

**DELAWARE ACCESS TO JUSTICE COMMISSION'S COMMITTEE ON
FAIRNESS IN THE CRIMINAL JUSTICE SYSTEM**

A Report on Bail & Pretrial Detention

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*Access to Justice Commission's Committee on
Fairness in the Criminal Justice System:
Equal Justice Initiative—Report on Bail & Pretrial Detention*

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I. EXECUTIVE SUMMARY

The Equal Justice Initiative is a private, nonprofit organization that provides legal representation to indigent defendants and prisoners who have been denied fair and just treatment in the legal system. EJI litigates on behalf of juvenile offenders, condemned prisoners, the wrongfully convicted, poor people who were denied adequate representation, and others whose trials were impacted by racial bias or prosecutorial misconduct.

The history of racial inequality and economic injustice in the United States has created continuing challenges for all Americans and we believe more must be done to advance our collective goal of equal justice for all. EJI works to confront the history of racial inequality and economic injustice in the United States. EJI works with communities that have been marginalized by poverty and discouraged by unequal treatment. Additionally, EJI prepares reports, newsletters, and manuals to assist advocates and policymakers in the critically important work of reforming the administration of criminal justice.

EJI is excited to have been invited to participate in Delaware's Access to Justice Commission's Committee on Fairness in the Criminal Justice System. EJI was asked to consider a number of topics related to the criminal justice system in order to evaluate best practices that jurisdictions have employed to help address issues of racial disparities and economic injustice. EJI was also asked to remain sensitive to collateral impacts of public safety, while still addressing ways Delaware's criminal justice system could be reformed to reduce the disproportionate impact on people of color and the economically disadvantaged.

In this paper, EJI has considered the way that Delaware's bail and pretrial detention system can be reformed to reduce the disparities experienced by indigent defendants and defendants of color. EJI has studied academic papers and considered the progress that has been made by other jurisdiction's reform efforts. Based on our research, EJI has seen improvements where jurisdictions have employed the following reforms:

- A default to unsupervised release and the elimination of money bail;
- The use of validated risk assessment instruments to guide release decisions;
- The development of effective pretrial services and alternatives to pretrial detention;
- The development of a number of additional practices to promote equitable pretrial release outcomes

II. THE CRISIS OF PRETRIAL DETENTION

The most important factor in determining whether a person is detained, ability to pay money bail, does not reflect the policy behind pretrial detention, minimize risk of flight and illegal activity. The result is a pretrial detention population that is overwhelmingly poor, African American, and unlikely to flee or commit an offense before trial. In Delaware, African American men, women, and children represent a disproportionately high number of individuals detained prior to trial, representing 56 percent of the pretrial detention population despite comprising only 22 percent of the state population.¹ Though the state has initiated reforms in its bail process, the rate of pretrial detention rose from 2012 to 2014 by 20 percent even as violent crime fell in the same period.² Of those detained prior to trial, over 65 percent are detained for more than 30 days and over 3 percent are detained for a year or longer.³ If Delaware mirrors national trends, the majority of people held in pretrial detention prior to trial are being detained merely because they cannot afford bail, and a significant portion are being held on misdemeanor offenses on bail amounts of \$1,000 or less.⁴

The consequences of high rates of pretrial detention are dire for those detained, for the community, and for states and localities. Spending just 24 hours in jail can worsen long-term outcomes even where the person is eventually released.⁵ Pretrial detention interferes with employment, payment of bills, and caregiving, and can inflict extraordinary psychological damage. Bail set at low amounts, just a couple hundred dollars, can be significant for individuals without a job or in low-wage positions. Working families living pay check to pay check can ill afford any extra costs when struggling to pay rent, utilities, and care for very young or very old family members.⁶ As the time spent in pretrial detention extends, families' social and economic networks deteriorate.⁷

Time spent in pretrial detention, especially in solitary confinement, is physically and psychologically damaging. The case of Kalief Browder, who spent three years in pretrial detention at Riker's Island in New York City, illustrates the point. Mr. Browder, arrested at age 16 for allegedly stealing a backpack, spent three years in pretrial detention, two of those in solitary confinement.⁸ He was assaulted on several occasions by guards and inmates, and he attempted suicide multiple times.⁹ Eventually Mr. Browder's charges were dropped, but the damage lasted well beyond his time in pretrial detention. Mr. Browder attempted suicide again six months after his release, after which he was hospitalized. He was hospitalized two more times around Christmas of 2014 after experiencing profound

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paranoia.¹⁰ Two years after his release, at age 22, Mr. Browder took his own life.¹¹ Mr. Browder's case and its tragic end show how devastating pretrial detention can be for individuals and their loved ones. For individuals that have not been convicted and may be of no risk for flight or commission of illegal activity, pretrial detention is the harbinger of crushing psychological and physical harm and of economic and social interruption and displacement.

Bail and pretrial detention contributes to disparities in incarcerated populations and places further fiscal strain on state and local budgets. Noted above, the population of detained individuals exhibits significant racial disparities, with people of color represented in disproportionately high numbers. Disparities in the pretrial detention phase contribute to disparities down the line, not just because pretrial detention increases the likelihood of a guilty plea, but because pretrial detention leads to a greater likelihood of incarceration and longer sentencing.¹² Even amongst low-risk individuals, those who are detained for any period before trial are more likely to be incarcerated and more likely to receive a longer sentence of incarceration.¹³

An additional enormous and immediate factor behind disparities in pretrial detention, in addition to historical inequities and threads of discrimination that continue to perpetuate inequality in all facets of life, is implicit bias. Magistrates and judges are imbued with significant discretion, even with the use of more objective tools like risk assessment instruments, to decide whether to set bail or detain someone pre-trial. Implicit bias, which often conflicts with self-reported beliefs, refers to prejudice that results from implicit attitudes toward particular groups and implicit stereotypes about particular groups.¹⁴ As one judge explained, “social scientists are convinced that we are, for the most part, unaware of them. As a result, we unconsciously act on such biases even though we may consciously abhor them.”¹⁵

Thus, however unintentional, racial bias can infect pretrial detention decisions where discretion permits the utilization of a magistrate's, judge's, pretrial service agency employee's, or anyone else's own opinion and instinct. As an example, researchers have documented that racial bias can influence how juvenile offenses are described in post-arrest narrative reports, which could influence pretrial release decisions. For white youth, officers tended to attribute the offense to external forces, like coming from a broken home, but for youth of color, officers tended to emphasize internal forces, like poor moral character, which tends to result in harsher, more punitive outcomes.¹⁶ Awareness of implicit bias and how

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it can impact decision-making is critical in evaluating ways in which bail and pretrial release processes can be reformed to eliminate disparities and reduce harmful, disproportionate impacts on people of color and poor people.

III. REFORMING BAIL AND PRETRIAL DETENTION

Research on bail and pretrial release decisions has generated a plethora of possible reforms that can maintain public safety while allowing only the most high risk individuals be detained pretrial. By eliminating money bail and the commercial bond system, Delaware and other states can eliminate the risk of incarcerating individuals presumed innocent merely for the inability to pay up. Moving to a risk-based model that emphasizes objective and standardized evaluation of flight and public safety risk will ensure that those who should be detained will be and that those who pose little or no risk can remain home. Additional mechanisms can expand the ability to keep people out of expensive pretrial detention, including the provision of robust pretrial services, diversionary programs, and alternatives like electronic monitoring or conditional release. Finally, additional reforms, like implementing a comprehensive notification system, training court staff and judges on implicit bias and pretrial options, and collecting adequate data, can further facilitate improved appearance rates.

A. Default to Unsupervised Release and Elimination of Money Bail

A fundamental principle of criminal law in the United States is that people are presumed innocent until proven guilty. For this reason, unsupervised release should be the default and presumptive option between arrest and trial for individuals accused of a crime.¹⁷ This presumption represents not just a legal and technical starting point in pretrial decision-making, but an ethos of preserving liberty that can orient magistrates and other court officials to pursuit of the least restrictive means of encouraging appearance at future proceedings and maintaining public safety. Where release is the norm, rather than the setting of bail, magistrates are likely to more closely examine the reasons for and appropriateness of any measures to ensure future appearance when there are indications that such measures are needed. In addition, defaulting to release avoids the punitive nature of pretrial detention for the significant portion of people who are later acquitted or, though found guilty, are not sentenced to any period of incarceration. In the least, defaulting to release will prevent the use of bail and pretrial detention as leverage to obtain guilty pleas in cases that would otherwise be dismissed or fail to result in conviction.

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Operating under a presumption of release also brings decision-makers into accord with the reality that the majority of people can be released on their own recognizance without concern that they represent a risk to public safety or that they will fail to appear at future proceedings.¹⁸ Even where magistrates and judges have the benefit of some form of pretrial assessment, the hurried fashion of pretrial court proceedings means they will tend towards custom and practice, which is currently money bail rather than release, and will set bail in an arbitrary and potentially unpredictable fashion.¹⁹ This is especially true where bail is viewed as a minor or routine administrative proceeding.²⁰ The results are racial and economic disparities in who gets released after arrest and in who is subjected to longer periods of pretrial detention.

Eliminating money bail completely, in addition to establishing release as the default, would substantially reduce the discrimination against poor people and people of color that occurs under money bail systems in which pretrial detention does not actually reflect danger to public safety or risk of flight.²¹ The International Association of Chiefs of Police has acknowledged the need for reform by noting that bail has “little or no bearing on whether a defendant will return to court and remain crime-free.”²² Thus, money bail has the perverse effect of permitting high-level offenders of means that are able to flee to be released while detaining people that pose less danger and are less likely to flee if released.²³

1. Eradicate the Commercial Bail Bond Industry

The commercial bail bond industry makes possible the release of millions of people each year, though only because money bail is used so extensively.²⁴ Commercial bail bonds, though they permit the release of many, amplify some of the problems associated with money bail and pretrial detention. First, individuals who already lack other means to finance their bail will lose money in fees to commercial bondsmen, though they may only serve individuals whose bail amounts are high enough that such fees are profitable.²⁵ This leaves some with lower bail amounts stuck because they cannot access commercial bonds but allows a greater number of higher risk individuals to be released.²⁶ Additionally, commercial bondsmen can return individuals to jail at any time for any reason.²⁷ Eradicating the commercial bail bond industry along with money bail altogether would contribute to more just release decisions, reduce racial disparities in pretrial detention, and orient release around risk rather than financial well-being.

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Case Study: Kentucky

a. The Process

Kentucky is one of four states in the country with a non-commercial bail system.²⁸ In 2011, the Kentucky Legislature passed House Bill 463, the Public Safety and Offender Accountability Act. This bill was projected to save Kentucky \$422 million dollars over ten years.²⁹ The bill required judges to use a research-based, validated assessment tool to measure a defendant's flight risk and public dangerousness.³⁰ It is now required that the court consider the pretrial risk assessment in the bail process, whereas before, judges were not obligated to factor it into bail determinations. Additionally, after HB 463, the amount of bail is limited to the maximum fine and cost of the offense. Any defendant who is charged with a crime that could result in presumptive probation is automatically released on his or her own recognizance.³¹ Any defendant held on money-bail would be presumed eligible for a bail credit of \$100 per day toward his or her bail amount so that he or she may earn release over time. However, high-risk offenders who receive money-bail do not receive these credits.³² Judges still maintained the option to override these presumptions upon a subjective finding of dangerousness or risk of flight, but would have to provide some written justification for the decision.³³ In addition to these changes, if it is determined that money bail is required, five factors must be considered including: (1) bail must be commensurate with the nature of the offense charged, (2) must be sufficient to insure compliance with conditions of release (3) must not be oppressive (4) must be considerate of past criminal acts and reasonably anticipated future acts, and (5) must be considerate of the defendant's ability to pay.³⁴

b. Supervision

The Kentucky system generally allows those considered low or moderate risk to be released on their own recognizance. For some moderate-risk defendants, courts impose conditions, such as drug testing or GPS monitoring. The program reinvests the savings from housing fewer inmates to community programs that supervise both defendants and those convicted of crimes.³⁵

c. Results

The unchecked ability for judges to override presumptions allows some implicit and conscious biases to influence the decision process. Despite these concerns, the Kentucky

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program has had moderately positive results. Pretrial releases increased from 50-70 percent of all arrested defendants in the first year of implementation.³⁶ Non-financial releases increased from 15-66 percent of all releases. 85 percent of low-risk assessed defendants were released, which is an 8 percent increase from pre HB 463 numbers. The release rate for moderate risk defendants rose from 60 percent to 67 percent.³⁷ The release rate of high risk defendants has risen just above 51 percent. The monitoring program, Monitored Conditional Release (MCR), was assigned 40 percent more clients after the Act was implemented. The appearance rate and public safety rate as measured by the MCR program increased by 1 percent.³⁸ However, 15 percent of defendants recommended for release without conditions and 33 percent of defendants recommended for conditional release remained incarcerated between June 2011 and June 2012. These numbers increased between June 2012 and June 2013.³⁹ This is largely attributed to the discretion given the judges in accepting the recommendations of the pretrial service officers over the risk assessment tools. There was also variation between counties in release rates, and counties with comparable demographic qualities and identical public safety rates had drastically different levels of release.

Case Study: Bronx Freedom Fund

a. Overview

The Bronx Freedom Fund was the first charitable bail organization licensed in New York state and was founded in affiliation with The Bronx Defenders, a holistic public defender office in the South Bronx. It has been in operation since 2013. The fund meets bail obligations for those facing misdemeanor charges who lack the money to post bail. Program participants are connected to services and support for the duration of their cases so they do not only get released, but also receive the assistance necessary to stabilize their lives long term.⁴⁰ The fund will also remind participants of court dates and provide the logistical assistance participants need to meet their court obligations.⁴¹ It pays bail fees for nearly 150 defendants in the Bronx every year. When the client's case closes, the bail money is refunded into a revolving fund to help others in need.⁴²

In a recent City Council Hearing, the Project Director of the Freedom Fund, Alyssa Work, suggested that in order to have an effective bail fund, the program would need: 1) sufficient funds (typically \$500 per participant is sufficient for bail costs), 2) a referral mechanism to quickly locate eligible individuals who cannot afford bail at arraignment, and 3) staff available at court to interview clients and post bail, as well as a system for reminding

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clients about upcoming court obligations. Ms. Work also recommended aligning the bail fund with a public defender's office to manage some of these logistical concerns.⁴³ Finally, Ms. Work cautioned against conditioning bail funds on drug tests, classes, hand scans or other mechanisms that could lead to net-widening and additional duties or violations before any adjudication of guilt.⁴⁴

b. Results

97 percent of clients return to all scheduled court dates, which is a higher compliance rate than defendants released on their own recognizance by judges. Every dollar spent by the bail fund saves over six dollars in incarceration costs.

B. Using Risk Assessment Instruments to Make Pretrial Release Decisions

Because the primary concerns regarding pretrial release are whether a person is a threat to public safety and whether a person will flee the jurisdiction,⁴⁵ magistrates and others involved in release decisions should actually be able to gauge the risks of these concerns being validated. Done correctly, risk assessment instruments can enable jurisdictions to end the use of money bail and avoid imprisoning people that pose little to no risk. This improves outcomes for the community, allowing people to maintain their jobs and continue to care for their families, in addition to saving local jurisdictions money and accurately identifying high risk individuals for pretrial detention.⁴⁶

Moreover, risk assessment instruments can offer guidance on how to use alternatives to pretrial detention when a person poses some moderate or medium amounts of risk, for example whether a person presents such a risk as to warrant electronic monitoring or simply regular check-ins with a pretrial services agency. Validated risk assessment instruments can prevent racial bias from influencing release decisions by focusing consideration on objective factors.⁴⁷

Where money bail is frequently set, jurisdictions often create and use bail schedules that standardize bail amounts relative to the seriousness of the offenses charged. As with money bail generally, this approach fails to correspond to actual risks of further offending and failure to appear. In fact, research has shown that severity of the initial charge is not an accurate predictor of risks associated with a particular person.⁴⁸ In addition, bail schedules reinforce the culture of setting bail rather than examining a particular person's risk of flight

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and further illegal behavior. Risk assessment instruments provide standardization of a different sort that can support a judicial culture that sees unsupervised release as the necessary default.

Risk assessment instruments utilize a variety of factors to classify individuals according to risk level, which corresponds to potential release options that include unsupervised release, diversion and other alternatives, and pretrial detention. Factors may include things like conviction history, age, employment, drug dependence, and current charge.⁴⁹ However, risk assessments may still invite racial biases when not adequately tested and refined at the local level to verify that utilizing the instrument does not exhibit racial bias.⁵⁰ For example, utilizing as a factor a person's number of juvenile arrests, rather than dispositions, may disproportionately impact individuals living in poor, densely populated communities of color that are often targeted for more aggressive and extensive policing.⁵¹ Utilizing unemployment as a risk elevating factor can reproduce the effects of setting money bail by penalizing people without financial means.⁵² Thus, validating the instrument is a critical step, as un-validated risk assessment instruments may not only be ineffective but have the unintended effect of engendering greater disparities in pretrial detention.⁵³

1. Recent State Moves Away from Money Bail and Toward Risk Assessment

New Jersey and Colorado both recently passed bail reform. The general focus of each state's reform was moving from a money-based to risk-based system, and risk assessment tools played roles in each state's reforms. In many ways the two states' reforms are similar, but there are also significant differences between the routes they took that may be illustrative for Delaware in crafting its reforms.

Case Study: New Jersey

a. Creating the presumption of pretrial release, and moving from a money-based to a risk-based system

In 2014, New Jersey passed two pieces of bail/pretrial detainment reform legislation concurrently. They had the general goal of shifting New Jersey's pretrial release system from a money-based bail system to a primarily risk-based system. These measures were Senate Bill 946 (S946),⁵⁴ which was passed by the legislature, signed into law by the governor, and codified at 2A:162-15 to 2A:162-26 et seq, and Senate Concurrent Resolution 128 (SCR128),

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a proposed constitutional amendment, which was passed by the legislature, placed on the ballot, and approved by New Jersey voters with 62 percent of the vote.⁵⁵

S946 restricts the circumstances in which bail can be imposed to only one: “when it is determined that no other conditions of release will reasonably assure the eligible defendant’s appearance in court when required.”⁵⁶ Otherwise, the court is to “rely[] upon pretrial release through non-monetary means to reasonably assure an eligible defendant’s appearance in court when required, the protection of the safety of any other person or the community, that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process, and that the eligible defendant will comply with all conditions of release.”⁵⁷ Upon motion of a prosecutor, the court can order pretrial detention of the defendant “when it finds clear and convincing evidence that no condition or combination of conditions can reasonably assure the effectuation of these goals.”⁵⁸ The legislation “shall be liberally construed to effectuate the purpose of primarily relying upon pretrial release by non-monetary means to reasonably assure” these goals.⁵⁹

In other words, from the outset of a prosecution, there is indeed a presumption of pretrial release without bail. Bail is available only upon a finding that no other measures will assure the defendant’s appearance in court (i.e., it is only available in the case of a flight risk). Otherwise, the court is to rely on non-monetary means for effectuating not only that goal but also public safety and preventing the “obstruct[ion of] the criminal justice process.”⁶⁰

Meanwhile, SCR128 amended the state constitution to remove the constitutional right to bail and to state that “[a]ll persons shall, before conviction, be eligible for pretrial release.”⁶¹ It also stated, however, in line with S946’s statutory changes, that “[p]retrial release may be denied to a person if the court finds that no amount of monetary bail, non-monetary conditions of pretrial release, or combination of monetary bail and non-monetary conditions would reasonably assure the person’s appearance in court when required, or protect the safety of any other person in the community, or prevent the person from obstructing or attempting to obstruct the criminal justice process.”⁶²

When the effects of both measures are combined, then, while neither bail nor pretrial release are constitutionally guaranteed, bail can be imposed only in the case of a flight risk, and all other defendants are to be released without bail unless there is a showing that non-monetary measures would be insufficient to assure public safety or the obstruction of the

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criminal justice process. These seem like generally progressive measures and indeed were lauded by reformers.⁶³

b. Speedy trials

Enhancing the meaningfulness of the presumption of release, under the New Jersey reforms, the court must (with exceptions, discussed further below) make a pretrial release decision within 48 hours after the defendant's commitment to jail.⁶⁴ The ACLU of New Jersey said the bill "ensures for the first time in New Jersey's history that any defendant who is detained would be entitled to a statutory speedy trial protection that ensures that defendants no longer languish in jails for years on end."⁶⁵

c. Potential flaws

There are a few items about New Jersey's legislation that Delaware should take a closer look at when drafting its own. First is the language allowing for pretrial detention if no measures can prevent the defendant from "obstructing the criminal justice process." This language is vague, and, given that the risk of a defendant not showing up for trial is already accounted for, it is unclear what "obstructing the criminal justice process" refers to. There may be a danger that the undefined phrase could be used as a loophole that a judge could use to essentially ignore the rest of the legislation's provisions. Without a clear definition of what "obstructing the criminal justice process entails," a judge's explicit or implicit biases about the propensity of people of color to engage in various behavior could enter the decision-making process and lead to disparities.

Second, the "speedy trial" provisions hailed by the ACLU may not be as clear-cut as it might seem on first glance. In addition to setting out the 48-hour period within which a pretrial detention decision must be made, the new statute also sets time limits on how long a defendant can be detained if pretrial detention is ordered.⁶⁶ The statute provides that a defendant "shall not remain detained in jail for more than 90 days . . . prior to the return of an indictment."⁶⁷ After 90 days without indictment, the defendant is to be released, unless (on motion of a prosecutor) the court finds that release would cause a safety risk to other people or would result in the obstruction of justice, *and* that the failure to indict was not due to "unreasonable delay by the prosecutor."⁶⁸ In such a case, the defendant can be held for a maximum additional 45 days.⁶⁹ Thus, the "speedy trial" provisions could still mean someone could be held for over four months without indictment. Again, the discretion left to judges

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and prosecutors here could let such lengthy pretrial detentions fall disproportionately on people of color.

After indictment, a defendant, “shall not remain in jail for more than 180 days on that charge.”⁷⁰ The defendant is then to be released, *unless* (on motion of a prosecutor) the court finds a safety or obstruction of justice risk and no unreasonable delay by the prosecutor, in which case, “the court may allocate *an additional period of time* in which the eligible defendant’s trial may commence.”⁷¹ Thus, despite provisions theoretically providing for a speedy trial, the judge and prosecutor have a great deal of discretion in deciding how long to keep someone detained pretrial. The only limit on the “additional period of time” is that a defendant must be released two years after the pretrial detention order if the prosecutor is not ready to proceed to voir dire, opening argument, or the hearing of any motions that had been reserved for the time of trial.⁷²

The third item to flag, then, is the issue of how much discretion is left to the judge and prosecutor in pretrial detention decisions. The statute enumerates certain crimes for which pretrial detention can be ordered if no bail or nonmonetary conditions would guarantee court appearance, protect public safety, and prevent the obstruction of justice.⁷³ One provision that appears to be positive is that for all crimes except murder and those that carry a possible life sentence “there shall be a rebuttable presumption that some amount of monetary bail, non-monetary conditions of pretrial release, or combination . . . would reasonably assure” court appearance, public safety, and prevention of the obstruction of justice.⁷⁴ Aside from the fact that this provision is confusing because it suggests monetary bail could be used to protect public safety or prevent the obstruction of justice, while the statute otherwise indicates that monetary bail can only be used to assure court appearance,⁷⁵ this provision seems positive in that it again creates a presumption of pretrial release. (Murder and crimes carrying possible life sentences carry a rebuttable presumption in the other direction—that the defendant *shall* be detained because no conditions would assure court appearance, public safety, or prevention of obstruction of justice.⁷⁶)

EJI’s concern here is that, despite the presumption, a judge has a great deal of discretion to decide whether the presumption has been overcome. In determining whether the presumption is overcome and a defendant should be detained, the judge “*may* take into account information concerning” numerous factors about the defendant and the crime.⁷⁷ Further, the judge “*may* take into account “[t]he release recommendation of the pretrial services program obtained using a risk assessment instrument”⁷⁸ Thus, while a risk

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assessment instrument theoretically serves as an *objective* measure of appropriateness of pretrial release or detention, the judge has the discretion to not even consider it, and has the discretion to consider or not consider numerous other factors. Explicit or implicit biases can influence a judge's decision-making just as much as anyone else's.⁷⁹ Thus, despite the presumption of release, the discretion given to the judge to decide whether that presumption is overcome could lead her to disproportionately detain, pretrial, defendants of color. Moreover, the factors to be considered may not be race neutral. For instance, considering prior offenses as a factor allows race—through explicit and implicit bias in previous arrests and convictions—in through the back door. Thus, while New Jersey's reforms appear to be a good start, Delaware can learn from the reform's imperfections in order to craft reforms that put it at the head of the pack of states creating bail and pretrial detention reform and attacking the problem of mass incarceration of people of color.

Case Study: Colorado

In 2013, Colorado's legislature passed bail reform in the form of House Bill 13-1236. It passed clarifications to HB 13-1236 the following year, with Senate Bill 14-212. Colorado's 2013/2014 bail reform is substantially similar in intent to New Jersey's. Legislative debate indicated that bail needed to shift from being money-based (1) because too many low-level offenders were being incarcerated merely because of their inability to post bond and (2) to infuse research-driven practices into bail administration.⁸⁰ Overall, however, Colorado's legislation seems much more aspirational and less likely to effect concrete change than New Jersey's. While, as highlighted above, New Jersey's legislation may be short-circuited by discretion left to judges in the "fine print", Colorado's bill gives much more discretion to judges on its face.

One important innovation of Colorado's new statute that is different from New Jersey's, and that is important to understand at the outset, is that Colorado's legislation redefined the term "bail." Instead of taking New Jersey's route of removing the requirement of setting bail in almost all cases, Colorado changed the definition of bail itself to include nonmonetary conditions.⁸¹ Bail is now a "security, which may include a bond with or without monetary conditions," intended "to provide reasonable assurance of public safety and court appearance."⁸²

As in Delaware, Colorado's legislation is based on a presumption of release: "All persons shall be bailable by sufficient sureties except" certain enumerated offenses. One is

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capital offenses “when proof is evident or presumption is great.”⁸³ A second is “a crime of possession of a weapon by a previous offender alleged to have been committed in violation of [certain code sections],” and a third is sexual assault. The other three enumerated situations are predicated on a criminal background: (1) “[a] crime of violence alleged to have been committed while on probation or parole resulting from a crime of violence,” (2) “[a] crime of violence alleged to have been committed while on bail pending the disposition of a previous crime of violence charge for which probable cause has been found,” and (3) [a] crime of violence alleged to have been committed after two previous felony convictions, or one such previous felony conviction if such conviction was for a crime of violence”⁸⁴

The new Colorado statute states that “the type of bond and conditions of release shall be sufficient to ensure the appearance of the person as required and to protect the safety of the person or community, taking into consideration the individual characteristics of each person in custody, including the person’s financial condition.”⁸⁵ While it is important that the judge must provide individualized consideration, there is no guarantee of what that individualized consideration looks like or whether it is meaningful, because the method and scope (besides financial means) of individualized consideration is completely discretionary. The statute states, “In determining the type of bond and conditions of release, if practicable and available in the jurisdiction, the court shall use an empirically developed risk assessment instrument designed to improve pretrial release decisions by providing to the court information that classifies a person in custody based upon predicted level of risk of pretrial failure.”⁸⁶

There is the Colorado Pretrial Assessment Tool, or “CPAT,” which is “an empirically derived multijurisdiction pretrial risk assessment instrument for use in Colorado.”⁸⁷ According to Timothy Schnacke, Executive Director of the Center for Legal and Evidence-Based Practices, who supports “moving from a primarily cash-based system toward more rational, transparent, and fair pretrial practices,” the CPAT “represents a state-of-the-art predictive tool.”⁸⁸ While the CPAT is used in various jurisdictions in the state, the statute is clear that judges do not have to use it or any other risk assessment tool. Likewise, rather than ending the use of bond schedules for setting monetary bond rates, the statute merely says that “[t]o the extent a court uses a bond schedule, the court shall incorporate . . . factors that consider the individualized risk and circumstances of a person in custody,”⁸⁹ but again how the judge does this seems to be purely discretionary.

Moreover, while New Jersey’s legislation explicitly limits the use of money bail (to

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cases of flight risk), Colorado's legislation leaves money bail on the table, generally, in all cases. The statute does provide that the court shall "[p]resume that all persons . . . are eligible for release on bond with the appropriate and *least-restrictive conditions*,"⁹⁰ and secured money bonds are considered to be a more restrictive condition,⁹¹ but there does not seem to be anything in the statute that would stop a judge from setting money bail in all cases if she wanted to. More importantly for our purposes, so much discretion is allowed that it is difficult to imagine that explicit and implicit biases around race would not continue to thoroughly infuse the bail-setting process. Thus, while Colorado's bail reform law seems to have the noble goal of moving from a money- to risk-based system in the hopes of incarcerating fewer people pretrial, it does not seem to be written in such a way as to offer much assurance at all that it will achieve this goal or reduce the disproportionate pretrial detention of people of color.

2. Successes Using Risk Assessment Instruments

While discretion in pretrial detention decisions could cause racial disparities, where judges are adequately trained in using validated risk assessment instruments, the positive results can be dramatic. However, choosing fair and objective, validated, risk assessment tools is critical to minimizing racial disparities in pretrial decision-making. Currently, only 10 percent of jurisdictions in the country use risk assessment tools,⁹² but the use of risk assessment is rapidly spreading. As it does, experts are looking more critically at risk factors and the extent to which they perpetuate disparities and potentially promote decision-making based on unconstitutional considerations. For example, some experts have suggested that risk assessment tools that rely on demographic, socioeconomic, or family background variables not only increase disparities, but they may ultimately prove unconstitutional based on the Supreme Court's doctrine on "statistical discrimination."⁹³ Even Attorney General Eric Holder expressed his concern about over reliance on even validated risk assessment tools stating

[a]lthough these measures were crafted with the best of intentions, I am concerned that they may inadvertently undermine our efforts to ensure individualized and equal justice. By basing sentencing decisions on static factors and immutable characteristics—like the defendant's education level, socioeconomic background, or neighborhood—they may exacerbate unwarranted and unjust disparities.⁹⁴

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Relying on these socioeconomic and demographic risk factors is not only problematic, it is also unnecessary. Research has found that the best predictors of pretrial risk are not those traits connected to poverty, such as neighborhood, employment status, or substance abuse history, but rather those factors exclusively related to criminal history and the current charge.⁹⁵ A study of 1.5 million cases drawn from hundreds of jurisdictions in the United States determined that nine factors, all related to a defendant's current charge and past criminal history, more accurately predicted new criminal activity and failure to appear than any other factors, including drug use, employment, and residence.⁹⁶ Additionally, even though these demographic factors appear as objective as criminal history, studies have found significant differences in how interviewers categorize these factors and have determined that they are particularly vulnerable to intentional manipulation by interviewers.⁹⁷

The Public Safety Assessment-Court risk assessment tool, which has been validated in Kentucky and in multiple counties across the country, relies on factors that relate solely to criminal history and current charge and has been proven both race and gender neutral.⁹⁸ Although the nine factors used in this risk assessment are subject to change and have not been released,⁹⁹ currently this risk assessment tool is considered a very promising model.

However, it is important to remember that risk assessment tools are most valuable if they are used consistently and judges lack override or discretionary power. It is also worth noting that even the most "objective" tools may still lead to racial disparities in pretrial detention. Because of the disproportionate incarceration of people of color, risk assessments that recommend pretrial detention for those with more extensive criminal histories may still disproportionately incarcerate African Americans and other minorities pretrial as compared to whites.¹⁰⁰

Case Study: Virginia Pretrial Risk Assessment Instrument (VPRAI)

Although Virginia's pretrial assessment tool relies on some problematic factors, including employment status and residence, its use of a guideline system to check judicial discretion and guarantee compliance with risk assessment recommendations is a useful model for Delaware.

The Virginia Pretrial Risk Assessment Instrument was first used in 1998 and by 2005, it was implemented in all pretrial service agencies. It was validated in 2007 and this validation study determined that it accurately predicted pretrial behavior. The study also

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revealed that factoring in the existence of outstanding warrants did not improve the accuracy of the tool so this factor was removed. The factors considered include the following: primary charge type, pending charge(s), criminal history, two or more failures to appear, two or more violent convictions, length at current residence, employed/primary caregiver, and history of drug abuse. Seven of these eight factors are assigned 1 point with the exception of two or more failures to appear, which receives 2 points.¹⁰¹ The points are totaled to give a score of 0-9, which is then used to create a risk level. There are 5 different risk levels available.¹⁰²

a. Praxis

Praxis is a guideline system that was created to address the inconsistent use of the VPRAI in pretrial release determinations and to establish best practices for post-release supervision. Although the VPRAI was proven effective, many judges were failing to consider it and allowing subjective considerations to sway pretrial release decisions. The Praxis decision grid uses VPRAI and the charge category (which has also been proven statistically significant in determining charge outcomes) to guide pretrial release recommendations and level of supervision upon release.¹⁰³

b. Results

Pretrial officers trained in Praxis were 2.3 times more likely to recommend release at first appearance on personal recognizance or unsecured appearance bonds. Judges were 1.9 times more likely to release a defendant at first appearance when trained in Praxis.¹⁰⁴ Pretrial services staff trained in Praxis followed Praxis supervision recommendations 84 percent of the time, whereas groups not trained in Praxis assigned the same supervision levels as Praxis only 36 percent of the time.¹⁰⁵ Studies have also found that defendants in Praxis groups are 1.2 times less likely to fail for any reason than are those in non-Praxis groups and they are 1.3 times less likely to fail to appear or to experience a new arrest pending trial.¹⁰⁶

IV. EFFECTIVE PRETRIAL SERVICE AGENCIES AND ALTERNATIVES TO PRETRIAL DETENTION

A. Pretrial Service Agencies

Pretrial service agencies, as in Delaware, provide a multitude of services to courts and individuals who have been arrested—namely risk assessments, bail recommendations, and

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supervision.¹⁰⁷ Administering validated risk assessments and gathering background information on individuals prior to release decision-making is a critical function of pretrial service agencies. Without them, release decisions are more arbitrary and lead to greater racial disparities.¹⁰⁸ Providing supervision is another key function of pretrial service agencies because it opens the door to alternatives to pretrial detention, especially for individuals who may exhibit moderate risk of flight or committing additional offenses. Through supervision and support provided by pretrial service agencies, moderate levels of risk can be mitigated, expanding the opportunities for courts to avoid placing individuals in pretrial detention.¹⁰⁹

Pretrial service agencies can provide modes of supervision like electronic monitoring or facilitate conditional release. Electronic monitoring can take several forms from devices that require periodic voice verification to prove location to devices that use GPS satellite technology.¹¹⁰ Interestingly, while electronic monitoring does not necessarily reduce failure to appear rates, it does provide a means of releasing higher risk individuals that would, without the option of electronic monitoring, be sent to jail.¹¹¹ Additionally, more advanced implementations based on GPS technology may provide such precise information on a person's whereabouts that the person can be easily located by authorities, which may deter flight and illegal activity.¹¹² Even using the latest technologies, electronic monitoring offers extensive cost-savings over pretrial detention.¹¹³

Pretrial service agencies may also facilitate conditional release. Conditional release refers to a form of supervised release in which a person must meet certain conditions like regular drug testing, abiding by a curfew, avoiding contact with a victim, or staying under the supervision of a family member.¹¹⁴ Conditional release offers courts the ability to avoid pretrial detention while setting specific conditions that target potential risk factors. Indeed, it is important to cater conditions to individuals based on validated risk assessments, avoiding blanket conditions for all and avoiding conditions that are either more onerous or less structured than a person's risk level warrants. Otherwise, the risk of flight, committing new offenses, or violating release conditions is elevated.¹¹⁵ Critically, financial conditions, as with money bail generally, should be avoided.¹¹⁶

B. Alternatives to Pretrial Detention

Diversion programs and the broader use of summons and citations can reduce arrests and subsequent opportunities for pretrial detention. Diversion programs, whether dictated by courts or even promoted from within prosecutors' offices, can steer individuals toward

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needed treatment rather than integrating them into the standard cycle of arrest-pretrial detention-incarceration.¹¹⁷ Citations and summons allow officers to avoid going through the standard booking process when minor offenses are concerned and further remove individuals from the pool of potential pretrial detainees.¹¹⁸

Case Study: District of Columbia

a. Process

Pretrial detention can only be ordered in D.C. if the judicial officer concludes that the defendant presents an unmanageable risk of flight or harm to the community. D.C. uses a recently overhauled, validated risk assessment tool, which considers 38 factors, most of which concern prior criminal history. Based on these factors, defendants are classified as high, medium, or low risk and pretrial detention recommendations are given. The risk category can be overridden by pretrial evaluative staff if the evaluating officer receives the approval of his or her supervisor. Overrides are rare and are only permissible in exceptional circumstances.¹¹⁹

b. Supervision

Post-release, defendants are placed in a number of monitoring programs and have regularly scheduled court hearings. Defendants may also be placed in a pro-social intervention/treatment program or supervision programs such as Drug Court or specialized supervision. The Specialized Supervision Unit provides specialized services and supervision of defendants diagnosed with mental illness, mental retardation, or co-occurring substance abuse and mental disorders. These defendants receive case management, mental health assessments, and a variety of other services and treatments. Case managers monitor compliance with release conditions for all defendants and provide the court with updates about noncompliance. Case managers may also alter the supervision plan based on noncompliance. When appropriate, case managers may also refer defendants to community-based social services providers. Higher risk defendants may receive home confinement, have to report regularly to a case manager, drug test at least once a week, and maintain an electronically monitored curfew. The program also promptly notifies the court, prosecution, and defense of any infraction. Defendants may also be under GPS supervision and if they violate, the court is notified within a day.¹²⁰

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c. Results

The District of Columbia has an 85-90 percent release rate for defendants charged with both misdemeanor and felony offenses. Only percent are released on financial bail and 88 percent of pretrial service participants appear in court as scheduled without re-arrest.¹²¹

V. ADDITIONAL PRACTICES TO PROMOTE EQUITABLE PRETRIAL RELEASE OUTCOMES

A. Establish Comprehensive Notification System

Research indicates that court date notification systems are effective at reducing failures to appear.¹²² In Delaware, an individual may expect notification by mail, but additional methods may provide greater coverage. For example, automated calling or texting or even “live” callers may provide an extra layer of notification that may be more accessible for some individuals. Live callers can provide more information to people about their court dates and the process of appearing, reducing the workload of court staff in answering people’s questions.¹²³ Automated notification systems provide a more streamlined approach but provide less information.

Case Study: Jefferson County, Colorado

a. Pilot Study

A pilot study in Jefferson County, Colorado attempted to lower the county’s failure to appear (“FTA”) rate by implementing a telephone notification system. The study had two phases. At phase 1, the caller would attempt to contact a defendant seven days before his or her court appearance date. The caller could make three attempts to get the defendant the message. When the caller reached the defendant, he or she had a script reminding the defendant of the court date, which included a list of anticipated questions. The caller could leave a message with the defendant, the defendant's voice mail, or a responsible adult living with the defendant. The second phase of the pilot project involved callers contacting defendants after they missed a court appearance to notify them of their failure to appear and the FTA warrant. The judges involved in the pilot study all agreed to stay these warrants for five days while callers contacted defendants.¹²⁴

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b. Results

Although the FTA rate in the county was previously 21 percent, when defendants were contacted and reminded of their court date, the FTA rate was reduced to 12 percent. Furthermore, if the message was left with a voicemail or responsible adult, the failure to appear rate decreased to 13 percent, whereas if the message was left with the defendant, the FTA rate went down to 8 percent. Additionally, before the pilot program, only 10 percent of those defendants who failed to return for their scheduled court date came to the court of their own initiative within five business days. When defendants were contacted and notified of the warrant through the pilot program, 50 percent came to court within five business days.¹²⁵

Other sites that have developed notification programs such as this have found not only a decrease in the FTA rate, but also reduced racial disparities in the failure to appear. In these counties the FTA rate was 23 percent for white defendants and 40 percent for defendants of color without any early notification system. With the notification system, the FTA rate for persons of color decreased to 14 percent and the FTA rate for white defendants decreased to 18 percent. This indicates that the use of notification systems may help to lessen the racial disparities in pretrial release outcomes.¹²⁶

B. Train Decision-Makers in Implicit Bias

Magistrates, police officers, pretrial services agency staff, and others that play a role in pretrial release decisions should be trained to recognize how implicit bias can impact their work. Even with validated risk assessment instruments that offer more objective guidance on an individual's risk, the discretion that pretrial services staff, magistrates, and others have at different points of pretrial proceedings permits the intrusion of racial bias. Research indicates that when people are aware of the potential for bias to infiltrate decision-making processes, they are typically open to correcting it.¹²⁷ Such training is all the more necessary where, as in Delaware, people of color are disproportionately impacted by pretrial detention.

Case Study: Saint Louis County, Minnesota

Saint Louis County, Minnesota offers a potential model for determining and addressing the causes of racial disparities in the pretrial release system. When evaluating and reforming its bail system, Saint Louis County developed a racial justice take force to investigate the causes of racial disparities in the pretrial detention and bail systems. The task

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force consisted of the County Attorney, the Chief Public Defender, the deputy Chief of Policy, an experienced criminal court trial judge, a representative of the American Indian Commission, the head of local probation, and a task force coordinator. The task force later added jail officials. In Minnesota, judges have the option of releasing defendants on their own recognizance or unsecured bond, imposing a monetary bond, or offering a monetary bond with an alternative of supervised release with conditions.

The task force assembled to figure out a working hypothesis for why defendants of color were being treated differently from white defendants pretrial. Whites in the county were at least twice as likely as other racial groups to be released on their own recognizance. Additionally, the median money bond amount imposed on African American defendants was double the amount placed on white defendants. These racial disparities were consistent even controlling for severity of the offense, number of felony charges, and criminal history.¹²⁸ The task force preliminarily hypothesized that because the African American population was more concentrated in urban areas and many defendants were not local to the county, and because Native American defendants typically lived on the Indian Reservation, probation officers and judges might consider them less ideal candidates for supervision and greater flight risks. They interviewed several judges who admitted that they used higher bail as a preventative measure in violation of the Minnesota Supreme Court's mandate to use bail only as an aide to release. Judge interviews also confirmed that they will generally not release a defendant if the probation officer opposes supervised release, even if the reasoning is simply that the defendant lives far from the courthouse. They also determined that pretrial supervision protocols led to unnecessarily onerous supervision requirements that undermined the effectiveness of the entire pretrial release and bail system. In response, the task force required judges and probation officers to undergo best practices training sessions and set out to correct some of the problematic practices that contributed to racial bias. They also received specific training by experts on identifying and minimizing the impact of implicit bias in discretionary decision-making.¹²⁹

Although the reasons for racial disparities in different bail systems may vary, it is important to investigate the causes of these disparities and potential solutions. Furthermore, implicit bias training and best practices models should be utilized wherever possible. This task force model, which engages and educates stakeholders, may be a useful approach for individual counties as they implement bail reform.

C. Train Judges and Create Reference Resources

Magistrates and others that make release decisions should be trained on the full system of assessment and range of possibilities for release, supervision, diversion, or pretrial detention.¹³⁰ As noted above, in many places where money bail is the norm, judges begin setting bail according to custom or common practice, including where other options may be available. Training judges to understand how pretrial risk assessments function and what the possible modes are for release, may lead them to better choose from the multitude of options available where discretion is available.

Creating bench cards that provide short, quick guidance on pretrial release options provides considerable support amidst crowded and hurried pretrial proceedings. Bench cards are one or two page sheets that could provide a checklist for the pretrial release process or a list of possible release options so that the magistrate or judge does not rely on practice or custom to make a decision.¹³¹ Although the use of risk assessments and recommendations from pretrial services agencies may guide judicial decisions, a bench card reference can further insulate the judge from the effects of fatigue, distraction, and fast paced decision-making, which would otherwise heighten the risk of arbitrary decisions influenced by implicit bias.¹³²

D. Collect Data and Promote Accountability

Pretrial release decisions “are low visibility proceedings” that occur quickly.¹³³ Thus, the proceedings tend not to be closely scrutinized. Collecting data on release decisions, including data from risk assessments and on the nature of the final release decision, can help promote accountability and provide information for future reform. An inter-agency committee composed of stakeholders in the pretrial release process may provide a formal institutional mechanism to provide checks on release decisions and make sure a robust risk-based process is being followed.¹³⁴

VI. CONCLUSION

By eliminating money bail and embracing unsupervised release as the default, localities can reduce racial and economic disparities in their pretrial detention populations and promote greater public safety. Making pretrial release decisions according to validated risk factors will promote healthier communities, with fewer individuals taken from their jobs

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and families merely because they lack financial means. Coupled with the ability of pretrial services agencies to provide supervision and facilitate alternatives to pretrial detention, judges can effectively choose release options that keep the number of detained individuals low while not endangering public safety. By implementing additional systems for notification, training, data collection, and oversight, localities can minimize failures to appear, enhance public safety, and reduce costs associated with high rates of pretrial detention.

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ENDNOTES

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53. *Id.* at 43.
54. 2014 NJ SESS. LAW SERV. CH. 31 (Senate 946) (West) (codified at N.J. STAT. ANN. § 2A:162-15 et. seq. (West) (effective Jan. 1, 2017)). For simplicity's sake, future references to the legislation will refer to the statute as codified.
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56. N.J. STAT. ANN. § 2A:162-15 (West) (effective Jan. 1, 2017)). For purposes of this legislation, an “eligible defendant” is anyone for whom a “complaint-warrant” is issued for an indictable offense or disorderly person offense “unless otherwise provided.” *Id.* A complaint-warrant is the form used in New Jersey for an arrest warrant. *See* N.J. R. Mun. Ct. 7:2-1, *available at* <https://www.judiciary.state.nj.us/rules/r7-2.htm>.

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57. *Id.*

58. *Id.*

59. *Id.*

60. The bill explicitly states: “The court shall not impose the monetary bail to reasonably assure the protection of the safety of any other person or the community or that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process, or for the purpose of preventing the release of the eligible defendant.” N.J. STAT. ANN. § 2A:162-17.

61. S.C.R. 128, 216th Leg. (N.J. 2014).

62. *Id.*

63. *See, e.g.*, Press Release, ACLU of New Jersey, ACLU-NJ Hails Passage of NJ Bail Reform as Historic Day for Civil Rights (August 4, 2014) [hereinafter ACLU-NJ Press Release], *a v a i l a b l e a t* <https://www.aclu.org/news/aclu-nj-hails-passage-nj-bail-reform-historic-day-civil-rights> (“This package will finally enable New Jersey to shift our bail system away from a money-based system to a risk-based one, and it will establish the statutory right to a speedy trial for defendants.”).

64. N.J. STAT. ANN. § 2A:162-16.

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66. N.J. STAT. ANN. § 2A: 162-22.

67. *Id.*

68. *Id.*

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70. *Id.*

71. *Id.* (emphasis added).

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72. *Id.*

73. N.J. STAT. ANN. § 2A:162-18, with the crimes enumerated in N.J. STAT. ANN. § 2A:162-19.

74. N.J. STAT. ANN. § 2A: 162-18(b).

75. N.J. STAT. ANN. § 2A: 162-15.

76. N.J. STAT. ANN. § 2A: 162-19.

77. N.J. STAT. ANN. § 2A: 162-20 (emphasis added) (listing the factors as follows:

- a. The nature and circumstances of the offense charged;
- b. The weight of the evidence against the eligible defendant, except that the court may consider the admissibility of any evidence sought to be excluded;
- c. The history and characteristics of the eligible defendant, including:
 - (1) the eligible defendant's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
 - (2) whether, at the time of the current offense or arrest, the eligible defendant was on probation, parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under federal law, or the law of this or any other state;
- d. The nature and seriousness of the danger to any other person or the community that would be posed by the eligible defendant's release, if applicable;
- e. The nature and seriousness of the risk of obstructing or attempting to obstruct the criminal justice process that would be posed by the eligible defendant's release, if applicable; and
- f. The release recommendation of the pretrial services program obtained using a risk assessment instrument under section 11 of P.L.2014, c.31 (§ 2A:162-25).

78. N.J. STAT. ANN. § 2A: 162-20.

79. *See* EQUAL JUSTICE INITIATIVE, A REPORT ON THE ROOT CAUSES OF RACIAL DISPARITIES IN DELAWARE'S CRIMINAL JUSTICE SYSTEM 5-10 (2015).

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80. TIMOTHY R. SCHNACKE, CENTER FOR LEGAL AND EVIDENCE-BASED PRACTICES, BEST PRACTICES IN BOND SETTING: COLORADO'S NEW PRETRIAL BAIL LAW 26-28 (2014), *a v a i l a b l e a t* <http://www.pretrial.org/download/law-policy/Best%20Practices%20in%20Bond%20Setting%20-%20Colorado.pdf>.

81. COLO. REV. STAT. ANN. § 16-1-104 (West).

82. *Id.*

83. COLO. REV. STAT. ANN. § 16-4-101.

84. *Id.*

85. COLO. REV. STAT. ANN. § 16-4-103(3)(a) (emphasis added).

86. COLO. REV. STAT. ANN. § 16-4-103(3)(b).

87. Schnacke, *supra* note 80, at 22 (citing PRETRIAL JUSTICE INSTITUTE & JFA INSTITUTE, THE COLORADO PRETRIAL ASSESSMENT TOOL (CPAT): A JOINT PARTNERSHIP AMONG TEN COLORADO COUNTIES, THE PRETRIAL JUSTICE INSTITUTE, AND THE JFA INSTITUTE, REVISED REPORT at 5 (Oct. 19, 2012), *available at* <http://www.pretrial.org/download/risk-assessment/CO%20Pretrial%20Assessment%20Tool%20Report%20Rev%20-%20PJI%202012.pdf>). Schnackne also cited COLORADO ASSOCIATION OF PRETRIAL SERVICES, COLORADO PRETRIAL ASSESSMENT TOOL (CPAT): ADMINISTRATION, SCORING, AND REPORTING MANUAL, VERSION 1, which no longer appears to be online. The COLORADO PRETRIAL ASSESSMENT TOOL (CPAT): ADMINISTRATION, SCORING, AND REPORTING MANUAL VERSION 2, however, is available through the Pretrial Justice Institute's website at <http://www.pretrial.org/download/risk-assessment/CPAT%20Manual%20-%20CAPS%202015-06.pdf>).

88. Schnacke, *supra* note 80, at 22.

89. COLO. REV. STAT. ANN. § 16-4-103(4)(b).

90. COLO. REV. STAT. ANN. § 16-4-103(4)(a).

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91. Schnacke, *supra* note 80, at 40-41 (quoting ABA Pretrial Release Standards, *supra* note 17, at 43-44) (“[T]he ABA Standard’s commentary on financial conditions makes it clear that the Standards consider secured money bonds to be a more restrictive alternative to both unsecured bonds and nonfinancial conditions: ‘When financial conditions are warranted, the least restrictive conditions principle requires that unsecured bond be considered first.’ . . . Thus, the new law’s inclusion of the phrase ‘least restrictive conditions’ may not be read in a vacuum. Instead, it must be read in conjunction with the legislative history, summarized above, which indicates the General Assembly’s desire specifically to reduce secured financial conditions of bail, to reduce unnecessary pretrial detention, and to generally follow best practices, as embodied in the ABA Standards, which consider secured financial conditions to be highly restrictive as compared to other nonmonetary or unsecured money conditions.”); H. Michael Steinberg, *Colorado’s New Bail Bond Law Means More Fairness In Setting Bail Bonds and Bail Bond Conditions*, COLORADO CRIMINAL LAWYER BLOG (Sep. 30, 2014), <http://www.colorado-criminal-lawyer-online.com/2014/09/colorados-new-bail-bond-law-me.html> (last visited Sep. 29, 2015.).

92. LAURA AND JOHN ARNOLD FOUNDATION, DEVELOPING A NATIONAL MODEL FOR PRETRIAL RISK ASSESSMENT 2 (Nov. 2013), *available at* <http://www.ncja.org/sites/default/files/documents/LJAF-Developing-a-National-Model.pdf>.

93. Sonja Starr, *The Risk Assessment Era: An Overdue Debate*, 27 FED. SENTENCING REP. 205, 206 (Apr. 2015).

94. *Id.* at 205.

95. Anne Milgram et al., *Pretrial Risk Assessment: Improving Public Safety and Fairness in Pretrial Decision Making*, 27 FED. SENTENCING REP. 216, 220 (Apr. 2015).

96. *Id.*

97. Starr, *supra* note 93, at 206.

98. Milgram et al., *supra* note 95, at 220.

99. Exact factors will be released later this year. Jason Tashea, *Kentucky tests new assessment tool to determine whether to keep defendants behind bars*, ABA JOURNAL (Apr. 1, 2015), *available at* http://www.abajournal.com/magazine/article/kentucky_tests_new_assessment_tool_to_de

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termine_whether_to_keep_defendants. Previously validated risk factors that relate exclusively to criminal history include: 1) prior failure to appear, 2) prior convictions, 3) present charge a felony, 4) having a pending case. *See* Bail Fail Report, *supra* note 18, at 30.

100. Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENTENCING REP. 237, 237 (Apr. 2015).

101. MONA DANNER, LUMINOSITY, RISK-BASED PRETRIAL RELEASE RECOMMENDATION AND SUPERVISION GUIDELINES 13 (2015), available at <http://www.pretrial.org/download/research/Risk%20Based%20Pretrial%20Release%20Rec%20&%20Superv%20Guidelines%20-%20Danner,%20VanNostrand,%20&%20Spruance%202015.pdf>.

102. Bail Fail Report, *supra* note 18, at 29.

103. Danner, *supra* note 101, at 17-22.

104. *Id.* at 18, 21.

105. *Id.* at 25.

106. *Id.* at 27.

107. Bail Fail Report, *supra* note 18, at 32-33.

108. Jones, *supra* note 19, at 956-57.

109. Subramanian et al., *supra* note 4, at 30.

110. Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1366-67 (2014).

111. MARIE VANNOSTRAND ET AL., STATE OF THE SCIENCE OF PRETRIAL RELEASE RECOMMENDATIONS AND SUPERVISION 27 (2011).

112. Wiseman, *supra* note 110, at 1368, 1371-72.

113. Wiseman, *supra* note 110, at 1368, 1373-74.

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114. Bail Fail Report, *supra* note 18, at 32.

115. *Id.*; VanNostrand et al., *supra* note 111, at 28.

116. See ABA Pretrial Release Standards, *supra* note 17, at 42.

117. Eaglin & Solomon, *supra* note 47, at 30.

118. Bail Fail Report, *supra* note 18, at 31; ABA Pretrial Release Standards, *supra* note 17, at 41.

119. KIDEUK KIM & MEGAN DENVER, DISTRICT OF COLUMBIA CRIME POLICY INSTITUTE, A CASE STUDY ON THE PRACTICE OF PRETRIAL SERVICES AND RISK ASSESSMENT IN THREE C I T I E S 8 (2 0 1 1) , a v a i l a b l e a t http://www.dccrimepolicy.org/images/Pretrial-Comparative-final-Report_1.pdf.

120. *Id.* at 8-9.

121. Frederick Reese, *Does Bail Really Work to Promote Justice?* MINTPRESS NEWS (Oct. 17, 2013), <http://www.mintpressnews.com/draft-jail-bonds-frederick/170698/>.

122. VanNostrand et al., *supra* note 111, at 20.

123. Bail Fail Report, *supra* note 18, at 34.

124. JEFFERSON COUNTY, COLORADO COURT DATE NOTIFICATION PROGRAM FTA PILOT P R O J E C T (N o v . 9 , 2 0 0 5) , a v a i l a b l e a t [http://www.pretrial.org/download/supervision-monitoring/Jefferson%20County%20Colorado%20Failure%20to%20Appear%20Pilot%20Project%20Summary%20\(2005\).pdf](http://www.pretrial.org/download/supervision-monitoring/Jefferson%20County%20Colorado%20Failure%20to%20Appear%20Pilot%20Project%20Summary%20(2005).pdf).

125. *Id.*

126. MATT NICE, BUDGET OFFICE EVALUATION, MULTNOMAH COUNTY, OREGON, COURT APPEARANCE NOTIFICATION SYSTEM: EVALUATION HIGHLIGHTS (2006), *available at* <http://www.pretrial.org/download/research/Multnomah%20County%20Oregon%20CANS%20Cost%20Benefit%202006.pdf>

127. Eaglin & Solomon, *supra* note 47, at 35.

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128. Jones, *supra* note 19, at 946-50.

129. *Id.* at 950-955.

130. *Id.* at 955-56.

131. Courts throughout the nation use bench cards on a variety of topics, from providing an interpreter to collecting fines. One such example from Delaware concerns the provision of language access services. *See* COURT INTERPRETER PROGRAM, ADMINISTRATIVE OFFICE OF THE COURTS, DELAWARE JUDICIARY LANGUAGE ACCESS PLAN 12-13 (2014), *available at* <http://courts.delaware.gov/forms/download.aspx?id=64928>.

132. Eaglin & Solomon, *supra* note 47, at 40.

133. Jones, *supra* note 19, at 959-60.

134. *Id.* at 960.