems by asking us to “[a]nalyze state law and work with law enforcement agencies and criminal justice partners to propose revisions that are necessary to support risk-based release decisions of those arrested and ensure that non-financial release alternatives are utilized and that financial release options, if utilized at all, are available without the requirement for a surety.”⁶⁴

The white paper also recommended that state court leaders engage in outreach and education on this issue, to promote the use of data in guiding any practice, and to reduce reliance on bail schedules in favor of evidence-based assessments of pretrial risk of flight and threat to public safety.⁶⁵ Already some state court chief justices have taken up the challenge of this call to action, driving important changes in their states’ pretrial rules and practices.

More than twenty jurisdictions have adopted or are in the process of implementing a Public Safety Assessment as part of their pretrial risk assessment.⁶⁶ In New York, former Court of Appeals Chief Judge Jonathan Lippman issued a clarion call for an overhaul of the state’s bail system, citing the large number of defendants being held before trial unable to pay nominal bond amounts.⁶⁷ His call to action was highlighted by several New York cases that have hit the headlines in recent years.⁶⁸ Now, Governor Andrew Cuomo has laid out plans to bring New York’s statutes in line with most of the country and the federal system by including dangerousness as a legitimate and transparent consideration for judges to rely on at bail hearings, so that judges can then make evidence-based risk assessments part of their

⁶⁴ *Id.* at 11.

⁶⁵ *Id.*

⁶⁶ Press Release, Laura & John Arnold Found., More Than 20 Cities and States Adopt Risk Assessment Tool to Help Judges Decide Which Defendants to Detain Prior to Trial (June 26, 2015), <http://www.arnoldfoundation.org/more-than-20-cities-and-states-adopt-risk-assessment-tool-to-help-judges-decide-which-defendants-to-detain-prior-to-trial/>.

⁶⁷ Press Release, N.Y. State Unified Court Sys., Chief Justice Jonathan Lippman Announces Series of Reforms to Address Injustices of NY’s Current Bail System (Oct. 1, 2015), https://www.nycourts.gov/press/PDFs/PR15_13.pdf; see also JONATHAN LIPPMAN, N.Y. STATE UNIFIED COURT SYS., THE STATE OF THE JUDICIARY 2013: “LET JUSTICE BE DONE” (2013), <https://www.nycourts.gov/ctapps/news/SOJ-2013.pdf>.

⁶⁸ See James C. McKinley Jr., *State’s Chief Judge, Citing ‘Injustice,’ Lays Out Plans to Alter Bail System*, N.Y. TIMES (Oct. 1, 2015), <http://www.nytimes.com/2015/10/02/nyregion/jonathan-lippman-bail-incarceration-new-york-state-chief-judge.html> (describing case of young individual who committed suicide while held in jail on charge of theft of a backpack); Michael Schwirtz, *Correction Dept. Investigating Death of Inmate at Rikers Island*, N.Y. TIMES (Mar. 19, 2014), <http://www.nytimes.com/2014/03/20/nyregion/correction-dept-investigating-death-of-inmate-at-rikers.html> (describing death of an inmate due to poor jail cell conditions).

tool kits for bail decisions.⁶⁹ Court leaders in New York are also implementing several other new initiatives to promote bail system reform. These measures include the automatic judicial review of bail decisions in misdemeanor cases where the defendant is unable to post bail, as well as periodic judicial review of felony cases for case viability, readiness for trial, and appropriate modifications to a defendant's bail status.⁷⁰

Teams from Arizona, Idaho, Indiana, and Wisconsin are working on implementing action plans that were developed during a Pretrial Justice Policy Forum that was convened by the National Center for State Courts and funded by the Public Welfare Foundation.⁷¹ As a result of work begun at that meeting, Chief Justice Scott Bales of Arizona has piloted the use of the Arnold Foundation's risk assessment tool statewide.⁷² With the expanded use of a validated risk assessment tool, judges across Arizona will be better able to objectively assess whether defendants can be released back into the community pretrial and thus move away from relying on money bonds, as long as the judges are also provided with ways to manage and mitigate those risks.

In New Jersey, bail reform has taken root and is moving full steam ahead, thanks in no small part to the judicial leadership provided by Chief Justice Stuart Rabner and the court system's Chief Administrative Judge, Glen Grant. The New Jersey state judiciary established a Joint Committee on Criminal Justice, comprised of representatives from all three branches of government and other stakeholder groups to study the issue of pretrial justice reform.⁷³ The committee issued a report in March 2014 that recommended the state transition from a "resource-based" system to a "risk-based" method for determining release conditions pretrial.⁷⁴ Following the issuance of that report, the legislature passed and the Governor signed into law a bill that adopted many of the committee's recommendations.⁷⁵

⁶⁹ ANDREW M. CUOMO, 2016 STATE OF THE STATE: BUILT TO LEAD 190–91 (2016).

⁷⁰ Press Release, N.Y. State Unified Court Sys., *supra* note 67.

⁷¹ PRETRIAL JUSTICE CTR. FOR COURTS, A SNAPSHOT OF PRETRIAL REFORM ACTIVITY ACROSS THE NATION 2 (2015).

⁷² See Shaila Dewan, *Judges Replacing Conjecture with Formula for Bail*, N.Y. TIMES (June 26, 2015), <http://www.nytimes.com/2015/06/27/us/turning-the-granting-of-bail-into-a-science.html> (noting Chief Justice Bales's decision to expand the program to all fifteen counties in the state).

⁷³ See N.J. JOINT COMM. ON CRIMINAL JUSTICE, REPORT OF JOINT COMMITTEE ON CRIMINAL JUSTICE 1 (2014).

⁷⁴ *Id.* at 50.

⁷⁵ Matt Arco, *Christie Signs Bail Reform Measure, Lauds Lawmakers for Bipartisanship*, NJ.COM (Aug. 12, 2014), http://www.nj.com/politics/index.ssf/2014/08/christie_signs_bail_reform_measure_lauds_lawmakers_for_bipartisanship.html.

Recently, voters in New Jersey approved a constitutional amendment that provides for pretrial detention in cases where a defendant has been identified as a serious public safety and/or flight risk in the community.⁷⁶ The new law will go into effect January 1, 2017. As importantly, the state has made it possible for thousands of its citizens who are currently being held in jail simply due to poverty to resolve their cases expediently in order to mitigate the impact of the ongoing criminogenic effects that being held in jail will have on their low risk status for future criminal conduct.

Justice Charles Daniels and the New Mexico judiciary have endorsed a proposal for a constitutional amendment similar to the one recently passed by New Jersey.⁷⁷ If approved by the legislature, it would be placed on the general election ballot in New Mexico next November.⁷⁸ Like New Jersey, the hope is that the legislation will be a catalyst for even greater progress in the pretrial arena.

By an order dated May 1, 2015, Chief Justice Leigh Saufley of Maine established an intergovernmental task force to study and update, innovate, and improve the systems and procedures affecting pretrial incarceration and restrictions in her state.⁷⁹ The task force is charged with presenting proposals for improvements to the leaders of all three branches of government so that a comprehensive bill can be considered during an upcoming regular session of the Maine legislature.⁸⁰ Since I gave this speech, the Maine legislature passed a law authorizing electronic monitoring of defendants in lieu of detention in jail.⁸¹

Utah's Judicial Council, led by Chief Justice Matthew Durrant, created a multidisciplinary committee to assess pretrial release and supervision practices in Utah's courts and to identify possible alternatives including the use of evidence-based risk-assessment tools.⁸² In

⁷⁶ Matt Arco, *Election Day 2014: Voters Approve Bail Reform Measure*, NJ.COM (Nov. 4, 2014), http://www.nj.com/politics/index.ssf/2014/11/election_day_2014_voters_approve_bail_reform_measure.html.

⁷⁷ Chris Clark, *New Mexico Judiciary Endorses Bail Reform Constitutional Amendment*, LOS ALAMOS DAILY POST (Aug. 27, 2015 4:53 PM), <http://www.ladailypost.com/content/new-mexico-judiciary-endorses-bail-reform-constitutional-amendment>.

⁷⁸ *Id.*

⁷⁹ See Order Establishing an Intergovernmental Pretrial Justice Reform Task Force (2015), www.courts.maine.gov/maine_courts/committees/2015%20PJR.pdf.

⁸⁰ *Id.*

⁸¹ An Act to Implement the Recommendations of the Intergovernmental Pretrial Justice Reform Task Force, ch. 436, 2016 Me. Laws 1146–48.

⁸² See UTAH STATE COURTS JUDICIAL COUNCIL COMM., REPORT TO THE UTAH JUDICIAL COUNCIL ON PRETRIAL RELEASE AND SUPERVISION PRACTICES 1 (2015), <https://www.utcourts.gov/resources/reports/docs/Pretrial%20Release%20and%20Supervision%20Practices%20Final%20Report.pdf> (describing the committee and its process).

November 2015 the committee submitted its report, which contains twelve recommendations to improve pretrial practices in Utah including reforms to minimize the impact of money in the pretrial decision-making process.⁸³ Both St. Louis County, Minnesota and Halifax County, North Carolina are examining racial and ethnic fairness issues in pretrial release decisions in collaboration with the American Bar Association's Racial Justice Improvement Project.⁸⁴

And this is just a snapshot of the myriad activities that are being pursued by state courts across the country.⁸⁵ State court chief justices recognize that the guarantee of equal justice in our courts starts when a defendant is first presented to the court for arraignment and a bail decision. We are committed to ensuring that from the beginning to the end, our processes for making these critical decisions are fundamentally fair.

CONCLUSION

In 2011, on the fiftieth anniversary of the Vera Conference, then Attorney General Eric Holder convened his own National Conference on Pretrial Justice Reform. At that time, Attorney General Holder recalled Attorney General Kennedy's call to action and unleashed this new generation of reform with the following statement:

By competently assessing risk of release, weighing community safety alongside relevant court considerations, and engaging with pretrial service providers – in private agencies, as well as in courts, probation departments, and sheriff's offices – we can design reforms to make the current system more equitable, while balancing the concerns of judges, prosecutors, defendants and advocacy organizations. We can help those serving on the bench make informed decisions that improve cost-effectiveness and preserve safety needs, as well as due process. And we can spark, as Robert Kennedy did, not only a vital discussion – but unprecedented progress.⁸⁶

⁸³ See *id.* at 32–53 (outlining the committee's recommendations).

⁸⁴ PRETRIAL JUSTICE CTR. FOR COURTS, *supra* note 71, at 2.

⁸⁵ See, e.g., Press Release, Pretrial Justice Inst., PJI Commends California Chief Justice's Call for Bail Reform (Mar. 9, 2016), <http://www.pretrial.org/pretrial-justice-institute-commends-california-chief-justices-call-for-bail-reform/> (highlighting Chief Justice Tani Cantil-Sakauye's call for bail reform and emphasis on policy alternatives); see also *Reform Activities*, PRETRIAL JUSTICE CTR. FOR COURTS, <http://www.ncsc.org/Microsites/PJCC/Home/Reform-Activities.aspx> (last visited Aug. 17, 2016) (summarizing initiatives in each state related to pretrial reform efforts).

⁸⁶ Eric Holder, U.S. Attorney Gen., Attorney General Eric Holder Speaks at the National Symposium on Pretrial Justice (June 1, 2011), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-symposium-pretrial-justice>.

The time is now. If we continue to push forward, we will finally end our country's reliance on money bail when making our pretrial release decisions. This third attempt at reform can be the charm, and we can finally end the injustice of detaining people before they are found guilty of any crime merely because they cannot afford to pay for their freedom.