REFORMING PRETRIAL DECISION-MAKING

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Pretrial reform efforts have enviable momentum. Reformers have won landmark legal victories dismantling oppressive money bail systems, secured some sweeping state legislative changes, prompted widespread adoption of actuarial risk assessment instruments, attracted significant private foundation investments, and accumulated an impressive array of other victories. These ambitious initiatives aim to shrink the country's swollen jail populations but they may do too little to change fundamental aspects of judicial decision-making that have been a persistent source of pretrial dysfunction.

This Article evaluates how effective current reforms will be in reshaping judicial behavior. To provide some background, Part II analyzes the decision-making processes that have historically led judges to rely too heavily on pretrial detention and overly restrictive release and outlines the costs of these flawed decisions. Pretrial reform efforts include a range of different strategies and Part III evaluates how well these existing approaches redefine pretrial decision-making. Part IV proposes improvements to both the definition and the measurement of pretrial risks. Part V calls for greater emphasis on judges' obligations to mitigate harm and promote successful pretrial release.

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I. INTRODUCTION

Bail reform efforts currently have enviable momentum. Support for bail reform has increased seemingly exponentially across a range of different constituencies, including financial backing from private

foundations,[1] significant news coverage and editorial endorsements,[2] and a noticeable uptick in scholarly attention.[3] Public interest lawyers have won numerous class action lawsuits undoing decades-old money bail systems.[4] Both Google and Facebook announced in

1. *Criminal Justice Reform*, CHARLES KOCH INST., https://www.charleskochinstitute.org/issue-areas/criminal-justice-policing-reform/ (last visited Nov. 26, 2020) (offering grants supporting criminal justice reform efforts, including efforts to ensure that the government respects constitutional restrictions on excessive bail and fines); *Pretrial Justice*, ARNOLD VENTURES, https://www.arnoldventures.org/work/pretrial-justice (last visited Nov. 26, 2020); Ryan J. Reilly, *Mark Zuckerberg and Priscilla Chan are Funding the Fight to End Money Bail*, HUFFPOST (Oct. 10, 2017, 3:54 PM), https://www.huffingtonpost.com/entry/chan-zuckerberg-bail-industry-criminal-justice-reform_us_59dcda8de4b0b34afa5c78c5; Steve Walentik, *MacArthur Foundation-Funded Initiative Has Helped Reduce Jail Population in St. Louis County Over Past 2 Years*, USML DAILY (Aug. 27, 2018), https://blogs.umsl.edu/news/2018/08/27/huebner-macarthur/.

2. *See, e.g.*, Editorial Board, *Cash Bail's Lonely Defender*, N.Y. TIMES (Aug. 25, 2017), https://www.nytimes.com/2017/08/25/opinion/cash-bails-lonely-defender.html?mcubz=0&_r=0 ("The only defender of the system, it seems, is the industry that profits from it."); Nicole Hong & Shibani Mahtani, *Cash Bail, a Cornerstone of the Criminal-Justice System, Is Under Threat*, WALL ST. J. (May 22, 2017, 11:26 AM), https://www.wsj.com/articles/cash-bail-a-cornerstone-of-the-criminal-justice-system-is-under-threat-1495466759; Jason L. Riley, *Bipartisanship on Bail*, WALL ST. J. (Sept. 25, 2018, 6:54 PM), https://www.wsj.com/articles/bipartisanship-on-bail-1537916063; The Times Editorial Board, *Editorial: How the Poor Get Locked Up and the Rich Go Free*, L.A. TIMES (Aug. 16, 2017), http://www.latimes.com/opinion/editorials/la-ed-bail-reform-20170816-story.html; Jeremy Travis, *Cash Bail System Makes Poverty a Crime*, USA TODAY (May 11, 2018, 5:32 PM), https://www.usatoday.com/story/opinion/policing/2018/05/11/poverty-bail-risk-jail-policing-usa/555928002/.

3. *See, e.g.*, SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM (2017) [hereinafter BAUGHMAN, BAIL BOOK]; CHRISTINE S. SCOTT-HAYWARD & HENRY F. FRADELLA, PUNISHING POVERTY: HOW BAIL AND PRETRIAL DETENTION FUEL INEQUALITIES IN THE CRIMINAL JUSTICE SYSTEM (2019); Russell M. Gold, *Jail as Injunction*, 103 GEO. L.J. 501 (2019); *see also* Shima Baradaran Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 949, 956 (2020) [hereinafter Baughman, *Dividing Bail*]; Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J.F. 1098, 1113 (2019); Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 678 (2018) [hereinafter Gouldin, *Defining Flight Risk*]; Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 712 (2017); Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2222–23 (2019); Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 304, 311 (2018); Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 424 (2016) [hereinafter Wiseman, *Fixing Bail*]; Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1401 (2017).

4. *See, e.g.*, *Challenging the Money Bail System*, C.R. CORPS, https://www.civilrightscorps.org/work/wealth-based-detention (last visited Nov. 26, 2020) (collecting cases); *Ending American Money Bail*, EQUAL JUST. UNDER L., https://equaljusticeunderlaw.org/money-bail-1 (last visited Nov. 26, 2020) (collecting cases).

2018 that the companies will no longer provide advertising space to bail bonds corporations.[5]

Even prominent celebrities have joined the fight. Hip-hop mogul Jay-Z has wielded his celebrity to focus public attention on bail reform, both through a documentary about Kalief Browder's three years of pretrial detention at Rikers Island and with a widely-reported June 2017 commitment to help bail men out of jail so that they could spend Father's Day with their families.[6] EGOT-winning music producer and songwriter John Legend, who serves with actor Danny Glover on the advisory board for The Bail Project's national bail fund, authored a CNN op-ed on the need for bail reform and narrated a Color of Change animated video, *The Truth About the Cash Bail Industry*.[7]

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5. *See* David Graff, *Google Bans Ads for Bail Bonds Services*, GOOGLE ADS (May 7, 2018), https://www.blog.google/products/ads/google-bans-ads-for-bail-bonds-services/ (announcing Google's new policy to prohibit ads, which promote bail bond services on their platform in an order to "protect users from deceptive or harmful products" and in an effort to support bail reform); Jon Schuppe, *Bail-Bond Industry Suffers Another Blow as Facebook and Google Ban Ads*, NBC NEWS (May 8, 2018, 9:16 PM), https://www.nbcnews.com/news/us-news/google-facebook-say-they-re-banning-profit-bail-bond-ads-n872386 (discussing Google and Facebook's decisions to block bail-bond ads to protect users from damaging or hurtful content).

6. Shawn Carter, *Jay Z: For Father's Day, I'm Taking On the Exploitative Bail Industry*, TIME (June 16, 2017, 2:48 PM), http://time.com/4821547/jay-z-racism-bail-bonds/ (discussing the "injustice of the profitable bail bond industry" and Jay-Z's support for organizations that "bail out fathers who can't afford the due process our democracy promises" on Father's Day). Jay-Z has also donated to Promise, a decarceration start-up that works on alternatives to holding low-risk offenders in jail "simply because they can't afford bail." Megan Rose Dickey, *Jay-Z's Roc Nation and First Round Capital Invest $3 Million in Bail Reform Startup Promise*, TECH CRUNCH (Mar. 19, 2018, 9:00 AM), https://techcrunch.com/2018/03/19/jay-zs-roc-nation-and-first-round-capital-invest-3-million-in-bail-reform-startup-promise/; *see also* Kory Grow, *Jay Z Talks Kalief Browder Doc, Inhumanity of Solitary Confinement*, ROLLING STONE (Oct. 6, 2016, 6:22 PM), https://www.rollingstone.com/movies/movie-news/jay-z-talks-kalief-browder-doc-inhumanity-of-solitary-confinement-113567/ (discussing the production of *Time: The Kalief Browder Story*, which focused on a range of criminal justice system failures including, but not limited to, Browder's three-year pretrial detention at Rikers Island).

7. *About*, FREEAMERICA, https://letsfreeamerica.com/about/ (last visited Nov. 26, 2020). In September 2018, Legend became the first African-American man to win an Emmy, Grammy, Oscar, and Tony award. Lisa Respers France, *John Legend's EGOT Win Makes History*, CNN (Sept. 10, 2018, 12:28 PM), https://www.cnn.com/2018/09/10/entertainment/john-legend-egot-win/index.html; John Legend & Michael Gianaris, *How New York's Bail System Makes Innocent People Less Safe*, TIME (Mar. 22, 2019, 1:50 PM), https://time.com/5556823/bail-reform-criminal-justice-system/; *Our Team*, THE BAIL PROJECT, https://bailproject.org/team/ (last visited Oct. 13, 2020); Sameer Rao, *John Legend Explains How Cash Bail Traps People of Color*, COLORLINES (May 22, 2018, 2:41 PM), https://www.colorlines.com/articles/john-legend-explains-how-cash-bail-traps-people-color.

The last several years have seen dramatic legislative changes and significant constitutional amendments in states like Alaska, California, Colorado, Connecticut, Illinois, Kentucky, New Jersey, New Mexico, New York, and Oregon,[8] although reforms in both California and New York have faced political backlash.[9] In some jurisdictions, prosecutorial policy changes have driven reforms.[10] In others, court decisions or courts' changes to their own rules have reduced reliance on money bail, required consideration of a defendant's ability to pay bail, or restricted the use of bail schedules.[11] These reforms are significant progress toward rolling back systems of wealth-based detention, and they make judicial decision-making somewhat more accurate, consistent, and transparent.[12]

Even with the current flurry of bail reform activity, judges continue to be the primary pretrial gatekeepers.[13] As a result, the processes of judicial decision-making—and the extent to which current reforms address documented flaws with those processes—demand ongoing scrutiny. This Article focuses on those questions while also broadening the lens to consider other aspects of pretrial decision-making that are understudied in academic literature and receive too little focus in current reform efforts. We need more critical analysis of the vulnerabilities of existing decision-making processes that promote overreliance on pretrial detention or the imposition of overly restrictive release conditions.

Part II provides background information about pretrial decision-making and the costs of mistakes. Part III briefly surveys the pretrial reform landscape and evaluates how new reforms envision the judicial role and reshape pretrial decision-making. While some reforms have placed limits on judicial power, most have not significantly reduced judicial discretion over pretrial decision-making.[14]

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8. *See* sources cited *infra* notes 108, 109, 135, 136, 155–62.

9. Kim Bellware, *Class, Race, and Geography Emerge as Flashpoints in New York's Bail Reform Debate*, WASH. POST (Feb. 15, 2020, 1:41 PM), https://www.washingtonpost.com/nation/2020/02/15/new-york-bail-reform/ (explaining the "bitter debate" over New York's new bail reform laws); Jazmine Ulloa, *California's Historic Overhaul of Cash Bail is Now on Hold, Pending a 2020 Referendum*, L.A. TIMES (Jan. 16, 2019, 7:25 PM), https://www.latimes.com/politics/la-pol-ca-bail-overhaul-referendum-20190116-story.html ("A day after [California Governor] Brown signed the law, a national coalition of bail agency groups launched its referendum drive, raising about $3 million and collecting more than enough signatures to qualify the measure in just two months.").

10. *See* PRETRIAL JUST. INST., WHAT'S HAPPENING IN PRETRIAL JUSTICE 5–6, 15 (2020) (identifying multiple examples of prosecutor's offices across the country changing their policies regarding bail).

11. Valdez-Jimenez v. Eighth Jud. Dist. Ct., 460 P.3d 976, 986 (Nev. 2020).

12. *See infra* Parts III–IV.

13. *See infra* Part III.

14. *See infra* Subpart II.B and Part III.

In two prior papers in the pretrial context, I focused on how and how well courts push the government to justify pretrial detention (or other pretrial liberty restraints). The first paper, *Disentangling Flight Risk from Dangerousness*, critiques most risk assessment tools for assigning a combined pretrial failure score to defendants (instead of scoring appearance and public safety risk separately).[15] *Defining Flight Risk*, the second paper, surfaces longstanding problems with our conception of appearance risk, or flight risk, and calls for a more sophisticated and nuanced approach to measuring and managing pretrial appearance risk.[16]

Building on that work, in Part IV, I analyze specific components of the pretrial decision-making process to identify persistent flaws in the way that pretrial risk is defined, described, and measured. Even in an era that seems reasonably described as a "risk assessment revolution," surprising issues are baked into the risk assessment tools being enthusiastically adopted around the country. I outline proposals to define and measure public safety and appearance risks more precisely and argue that risk numbers are being communicated to judicial decisionmakers in misleading ways. I also question the emphasis on some risks and the continued neglect of other known harms to defendants and their communities.

Finally, Part V evaluates whether pretrial reforms have focused sufficiently on the task of pretrial risk management. Although reformers seek to improve the accuracy of judicial decision-making, particularly through the use of risk assessment tools, those reforms may obscure an essential aspect of a judge's pretrial responsibility: to manage or mitigate pretrial risk by effectively gauging defendants' needs and providing appropriate interventions, supports, or conditions of release.[17] This Part focuses on whether reform efforts help judges understand their obligations to manage pretrial risks in ways that protect defendants' pretrial liberties and minimize harm to communities.

II. PRETRIAL DECISIONS

A. Liberty, Restraint, Detention

In the pretrial context, what is often described as a single binary decision—liberty or detention—is actually a choice of points on a spectrum between two poles: with pretrial liberty (what has long been

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15. Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. REV. 837, 837 (2016) [hereinafter Gouldin, *Disentangling*].

16. Gouldin, *Defining Flight Risk*, *supra* note 3, at 677.

17. In a separate work in progress, I explore whether reframing the judicial role—describing the judicial role as one of facilitating pretrial success—might helpfully reshape the pretrial process. Lauryn P. Gouldin, Framing for Release (Sept. 1, 2020) (unpublished manuscript) (on file with author) [hereinafter Gouldin, *Framing for Release*].

called release on recognizance or "ROR") at one end and pretrial detention at the other. The points between those two extremes include a range of different forms and degrees of conditional release or restraints on liberty, which are discussed in more detail below.[18] What complicates the analysis further is that for each individual defendant, multiple pretrial outcome decisions may be made during the pretrial period.[19] Defendants may be detained for days or weeks before judges are persuaded to release them with or without conditions.[20] Conditional release decisions may also be revisited during the pretrial period.[21]

These liberty-restraint-detention decisions are (or should be) the product of a series of separate determinations.[22] The ultimate pretrial decision is whether there are any legitimate grounds for a judge to interfere with a defendant's pretrial liberty. Judges making pretrial determinations about whether defendants can be released or must be detained before trial are generally making predictions about two broad categories of risk: (i) nonappearance risk (the risk that a defendant will not appear for future court dates), or (ii) public safety risk (the risk that a defendant may commit a crime if released).[23]

If there are no legitimate grounds to interfere with a defendant's pretrial liberty, the defendant should remain free until any future court appearances.[24] Although federal and state statutes explicitly state that ROR is the default choice,[25] over the past several decades, rates of ROR have dropped significantly while pretrial detention rates have skyrocketed.[26]

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18. Jenny E. Carroll, *Beyond Bail*, FLA. L. REV. 1, 21–22 (forthcoming 2020) ("Defendants released on conditions are routinely characterized as being set free—as opposed to detained or released on bail. However, such conditions may do as much or more to restrict the defendant's current and future liberty as monetary bail."). *See generally* Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490 (2018) (discussing pretrial restraints).

19. Researchers who attempt to measure pretrial outcomes for defendants face challenges trying to categorize these mixed outcomes. Evan Lowder, April Presentation to Duke Criminal Law Workshop (Apr. 6, 2020).

20. PATRICK LIU ET AL., THE HAMILTON PROJECT: THE ECONOMICS OF BAIL AND PRETRIAL DETENTION 5 (2018).

21. STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE 4 (AM. BAR. ASS'N 2007).

22. SCOTT-HAYWARD & FRADELLA, *supra* note 3, at 32–35 (describing the four decisions that judges make: (i) detention, (ii) release on recognizance, (iii) conditions of release, and (iv) amount of money bail (if financial conditions imposed)).

23. *See* Gouldin, *Disentangling*, *supra* note 15, at 842.

24. *See, e.g.*, 18 U.S.C. § 3142(b) (directing judges to release defendants without conditions unless such release "will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community").

25. *Id.*

26. BAUGHMAN, BAIL BOOK, *supra* note 3, at 3–4; THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUST. STATS., PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 2 (2007).

If the government identifies legitimate public safety or appearance risks, federal and state statutes bind judges to choosing the least restrictive set of conditions that will achieve the government's specified interests.[27] The spare language of the Eighth Amendment's excessive bail clause that "[e]xcessive bail shall not be required" is also at least a modest constraint: the Supreme Court interprets it as a prohibition on the use of pretrial detention, money bail, or other conditions of pretrial release that are excessive in light of the government's objectives.[28] If judges cannot identify conditions of release that will achieve these objectives, they are empowered (as a last resort in the statutes if not in practice) to order high-risk defendants to be detained.[29]

Although reforms around the country have reduced reliance on money bail, it is still the most frequently utilized condition of release.[30] Too often, bail is unaffordable for defendants, leading to detention.[31] In the past several years, however, lawsuits challenging pretrial decision-making in both federal and state courts have successfully ended wealth-based pretrial detention in some jurisdictions. As Kellen Funk explains, those court victories have turned primarily on equal protection, substantive due process, and procedural due process challenges, not on the Eighth Amendment.[32]

Judges can also impose other nonfinancial conditions of release, including requiring the defendant to: submit to (and potentially pay for) electronic monitoring; remain in the custody of a third party; seek or maintain employment or education; refrain from associating with particular people; abide by restrictions on travel and housing; comply with curfews or restrictions on living arrangements; refrain from excessive alcohol use; avoid all drug use; not possess weapons; report

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27. *See, e.g.*, 18 U.S.C. § 3142(c)(1)(B) (limiting judges to imposing the "least restrictive condition or combination of conditions" that will address the specified concerns). The following examples show state statutes, rules, and cases that require the use of the least restrictive means. ALASKA STAT. § 12.30.011(b) (2020); CONN. GEN. STAT. § 54-63b(b), 54-64a (2013); D.C. CODE § 23-1321(c)(1)(B) (2012); ME. REV. STAT. ANN. tit. 15, § 1026 (2013); MASS. GEN. LAWS ch. 276, § 58A(2)(B) (2005); UTAH CODE ANN. § 77-20-10 (LexisNexis 2020) (bail on appeal) (effective until Oct. 1, 2020); *see also* N.C. BAIL POLICY FOR TWENTY-SIXTH JUD. DIST.; N.M. R. ANN. 5-401(B); R.I. BAIL GUIDELINES R. II(2); WASH. SUPER. CT. CRIM. R. 3.2(b); Thomas v. State, 542 S.W.2d 284, 290 (Ark. 1976); Brill v. Gurich, 965 P.2d 404, 408 (Okla. Crim. App. 1998).

28. Gouldin, *Defining Flight Risk*, *supra* note 3, at 847 (analyzing excessive bail provision in greater detail but noting that it has not provided defendants with much protection from pretrial detention or overregulated pretrial release).

29. *Id.*

30. COLIN DOYLE, CHIRAAG BAINS & BROOK HOPKINS, BAIL REFORM: A GUIDE FOR STATE AND LOCAL POLICYMAKERS 1 (2019), http://cjpp.law.harvard.edu/assets/BailReform_WEB.pdf.

31. Gouldin, *Disentangling*, *supra* note 15, at 840.

32. Funk, *supra* note 3 at 1102–11 (analyzing constitutional claims in detail); *id.* at 1110 ("In all the recent challenges, the bell that largely hasn't rung is the Eighth Amendment's prohibition on 'excessive bail.'").

regularly to supervising authorities; and/or undergo medical, psychiatric, and/or substance abuse treatment.[33] Most statutes permit judges to impose other appropriate conditions of release.[34] These provisions make clear that judges are not merely supposed to predict pretrial risk; they are empowered to mitigate it. Their job at the pretrial stage is to figure out what levers to pull (if any) to assure the appearance of the defendant at future court proceedings and to protect the safety of the community.[35]

What level of risk justifies what type of intervention? There are no comprehensive statutory guides about this, but California's 2019 bail legislation seems to come closest to trying to create that sort of scheme.[36] Specifically, under SB 10, a person whose risk to public safety and flight risk is determined to be "low" will be released with the least restrictive nonmonetary conditions possible.[37] Local standards determine whether "medium-risk" individuals are detained or released.[38] Judges are required to keep "high-risk" individuals in custody until their arraignment and then can determine whether to release them from custody.[39]

Some statutes, which are intended to provide guidance to judges about potentially high-risk defendants, create presumptions of detention for more serious charged crimes.[40] Bail schedules adopted in different jurisdictions similarly set default bail amounts based on the offense of arrest.[41] There are real questions, however, about how well the offense of arrest predicts pretrial risks.[42] In addition, as noted above, bail schedules are increasingly being abandoned because of successful equal protection challenges (arguing that the schedules effectively create an unconstitutional system of wealth-based detention as opposed to serving any meaningful risk management function).[43]

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33. *Id.* at 853–54; *see also* Carroll, *supra* note 18, at 43.

34. *See, e.g.*, 18 U.S.C. § 3142(c)(1)(B)(xiv) (2012) (stating that the court may require the defendant to "satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community"); *see also* Carroll, *supra* note 18, at 6–7, 39–40 (detailing the types of conditions judges routinely impose).

35. Gouldin, *Disentangling*, *supra* note 15, at 845, 847.

36. *See* 2018 Cal. Legis. Serv. Ch. 244 (S.B. 10) (West).

37. *Id.*

38. *Id.*

39. *Id.*

40. Gouldin, *Disentangling*, *supra* note 15, at 850.

41. *Id.* at 866.

42. Wiseman, *Fixing Bail*, *supra* note 3, at 446.

43. *See, e.g.*, Buffin v. City & County of San Francisco, No. 15-cv-04959, 2019 WL 1017537, at *5, *18 (N.D. Cal. Mar. 4, 2020) (holding bail schedules and lack of individualized assessment unconstitutional; "'operational efficiency' does not trump a significant deprivation of liberty"); ODonnell v. Harris County., 251 F. Supp. 3d 1052, 1156 (S.D. Tex. 2017), *aff'd as modified*, 882 F.3d 528 (5th Cir. 2018) ("These policies systematically detain misdemeanor defendants who are otherwise eligible for release before trial but whose indigence makes them unable

Judicial power over these pretrial decisions is supposed to be constrained by the statutory and constitutional provisions described above. As Jenny Carroll explains, these provisions suggest a "measured, precise, and just" process that differs in troubling ways from the realities of pretrial judicial decision-making.[44]

B. Problems with Judicial Gatekeeping

Judges have traditionally been the principal pretrial gatekeepers, and their discretion has long been the focus of pretrial policymaking.[45] Efforts to cabin pretrial judicial decision-making extend back centuries and are reflected in the framers' explicit effort to prevent judges from imposing "excessive bail."[46] The drafters of the Eighth Amendment, like the drafters of the British Bill of Rights of 1689 on which the Eighth Amendment was modeled, attempted to limit judges' ability to set high bails in order to ensure pretrial detention.[47]

The desire to fix the perennial problem of pretrial judicial discretion continues to shape reform efforts.[48] Reformers seek ways

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to pay a secured financial condition of release . . . . The evidence shows that secured financial conditions of release are not more effective at meeting the County's interests than unsecured or nonfinancial conditions of release in misdemeanor cases.").

44. Carroll, *supra* note 18, at 43 ("But the world of pretrial release operates outside of theory.").

45. Gouldin, *Disentangling*, *supra* note 15, at 844, 848.

46. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); *see also* Gouldin, *Disentangling*, *supra* note 15, at 845–47, 871 (tracing the origins of the "excessive bail" language in the Eighth Amendment); Samuel Wiseman, *Discrimination, Coercion, and the Bail Reform Act of 1984: The Loss of the Core Constitutional Protections of the Excessive Bail Clause*, 36 FORDHAM URB. L.J. 121, 149–50 (2009) [hereinafter Wiseman, *Discrimination*].

47. Wiseman, *Discrimination*, *supra* note 46, at 127 (explaining that judges could effectively order pretrial detention "by deliberately setting bail so high that defendants could not pay"); *see also* Hermine H. Meyer, *Constitutionality of Pretrial Detention*, 60 GEO. L.J. 1381, 1454 (1972). Although earlier generations of bail reforms focused on the problems of judicial decision-making, those ambitious efforts did not displace judges as the primary pretrial decisionmakers. *See* Gouldin, *Disentangling*, *supra* note 15, at 872–85 (analyzing pretrial processes in federal and state statutes).

48. John S. Goldkamp & E. Rely Vîlcică, *Judicial Discretion and the Unfinished Agenda of American Bail Reform: Lessons from Philadelphia's Evidence-Based Judicial Strategy*, *in* STUDIES IN LAW, POLITICS, AND SOCIETY: SPECIAL ISSUE NEW PERSPECTIVES ON CRIME AND CRIMINAL JUSTICE 115, 117, 129 (Austin Sarat ed., vol. 47, 2009) (explaining that bail reform efforts must include "a viable method for addressing the difficult problems of judicial discretion that lie at the core of bail, pretrial release, and detention problems in the United States"); JOHN S. GOLDKAMP & MICHAEL R. GOTTFREDSON, POLICY GUIDELINES FOR BAIL: AN EXPERIMENT IN COURT REFORM 14–15 (1985).

to improve, or to limit, judicial decision-making.[49] Although pretrial reforms have shifted some pretrial discretion to other actors, judges remain pivotal decisionmakers in the pretrial process.[50] Whether current bail reform efforts will translate into meaningful increases in pretrial release rates depends on whether and how judicial behavior will change.

Judges' pretrial decisions are prone to a host of different errors that affect how judges view the liberty-restraint-detention choices they are given. Some of these decision-making errors have received significant attention in this generation of pretrial reform,[51] but others have not.

First, judges make inaccurate probability judgments. Judges have long relied on subjective, intuitive, gut calculations of the risks posed by defendants if released.[52] Judges' pretrial decisions are also inconsistent, from judge to judge and from one defendant to the next.[53] For decades, scholars have documented "large and systematic differences" in pretrial judicial decision-making that are attributable to "judge-specific preferences rather than differences in case composition."[54] Despite these deficits, judges may, like other professionals, be overconfident about their risk predictions.[55]

Many jurisdictions are focused on improving these accuracy and consistency problems by calling for judges to use risk assessment tools.[56] There is clearly an expectation that with better risk information, judges will make better release decisions.[57] As outlined

49. Wiseman, *Fixing Bail*, *supra* note 3, at 455 (describing "judicial discretion" as a "significant factor" in the pretrial detention crisis).

50. *See infra* Part III.

51. Brandon L. Garrett & John Monahan, *Judging Risk*, 108 CALIF. L. REV. 439, 450 (2020); Gouldin, *Defining Flight Risk*, *supra* note 3, at 742; Gouldin, *Disentangling*, *supra* note 15, at 866–67.

52. Gouldin, *Disentangling*, *supra* note 15, at 867.

53. *See, e.g.*, Anna Maria Barry-Jester, *You've Been Arrested. Will You Get Bail? Can You Pay It? It May All Depend on Your Judge*, FIVETHIRTYEIGHT (June 19, 2018), https://fivethirtyeight.com/features/youve-been-arrested-will-you-get-bail-can-you-pay-it-it-may-all-depend-on-your-judge/ ("A FiveThirtyEight analysis of 105,581 cases handled by The Legal Aid Society, the largest public defender organization in New York, found that how much bail you owe—and whether you owe it at all—can depend on who hears your case the day you're arraigned.").

54. Yang, *supra* note 3, at 1408.

55. Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 5 (1994) ("[I]t is exactly through this blind faith in their impartiality that judges may gain a false sense of confidence in their decisions."); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1225–26 (2009) [hereinafter Rachlinski et al., *Unconscious Racial Bias*] ("[J]udges might be overconfident about their abilities to control their own biases" and may, thus, "fail to engage in corrective processes on all occasions.").

56. Sarah L. Desmarais et al., *Predictive Validity of Pretrial Risk Assessments: A Systematic Review of the Literature*, CRIM. J. & BEHAV., 2–3 (forthcoming 2020); Yang, *supra* note 3, at 1485–86.

57. Yang, *supra* note 3, at 1483.

in Part IV, however, these efforts to make risk calculations more accurate are flawed in significant ways.

Judges' pretrial decisions skew toward detention and toward imposing excessive conditions of release for other reasons as well. One significant contributing factor—judicial risk aversion—requires more explicit focus in reform efforts.[58]

Our system is structured so that judges bear sole "responsibility" for salient pretrial release "mistakes" (e.g., defendants who are accused of committing violent offenses while on pretrial release), which are likely to be splashed across the front page.[59] As Sam Wiseman explains, "there is a significant risk of public scorn if a released defendant flees justice, or worse, commits a violent crime while on pretrial release."[60]

Judges are vested with almost unreviewable discretion in making pretrial release decisions, and they are not otherwise held accountable for over detention or for over management of risk when it occurs.[61] When judges (i) mistakenly order pretrial detention (for defendants whose risk levels were too low to justify detention), (ii) mistakenly compel a defendant to cobble together a financially crippling bail figure to secure release, or (iii) order electronic monitoring for a defendant who does not need that level of supervision, these mistakes are hidden from public view (and from the judges themselves).[62] Judges also receive limited feedback about pretrial release successes—defendants who return to court on schedule and who do not commit crimes on release.[63] Taken together,

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58. Nicole M. Myers, *Shifting Risk: Bail and the Use of Sureties*, 21:1 CURRENT ISSUES IN CRIM. J. 127, 128 (2009) (concluding that overreliance on money bail is the product of "an increasing culture of risk aversion which is permeating the entire criminal justice system"); *see also* Benjamin L. Berger & James Stribopoulos, *Risk and the Role of the Judge: Lessons from Bail*, *in* TO ENSURE THAT JUSTICE IS DONE: ESSAYS IN MEMORY OF MARC ROSENBERG (Benjamin L. Berger et al., eds., 2017) (arguing that "no meaningful reform of [Canadian] bail practices can occur without addressing what some scholars have called a 'culture of risk aversion' in the courts").

59. The quotes used in the text here are intended to reflect some concern about this framing. It may unhelpfully reinforce problematic security-obsessed narratives about the preventability of future crime. *See infra* Subpart IV.E.

60. Wiseman, *Fixing Bail*, *supra* note 3, at 428–29 ("While no one wants to be the object of public ire, the problem is particularly acute for elected judges, of whom there are many."). These pressures arise in misdemeanor cases as well as felony cases. Shima Baradaran Baughman, *The History of Misdemeanor Bail*, 98 B.U. L. REV. 837, 870 (2018) [hereinafter Baughman, *History of Misdemeanor Bail*] (describing judges' fear that "releasing an individual charged with any crime will lead to violent crime").

61. Dorothy Weldon, *More Appealing: Reforming Bail Review in State Courts*, 118 COLUM. L. REV. 2401, 2422 (2018); Wiseman, *Fixing Bail*, *supra* note 3, at 428.

62. Wiseman, *Fixing Bail*, *supra* note 3, at 428, 430, 431–32 (explaining that the decision to detain has few downsides for a judge as the judge will not directly experience a penalty for an unnecessary detention).

63. *Id.* at 428.

these structural features encourage judges to err on the side of detention when evaluating pretrial risk.[64]

C. Balancing Pretrial Interests

Pretrial decisions naturally involve considering the interests of the community alongside a defendant's liberty rights.[65] There is an unfortunate tendency to characterize this pretrial "balancing" as a zero-sum binary choice: individual liberty versus community security.[66] Perhaps unsurprisingly, on that simple judicial scale, one individual defendant's intangible liberty injuries frequently pale in comparison to the potential harms that whole communities might suffer.[67] It is also highly problematic that the individual whose rights are in the balance has been labeled, by virtue of his or her arrest, as a criminal.[68]

Defendants also fare poorly in these pretrial balancing decisions because judges too often exclude the defendant from their vision of the "community" whose interests and safety must be protected.[69] Judges, like other system actors, often express concern about community safety in the pretrial context. And potential threats to

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64. Gouldin, *Defining Flight Risk*, *supra* note 3, at 681; *see also* Baughman, *History of Misdemeanor Bail*, *supra* note 60, at 870 (stating how fewer defendants enjoy pretrial release because of the "baseless fear of judges that releasing an individual charged with any crime will lead to violent crime"); Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L. & SOC. SCI. 203, 221 (2017).

65. Yang, *supra* note 3, at 1450–51 (explaining that "there is almost universal agreement that bail judges should be engaging in some form of cost-benefit analysis"); AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE 29–30 (3d ed. 2007) (stating "the judicial decision of whether to release or detain a defendant requires judges to 'strike an appropriate balance' between the competing societal interests of individual liberty, court appearance, and public safety").

66. Yang, *supra* note 3, at 1451.

67. *Id.* at 1405; *see also* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 192 (2002) (explaining that in the sentencing context, "[i]f it relates to the release of a convicted offender, then any level of risk is unacceptable. Their calculations are simple—the liberty interests of the prisoner are set at zero if his or her release might expose the public to avoidable danger, or require the responsible official to run any substantial political risk.").

68. Anna Roberts, *Arrests As Guilt?*, 70 ALA. L. REV. 987, 989 (2019) (explaining that "in a wide range of ways, in a wide range of contexts, and in the assumptions of a wide range of people, arrests appear to be fused with guilt. The stage that is supposed to lie between arrest and adjudication—that period of diligent investigation, zealous representation, exploration of defenses, and possible dismissal—has too often collapsed in our implicit, and sometimes explicit, understandings of the criminal legal system.").

69. Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 265 (2019) (describing the need to "include and even prioritize the voices of those marginalized populations who are most directly impacted by criminal procedural practices").

public safety are also frequently amplified in media reporting. These discussions, however, have traditionally ignored entirely the actual harms that mass pretrial incarceration inflicts on marginalized communities.[70]

Scholars are increasingly focused on the costs that pretrial detention or overly restrictive pretrial release imposes on defendants.[71] There is also greater awareness of the burdens borne by families and by communities whose members are detained unnecessarily before trial.[72]

D. The Costs of Flawed Pretrial Decisions

Studies of pretrial detention populations—which show significant numbers of low-risk detainees—paint a grim picture of system failure.[73] Judges continue to overestimate and/or overregulate pretrial risk.[74]

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70. *See* Janet Moore, *The Antidemocratic Sixth Amendment,* 91 WASH. L. REV. 1705, 1729 (2016) (pointing out that poor people and people of color are in the best position to assess defense performance because of their "disproportionate contact with crime and criminal legal systems[,]" but "claims of superior judicial expertise in evaluating counsel performance" outweigh the voices of those in the affected communities); *cf.* Simonson, *supra* note 69, at 253; Erin Collins, *Against the Evidence-Based Paradigm* (2020) (unpublished manuscript, on file with author) ("We could try to change the meaning of public safety to center those who are most impacted by criminal justice policies. Or we could attempt to measure more intangible values like dignity, justice, and equity, and add those to this equation for criminal justice.").

71. Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. REV. 1, 4–7 (2017); Carroll, *supra* note 18, at 6–7 (focusing on conditions of release); Yang, *supra* note 3, at 1401–03, 1411–13.

72. Baughman, *supra* note 71, at 5–7.

73. According to Department of Justice estimates, up to two-thirds of the members of this population pose "no significant risk to . . . the community" and "a low risk of flight." Samuel R. Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L.J. 1344, 1352 (2014) [hereinafter Wiseman, *The Right to be Monitored*]. Similar studies in other jurisdictions paint a similar picture of overall system failure. Based on research conducted pursuant to a MacArthur Foundation grant, Philadelphia found that three of every five pretrial detainees were accused of nonviolent offenses. Chris Brennan, *In the Race for DA in Philly, Reform is All the Buzz*, PHILA. INQUIRER (Mar. 3, 2017, 7:03 PM), http://www.philly.com/philly/news/politics/In-the-race-for-DA-in-Philly-reform-is-all-the-buzz.html. A New York City study found that over 20 percent of pretrial detainees charged with misdemeanors were not convicted (and more than half of those who were convicted were not sentenced to incarceration). HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY 29–30 (2010) (concluding that low-risk nonfelony defendants were serving time in jail pretrial "only because they were unable to post bail").

74. *See* Carroll, *supra* note 18, at 27 (explaining that in jurisdictions where reforms have increased release rates, "studies suggest that such reforms have not resulted in an increase in either failures to appear or recidivism among defendants who have benefitted from them.").

1. The Costs of Over-Detention

Pretrial detention takes a heavy toll on defendants and their communities.[75] Even among correctional facilities, jails are especially unpleasant places to spend time. When compared to prisons, jails generally have scarcer resources, staff with less training, and more overcrowding problems.[76] The turnover among the inmate population in jails leads both to a more chaotic atmosphere and to higher rates of infection and illness.[77] Laura Appleman describes the country's "rotting jail cells of impoverished defendants—still innocent before proven guilty" as "the Shadowlands of Justice."[78] As she elaborates, the Shadowlands are defined both by conditions inside the jail facility and by a seemingly lawless process that leads to pretrial detention: "the unregulated private actors, unsupervised and unaccountable bail bonding companies, complex and unfair fee structures, tremendous pressure to plead guilty, overincarceration for minor offenses, and disproportionately high bail all combine to make our system of pretrial detention a nightmare to navigate and constitutionally questionable."[79]

The personal costs of pretrial detention go far beyond the experience of incarceration itself.[80] Jail stays can quickly lead to unemployment and loss of housing.[81] Studies show that these immediate disruptions have persistent, long-term, and costly effects on defendants' attachments to the formal labor market.[82] Those

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75. Baughman, *supra* note 71, at 5–7; Yang, *supra* note 3, at 1417 ("The private and social costs of pre-trial detention fall into five main categories: loss of freedom, wrongful conviction, future costs associated with the collateral consequences of detention, externalities on other members of society, and finally the administrative costs of jails.").

76. Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1301–02 (2012); David C. Gorlin, Note, *Evaluating Punishment in Purgatory: The Need to Separate Pretrial Detainees' Conditions-of-Confinement Claims from Inadequate Eighth Amendment Analysis*, 108 MICH. L. REV. 417, 419 (2009) ("Whereas most convicted prisoners serve their sentences at state or federally operated prisons, detainees are typically housed in locally operated jails where resources are scarcer, the staff is 'less professionalized,' classification of inmates is haphazard, and rapid turnover makes for generally chaotic conditions."); Heaton, Mayson & Stevenson, *supra* note 3, at 713–15.

77. Appleman, *supra* note 76, at 1301–02, 1318–19; Gorlin, *supra* note 76, at 419.

78. Appleman, *supra* note 76, at 1302.

79. *Id.* at 1310.

80. *See* Wiseman, *The Right to be Monitored*, *supra* note 73, at 1353–58 (describing the burdens of pretrial detention in detail).

81. RAM SUBRAMANIAN ET AL., INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 32 (2015).

82. Yang, *supra* note 3, at 1424 (describing study findings that "detained defendants are substantially less likely to be employed in the formal labor market and are significantly less likely to have any household income up to four years after their bail hearing"); *id.* ("This recent study suggests that the costs of pre-trial detention in terms of reduced labor market attachment are substantial, and

detained pretrial also suffer other immediate and crippling financial burdens.[83] Some jails impose charges, fines, and fees that compound the financial impacts of pretrial detention.[84] Jail stays can also jeopardize parents' custody of their children.[85] Perhaps more intangible—but no less devastating—are the impacts on family members (particularly children of those incarcerated)[86] and the impacts on the mental health of detainees.[87]

Pretrial detention also has significant impacts on case and system outcomes.[88] Studies find that those who are detained before trial are more likely than comparable defendants who are released

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estimates that the net present discounted value of lost earnings over the work-life of a detained defendant is over $18,000.").

83. SUBRAMANIAN ET AL., *supra* note 81, at 15–16.

84. *Id.* at 18, 22; Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1192 (describing "pay-to-stay" legal financial obligations ("LFOs")); *id.* at 1211 (cautioning that the earlier in the process an LFO is imposed, "the more problematic it is"); *id.* at 1207 n.252 (citing Slade v. Hampton Roads Reg'l Jail, 407 F.3d 243, 246 (4th Cir. 2005) for upholding pretrial detention fees); *see also* Payton v. County of Carroll, 473 F.3d 845, 854 (7th Cir. 2007) (rejecting Eighth Amendment and Due Process objections to an Illinois statute permitting the state to charge an administrative fee for posting bond); Broussard v. Parish of Orleans, 318 F.3d 644, 663 (5th Cir. 2003) (rejecting a constitutional challenge to three Louisiana bail-fee statutes).

85. *See* SUBRAMANIAN ET AL., *supra* note 81, at 18, 22.

86. *Id.* at 18 (explaining that children whose mothers go to jail are more likely to experience changes in their caregivers or to enter foster care) (citing Susan McCampbell, *The Gender-Responsive Strategies Project: Jail Applications*, U.S. DEP'T OF JUST. NAT'L INST. OF CORR., 2, 4 (2005)); Yang, *supra* note 3, at 1427–28. Incarcerated mothers with children in foster care are "half as likely to reunite with their children upon release when compared to nonincarcerated mothers with children in foster care." SUBRAMANIAN ET AL., *supra* note 81, at 18 (citing Steve Christian, *Children of Incarcerated Parents*, NAT'L COUNCIL OF STATE LEGISLATURES 5 (2009)).

87. BAUGHMAN, BAIL BOOK, *supra* note 3; PREET BHARARA ET AL., CRIPA INVESTIGATION OF THE NEW YORK CITY DEPARTMENT OF CORRECTION JAILS ON RIKERS ISLAND 4 (Aug. 4, 2014), http://www.justice.gov/usao/nys/pressreleases/August14/RikersReportPR/SDNY%20Rikers%20Report.pdf.

88. Wiseman, *The Right to be Monitored*, *supra* note 73, at 1353–58 (describing the burdens of pretrial detention in detail).

before trial to plead guilty,[89] to be convicted after trial,[90] and to receive more severe sentences.[91] In many cases, even brief jail stays undermine other system goals by increasing the likelihood of future nonappearance and future offending, instead of effectively managing those risks.[92]

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89. *See* Heaton, Mayson & Stevenson, *supra* note 3, at 722 (finding that detained defendants are more likely to plead guilty for various reasons, including "increased incentives," limitation in ability to prepare a defense, "reduced financial resources" to prepare their defense, and inability to "demonstrate positive behavior" which might mitigate the sentence); MARY T. PHILLIPS, A DECADE OF BAIL RESEARCH IN NEW YORK CITY 115 (2012), http://issuu.com/csdesignworks/docs/decadebailresearch12?e=2550004/5775378; VERA INST. OF JUST., LOS ANGELES COUNTY JAIL OVERCROWDING REDUCTION PROJECT (2011), https://www.vera.org/downloads/Publications/los-angeles-county-jail-overcrowding-reduction-project-final-report/legacy_downloads/LA_County_Jail_Overcrowding_Reduction_Report.pdf ("[S]ome . . . [in law enforcement] acknowledged that defendants in custody have a greater incentive to plead than those who are released pretrial, and that this pressure may serve the purpose of settling cases more quickly."); *see also* Alec Karakatsanis, *Policing, Mass Imprisonment, and the Failure of American Lawyers*, 128 HARV. L. REV. F. 253, 264 (2015) (describing watching "hundreds of defendants in minor misdemeanor cases plead guilty without a lawyer just so that they could finally get out of jail after weeks in custody because they were too poor to pay for their release pending trial . . . ."); Will Dobbie, Jacob Goldin & Crystal Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges* 20–22 (Nat'l Bureau of Econ. Res., Working Paper No. 22,511, 2016), https://scholar.harvard.edu/files/cyang/files/dgy_bail_feb2017.pdf (concluding, based on data collected from both Philadelphia County and Miami-Dade County, that even when controlling variables such as age, race, gender, prior offenses, and crime severity, "released defendants are significantly less likely to be found guilty of an offense, to plead guilty to a charge, and to be incarcerated following case disposition").

90. *See* Heaton, Mayson & Stevenson, *supra* note 3, at 714.

91. SUBRAMANIAN ET AL., *supra* note 81, at 14 ("While results varied by length of detention and risk level, in virtually every category, those detained were more likely to be rearrested before trial, to receive a sentence of imprisonment, to be given a longer term of imprisonment, and to recidivate after sentence completion."); *see also* CHRISTOPHER T. LOWENKAMP ET AL., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES, LAURA & JOHN ARNOLD FOUND. 4 (2013) [hereinafter LOWENKAMP ET AL., SENTENCING OUTCOMES], http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_state-sentencing_FNL.pdf (noting that the detained population is more likely to be sentenced to prison and likely to be sentenced to longer prison terms); CHRISTOPHER T. LOWENKAMP ET AL., LAURA & JOHN ARNOLD FOUND., THE HIDDEN COSTS OF PRETRIAL DETENTIONS 4 (2013) [hereinafter LOWENKAMP ET AL., HIDDEN COSTS], http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf (noting that offending both pre- and post-trial directly correlates with the amount of time spent in pretrial detention).

92. Yang, *supra* note 3, at 1426–27 ("The available empirical evidence suggests that pre-trial detention is indeed criminogenic, imposing long-term costs on society . . . . After case disposition, marginal defendants who are detained before trial are over ten percentage points more likely to be rearrested for a new crime up to two years after the initial arrest, with suggestive evidence that these defendants commit new crimes because they are unable to find employment in the formal labor market."); *see also* Timothy P. Cadigan & Christopher T.

What makes perhaps the least sense, then, is how much money taxpayers spend to prop up this flawed system. Each year, local governments spend billions of dollars on pretrial detention.[93] Estimates range from $9 billion to $22 billion or more.[94] The cost of an annual jail stay per person can reach over $70,000 in some jurisdictions.[95] These numbers do not include the collateral public welfare costs that taxpayers bear due to the impacts of jail on defendants and their families (described above).[96] Crystal Yang explains that these costs reflect "staggering" housing, food, and medical expenses, as well as "second-order costs includ[ing] the administration of the bail system, . . . the costs of transporting detained defendants to court appearances, as well as court resources spent on detained defendants, such as bail modification hearings."[97] Yang also cautions that reformers focused on costs must distinguish between marginal and total costs.[98] Most reforms, short of abolition, yield only marginal savings.[99]

Lowenkamp, *Preentry: The Key to Long-Term Criminal Justice Success?*, 75 FED. PROB. 74, 74 (2011); LOWENKAMP ET AL., HIDDEN COSTS, *supra* note 91 (reporting that detention of eight days or more increases likelihood of offending (both before and after trial)); Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*, U.S. DEP'T OF JUST., NAT'L INST. OF CORR., 28–29 (2014) (describing a study demonstrating that "[a]s the time in jail increased, the researchers found, the likelihood of defendant misbehavior also increased[,]" and highlighting "that even small amounts of pretrial detention . . . [has] negative effects on defendants and actually makes them more at risk for pretrial misbehavior").

93. Baughman, *supra* note 71, at 29.

94. Natalie R. Ortiz, *County Jails at a Crossroads: An Examination of the Jail Population and Pretrial Release*, NAT'L ASS'N OF CNTYS. WHY CNTYS. MATTER PAPER SERIES 2 (2015) ("According to the U.S. Attorney General, county governments spend around $9 billion annually on jailing defendants while they are awaiting their trial."); Yang, *supra* note 3, at 1428 (estimating $9 billion); Office of the Press Sec'y, *Fact Sheet: Launching the Data-Driven Justice Initiative: Distrusting the Cycle of Incarceration*, WHITE HOUSE (June 30, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/06/30/fact-sheet-launching-data-driven-justice-initiative-disrupting-cycle (estimating $22 billion); CHRISTIAN HENRICHSON, JOSHUA RINALDI & RUTH DELANEY, THE PRICE OF JAILS: MEASURING THE TAXPAYER COST OF LOCAL INCARCERATION 4 (2015) (noting that The Vera Institute asserts that $22 billion may be too low an estimate); *see also* Baughman, *supra* note 71, at 6–10 (noting that the average annual cost to detain a single inmate is $22,650 and explaining how releasing defendants who statistically pose no risk to the public could save an estimated $78 billion).

95. INST. FOR INNOVATION IN PROSECUTION, PROSECUTORS & BAIL: USING DISCRETION TO BUILD A MORE EQUITABLE AND EFFECTIVE SYSTEM 2 (2017), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=c019f5c3-2f4e-b516-dddd-c24f05e95642&forceDialog=0.

96. *Id.*

97. Yang, *supra* note 3, at 1428.

98. *Id.*

99. *Id.* ("In determining the costs of detention, it is important for policymakers to distinguish between average and marginal costs. Most policy reforms to the bail system, such as the use of risk-assessment instruments, are

2. *The Costs of Overly Restrictive Release*

While the costs of excessive detention have been well-documented in pretrial scholarship, the phenomenon of overly restrictive pretrial release is understudied.[100] Federal studies document that the imposition of conditions of release has been on the rise for the last decade: federal judges have been applying more conditions to more defendants.[101] Jenny Carroll cautions that as successful bail reform efforts increase rates of pretrial release in states around the country, we can expect to see further increases in the imposition of conditions of release:

> Even as the bail reform movement has succeeded in ensuring pretrial release more frequently for marginal defendants, it has failed to address the reality that such defendants may still be subject to release conditions that are costly, carry significant collateral consequences, and have been subjected to relatively little scrutiny as to their necessity.[102]

The same constitutional and statutory constraints described above apply to release conditions: courts may only impose the least restrictive conditions of release that are necessary to further the government's interests.[103] In practice, however, these protections are inadequate.[104] There is limited appellate review of the imposition of these conditions—perhaps even less review than of minimally-reviewed bail determinations.[105] Many defendants, relieved to avoid detention and hesitant to jeopardize that outcome, may decline to challenge these conditions.[106] Judges rely too heavily on conditions of

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changes that will impact the number of detained individuals at the margin, rather than eliminate pre-trial detention altogether, such that marginal costs are most relevant.").

100. *See* Kristin Bechtel et al, *A Meta-Analytic Review of Pretrial Research: Risk Assessment, Bond Type, and Interventions*, 42 AM. J. CRIM. JUST. 443, 459–60 (2017) (explaining that "more research is needed testing the effectiveness of various pretrial interventions"); Carroll, *supra* note 18, at 40 (explaining that although pretrial release is more frequently achieved, defendants are still subject to conditions "that are costly, carry significant collateral consequences, and have been subjected to relatively little scrutiny as to their necessity").

101. *See, e.g.*, Thomas H. Cohen & Amayllis Austin, *Examining Federal Pretrial Release Trends Over the Last Decade*, 2018 FED. PROB. 3 (discussing pretrial release trends between 2008–2017); *see also* Matthew G. Rowland, *The Rising Federal Pretrial Detention Rate, in Context*, 2018 FED. PROB. 13; Sara J. Valdez Hoffer, *Federal Pretrial Release and the Detention Reduction Outreach Program (DROP)*, 2018 FED. PROB. 46.

102. Carroll, *supra* note 18, at 40.

103. *See id.*

104. *Id.* at 39.

105. *See* Weldon, *supra* note 61, at 2404–05.

106. *See* Carroll, *supra* note 18, at 40 n.19; Weldon, *supra* note 61, at 2420–25.

release, despite the fact that "few have been demonstrated to be effective."[107]

III. REFORMING PRETRIAL DECISION-MAKING

In just the last three years, nearly every state in the country has made changes to its pretrial system.[108] States have passed hundreds of laws related to pretrial release, and there are more than two hundred pretrial release bills pending in thirty-nine state legislatures.[109] In some states, like California, Alaska, New Jersey, New Mexico, and New York, these reforms are the product of comprehensive legislative efforts.[110] Court decisions, changes to court

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107. Megan T. Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail* 47 (U. Pa. L. Sch. Pub. L. Working Paper No. 17-18, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2939273.

108. Baughman, *Dividing Bail*, *supra* note 3, at 949.

109. *Id.* at 1022 (estimating that states have passed hundreds of new pretrial release laws over the last several years; "[t]here are now over 200 bills related to pretrial release pending in 39 state legislatures across the country"); *see also* Desmarais et al., *supra* note 56, at 1.

110. *See* 2018 Cal. Legis. Serv. Ch. 244 (S.B. 10) (West). This bill would require "persons arrested and detained [to] be subject to a pretrial risk assessment conducted by Pretrial Assessment Services." *Id.* Pretrial Assessment Services is an "entity, division, or program" to be established by the court. *Id.* Misdemeanors "except as specified" will be "booked and released" without bail and designated as "low risk." *Id.* *See also* ALASKA STAT. § 12.30.011 (2020) (eliminating money bail); N.J. STAT. ANN. §§ 2A:162-23 (West 2020) (relying now upon pretrial release by nonmonetary means when there is no clear and convincing evidence to the contrary of pretrial release); N.M. CONST. art. II, § 13 (2020) (changing the New Mexico Constitution to include "A person who is . . . otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond. A defendant who is neither a danger nor a flight risk and who has a financial inability to post a money or property bond may file a motion with the court requesting relief from the requirement to post bond."); N.Y. CRIM. PROC. L. § 510.30 (2020) (noting that the court "must impose the least restrictive kind and degree of control or restriction that is necessary to secure the principal's return to court when required"). Other states have also recently passed significant bail reform laws, including Illinois, Colorado, Kentucky, Connecticut, and Oregon. S. 2034. 100th Gen. Assemb. (Ill. 2017) (providing that there shall be a presumption that any conditions of release imposed shall be nonmonetary in nature and the court shall impose the least restrictive conditions or combination of conditions necessary to reasonably assure the appearance of the defendant); H.B. 13-1236, 69th Gen. Assemb., Reg. Sess. (Colo. 2013) (allowing for the assessment of defendants' financial condition in setting bail and analyzing the least-restrictive conditions); H.B. 463, 2011 Gen. Assembly, Reg. Sess. (Ky. 2011) (allowing for automatic pretrial release for certain defendants if they meet specific criteria that indicate a low flight risk). The Court of Appeals of Maryland also unanimously decided to compromise on bail reform and keep cash bail as a last resort. Md. R. 4-216.1 (2017) ("[U]nless the judicial officer finds that no permissible non-financial condition attached to the release will reasonably ensure . . . appearance of the defendant, and the safety of each alleged victim . . . the judicial officer shall release a defendant on personal recognizance or unsecured bond."); *see also* An Act Concerning Pretrial Justice Reform, Pub. Act 17-145, codified at CONN. GEN. STAT. § 54-64a(a) et seq;

rules, and prosecutorial commitments also drive significant pretrial policy changes.[111]

Changes to judicial decision-making in six main areas have been key features of most reforms. Those areas include: (i) restricting the use of money bail, (ii) requiring consideration of a defendant's ability to pay, (iii) ending or restricting the use of bail schedules, (iv) placing greater emphasis on public safety risk, (v) imposing requirements for stationhouse release, and (vi) increasing the use of risk assessment tools. The following subparts briefly describe these categories of reforms and evaluate their impacts on the judicial role in pretrial decision-making and their effects on the accuracy of pretrial decision-making.

A. Restricting or Ending the Use of Money Bail

In many states, reforms have focused on stripping judges of their ability to rely on cash bail or other monetary conditions of release.[112] New Jersey, for example, significantly restricted judges' ability to set cash bail in its 2017 reforms and shifted to a risk-based system in which a defendant could only be detained pretrial if no conditions of release could ensure the defendant's return to court or protect the public.[113] The following year, California enacted bail reform legislation that entirely eliminated money bail for all defendants awaiting trial.[114] California's law did not take effect in 2019 as planned because opponents of the legislation obtained the hundreds of thousands of signatures needed to force a referendum on the reform.[115] For now, SB 10 has not gone into effect and Californians will vote on whether to uphold or repeal the legislation in the referendum in November 2020.[116] Following New Jersey's and

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Press Release, State of Conn., Gov. Malloy Signs Legislation Reforming the State's Pretrial Justice System to Help Break the Cycle of Crime and Poverty (June 28, 2017) [http://perma.cc/2SWC-LY26].

111. *Bail Reform: A Practical Guide Based on Research and Experience*, NAT'L TASK FORCE ON FINES, FEES, & BAIL PRACS. (Mar. 12, 2019), https://www.ncsc.org/__data/assets/pdf_file/0023/16808/bail-reform-guide-3-12-19.pdf.

112. *See, e.g.*, *Pretrial Justice Reform*, ACLU N.J., https://www.aclu-nj.org/theissues/criminaljustice/pretrial-justice-reform (last visited Oct. 13, 2020).

113. *Id.*; Diana Dabruzzo, *New Jersey Set Out to Reform its Cash Bail System. Now, the Results Are In.*, ARNOLD VENTURES (Nov. 14, 2019), https://www.arnoldventures.org/stories/new-jersey-set-out-to-reform-its-cash-bail-system-now-the-results-are-in/.

114. 2018 Cal. Legis. Serv. Ch. 244 (S.B. 10) (West).

115. 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/california/article224682595.html.

116. *Id.*; Jazmine Ulloa, *California's Historic Overhaul of Cash Bail is Now on Hold, Pending a 2020 Referendum*, L.A. TIMES (Jan. 16, 2019, 7:25 PM), https://www.latimes.com/politics/la-pol-ca-bail-overhaul-referendum-20190116-story.html ("Bail groups fought [SB 10] since it was first proposed three years ago, saying it would result in the release of violent offenders to the streets and decimate a $2-billion national industry.").

California's lead, New York enacted bail reform within a larger criminal justice reform package in the 2019 state budget.[117] New York's reform ended cash bail for the vast majority of misdemeanor offenses and nonviolent felonies.[118] Like California, New York's ambitious reforms were met with sharp criticism.[119] A number of other states have also significantly limited the use of money bail.[120]

In addition to these statewide legislative efforts, municipal ordinances and changes in local court rules now limit the use of money bail in a number of jurisdictions.[121] In Georgia, the Municipal

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117. *No Plastic Bags or Cash Bail: The Changes New Yorkers Will See Because of the State Budget*, SPECTRUM NEWS (Apr. 2, 2019, 11:23 AM), https://www.ny1.com/nyc/all-boroughs/politics/2019/04/02/new-yorkers-changes-state-budget.

118. Roxanna Asgarian, *The Controversy Over New York's Bail Reform Law, Explained*, VOX (Jan. 17, 2020, 8:30 AM), https://www.vox.com/identities/2020/1/17/21068807/new-york-bail-reform-law-explained (estimating that 90 percent of arrests will be subject to release without bail under the reform); Gloria Pazmino, *Cash Bail Will Mostly End in NY in 2020. Here's What That Could Look Like.*, SPECTRUM NEWS (Sept. 9, 2019, 8:24 PM), https://www.ny1.com/nyc/all-boroughs/politics/2019/09/10/cash-bail-ending-in-new-york-in-2020-what-could-it-look-like (explaining that the bail reform law eliminates money bail for most misdemeanors and nonviolent felonies, with the exception of sex crimes, witness intimidation, and domestic violence-related offenses); Insha Rahman, *New York, New York: Highlights of the 2019 Bail Reform Law*, VERA INST. OF JUST. 11–12 (2019), https://www.vera.org/downloads/publications/new-york-new-york-2019-bail-reform-law-highlights.pdf (explaining that the New York law mandates pretrial release for "a wide swath of offenses that constitute the majority of all arrests in New York State").

119. Bellware, *supra* note 9 ("To opponents of the law, [the legislation] makes communities less safe by stripping judges of their power to enforce bail and enabl[es] defendants to be released, only to reoffend. The law's supporters argue it's a long-overdue corrective to what used to be a two-tiered system of justice that once disproportionately hurt poor and minority communities but now keeps vulnerable people . . . out of jail."); Douglass Dowty, *CNY Law Enforcement Sound Alarm on Justice Reform: Flawed, Dangerous, Insane*, SYRACUSE.COM (Nov. 21, 2019), https://www.syracuse.com/crime/2019/11/cny-law-enforcement-sound-alarm-on-justice-reform-flawed-dangerous-insane.html ("DAs and police said they were not opposed to reform, but they say the legislation goes too far and doesn't provide any money to carry it out.") [hereinafter Dowty, *CNY Law Enforcement*]; Douglass Dowty, *Judge: NY Killers, Burglars, Robbers, Bail Jumpers Must Be Freed Under 'Dangerous' Bail Law*, SYRACUSE.COM (Jan. 3, 2020), https://www.syracuse.com/crime/2020/01/judge-ny-killers-burglars-robbers-bail-jumpers-must-be-freed-under-dangerous-bail-law.html [hereinafter Dowty, *Judge*]; Erika Leigh, *Lawmakers, Law Enforcement Call for Bail Reform Moratorium*, SPECTRUM NEWS (Nov. 12, 2019, 11:32 AM), https://spectrumlocalnews.com/nys/hudson-valley/news/2019/11/12/tedisco-walsh-press-conference-bail-reform (describing the criticisms of New York's bail reform law from the perspective of politicians, police departments, and prosecutors).

120. *See* sources cited *supra* note 110.

121. *New Orleans Passes Municipal Bail Reform*, ACLU LA. (Jan. 13, 2017, 12:00 AM), https://www.laaclu.org/en/news/new-orleans-passes-municipal-bail-reform; Matt Sledge, *Bail Helps Keep New Orleans Safer? This New Analysis Calls that into Question*, NOLA (Jan. 28, 2020, 3:54 PM), https://www.nola.com/news/courts/article_c94548a8-4218-11ea-b333-73fb81c0c50a.html.

Court of Atlanta plans to "allow those charged with [a] nonviolent offense to sign signature bonds rather than requiring cash for bail."[122] Similarly, the Broward County, Florida, court system adopted a new rule in which "judges will presume someone can be released on their 'own recognizance' to await trial" when an individual is charged with most misdemeanor offenses.[123]

Reduced reliance on money bail is also the product of court decisions. In April 2020, the Nevada Supreme Court issued a decision that limits (but does not prohibit) the use of money bail in future cases.[124] In addition, the Nevada Court requires that judges who set bail must place their findings on the record, and it declared unconstitutional Nevada's requirement that "good cause" must be shown to release a person without bail.[125] Together, these heightened burdens on prosecutors, new presumptions in favor of pretrial release, and procedural protections are expected to lessen the use of money bail in Nevada.[126]

Prosecutors have also been the catalysts for reform by changing office-wide policies for requesting bail.[127] In January 2018, more than

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122. Katheryn Tucker, *Atlanta City Court Moves to End Money Bail System*, DAILY REPORT (Jan. 24, 2018, 5:58 PM), https://www.law.com/dailyreportonline/sites/dailyreportonline/2018/01/24/atlanta-city-court-moves-to-end-money-bail-system/.

123. David Ovalle & Charles Rabin, *Poor Defendants Accused of Minor Crimes Will No Longer Need Cash to Get Out of Broward Jail*, MIAMI HERALD (Aug, 26, 2019, 4:33 PM) https://www.miamiherald.com/news/local/crime/article234388292.html ("[F]or most misdemeanors such as petty theft, marijuana possession or public intoxication, judges will presume someone can be released on their 'own recognizance' to await trial."). Broward County's change is supported by the Broward state attorney, county sheriff, and the public defender. *Id.*

124. Valdez-Jimenez v. Eighth Jud. Dist. Ct., 460 P.3d 976, 984, 988 (Nev. 2020) ("When bail is set at an amount greater than necessary to serve the purposes of bail, it effectively denies the defendant his or her rights under the Nevada Constitution to be 'bailable by sufficient sureties' and for bail not to be excessive. Thus, bail may be imposed only where it is necessary to reasonably ensure the defendant's appearance at court proceedings or to protect the community."). The court set new requirements for prompt hearings and heightened burdens on prosecutors who request money bail to establish by "clear and convincing evidence" that there is "no less restrictive alternative" than cash bail. *Id.* at 987.

125. *Id.*

126. Riley Snyder, *Nevada Supreme Court Orders Significant Limits on Cash Bail*, NEVADA INDEP. (Apr. 9, 2020, 2:44 PM), https://thenevadaindependent.com/article/nevada-supreme-court-orders-significant-limits-on-cash-bail ("Although the court did not outright abolish cash bail in the decision, . . . it's likely to significantly reduce the number of people who are required to pay cash bail to be released from confinement before a trial.").

127. INST. FOR INNOVATION IN PROSECUTION, *supra* note 95, at 1–2 (explaining that prosecutors can collaborate with the legislature, can use their voice in the media, and can use their discretion to reduce what individuals are held on bail as a matter of policy); *see also* PRETRIAL JUST. INST., *supra* note 10, at 3 (identifying multiple examples of prosecutor's offices across the country changing their policies regarding bail).

a year before New York adopted statewide legislative reforms, the District Attorneys in both Manhattan and Brooklyn announced that they would stop requesting bail in nonviolent misdemeanor cases.[128] The Philadelphia District Attorney followed suit one month later, ending cash bail for low level offenses.[129] That same month, the California Attorney General announced "his office would not defend future bail determinations that do not take into account what the defendant cannot afford to pay and whether there are alternatives to holding them in jail before trial."[130] Even prosecutors in smaller jurisdictions like Middlesex County, Massachusetts, have announced similar policy changes: they will no longer seek cash bail for offenses that are unlikely to result in a jail sentence.[131]

More recently, the COVID-19 pandemic has caused many jurisdictions to evaluate means to quickly reduce their jail

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128. James C. McKinley Jr., *Some Prosecutors Stop Asking for Bail in Minor Cases*, N.Y. TIMES (Jan. 9, 2018), https://www.nytimes.com/2018/01/09/nyregion/bail-prosecutors-new-york.html ("As the New York State Legislature takes up a bill to eliminate cash bail for many crimes, the two biggest district attorney offices in New York City have already taken steps in that direction, ordering prosecutors not to request bail in most misdemeanor cases."); Press Release, Manhattan Dist. Att'y's Office, Manhattan and Brooklyn District Attorney's Offices End Requests for Bail in Most Misdemeanor Cases (Jan. 9, 2018), https://www.manhattanda.org/manhattan-and-brooklyn-district-attorneys-offices-end-requests-bail-most-misdemeanor/.

129. Press Release, Phila. Dist. Att'y's Office, Larry Krasner Announces End to Cash Bail in Philadelphia for Low-Level Offenses (Feb. 21, 2018), https://phillyda.wordpress.com/2018/02/21/larry-krasner-announces-end-to-cash-bail-in-philadelphia-for-low-level-offenses/. *But see* Chris Palmer, *Tensions are Boiling Over Between Philly DA Larry Krasner and Bail Reform Advocates*, PHILA. INQUIRER (Jul. 29, 2020), https://www.inquirer.com/news/philadelphia/philadelphia-da-larry-krasner-cash-bail-reform-advocates-20200729.html (explaining Philadelphia District Attorney Larry Krasner is under criticism for "falling short of his pledge to help limit pretrial incarceration during the pandemic"); PHILA. BAIL FUND, RHETORIC VS. REALITY: THE UNACCEPTABLE USE OF CASH BAIL BY THE PHILADELPHIA DISTRICT ATTORNEY'S OFFICE DURING THE COVID-19 PANDEMIC 4 (July 2020), https://www.phillybailfund.org/dao-policy-rhetoric-vs-reality (documenting and criticizing the Philadelphia District Attorney's Office's reliance on cash bail during the COVID-19 pandemic).

130. Alexei Koseff, *California's Bail System Doesn't Make Us Safer, Attorney General Says*, SACRAMENTO BEE (Feb. 20, 2018, 2:13 PM), http://www.sacbee.com/news/politics-government/capitol-alert/article201169714.html.

131. Dan Glaun, *'Not Guilty' Doesn't Mean Unpunished; How the Middlesex DA is Changing the Way Court Views Bail*, MASS LIVE (July 28, 2019), https://www.masslive.com/news/2019/07/not-guilty-doesnt-mean-unpunished-how-the-middlesex-da-is-changing-the-way-court-view-bail.html ("For the last 18 months, Massachusetts' most populous county has sought to abolish the use of cash bail for low-level defendants . . . . Middlesex County District Attorney Marian Ryan announced in January of last year that her office would not seek cash bail for offenses that would typically not lead to a jail sentence, including some drug and property crimes."); *see also Transparency Through Data: Middlesex County Case Data*, MIDDLESEX DIST. ATT'Y, https://www.middlesexda.com/transparency-through-data (last visited Nov. 26, 2020) (providing bail data from Middlesex County).

populations to prevent a severe outbreak within jails. For example, the California Judicial Council reduced bail to $0 for all misdemeanors and some nonviolent felonies, with exceptions for domestic violence offenses, some sex crimes, and driving under the influence.[132] In Alaska, an individual charged with most misdemeanors is to be released on recognizance to avoid "unnecessary health risks" of putting more people in jail amid the pandemic, but the arresting officer or prosecutor can still ask a judge to set bail under some circumstances.[133]

B. Requiring Judges to Consider a Defendant's Ability to Pay

Some jurisdictions that still permit judges to set money bail have scaled back its use by requiring judges to consider a defendant's ability to pay when setting bail.[134] These reforms are intended to reduce the number of defendants who are held pretrial because they cannot afford their release.[135] These changes have developed through legislative means, amendments to court rules and policies, and successful litigation.

New York's reforms, for example, require judges to consider the defendant's ability to pay bail without undue hardship.[136] New

132. Christopher Damien, *Coronavirus: Bail Cost Eliminated for People Accused of Certain Crimes*, DESERT SUN (Apr. 6, 2020), https://www.desertsun.com/story/news/crime_courts/2020/04/06/coronavirus-bail-cost-eliminated-people-accused-certain-crimes-california/2955800001/ (explaining the California Judicial Council reduced the bail schedule to $0 for all misdemeanors and some felonies and that this bail change will remain in effect until ninety days after the state of emergency caused by the COVID-19 pandemic is over).

133. Casey Grove, *Amid Pandemic, Alaska Courts Order No Jail for Most Misdemeanors, New Pathway for Bail*, ALASKA PUB. MEDIA (Apr. 6, 2020) https://www.alaskapublic.org/2020/04/06/alaska-courts-order-no-jail-for-most-misdemeanors-new-pathway-for-bail-amid-pandemic/ ("One order, signed March 27 by the presiding judges for all four Alaska judicial districts, sets a temporary bail schedule for misdemeanor crimes. It says anyone charged with a misdemeanor, other than domestic violence or stalking, is to be released on their own recognizance.").

134. *See e.g.*, Asgarian, *supra* note 118 (quoting Governor Andrew Cuomo: "The blunt ugly reality is that too often, if you can make bail, you are set free, and if you are too poor to make bail, you are punished."); Michael Dresser, *Maryland Court of Appeals: Defendants Can't be Held in Jail Because They Can't Afford Bail*, BALT. SUN (Feb. 8, 2017, 8:44 AM), http://www.baltimoresun.com/news/maryland/bs-md-bail-rule-20170207-story.html ("Certainly, there's a consensus that the lack of money should not keep someone in jail before they have a trial.").

135. Asgarian, *supra* note 118.

136. Rahman, *supra* note 118, at 13 ("The new law requires judges to consider a person's 'ability to post bail without posing undue hardship, as well as his or her ability to obtain a secured, unsecured, or partially secured bond.' The law also requires judges, when setting bail, to set at least three or more forms of bail, one of which must be an unsecured or partially secured bond."); *see* N.Y. CRIM. PROC. L. § 510.30 (2020) (requiring the court to "consider and take into account . . . the [accused's] ability to post bail without imposing undue hardship,

Mexico effected similar changes through a constitutional amendment.[137] In Maryland, by contrast, this development was the product of changes to procedural rules adopted by the Maryland Court of Appeals.[138] These rules have also been adopted at the county level in places like Cook County, Illinois.[139]

Litigation is prompting these changes in some jurisdictions. In a series of class action lawsuits filed over the last several years, nonprofit legal services organizations have successfully challenged money bail systems that do not take account of a defendant's ability to pay.[140] These cases argue that pretrial detention of those unable to afford their bail "without an individualized hearing regarding the person's indigence and the need for bail or alternatives to bail, violates the Due Process Clause of the Fourteenth Amendment."[141] Similar victories have since been won in federal courts across the

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as well as his or her ability to obtain a secured, unsecured, or partially secured bond[ ]").

137. N.M. CONST. art. II, § 13 (amendment effective November 8, 2016) ("A person who is . . . otherwise eligible for bail *shall not be detained solely because of financial inability to post a money or property bond*. A defendant who is neither a danger nor a flight risk and who has a financial inability to post a money or property bond may file a motion with the court requesting relief from the requirement to post bond.") (emphasis added).

138. MD. CODE ANN. CTS. & JUD. PROC. §§ 4.200–217, 4.200–349, 5.101, 15.303 (West 2016) (requiring judges to consider a defendant's ability to pay before setting bail). Revised rule 4–216.1(b)(2) contains the language about "individualized consideration" of a defendant's "ability . . . to meet a special condition of release with financial terms." These reforms may not necessarily lead to reductions in pretrial detention rates. Lynh Bui, *Reforms Intended to End Excessive Cash Bail in Md. are Keeping More in Jail Longer, Report Says*, WASH. POST (July 2, 2018, 5:22 PM), https://www.washingtonpost.com/local/public-safety/reforms-intended-to-end-excessive-cash-bail-in-md-are-keeping-more-in-jail-longer-report-says/2018/07/02/bb97b306-731d-11e8-b4b7-308400242c2e_story.html (discussing a report that compared the court records of those arrested in Prince George's County eleven months prior and eleven months after Maryland's bail reform rule and found that as the use of cash bail decreased, the number of arrestees that judges held without bond increased by nearly 15 percent).

139. In 2017, the Cook County, Illinois, Chief Judge issued an administrative order requiring Cook County judges to determine whether the defendant has the ability "to pay the amount necessary to secure his release." STATE OF ILL., CIR. CT. OF COOK CNTY., GENERAL ORDER NO. 18.8A – PROCEDURES FOR BAIL HEARINGS AND PRETRIAL RELEASE (July 17, 2017), http://www.cookcountycourt.org/Manage/Division-Orders/View-Division-Order/ArticleId/2562/GENERAL-ORDER-NO-18-8A-Procedures-for-Bail-Hearings-and-Pretrial-Release (requiring that "no defendant is held in custody prior to trial solely because the defendant cannot afford to post bail.").

140. *See generally* Funk, *supra* note 3, at 1102–11 (providing a detailed analysis of the constitutional claims asserted in these cases and of the circuit splits that have arisen from them).

141. *See, e.g.*, Jones v. City of Clanton, No. 15cv34-MHT, 2015 WL 5387219, at *2 (M.D. Ala. Sept. 14, 2015) ("The Fourteenth Amendment prohibits 'punishing a person for his poverty,' *Bearden v. Georgia*, 461 U.S. 660, 671 (1983), and this includes deprivations of liberty based on the inability to pay fixed-sum bail amounts.").

country, including in Missouri,[142] Mississippi,[143] Texas,[144] and most recently, in Nevada.[145] These legal successes have driven important reforms to reduce judges' default reliance on money bail and to end the disparities driven by wealth-based detentions.

C. Ending the Use of Bail Schedules

Bail schedules are tables that set presumptive bail amounts based primarily on the charged offenses.[146] For decades, they have been widely used around the country to accelerate and regularize pretrial decision-making in an attempt to ease the workload on overburdened courts and jails.[147] They are problematic, though, precisely because of these efficiency gains: the schedules rely exclusively on the charged offense with no individualized assessment of a defendant's flight risk, public safety risk, and/or ability to pay, and only take into account the charged offense.[148] As a result,

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142. Pierce v. City of Velda City, No. 4:15–cv–570–HEA, 2015 WL 10013006, at *1 (E.D. Mo. June 3, 2015) (stating that the Equal Protection Clause is violated when an individual is detained after an arrest because that person cannot afford to post a monetary bond).

143. Thompson v. Moss Point, No. 1:15cv182LG-RHW, 2015 WL 10322003, at *1 (S.D. Miss. Nov. 6, 2015) (holding that it is unconstitutional for an individual to be held in custody after an arrest because the person is too poor to post monetary bond).

144. ODonnell v. Harris County, 251 F. Supp. 3d 1052, 1167 (S.D. Tex. 2017), *aff'd as modified*, 892 F.3d 147, 152 (5th Cir. 2018) ("[W]e affirm the court's rulings that the County's bail system violates both due process and equal protection.").

145. Valdez-Jimenez v. Eighth Jud. Dist. Ct., 460 P.3d 976, 986 (Nev. 2020) (holding that if the court determines bail must be set, "the court must take into consideration the defendant's financial resources as well as the other factors relevant to the purposes of bail" and that "consideration of how much the defendant can afford is essential to determining the amount of bail that will reasonably ensure his or her appearance and the safety of the community").

146. DOYLE, BAINS & HOPKINS, *supra* note 30, at 7 ("Many states set bail amounts through bail schedules. Bail schedules prescribe predetermined bail amounts based on the seriousness of the criminal charges and sometimes include other factors such as age and criminal history.").

147. Lindsey Carlson, *Bail Schedules: A Violation of Pretrial Discretion?*, 26 CRIM. JUST. 12, 14 (2011). In a 2010 poll of the nation's most populous counties, nearly 64 percent of the 112 respondent counties indicated that their jurisdictions used bail schedules to facilitate bail determinations. *Pretrial Justice in America: A Survey of County Pretrial Release Policies, Practices and Outcomes*, PRETRIAL JUST. INST. 7 (2010), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=bb5a2ba0-6c0a-eb4d-816a-3c8083e5e388&forceDialog=0.

148. Gouldin, *Disentangling*, *supra* note 15, at 866 (explaining that bail schedules do not adjust for defendants' financial resources); Wiseman, *Fixing Bail*, *supra* note 3, at 445–46 ("The crime charged is an extremely rough, singular indicator of likely dangerousness and flight risk compared to the sophisticated actuarial models deployed elsewhere, and judges augment this rudimentary predictor only with impressionistic assessments reached after questioning a defendant for a few minutes, at best."); Wiseman, *The Right to Be Monitored*,

similarly situated defendants who could afford to pay the scheduled release price were released; poorer defendants were detained.[149]

Many jurisdictions, under pressure from reformers or in response to the litigation described above, have abandoned the use of bail schedules.[150] California's new legislation, for example, has eliminated the use of both misdemeanor and felony bail schedules that were previously required to be used in courts across the state.[151] Even if SB 10 does not survive the November referendum, a recent federal decision in the Northern District of California has declared the schedules unconstitutional.[152] As Federal District Court Judge Yvonne Gonzalez Rogers explained, a bail schedule "merely provides a 'Get Out of Jail' card for anyone with sufficient means to afford it."[153] This case is representative of other federal court victories in Dallas, Houston, and St. Louis, among others, that have prohibited the use of bail schedules on due process and equal protection grounds.[154]

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supra note 73, at 1360 ("Although bail is sometimes based on a defendant's ability to pay, it is also largely determined by fixed bail schedules, which assign specific monetary amounts based on the charges lodged.").

149. Wiseman, *The Right to Be Monitored*, *supra* note 73, at 1362 ("The common use of fixed bail schedules contributes to the problem: in addition to placing unfair burdens on indigent defendants charged with pricey crimes, it leaves rich defendants charged with the same crime in a relatively easy financial condition. A crime with a fixed bail rate of $50,000 is expensive for a poor man, in other words, but relatively cheap for someone with adequate funds.").

150. Daves v. Dallas County, 341 F. Supp. 3d 688, 694 (N.D. Tex. 2018) (requiring the county to stop using bail schedules because of the disparities they created between wealthy and indigent arrestees; "[w]ealthy arrestees—regardless of the crime they are accused of—who are offered secured bail can pay the requested amount and leave . . . . Indigent arrestees in the same position cannot.").

151. CAL. PENAL CODE § 1269b(c) (West 2010); *see also* BAIL SCHEDULE FOR INFRACTIONS AND MISDEMEANORS: SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (2018), https://www.lacourt.org/division/criminal/pdf/misd.pdf. If SB 10 survives the 2020 referendum, bail schedules will be eliminated in California. Alex Emslie, *Referendum to Block Bail Appears Headed for Ballot*, KQED (Nov. 20, 2018), https://www.kqed.org/news/11707702/referendum-to-block-bail-law-appears-headed-for-ballot (reporting that if SB 10 is upheld in the November 2020 referendum, the "county-by-county bail schedules that set the amount of down-payments a defendant can post to be released pending trial" will be eliminated).

152. Buffin v. City & County of San Francisco, No. 15-cv-04959, 2019 WL 1017537, at *17 (granting the plaintiffs' motion for summary judgment).

153. *Id.* ("Operational efficiency based upon a bail schedule which arbitrarily assigns bail amounts to a list of offenses without regard to any risk factors or the governmental goal of ensuring future court appearances is insufficient to justify a significant deprivation of liberty.").

154. ODonnell v. Harris County, 892 F.3d 147, 152 (5th Cir. 2018); *Daves*, 341 F. Supp. 3d at 694–95; Orin France, *City of St. Louis Sued over Cash Bail System*, JURIST (Jan 29, 2019, 2:27 PM), https://www.jurist.org/news/2019/01/city-of-st-louis-sued-over-cash-bail-system/.

These shifts are expected to significantly reduce the numbers of defendants who are held before trial merely because they cannot afford to pay their bail.[155] Whether these changes will reduce pretrial populations overall, however, is a different question. The elimination of bail schedules returns pretrial discretion to judges in ways that may undermine that goal.

D. Affording Judges Greater Latitude to Consider Public Safety Risk

Some states have increased judges' ability to rely on public safety risk when ordering pretrial detention or when setting conditions of release. In New Jersey, for example, legislation restricting reliance on cash bail was paired with a constitutional amendment that permitted judges to detain defendants for more than just appearance- or flight-related risks.[156] Critics of California's new legislation argue that its provisions give too much discretion to judges to detain individuals based on public safety risk, effectively replacing the state's wealth-based detention system with enhanced preventive detention.[157] Many reformers who originally supported the bail law shared this concern and withdrew their support from the final version.[158]

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155. Sophie Barbier, *How Global Citizens Helped Move Cash Bail Reform Forward in New York*, GLOB. CITIZEN (Apr. 12, 2019), https://www.globalcitizen.org/en/content/new-yorks-new-budget-partially-eliminates-cash-bai/; Laurel Eckhouse, *California Abolished Cash Bail. Here's Why Bail Opponents Aren't Happy*, WASH. POST (Aug. 31, 2018, 5:00 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2018/08/31/california-abolished-money-bail-heres-why-bail-opponents-arent-happy/.

156. DOYLE, BAINS & HOPKINS, *supra* note 30, at 44–46; EQUAL JUSTICE INITIATIVE, DELAWARE ACCESS TO JUSTICE COMMISSION'S COMMITTEE ON FAIRNESS IN THE CRIMINAL JUSTICE SYSTEM 9 (2015) ("In 2014, New Jersey passed two pieces of bail/pretrial detainment reform legislation concurrently . . . [to] shift[] New Jersey's pretrial release system from a money-based bail system to a primarily risk-based system."); *see also* 2014 N.J. Sess. Law Serv. Ch. 31 (West) (codified at N.J. STAT. ANN. § 2A:162-15–2A:162-26 (West 2017)); S. CON. RES. 128, 216th Leg. (N.J. 2014).

157. John Ralphing & Jasmine Tyler, *Human Rights Watch Opposes California Senate Bill 10, The California Bail Reform Act*, HUM. RIGHTS WATCH (Aug. 14, 2018, 9:00AM), https://www.hrw.org/news/2018/08/14/human-rights-watch-opposes-california-senate-bill-10-california-bail-reform-act; *see also* Erwin Chemerinsky, *Improve SB 10, Don't Eliminate It*, SACRAMENTO BEE (Jan. 27, 2019, 12:01AM), https://www.sacbee.com/opinion/california-forum/article225032170.html (arguing that SB 10 gives judges "total discretion" to determine whether to release a defendant).

158. Jeremy B. White, *California Ended Cash Bail. Why Are So Many Reformers Unhappy About It?*, POLITICO (Aug. 29, 2018), https://www.politico.com/magazine/story/2018/08/29/california-abolish-cash-bail-reformers-unhappy-219618 ("The new law . . . will replace the old system of money-based freedom with a new one of risk assessments and preventative detention. In critics' eyes, that means California will continue to give local judges the sweeping authority to keep people incarcerated before they're convicted of anything.").

New York remains the notable outlier in this realm, as it is the only state that prevents judges from considering a defendant's risk to public safety when making pretrial decisions.[159] In passing New York's bail reform law, progressive legislators succeeded in preventing the adoption of the proposed provisions that would have permitted judges to make pretrial determinations based on an assessment of a defendant's public safety risk.[160] But the political blowback that has forced some adjustments of New York's bail reform principally focuses on the disempowerment of New York judges and their purported inability under the new system to protect public safety.[161] Even with the 2020 amendments, New York judges are still not permitted to rely on risk to public safety when determining what, if any, conditions of release should be imposed on a defendant.[162] Legislative determinations about which offenses are eligible for money bail, however, do reflect concerns about offenders' public safety risk.[163]

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159. Rahman, *supra* note 118, at 8 ("New York was, and remains, the only state in the country that precludes judges from taking into account any consideration of public safety when setting bail or imposing pretrial detention.").

160. *Id.* ("Ultimately, no public safety provision made it into the final bill, but as a compromise, money bail remained for the kinds of serious cases—most violent felonies, all sex-related charges, some domestic violence offenses—that trigger concerns about public safety.").

161. Prosecutors, law enforcement officers, and conservative lawmakers repeatedly emphasized the loss of judicial discretion in their calls to repeal the new bail reform laws. Dowty, *CNY Law Enforcement*, *supra* note 119 ("Onondaga County Sheriff Gene Conway warned it will 'create chaos in the criminal justice system' and pose a 'danger to citizens.'"); Dowty, *Judge*, *supra* note 119; Tara Smith, *Experts: The New Bail Law Must Be Repealed*, SUFFOLK TIMES (Jan. 13, 2020), https://suffolktimes.timesreview.com/2020/01/experts-the-new-bail-law-must-be-repealed/. The recent amendments to New York's bail reform have returned some, but not all, discretion to judges. Taryn A. Merkl, *New York's Latest Bail Law Changes Explained*, BRENNAN CTR. FOR JUST. (Apr. 16, 2020), https://www.brennancenter.org/our-work/analysis-opinion/new-yorks-latest-bail-law-changes-explained ("The new changes provide judges with more options in fashioning those pretrial release conditions. . . . The update provides judges with wider discretion.").

162. Douglass Dowty, *Should a Judge be Free to Lock Up Any Dangerous Suspect? A NY Bail Reform Dilemma*, SYRACUSE.COM (Jan. 22, 2020), https://www.syracuse.com/crime/2020/ 01/should-a-judge-be-free-to-lock-up-any-dangerous-suspect-a-ny-bail-reform-dilemma.html (explaining that New York's 2019 bail reform continued New York's prior tradition of disallowing judicial consideration of an accused's dangerousness when making bail decisions); Barry Kamins, *Bail, Discovery, and Speedy Trial: The New Reforms*, LAW.COM (June 1, 2020, 12:30 PM), https://www.law.com/newyorklawjournal/ 2020/06/01/bail-discovery-and-speedy-trial-the-new-reforms/?slreturn=20200930 110958 (noting in the 2020 amendments, the Legislature did not add "a provision authorizing judges to assess a defendant's 'dangerousness'").

163. *See* Joe Werkmeister, *Column: Backlash Over New York's Bail Reform Fueled by Fear*, SHELTER ISLAND REP. (Jan. 24, 2020), https://shelterisland reporter.timesreview.com/2020/01/24/column-backlash-over-new-yorks-bail-reform-fueled-by-fear/ ("The public safety provision was not included into New

E. *Stationhouse Release*

Some jurisdictions' reforms include requiring or expanding the use of stationhouse release, i.e., the issuance of a citation or appearance ticket to a defendant instead of taking that person into custody.[164] Stationhouse release "can reduce the number of people who require bail in the first place" because it permits an individual's release directly from the police station.[165] New York's reforms instituted mandatory stationhouse release for most misdemeanors and some nonviolent felonies.[166] California's proposed reforms would require that "a person arrested or detained for a misdemeanor . . . may be booked and released without being taken into custody or, if taken into custody, shall be released without a risk assessment by Pretrial Assessment Services."[167] Philadelphia, Pennsylvania; New Orleans, Louisiana; and Ferguson, Missouri, have recently increased the use of citations or summonses for certain crimes, and Kentucky utilizes a pretrial risk assessment tool to identify candidates for stationhouse release.[168] These reforms reduce judges' authority over pretrial release decisions for significant categories of defendants (typically those accused of low-level offenses or those who are otherwise deemed to be low appearance or public safety risks).

F. *The Rise of Risk Assessment Tools*

One of the defining features of the modern era is widespread enthusiasm about "data-driven," actuarial-style risk assessment tools.[169] The promise of these tools is simple: they calculate the riskiness of defendants and assign them a score, so that judges making these decisions no longer have to rely on their intuition.[170] Instead, the claim is that judges can supplement their analysis with objective data.[171] Proponents of these tools emphasize that they

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York's bail reform but, as a compromise, bail remained for serious cases of violent felonies, sex-related charges and some domestic violence offenses.").

164. Stevenson & Mayson, *supra* note 107, at 31.

165. *Id.*

166. Rahman, *supra* note 118, at 11.

167. 2018 Cal. Legis. Serv. Ch. 244 § 1320.8 (S.B. 10) (West).

168. Stevenson & Mayson, *supra* note 107, at 31.

169. Gouldin, *Disentangling*, *supra* note 15, at 867–68.

170. LAURA & JOHN ARNOLD FOUND., DEVELOPING A NATIONAL MODEL FOR PRETRIAL RISK ASSESSMENT 2 (2013) [http://perma.cc/YB6U-3KEY].

171. *See, e.g.*, *id.* (describing the tools as facilitating a shift away "from a system based solely on instinct and experience to one in which judges have access to scientific, objective risk assessment tools"); *see also* Gouldin, *Disentangling*, *supra* note 15, at 888 ("[R]isk assessment tools address concerns of unconscious bias and overestimation] by replacing reliance on subjective and intuitive judicial measures of risk with more objective data that is insulated from cognitive bias."); DOYLE, BAINS, & HOPKINS, *supra* note 30 at 17 ("The appeal of a risk assessment tool is straightforward: Big data could help judges make more accurate, consistent, and transparent decisions.").

intend to augment (and not replace) the experience and wisdom of judges.[172] The results are ultimately intended to give judges additional information while leaving them to make their own decisions.[173]

Today, roughly 10 percent of all courts use a pretrial risk assessment tool.[174] The federal government fully implemented the Pretrial Services Risk Assessment tool in September 2011, and there have been many statewide adoptions of pretrial tools, including Arizona, Colorado, Florida, Indiana, Kentucky, New Jersey, Ohio, and Virginia.[175] Forty jurisdictions at the state and local levels have implemented the Laura and John Arnold Public Safety Assessment (the "PSA"), and hundreds more have expressed interest in implementing the PSA.[176] If its reforms survive the November referendum, California will require localities to adopt risk assessments, but the reforms did not specify a particular tool for statewide adoption.[177]

In most of these jurisdictions, judges must consider risk assessments when making decisions, but they are not bound to follow any recommendations.[178] Some jurisdictions require judges to

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172. LAURA & JOHN ARNOLD FOUND.,, *supra* note 170, at 5.

173. *Id.*

174. Yang, *supra* note 3, at 1484.

175. Gouldin, *Defining Flight Risk*, *supra* note 3, at 681–82; Yang, *supra* note 3, at 1484 n.276; *Pretrial Risk Assessment Now Available to All Interested Jurisdictions; Research Advisory Board Announced*, ARNOLD VENTURES (July 11, 2018), https://www.arnoldventures.org/newsroom/laura-and-john-arnold-foundation-makes-pretrial-risk-assessment-available-to-all-jurisdictions-announces-expert-panel-to-serve-as-pretrial-research-advisory-board/.

176. GLENN A. GRANT, ACTING ADMINISTRATIVE DIRECTOR OF THE COURTS, CRIMINAL JUSTICE REFORM REPORT TO THE GOVERNOR AND THE LEGISLATURE 3–4 (2016); *Pretrial Risk Assessment Now Available to All Interested Jurisdictions; Research Advisory Board Announced*, *supra* note 175 (explaining that "more than 600 jurisdictions across the nation have expressed interest in implementing [the PSA]").

177. Instead, the law allows each county to pick its own risk assessment tool from a list of preapproved tools, which could cause similarly situated defendants in different counties to receive different risk assessments. 2018 Cal. Legis. Serv. Ch. 244, § 1320.7 (S.B. 10) (West) ("'Validated risk assessment tool' means a risk assessment instrument, selected and approved by the court, . . . from the list of approved pretrial risk assessment tools maintained by the Judicial Council."); *see also* Chemerinsky, *supra* note 157 ("As revised, SB 10 leaves [the determination of risk] to each locality and ultimately it gives judges total discretion during the arraignment hearing to decide whether to release an individual and on what conditions."); *id.* ("Further, the tools are not objective assessors of risk. The risk categories (high, medium and low) required in the proposed legislation are policy choices, meaning that whoever controls the implementation of the tools can decide how large to make each category.").

178. GRANT, *supra* note 176, at 11–13.

provide a written explanation if they stray from a risk assessment recommendation.[179]

G. Judging Around Reforms

Although reform efforts seek to influence, supplement, and sometimes replace judicial decision-making, in most state processes (and the largely unchanged federal pretrial process), judges retain significant pretrial discretion. In other words, with some important exceptions noted above, judges have maintained their grip on the keys to pretrial release. Indeed, reforms in New York that arguably shifted the most power away from judges have faced the most significant backlash.[180]

With judges still at the center of pretrial decision-making, it is important to consider how well they are adapting to new reforms, confronting their decision-making biases, and using new data provided by risk assessment tools and algorithms.[181] Reports from federal, state, and county-level studies are cause for concern that new investments in risk assessment tools may not materially change outcomes.[182]

Many jurisdictions encourage—but do not require—judges to consider risk assessment information.[183] As a result, some judges simply ignore the tools, while others misuse them because of inadequate training.[184] Studies of judges' consideration of risk assessment information suggest that reformers have not yet figured out how to change judicial behavior.[185] In her analysis of Kentucky judges' use of risk assessment tools, Megan Stevenson found that "judges took advantage of the discretion allowed to them by law and

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179. *See, e.g.*, N.J. STAT. ANN. § 2a:162-23(2) (West 2017) (requiring any court that enters "an order that is contrary to the recommendation made in risk assessment" to "provide an explanation in the document that authorizes the eligible defendant's release"); *see also* Garret & Monahan, *supra* note 51, at 470 (explaining that Kentucky's implemented legislation requires judges to provide written reasons for imposing cash bail when failing to release "pretrial defenders who scored a low to moderate risk based on the Public Safety Assessment").

180. Bellware, *supra* note 9.

181. Garrett & Monahan, *supra* note 51, at 447 (describing lack of judicial training: "To change decision-making, we need to address policy, structure of decision-making, and training. Coherent regulation is needed.").

182. *Id.*; *see also* Stevenson, *supra* note 3, at 308; Frank Main, *Cook County Judges Not Following Bail Recommendations: Study*, CHI. SUN-TIMES (July 3, 2016, 9:00 PM), https://chicago.suntimes.com/2016/7/3/18325456/cook-county-judges-not-following-bail-recommendations-study.

183. Garrett & Monahan, *supra* note 51, at 444 ("States have made the use of these instruments advisory rather than presumptive or mandatory, and as a result, the discretion of the decision-maker plays an important role.").

184. Yang, *supra* note 3, at 1468.

185. Garrett & Monahan, *supra* note 51 at 478; Stevenson, *supra* note 3, at 334. Interestingly, Frank Main conducted a review of over 1,500 cases in Cook County and found that judges "routinely"—or 85 percent of the time—made bail decisions contrary to a risk assessment instrument. Main, *supra* note 182.

ignored the presumptive default of non-monetary release in more than two-thirds of cases."[186] Even the small pretrial gains she observed "eroded over time as judges returned to their previous bail-setting practices."[187]

Brandon Garrett and John Monahan argue that getting judges to rely more consistently on these tools will require better judicial education, changes to the structure of judges' decision-making processes, and increased resources for community programs (so that judges will have meaningful supports to help defendants released pretrial).[188]

IV. DEFINING AND MEASURING PRETRIAL RISKS AND HARMS

The first step in a decision-making or risk management enterprise is careful definition and identification of the goals and risks.[189] What are the categories of harms that judges and policymakers are trying to avoid in the pretrial context? How do we balance competing interests? The following subparts consider specific components of the pretrial decision-making process to identify persistent flaws in the way that pretrial risks and harms are defined, described, and measured.

A. Defining Risks and Goals

The concern that judges overestimate pretrial risks animates much of the pretrial reform discourse. As a result, we might expect new reforms (including risk assessment tools) to be precise about the goals of pretrial decision-making or the definitions of pretrial risks. Because judicial risk aversion is a known problem, we should be especially concerned about risk definitions that are overbroad.

These definitional issues—and questions about whether the risks that are being measured actually map onto the societal concerns that are purportedly being addressed—are well-known, thorny problems in all sorts of risk conversations:

> [W]hat becomes clear in risk discussions are the fissures and gaps between scientific and social rationality in dealing with the hazardous potential of civilization. The two sides talk past each other. Social movements raise questions that are not answered by the risk technicians at all, and the technicians answer questions which miss the point of what was really asked and what feeds public anxiety.[190]

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186. Stevenson, *supra* note 3, at 308.

187. *Id.* (concluding that "if judges are not 'convinced' or 'coerced' to abide by statutory guidelines, risk assessment tools will not be an effective way of liberalizing release").

188. Garrett & Monahan, *supra* note 51, at 469.

189. *See id.*

190. ULRICH BECK, RISK SOCIETY: TOWARDS A NEW MODERNITY 30 (1992).

The question of which actors and communities are empowered to make these pivotal determinations with respect to pretrial risk assessment tools is a fundamental question that is increasingly getting attention from legal scholars.[191]

As Brandon Garrett and John Monahan explain, these choices of "what risks and needs to measure, and at what thresholds" are fundamentally policy questions, not merely questions with a scientific answer.[192] They offer, by way of a pretrial example, the observation that "[w]hile some jurisdictions treat non-appearance as an important concern pre-trial, others reconsidered that choice and made efforts to reschedule court appearances and excuse certain non-appearance."[193]

As outlined in the subparts that follow, many currently used definitions of both public safety risk and nonappearance risk are overbroad and imprecise; most tools merge nonappearance and public safety risks together to generate a combined risk score that is problematic for constitutional, statutory, and policy reasons; and, as outlined in more detail in Part V, most tools provide a pre-intervention risk score, giving judges too little information about how they should try to manage pretrial risk without relying on detention.

1. Specifying Violence and Danger

Most of the risk assessment tools currently being used provide a broad prediction of future public safety risk, measuring the risk that the defendant will commit any crime on release.[194] Importantly, and unfortunately, these predictions are not multiplied by the nature or severity of the future offense as they might be in a more rigorous cost-benefit calculation.[195] And, in many tools, the risk of future dangerousness or violence is not separated from predictions of nonviolent offending.[196] This means that some tools treat defendants

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191. *See* Sean Hill, *Bail Reform & The (False) Racial Promise of Algorithmic Risk Assessment*, 68 UCLA L. REV. (forthcoming 2021); Ngozi Okidegbe, The Democratizing Potential of Algorithms (Sept. 1, 2020) (unpublished manuscript, on file with author) (outlining a new vision of "pretrial algorithmic governance" in which racially marginalized communities most impacted by mass pretrial incarceration would have greater power over the "design and implementation" of technologies intended to promote "community safety"); Christopher Ansell & Patrick Baur, *Explaining Trends in Risk Governance: How Problem Definitions Underpin Risk Regimes*, 9 RISK, HAZARDS, & PUB. POL'Y 397, 397–99 (2018); *cf.* BECK, *supra* note 190, at 223; Jessica Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59, 63 (2017) (focusing on sentencing tools).

192. Garrett & Monahan, *supra* note 51, at 487 (2020).

193. *Id.* at 488.

194. Mayson, *supra* note 3, at 723.

195. Yang, *supra* note 3, at 1483.

196. Baughman, *Dividing Bail*, *supra* note 3, at 1024 (arguing that bail practice must treat misdemeanor charges differently than felonies).

who may deal drugs before trial, defendants who may only use drugs, and those who pose a risk of violent assault as equally risky.[197]

A prediction that provides information of any future criminality, with no adjustments for the seriousness or potential violence of the predicted criminality, is of limited utility. It does not reflect the differences in the costs that various types of crime impose on the community, and it provides little guidance about how to manage the risk that is presented.[198] It seems likely that communities have different risk thresholds for different types of crimes. In other words, communities might prefer detention at lower risk numbers for possible future violent crime, and they might tolerate release for that same risk level for a possible future nonviolent offense.[199] Indeed, recent reforms in California and New York reflect precisely those priorities.[200]

Of approximately eight risk assessment tools currently in use across the country, only two, the PSA and Northpointe's proprietary Correctional Offender Management Profiling for Alternative Sanctions ("COMPAS") tool, offer specific predictions of the risk of future violent crime.[201] The PSA tool, like COMPAS, calculates the risk of future violence ("new violent criminal activity"), separating that score from the much broader category of "new criminal activity."[202] Other risk assessment tools should follow suit.

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197. *See id.* at 1022 (explaining that many recommended risk assessment tools do not treat misdemeanors differently than felonies, "making it nearly impossible for most poor defendants to obtain release").

198. *See* Yang, *supra* note 3, at 1450–71 (describing the potential for cost-benefit analysis to reduce errors in pretrial decision-making).

199. *See* Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 554–55 (2012); Hill, *supra* note 191 at 10–11 ("A Black community may, for example, be willing to tolerate higher thresholds of risk, given not only a general distrust of the criminal justice system, but because higher release rates and fewer pretrial restraints could translate into wider caregiver networks, increased revenue streams, or greater parental involvement.").

200. *See* 2018 Cal. Legis. Serv. Ch. 244 (S.B. 10) (West); Juan Manuel Benitez, *How the NY State Budget Will Result in Fewer People in Jail Awaiting Trial*, SPECTRUM NEWS (Apr. 1, 2019, 6:20 PM), https://www.ny1.com/nyc/all-boroughs/politics/2019/04/01/how-the-ny-state-budget-will-result-in-fewer-people-in-jail-awaiting-trial.

201. *See generally* Mayson, *supra* note 3 (compiling thorough data on eight risk assessment instruments); ARNOLD VENTURES, PUBLIC SAFETY ASSESSMENT FAQS ("PSA 101") 1 (2019), https://craftmediabucket.s3.amazonaws.com/uploads/Public-Safety-Assessment-101_190319_140124.pdf; THOMAS BLOMBERG ET. AL., VALIDATION OF THE COMPAS RISK ASSESSMENT CLASSIFICATION INSTRUMENT 48 (2010) ("[T]he data consistently demonstrates that offenders assessed by COMPAS as having a high risk of future violence did, in fact, commit violent crime at higher rates than offenders assessed at lower risk levels.").

202. LAURA & JOHN ARNOLD FOUND., PUBLIC SAFETY ASSESSMENT: RISK FACTORS AND FORMULA 3, https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/PSA-Risk-Factors-and-Formula.pdf (last visited Nov. 26, 2020).

It is important to note that statutory definitions of public safety risk (i.e., the risk that a defendant "will endanger the safety of any other person or the community") have been interpreted to include risks of nonviolent offending as well as more dangerous offenses.[203] Indeed, when the federal Bail Reform Act was enacted in 1984, the Senate Judiciary Committee report endorsing the legislation anticipated this precise question, explaining that the statutory language included "the risk that a defendant will continue to engage in drug trafficking constitutes a danger to the 'safety of any other person or the community.'"[204]

If the Senate Judiciary Committee was motivated by an assumption that drug trafficking is typically accompanied by violence, recent research refutes that assumption.[205] As Shima Baradaran Baughman has explained:

> [S]ometimes there is a blanket presumption by courts and legislatures that where there are drugs, guns will be found and inevitably violence—without empirical backing or an individual showing based on particularized facts. This blanket presumption by courts and legislatures that drugs cause violence is separated from the empirical reality and disconnected from the wealth of social science research.[206]

Given the Bail Reform Act's legislative history, risk assessment tool creators' neglect of the distinction between violent crimes and nonviolent crimes is perhaps understandable. But it means that these tools reflect the outdated norms and values of the War on Drugs or Broken Windows eras as opposed to incorporating next-generation thinking about criminal justice. The need to correct course and to add more differentiation to public safety risk assessment calculations that reflect current criminal justice values and priorities is obvious.[207] The same can be said for the nonappearance risks described in the next subpart.

2. Distinguishing Nonappearance

Current reform efforts would also benefit from precision in the definition of nonappearance risk. As I have explained in other work, while judges, practitioners, and academics often describe the relevant risk as "flight risk," in fact, state and federal statutes refer to a

203. *See* Wiseman, *Discrimination*, *supra* note 46, at 143 (collecting federal cases).

204. S. REP. NO. 98-225, at 13 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3196.

205. Shima Baradaran Baughman, *Drugs and Violence*, 88 S. CAL. L. REV. 227, 254 (2015).

206. *Id.*

207. Baughman, *Dividing Bail*, *supra* note 3, at 947, 951 (critiquing "fundamentally flawed" bail reform efforts that treat all crimes as "interchangeable").

broader category of nonappearance: the risk that a defendant will fail to appear for a future court date.[208] Bail reform efforts have been less focused on nonappearance risk, as a rule, and have mostly neglected the distinction between flight and other forms of nonappearance.[209] New risk assessment tools measure nonappearance in its broadest form, even while reformers continue to describe all manner of nonappearance as "flight."[210]

In *Defining Flight Risk*, I explained that these terms are not equivalents: "Flight risk is properly assigned to defendants who are expected to flee a jurisdiction. This is a small, and arguably shrinking, subcategory of a much larger group of defendants who pose risks of nonappearance."[211] I proposed a new taxonomy, to divide the broad category of nonappearing defendants (i.e., defendants who fail to appear) into three subcategories: (i) defendants who flee the jurisdiction, (ii) "local absconders" (defendants who remain in the jurisdiction but actively and persistently avoid court), and (iii) "low-cost nonappearances" (defendants who remain in the jurisdiction but whose failures to appear are more preventable in advance and less costly after the fact).[212] As I explained:

> These subcategories differ in nature and not merely by degree. Defendants in these subcategories impose distinct system costs and call for different types of supervision and management. The distinctions between these groups turn on the intent of the actor, the persistence of the nonappearance, the difficulty (for the jurisdiction) of locating him or her, and the specific types of pretrial interventions that might be appropriate to ensure appearance.[213]

Recent reform efforts suggest that these distinctions reflect community perceptions and priorities.[214] Communities continue to

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208. Gouldin, *Defining Flight Risk*, *supra* note 3, at 682.

209. *Id.* at 721; *see also* Wiseman, *Fixing Bail*, *supra* note 3, at 421 ("Flight-risk—the other chief factor in bail decision—has been largely ignored . . . ."). *But see* Lauryn Gouldin, *New Perspectives on Pretrial Nonappearance*, *in* HANDBOOK ON CORRECTIONS AND SENTENCING: PRETRIAL JUSTICE 27–49 (Jennifer Copp, et al. eds.) (forthcoming) [hereinafter Gouldin, *New Perspectives*] (analyzing current research and reform efforts focused on pretrial appearance).

210. Gouldin, *Defining Flight Risk*, *supra* note 3, at 682 ("What judges, attorneys and scholars frequently describe in shorthand terms as 'flight risk' is defined in older statutes and newer risk-assessment tools in significantly broader terms: the risk that a defendant will fail to appear for a future court date.").

211. *Id.* at 683; *see also* Wiseman, *The Right to be Monitored*, *supra* note 73, at 1352–53 (explaining that technological advances make fleeing less effective in avoiding trial).

212. Gouldin, *Defining Flight Risk*, *supra* note 3, at 683–84.

213. *Id.*

214. Gouldin, *New Perspectives*, *supra* note 209, at 33–35 (describing reforms that have begun to draw distinctions between different types of pretrial nonappearance); *see also Hearing on "The Administration of Bail by State and Federal Courts: A Call for Reform" Before the Subcomm. on Crime, Terrorism, &*

invest in reminder systems.[215] Reforms in other jurisdictions have created or expanded grace periods for nonappearing defendants to return to court before a warrant will be issued.[216] Other jurisdictions are investing in transportation, childcare support, and more supportive forms of pretrial supervision.[217]

None of the risk assessment tools currently in use isolate flight risk from other forms of nonappearance, and none attempt to draw distinctions between the other two categories of local absconders and low-cost nonappearances.[218] Although the tools typically place defendants into high, medium, and low tiers of nonappearance risk according to their risk scores, that sort of scaling is insufficient. An individual who poses a high risk of nonappearance may or may not be a flight risk.[219] If reducing pretrial detention is the goal, then reliance on tools with overly broad risk definitions is obviously problematic.

There are still significant information gaps regarding nonappearance,[220] although there are studies in progress.[221] Addressing these data deficits offers opportunities to develop more effective strategies for ensuring that released defendants return to court.

B. Isolating Distinct Risks

Many risk assessment tools combine their predictions of future nonappearance and future criminality into a single risk of pretrial

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Homeland Sec. of the H. Comm. on the Judiciary, 116th Cong. 10 (2019) (statement of Alison Siegler, Clinical Professor of L. & Dir. of the Fed. Crim. Just. Clinic, Unv. of Chi. L. Sch.) (advocating amending the Bail Reform Act to reflect distinctions between flight and nonappearance; explaining that many nonappearances are attributable to "poverty, transportation barriers, and lack of resources").

215. *See, e.g.*, Teresa Mathew, *Hello, Your Court Date is Tomorrow*, BLOOMBERG CITYLAB (Jan. 29, 2018, 1:47 PM), https://www.bloomberg.com/news/articles/2018-01-29/texting-people-makes-them-more-likely-to-attend-court.

216. David McKinley, *New York Bail Reform: What if You Just Don' t Show Up For Court?*, WGRX (Feb. 5, 2020, 7:32 PM), https://www.wgrz.com/article/news/local/new-york-bail-reform-what-if-you-just-do-not-show-up-in-court/71-eafadd87-ac6f-42ce-83a2-6d85f242a1a3.

217. Gouldin, *New Perspectives*, *supra* note 209, at 29–49.

218. Gouldin, *Defining Flight Risk*, *supra* note 3, at 725, 728–29.

219. *Id.* at 683.

220. *Id.* at 724. ("We still know far too little about who fails to appear, why they fail to appear, and what can be done to remedy that."); *cf.* John S. Goldkamp, *Fugitive Safe Surrender: An Important Beginning*, 11 CRIM. & PUB. POL'Y 429, 429–30 (describing the "elusiveness of complete and accurate data relating to fugitives" and explaining that "just the task of counting fugitives to define the numerators and denominators of potential effectiveness measures presents difficult challenges"); *cf.* Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 337–38 (2016) ("[T]he studies are too few, too limited, and too dated to draw strong conclusions.").

221. Gouldin, *New Perspectives*, *supra* note 209, at 37–39.

failure score that is provided to the judge.[222] In prior work, I detailed constitutional and statutory requirements that call for separate calculations of these different types of risk.[223] Judges—and the risk assessment tools being developed to improve their judgment—need to measure and manage flight risk and dangerousness separately. Inadequate separation of those risks has been a perennial problem for judges, and the tools developed to aid them replicate (instead of remedying) that problem.

There are compelling constitutional, statutory, and practical justifications for evaluating those two risk categories (flight and danger) separately. Federal and state constitutions include prohibitions against excessiveness that require precision in risk definitions and require a match between risks and pretrial interventions that are used to manage risk.[224] Federal and state statutes do not permit detention on public safety grounds in all cases; for some detention decisions (and also for all bail decisions), flight or appearance risk is the only relevant consideration.[225]

There are also important practical justifications for separating the risk calculations. Merging the risks may lead judges to overestimate both types of risk.[226] Separating the risks may also improve judicial decision-making because when judges follow more intricate rules, they may be led to more deliberative (and less intuitive) judgments.[227] In the bail context, where judges may be prone to cognitive biases, more deliberative decision-making may make judges less risk averse.[228]

In addition, pretrial risks must be considered separately because of judges' risk management obligations, which are discussed in more detail in Part V. Judges are supposed to use their own risk estimates or information provided by risk assessment tools to determine appropriate conditions of release.[229] Those conditions manage nonappearance and public safety risk in different ways and to

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222. Gouldin, *Disentangling*, *supra* note 15, at 842. The Arnold PSA and the COMPAS tool are noteworthy exceptions. *See* LAURA & JOHN ARNOLD FOUND., *supra* note 202; BLOMBERG ET AL., *supra* note 201, at 8.

223. Gouldin, *Disentangling*, *supra* note 15, at 844 ("[F]light risk must be measured and evaluated independently of dangerousness because federal and state laws governing pretrial detention and release frequently require separate considerations of three distinct risks.").

224. Gouldin, *Defining Flight Risk*, *supra* note 3, at 696.

225. Gouldin, *Disentangling*, *supra* note 15, at 882.

226. *Id.* at 866.

227. Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 101, 126 (2007) (suggesting that the "highly intricate, rule-bound nature" of probable cause evaluations may "signal[] to judges that intuition might be inconsistent with the governing law" and thus "facilitate" more deliberative decision-making).

228. *Id.* at 141.

229. Gouldin, *Disentangling*, *supra* note 15, at 893.

different degrees.[230] Separate risk measurements are necessary to steer judges away from both unnecessary detention and unnecessarily restrictive conditions of release.[231]

C. Accurately Measuring Risks

Pretrial reformers continue to focus on improving the accuracy of pretrial risk calculations, primarily through refinements to the risk assessment tools described briefly in Part III. Those tools have become principal components of most significant bail reforms.[232] The allure of these tools is plain: they are politically popular because they promise to help judges make "smarter" decisions.[233] These tools are said to generate more accurate risk predictions than unaided judicial or other professional assessments.[234] They are also viewed as more fair, although scholars raise important questions about whether the bias of the inputs used to generate the scores is obscured in the scores that are generated.[235]

For the reasons outlined above, however, it is unclear whether the tools are improving judges' accuracy in measuring the right things. While the tools do predict whether someone will fail to appear for a future court date, they do not predict serial nonappearances or flight from the jurisdiction (the risks that communities likely prioritize).[236] Similarly, most tools predict the risk of an arrest for any new criminal activity without specifying the kinds of risks that communities care most about: risks of serious crimes or violence.[237] Although many of the tools are praised for their transparency, many of these essential distinctions are obscured behind misleading and potentially risk-inflating labels.[238]

The tools also have real limitations, which are not always clear from how the scores and calculations generated by the tools are presented. As outlined in the next subpart, there are important

230. *Id.*

231. *Id.* at 855, 872.

232. New York's 2019 bail reform was notable for its omission of a risk assessment. H. Rose Schneider, *New York and New Jersey Limit Cash Bail for Crimes. But There's One Major Difference*, DEMOCRAT & CHRON. (Dec. 17, 2019, 5:00 AM), https://www.democratandchronicle.com/story/news/politics/albany/2019/12/17/ny-and-nj-limit-cash-bail-crimes-but-theres-one-major-difference/2668074001/.

233. Gouldin, *Disentangling*, *supra* note 15, at 841.

234. *Id.* at 841–42.

235. *See generally* Garrett & Monahan, *supra* note 51.

236. *See id.* at 450, 452–53; *see also* Erin Collins, *Punishing Risk*, 107 GEO. L.J. 57, 100–06 (2018) (arguing that even if risk assessments improve accuracy slightly, in so doing they may reify the decision and prevent consideration of whether the "risk" calculation at issue is the right one).

237. Collins, *supra* note 236, at 100–06.; *see also* Roberts, *supra* note 68, at 1007–09 (pointing out that most risk assessment tools rely on arrest to predict recidivism, which is problematic because arrests do not reflect guilt).

238. Gouldin, *Defining Flight Risk*, *supra* note 3, at 687–88.

questions about what judges are supposed to do with the new and improved risk predictions they are given.

D. Making Risk Numbers Meaningful

How well do judges understand what a particular risk score means?[239] What level of risk justifies detention? What level of risk justifies imposing conditions of release? As Megan Stevenson and Sandy Mayson have explained, these are fundamental questions that have "no easy answer."[240] In the past, legislators answered these questions by creating rebuttable presumptions of detention for certain offenses.[241] Not surprisingly, those rebuttable presumptions strongly influence judicial behavior. Attempting to improve the accuracy of risk measurements only makes these questions of response and risk management more obvious and important.

Reformers have made some efforts to address these issues. Some risk assessment tools sort defendants, by score, into labeled tiers identifying them as low, moderate, or high risk.[242] Bail reforms adopted in California actually called for defendants to be assigned these labels and then outlined next steps.[243]

Unfortunately, these labels—particularly the medium or moderate-to-high risk categories—may seriously inflate the underlying risk information.[244] One recent study found that "people significantly overestimate the recidivism rate for individuals who are labeled as 'moderate-high' or 'high' risk on a risk assessment."[245] Given the probabilities underlying some of these categories, the labels

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239. Garrett & Monahan, *supra* note 51, at 492 (quoting L. Maaike Helmus & Kelly M. Babchishin, *Primer on Risk Assessment and the Statistics Used to Evaluate Its Accuracy*, 44 CRIM. JUST. & BEHAV. 8, 8–9 (2017)) ("A central problem facing criminal justice today is that accurate and fair risk assessments will 'make little difference if the decision-makers do not understand the information, which is a serious possibility.'").

240. Heaton, Mayson & Stevenson, *supra* note 3, at 41.

241. *See, e.g.*, 18 USC §§ 3142(e)(2)–(3), (f)(1); ALASKA STAT. § 12.30.011(d)(2) (2020); N.C. GEN. STAT. § 15A-533(d)–(e) (2020); *see also* Note, *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125, 1138–39 (2018) (noting that the New Jersey Judiciary Committee has broadened the number of crimes that trigger a presumption of detention).

242. *See, e.g.*, LAURA & JOHN ARNOLD FOUND., DEVELOPING A NATIONAL MODEL FOR PRETRIAL RISK ASSESSMENT 1–2, 4 (2014), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary_PSA-Court_4_1.pdf.

243. 2018 Cal. Legis. Serv. Ch. 244 (S.B. 10) (West) (approved by Governor Brown on Aug. 28, 2018 to become operative Oct. 1, 2019).

244. *See* Daniel A. Krauss et al., *Risk Assessment Communication Difficulties: An Empirical Examination of the Effects of Categorical Versus Probabilistic Risk Communication in Sexually Violent Predator Decisions*, 36 BEHAV. SCI. & L. 532, 544 (2018).

245. *Id.* (finding that study participants' estimates of recidivism risks for those labeled "moderate-high risk" were sometimes double the underlying risk scores).

"low, lower, and lowest" risk may more accurately and meaningfully communicate the relevant information.[246]

To date, these sorts of labels have been applied somewhat cavalierly and with too little appreciation of their influence on decision-making.[247] As Brandon Garrett and John Monahan explain:

> A new approach is needed that takes account of the interface between general quantitative risk information and the officials, such as judges, prosecutors, and probation officers, who take that information into account in decision-making. That interface must be evidence-informed and based on common goals.[248]

For jurisdictions enthusiastically embracing risk assessment tools, these questions about where risk thresholds should be set are fundamental policy questions that ought to be closely studied and publicly discussed and debated.[249] As Louise Amoor elegantly explains:

> [I]n the security domain, because the entire array of judgements made—their prejudices, their intuitions, sensibilities and dispositions—are concealed in the glossy technoscientific gleam of the risk-based solution, there is a place for critical thought to retrieve this array and arrange it differently.[250]

Public discussion and debate about risk thresholds, with active participation from those communities most directly impacted by pretrial incarceration policies, could force much needed collective re-examination of our risk tolerance.[251] As Sean Hill explains, decisions about "the selection of risk categories and 'cut-off points,' which have

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246. With thanks to Stephen Demuth for suggesting this relabeling.

247. Garrett & Monahan, *supra* note 51, at 445.

248. *Id.*

249. *Id.* at 488 ("As described, selecting what threshold to define various categories of risk and selecting which are relevant risks to be measured are policy choices."); *see* BECK, *supra* note 190, at 29 ("There is no expert on risk. . . . [A]t the center of [scientists'] work [on risk], they continue to be reliant on social and thus prescribed expectations and values. Where and how does one draw the line between *still* acceptable and *no longer* acceptable exposures?"); *see also* Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 766–75 (2011) (arguing that there should be a presumption of innocence pretrial and that defendants have a due process right to be released absent proof of "substantial risk" that he or she will flee or threaten witnesses); Mayson, *supra* note 3, at 772. *See generally* Louise Amoore, *Data Derivatives: On the Emergence of a Security Risk Calculus for Our Times*, 28 THEORY, CULTURE & SOC'Y 24, 36 (2011) (explaining that risk itself has become a pervasive technique of governing).

250. Amoore, *supra* note 249, at 38.

251. Ansell & Baur, *supra* note 191, at 407 ("The problem definition literature focuses on how politicians, advocacy groups, and the media define public problems. While these actors typically produce the most publicly visible claims, public agencies, courts, experts, and citizens also play an important role in framing and defining risks.").

also been largely left to the discretion of developers and state officials" are "incredible decision[s] made on behalf of communities, particularly those that have been traditionally marginalized because of over-policing, overincarceration, and the concomitant inability to build wealth."[252]

While risk assessment tools may have some still unrealized potential to improve accuracy, consistency, and transparency, they also problematically reinforce our security-obsessed culture by suggesting that all negative outcomes can be predicted, measured, and prevented.[253] It may be time to stop letting one vision of public safety risk dominate the policy discourse and consider new ways of measuring community harms.

E. Measuring Harms

As currently configured, criminal justice risk assessment tools envision public safety and appearance concerns in ways that completely neglect whole categories of harm to defendants (and related harms to their communities) that result from pretrial detention or restrictive forms of release.[254] Although there is increasing academic and reform attention to these costs, they have not yet been incorporated into any of the pretrial risk assessment tools being used around the country.[255] As a result, our system devotes substantial resources to speculating about unknowable risks while simultaneously ignoring existing, known harms.[256] In part, that reflects the tools' origins. Because they have been developed to

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252. Hill, *supra* note 191, at 10; *see also* Okidegbe, *supra* note 191.

253. Rik Peeters, *The Price of Prevention: The Preventative Turn in Crime Policy and its Consequences for the Role of the State*, 17 PUNISHMENT & SOC'Y 163, 167 (2015) (explaining that prevention is both "boundless" and "elusive": "the limits of prevention are constituted by the limits of imagination" and "in principle no criterion to decide how much should be done"); *cf.* GARLAND, *supra* note 67, at 205 ("The problem of crime control in late modernity has vividly demonstrated the limits of the sovereign state . . . . [T]he state is seriously limited in its capacity to provide security for its citizens and deliver adequate levels of social control . . . . Instead it must harness the governmental capacities of the organizations and associations of civil society, together with the local powers and knowledge that they contain. We are discovering—and not before time—that this is true of crime control as well."); Jonathan Simon, *Reversal of Fortune: The Resurgence of Individual Risk Assessment in Criminal Justice*, 1 ANN. REV. L. & SOC. SCI. 397, 416 (2005) ("The sophisticated science of risk assessment that was developed in the 1990s remains highly dependent on the criminal justice system as both the producer of its major inputs and the consumer of its services.").

254. Letter from AI Now Institute, Color of Change, et al., to Eve Hershcopf, Crim. L. Advisory Comm., Jud. Council of Cal., & Kara Portnow, Crim. L. Advisory Comm., Jud. Council of Cal. (Dec. 14, 2018).

255. Yang, *supra* note 3, at 1399–1400.

256. Letter from AI Now Institute, Color of Change, et al., *supra* note 254.

help with sorting defendants within the carceral systems, they have limited utility for noncarceral or decarceral problem-solving efforts.[257]

Crystal Yang's cost-benefit proposal is an effort to reframe evidence-based decision-making in precisely this way. As she explains:

> These instruments, while improving the accuracy of risk predictions, do nothing to predict the harms associated with pre-trial detention. As mounting evidence indicates that high-risk defendants may also be most adversely affected by a stint in pre-trial detention, I argue that jurisdictions employing evidence-based practices should estimate both costs and benefits for each defendant. In doing so, policymakers can better ensure that detention is not based solely on ensuring public safety, but gives due weight to the short- and long-term consequences of pre-trial detention on defendants and society.[258]

This expanded view of the problems posed by pretrial detention may help judges recalculate how to prevent and mitigate pretrial harms.[259] Ideally, this kind of effort could be part of broader shifts away from overreliance on penal and carceral sanctions to provide for community security.

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257. *See* Collins, *supra* note 236, at 85–91 (tracking the development of risk tools for correctional use and critiquing their "off-label" application to sentencing decisions); *cf.* Malcolm Feeley & Jonathan Simon, *The New Penology Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 452 (1992) ("In contrast, the new penology is markedly less concerned with responsibility, fault, moral sensibility, diagnosis, or intervention and treatment of the individual offender. Rather, it is concerned with techniques to identify, classify, and manage groupings sorted by dangerousness. The task is managerial, not transformative. It seeks to regulate levels of deviance, not intervene or respond to individual deviants or social malformations.").

258. Yang, *supra* note 3, at 1492; *see also* Mayson, *supra* note 3, at 2286 ("The appropriate response [to identified risk] is an intervention that minimizes the possibility of a net harm, taking into account any harm the intervention itself inflicts, and maximizes the possibility of a net benefit."). Yang's project is an example of what some scholars call "vertical problem redefinition" because it "follows the causal pathways of a particular risk object—either upstream (identifying new risk factors) or downstream (identifying new potential harms) from the initial locus of control." Ansell & Baur, *supra* note 191, at 399.

259. Simon, *supra* note 253, at 414–15 ("There is also a greater effort to link individual risk assessment with the growing literature on community ecology by sociologists and criminologists, much of it emphasizing the importance of concentrated poverty on the behavior of residents."); *cf.* Ansell & Baur, *supra* note 191, at 412 (describing expansion of control strategies to address more broadly defined risks; "Control strategies can also expand in scope. In food safety, the control strategy known as Hazard Analysis and Critical Control Points (HACCP) was extended from the meat sector to the seafood sector (horizontal expansion), while also expanding upstream to suppliers and downstream to retailers and foodservice (vertical expansion).").

Adopting these approaches does not require abandoning concerns about crime prevention or public safety. That would be a significant and unlikely cultural reversal.[260] Instead, more "positive" and "capacity-building" prevention strategies would be directed at a broader set of upstream social and economic causes and downstream harms.[261]

V. PRETRIAL DECISION-MAKING AS RISK MANAGEMENT

Although much reform attention is directed at improving the accuracy of risk measurements, those reforms may obscure an essential aspect of a judge's pretrial decision-making responsibility. Calculating the pretrial risks posed by a defendant is only the first half of the task that judges face. Judges in the pretrial context are tasked with managing or mitigating pretrial risk, not simply measuring it.[262] Their objectives are to protect public safety and to ensure defendants' appearances at future court dates.[263]

The current generation of pretrial risk assessment tools focus primarily on the risk presented by a particular defendant before any court interventions.[264] These tools do not yet adequately account for

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260. *Cf.* GARLAND, *supra* note 67, at 199–200 ("Why do governments so quickly turn to penal solutions to deal with the behaviour of marginal populations rather than attempt to address the social and economic sources of their marginalization? Because penal solutions are immediate, easy to implement, and can claim to 'work' as a punitive end in themselves even when they fail in all other respects. Because they have few political opponents, comparatively low costs, and they accord with common sense ideas about the sources of social disorder and the proper allocation of blame. Because they rely upon existing systems of regulation, and leave the fundamental social and economic arrangements untouched. Above all, because they allow controls and condemnation to be focused on low-status outcast groups, leaving the behaviour of markets, corporations and the more affluent social classes relatively free of regulation and censure.").

261. Peeters, *supra* note 253, at 176 ("The 'positive' prevention strategy focuses on 'capacity building' or supporting citizens to show desirable behaviour. Typical techniques here are treatment in detention for juvenile delinquents and habitual offenders, early detection of risk adolescents (e.g. Keymolen and Broeders, 2013), and family support programmes (e.g. Welsh and Farrington, 2006). Here, crime prevention often overlaps with welfare policies, albeit that care and support are instrumental to preventative objectives.").

262. Gouldin, *Framing for Release*, *supra* note 17; *see* Barry Mahoney et al., *Pretrial Services Programs: Responsibilities and Potential*, NAT'L INST. OF JUST. 65–66 (2001).

263. *See* Mahoney et al., *supra* note 262, at 5.

264. *See* Gouldin, *Defining Flight Risk*, *supra* note 3, at 684 ("Instead, current risk-assessment tools treat all nonappearances equally and produce risk numbers that do not adequately account for a court's ability to manage and mitigate pretrial flight and nonappearance risk."); Garrett & Monahan, *supra* note 51, at 468 ("[A] strong majority of judges found the availability of alternative interventions for eligible drug and property offenders in their communities to be inadequate at best. Those judges stated that they believed that an increase in

a court's ability to manage and mitigate pretrial flight and nonappearance risk.[265] In other words, the tools do not communicate to judges their obligations to manage particular risks in order to maximize pretrial liberties.[266] They also give judges too little information about how they should try to manage pretrial risk short of detention. If reformers are committed to increasing pretrial release rates, they should strive to develop and communicate to risk-averse judges information about risk management options and pretrial supports that are less restrictive than pretrial detention and avoid unnecessary release restrictions.[267]

A. Measuring Needs

As noted above, a particular defendant's level of nonappearance or public safety risk is not a fixed number that exists in a vacuum—it must be assessed in reference to the available conditions of release (e.g., travel restrictions, community supervision, or electronic monitoring) that judges can employ to manage or mitigate pretrial risks.[268] Judges must calculate appearance and safety risks and then employ available conditions of release (or in extreme cases, deny release) to manage and mitigate those risks.[269]

In many domains, risk assessments are paired with needs assessments that do precisely this work.[270] The widely-used Risk-Needs-Responsivity paradigm breaks the analysis into three

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the availability of alternative interventions would change their sentencing practices.")

265. Gouldin, *Defining Flight Risk*, *supra* note 3, at 893–97; *see also* Garrett & Monahan, *supra* note 51, at 481 ("Risk assessment instruments are not designed to tell decisionmakers anything about whether an alternative to punishment (or bail, or supervised probation) might mitigate risk.").

266. Garrett & Monahan, *supra* note 51, at 490 (citing ODonnell v. Harris County, 892 F.3d 147, 159 (5th Cir. 2018)) ("While liberty of arrestees, the court noted, is a very important interest, the court also noted that an efficient process stands to benefit arrestees who desire prompt resolution of their cases.").

267. *Id.* at 445 ("Behavioral research on how decisionmakers make use of quantitative information can help to inform this task. A new approach is needed that takes account of interface between general quantitative risk information and the officials, such as judges, prosecutors, and probation officers, who take that information into account in decisionmaking. That interface must be evidence-informed and based on common goals.").

268. Note that what a defendant "needs" can be interpreted in very different ways (e.g., surveillance or services/treatment).

269. *See* Gouldin, *Defining Flight Risk*, *supra* note 3, at 897.

270. Collins, *supra* note 236, at 81–83 (explaining that the risk calculation is not an end in itself; the point is to be able to reduce risk through attention to a defendant's dynamic criminogenic needs); Garrett & Monahan, *supra* note 51, at 481 ("In a range of settings [including the juvenile justice system], risk assessments may accompany needs assessments. These may include mental health screenings, substance abuse screenings, educational assessments where the goal is not just to assess risk but also to mitigate it by providing rehabilitative interventions.").

components: "assessing risk, assessing criminogenic needs, [and] providing treatment that is responsive to the offender's abilities and learning style."[271] Criminogenic needs are the "dynamic risk factors" used to make predictions of future criminal conduct.[272] In the sentencing context, where recidivism is often the primary risk measure, judges focus on those dynamic factors that can be addressed through interventions and which are most associated with future criminal conduct, including "current age, education level, marital status, employment status, current substance use, and residential stability."[273] In a pretrial setting, judges also need to focus on those dynamic factors that correlate with pretrial nonappearance or flight.[274] By contrast, "static risk factors" are fixed attributes like "age at first arrest, gender, past problems with substance or alcohol abuse, prior mental health problems, or a history of violating terms of supervision."[275]

More comprehensive risk-needs-responsivity models should be adopted in the pretrial context. Pretrial reforms must push for a shift from static pre-intervention risk calculations to more dynamic measures that predict risk in light of both judicially-determined conditions of release (focused on particular defendants) and systemic features that impact pretrial failure. This will require a different set of risk calculations adjusted to reflect the risk-mitigating impacts of various interventions, or at least more clear guidance to judges about how to weigh and adjust risk calculations in light of available interventions.

Risk assessment tools like the Arnold Ventures PSA have deliberately moved to relying on a short list of static factors (like one's criminal history or history of failures to appear ("FTAs"), for example), in part because these data points are easily gleaned from court documents.[276] Many of the dynamic risk factors listed above must be determined through interviews with arrestees.[277] As outlined in the next subpart, these choices, intended to make the tool

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271. NATHAN JAMES, CONG. RES. SERV., R44087, RISK AND NEEDS ASSESSMENT IN THE FEDERAL PRISON SYSTEM 4 (2018) ("The Risk-Needs-Responsivity (RNR) is one of the most dominant paradigms in the risk and needs assessment field. It has emerged as a prominent framework for guiding offender assessment and treatment because it is one of the few comprehensive theories of how to provide effective recidivism reduction interventions to offenders.").

272. *Id.* at 3.

273. *Id.*

274. Gouldin, *Defining Flight Risk*, *supra* note 3, at 716–17.

275. JAMES, *supra* note 271, at 3.

276. Gouldin, *Defining Flight Risk*, *supra* note 3, at 718; *see also* Mayson, *supra* note 18, at 511–12.

277. *See* Mayson, *supra* note 18, at 511–512 (outlining that static factors include prior conviction and a history of FTAs, while dynamic factors include employment status and substance abuse and often require interviews for assessment).

more appealing for resource-constrained jurisdictions,[278] may influence judicial behavior in unanticipated or unintended ways.

B. Judges as Risk Managers

Pretrial reform efforts are largely dominated by risk-only measures.[279] Because the relevant tools do not measure defendants' needs, they miss an opportunity to remind judges of their roles as risk managers or the options for promoting defendants' pretrial success.[280] If reform efforts intend to encourage greater reliance on pretrial release and to support defendants' success on release, risk-only measures may undermine those goals. Ideally, tools would emphasize these judicial obligations and identify specific interventions that match defendant needs.[281] Judges more focused on a defendant's pretrial needs will attempt to gauge whether various "risk reduction strategies" like drug treatment, "cognitive behavioral programs, . . . employment training and job assistance" might help improve outcomes during the pretrial period.[282]

The risk-focused and needs-neglecting discussion around pretrial reform also fails to communicate to the community broader systemic causes of pretrial failure and corresponding means of promoting pretrial liberty and success. While there are certainly still significant questions about the types of interventions that will be most effective in addressing particular defendant needs or chronic system problems,[283] emphasizing that the system has an obligation to identify and address those needs and system defects will help prioritize that research and hopefully lead to financial investments in those interventions.[284]

C. Considering System-Focused Interventions

If judges focus on ways to mitigate pretrial risks—and hopefully shift to considering ways that the court system might promote pretrial success—they may begin to recognize aspects of the system that demand change.[285] Certainly, judges have long lists of suggested conditions of release that they are able to impose in appropriate

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278. *See* Gouldin, *Defining Flight Risk*, *supra* note 3, at 718.

279. *See* Gouldin, *Disentangling*, *supra* note 15, at 865.

280. *See* Gouldin, *Framing for Release*, *supra* note 17.

281. PAMELA M. CASEY ET. AL., OFFENDER RISK & NEEDS ASSESSMENT INSTRUMENTS: A PRIMER FOR COURTS, NAT'L CTR. FOR ST. CTS. 6, Exhibit B (2014), https://www.ncsc.org/__data/assets/pdf_file/0018/26226/bja-rna-final-report_combined-files-8-22-14.pdf (explaining that risk-needs assessments highlight "potential strategies for reducing the offender's risk").

282. *Id.* at 4.

283. Mayson, *supra* note 3, at 2286–87 (calling for more "supportive, needs-oriented response to risk" but recognizing that "there is scant evidence on what interventions 'work' to manage crime risk at the individual level").

284. Garrett & Monahan, *supra* note 51, at 443–44.

285. Gouldin, *Defining Flight Risk*, *supra* note 3, at 738.

cases.[286] Many of those conditions appear on judicial checklists as a menu of options for managing pretrial risk.[287]

But improving pretrial success rates may also depend on system-focused efforts to simplify court processes, adopt more flexible scheduling options (to accommodate work or caregiving conflicts), develop more accommodating grace periods for defendants who miss court dates, recognize transportation barriers, reduce case delays, and eliminate or reduce case-related fines and fees.[288]

VI. CONCLUSION

In less than a decade, the pretrial landscape has undergone an unmistakable transformation. Reformers have won landmark legal victories dismantling oppressive money bail systems, secured sweeping state legislative changes, achieved widespread adoption of actuarial risk assessment instruments, attracted significant private foundation investments, and accumulated an impressive array of other victories. These changes have not, however, displaced judges as pivotal pretrial decisionmakers, and they have made only modest and incremental adjustments to the processes of pretrial decision-making. Close and critical scrutiny of the goals of pretrial decision-making suggests that further work must be done to improve the definition and the measurement of pretrial risks, quantify the harms of pretrial detention and restricted release, clarify judges' responsibilities to mitigate risks and minimize harms to defendants, and provide additional tools for judges to be successful in that role.

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286. *Id.* at 696–97.
287. *Id.*
288. *See id.* at 738–41.