McGannon Center Automating Inequality Book Award

Friday, May 3, 2019

9 - 9:30 a.m. check-in
9:30 - 10 a.m. breakfast and mingle
10 a.m. - 12:30 p.m. program
Skadden Conference Center
(Second Floor)

CLE Course Materials
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Session 1: Future Dangerousness


Center for Court Innovation. New York’s Bail Reform Law. Summary of Major Components. [View in document]

Roberts. Dorothy E. Harvard Law Review. Digitizing the Carceral State. [View in document]

Stevenson, Megan; Mayson, Sandra G.. Bail Reform: New Directions for Pretrial Detention and Release. [View in Document]
Automating Inequality Speaker Bios

**Ifeoma Ajunwa**
Assistant Professor of Labor and Employment Law in the Law, Labor Relations, and History Department, Cornell University’s Industrial and Labor Relations School

Dr. Ajunwa is an Assistant Professor of Labor and Employment Law in the Law, Labor Relations, and History Department of Cornell University’s Industrial and Labor Relations School (ILR), and Associated Faculty Member at Cornell Law School. She is also a Faculty Associate at the Berkman Klein Center at Harvard Law School and an Affiliate of the Center for the Study of Inequality at Cornell University. Dr. Ajunwa’s research interests are at the intersection of law and technology with a particular focus on the ethical governance of workplace technologies. Her research focus is also on diversity and inclusion in the labor market and the workplace. Dr. Ajunwa’s scholarly articles have been published or are forthcoming in both top law review and peer review publications. Dr. Ajunwa has been invited to present her work before governmental agencies and many national and international conferences. Dr. Ajunwa’s forthcoming book, “The Quantified Worker,” which examines the role of technology in the workplace and its effects on management practices as moderated by employment and anti-discrimination laws will be published by Cambridge University Press in 2019.

Dr. Ajunwa earned a Ph.D. in Sociology at Columbia University in the City of New York (emphasis on Organizational Theory and Law and Society). Her doctoral research on reentry received a grant from the National Science Foundation (NSF) and honorable mention from the Ford Foundation. Prior to graduate school, she also earned a law degree from the University of San Francisco School of Law and Dr. Ajunwa has been admitted to the Bar in the states of New York and California.

**Virginia Eubanks**
Political Scientist; Associate Professor of Political Science, University of Albany

Virginia Eubanks is an Associate Professor of Political Science at the University at Albany, SUNY. She is the author of *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor*; *Digital Dead End: Fighting for Social Justice in the Information Age*; and co-editor, with Alethia Jones, of *Ain’t Gonna Let Nobody Turn Me Around: Forty Years of Movement Building with Barbara Smith*. Her writing about technology and social justice has appeared in *Scientific American*, *The Nation*, Harper’s, and *Wired*. For two decades, Eubanks has worked in community technology and economic justice movements. She was a founding member of the Our Data Bodies Project and a 2016-2017 Fellow at New America. She lives in Troy, NY.

**Scott Levy**
Special Counsel, The Bronx Defenders

As Special Counsel, Scott provides critical legal and policy advice to the Criminal Defense Practice at The Bronx Defenders and currently manages The Bronx Defenders' criminal justice reform efforts in the areas of bail, discovery, and speedy trial. Scott is also lead counsel on Trowbridge v. DiFiore, a federal civil rights case challenging delays in misdemeanor cases in Bronx Criminal Court. Scott previously developed and managed The Bronx Defenders Marijuana Arrest Project and The Bronx Defenders Fundamental Fairness Project. Scott graduated from Princeton’s Woodrow Wilson School of International and Public Affairs and received his J.D. in 2007 from Harvard Law School, where he was the Special Projects Editor for the Harvard Civil Rights-Civil Liberties Law Review. He clerked for the Honorable Nancy Gertner in the Federal District Court of Massachusetts before joining The Bronx Defenders.
Cathy O’Neil
Data Scientist; Author, mathbabe.org

Cathy O’Neil earned a Ph.D. in math from Harvard, was a postdoc at the MIT math department, and a professor at Barnard College where she published a number of research papers in arithmetic algebraic geometry. She then switched over to the private sector, working as a quant for the hedge fund D.E. Shaw in the middle of the credit crisis, and then for RiskMetrics, a risk software company that assesses risk for the holdings of hedge funds and banks. She left finance in 2011 and started working as a data scientist in the New York start-up scene, building models that predicted people’s purchases and clicks. She wrote Doing Data Science in 2013 and launched the Lede Program in Data Journalism at Columbia in 2014. She is a regular contributor to Bloomberg View and wrote the book Weapons of Math Destruction: how big data increases inequality and threatens democracy. She recently founded ORCAA, an algorithmic auditing company.

Olivier Sylvain
Professor, Fordham Law School Director, McGannon Center

Olivier Sylvain is a Professor of Law at Fordham University School of Law. His academic interests are chiefly in information and communications law and policy. He has written a variety of law review articles, symposium pieces, essays, policy papers, news articles, op-eds, and blog posts on current controversies in communications policy, online intermediary liability, privacy, and copyright. He is part of a team of legal scholars, research engineers, and social entrepreneurs to whom The National Science Foundation in fall 2017 awarded a three-year one-million-dollar grant to prototype an “edge-cloud” network that is to be owned and operated as a “commons resource” for Harlem residents.

Diem Tran
Legislative Counsel, Brooklyn District Attorney’s Office

Diem Tran began her career in private practice as a Litigation Attorney at Weil, Gotshal & Manges LLP. She then turned to public service at the New York State Senate before joining the Manhattan District Attorney’s Office. Serving as DA Cyrus Vance’s Legislative Counsel, she collaborated with legislators, policymakers, advocates, and other government and community partners to help develop important criminal justice legislative reforms, including advocating for the legalization of marijuana, decriminalizing fare evasion, and protecting immigrants. She also served as co-director of Prosecutors Against Gun Violence, collaborating with D.A.s and gun safety advocates across the country, and served as the office’s liaison to both the District Attorneys Association for the State of New York (D.A.A.S.N.Y.) and the Association of Prosecuting Attorneys.

She recently joined the Brooklyn District Attorney’s Office as Legislative Counsel to help shape legislative and policy reforms that reflect the progressive values of DA Eric Gonzalez’s Justice 2020 Initiative, promoting both safety and fairness for the people of Brooklyn.

Diem received her undergraduate degree from the University of Pennsylvania, and obtained her J.D. from the University of Virginia School of Law, where she served on the editorial board of the Virginia Law Review.
Jan 1. - Dec. 31
2018
Report to the Governor and the Legislature

New Jersey Courts
Independence • Integrity • Fairness • Quality Service

NEW JERSEY JUDICIARY

Submitted by:

GLENN A. GRANT, J.A.D.
Acting Administrative Director of the Courts
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I. EXECUTIVE SUMMARY

Overview

Created through the cooperation and commitment of all three branches of state government, Criminal Justice Reform (CJR) embodies principles of fairness in our American justice system that entitle all defendants to a presumption of innocence and a speedy trial. The new system in place balances an individual’s right to liberty with the State’s responsibility of assuring community safety.

As this 2018 Annual Report details, CJR is working as intended.

New Jersey has moved away from a system that relied heavily on monetary bail. Two years into its existence, CJR has begun to remove many of the inequities created by the prior approach to pretrial release. At the same time, court appearance rates for CJR defendants remain high while the rate of alleged new criminal activity for CJR defendants remains low. CJR defendants are no more likely to be charged with a new crime or fail to appear in court than defendants released on bail under the old system.

Under the risk-based system of CJR, monetary bail is rarely used. Lower-risk individuals no longer spend weeks and months in jail because they lack the financial resources to post relatively small amounts of bail. More than 70 percent of CJR defendants are released on a summons pending the disposition of their cases -- without first being sent to jail. And a majority of defendants arrested on complaint-warrants are released on conditions that Pretrial Services officers monitor.

On the other end of the spectrum, higher-risk individuals who pose a danger to the community or a substantial risk of flight are no longer able to secure their release simply because they have access to funds.

New Jersey’s jail population looks very different today than it did when the idea of reforming the state’s criminal justice system began to take hold in 2013. On any given day, there are thousands fewer defendants in jail, with only the highest-risk defendants and those charged with the most serious offenses detained.

In all, CJR has reduced the unnecessary detention of low-risk defendants, assured community safety, upheld constitutional principles, and preserved the integrity of the criminal justice process.
Research Studies

During 2018, with an understanding of the importance of our state’s CJR model in the nationwide discussion of pretrial reform efforts, the Judiciary engaged in two comprehensive research projects to review the impact and gauge the success of reforms to the pretrial criminal justice process in New Jersey. The research was conducted by members of a research collaborative, including social science researchers and data scientists from the Judiciary’s Quantitative Research Unit and two independent organizations (University of Chicago – Crime Lab New York and Luminosity, Inc.).

- The first study compared data from 2017, under the current reformed system, to data from 2014, under the longstanding system of monetary bail.

- The second study updated a Jail Population Study published in 2013 and compared the jail populations on October 3, 2012 to the same day in 2018.

Together, these two endeavors inform the main sections of this year’s Annual Report.

Comparing Criminal Justice Reform with Money Bail

The first study -- the 2014/2017 Research Project -- compared outcomes and performance measures in 2014 and 2017 for defendants issued a complaint-summons or complaint-warrant in those years. The project tracked cases until final disposition or October 31 of the following year, whichever came first.

The study shed new light on factors that contributed to the decline in New Jersey’s pretrial jail population. It revealed that the jail population decreased substantially because CJR defendants were released much sooner than pre-CJR defendants had been.

The Research Project also revalidated and analyzed the performance of the Public Safety Assessment (PSA), a risk assessment tool that aids judges as they craft conditions of pretrial release for individual defendants.

An extensive review of the actual rates of alleged new criminal activity, court appearance, and alleged new violent criminal activity for CJR defendants in 2017 confirms that the PSA has been remarkably accurate in classifying a defendant’s risk. It found that as risk scores increase, actual failure rates of compliance increase in step.

As part of the project, researchers analyzed defendants who were released pretrial and confirmed that a large majority were not accused of committing a new crime and
appeared in court when required. Notably, in 2014, 12.7 percent of defendants were charged with a new indictable crime while on pretrial release, a number that remained consistently low, 13.7 percent, in 2017. Because of certain challenges in compiling data from 2014, small changes in outcome measures should be interpreted with caution and likely do not represent meaningful differences.

Moreover, the rate at which defendants appeared in court remained high after CJR, with an average appearance rate of 92.7 percent in 2014 and 89.4 percent in 2017. Concerns about a possible spike in crime and failures to appear did not materialize.

Research has demonstrated that incarceration before trial can have significant unintended consequences, such as the loss of employment, housing, and custody of children. Defendants detained in jail while awaiting trial also plead guilty more often, are convicted more often, are sentenced to prison more often, and receive harsher sentences than similarly situated defendants who are released during the pretrial period. For those and other reasons, it is critical for a system of criminal justice to limit pretrial incarceration to defendants who pose a substantial risk of flight or danger. Researchers accordingly examined factors that affect the size and makeup of New Jersey’s daily jail population.

Under CJR, a substantially larger proportion of lower-risk defendants are released on complaint-summons, rather than complaint-warrants, without first going to jail. Greater prosecutorial oversight and screening as well as changes in court rules have contributed to that trend. In 2014, 54 percent of defendants were issued a complaint-summons. In 2017, that percentage increased to 71 percent. For the remaining defendants, judges or judicial officers issued complaint-warrants. Viewed otherwise, the number of complaint-summons went from 69,469 in 2014 to 98,473 in 2017. That shift demonstrates that substantially fewer lower-risk defendants are going to jail.

For defendants who are arrested under a complaint-warrant, the CJR law requires that Pretrial Services complete a risk assessment and a judge make a release decision within 48 hours of an arrest. A defendant must be released unless the prosecutor files a motion for detention. In 2017, when no detention motion was filed by a prosecutor, the vast majority of defendants, 81.3 percent, were released within 24 hours; 99.5 were released within 48 hours.

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1 In New Jersey, a defendant can be charged with a crime or offense in two ways. Law enforcement officers have discretion to issue a complaint-summons that lists a date to appear in court. Alternatively, officers can apply to a judicial officer for a complaint-warrant, which directs that the defendant be sent to jail. Only defendants issued a complaint-warrant are “eligible defendants” subject to the provisions of the CJR law.
In addition, the study confirmed that courts are completing cases in roughly the same amount of time under both systems. In 2014, 80.4 percent of cases were completed within the 22-month period; in 2017, 78.2 percent of cases were completed within the same time frame.

**Jail Population Analysis**

The second study undertaken for this report -- a 2018 Jail Population Study -- analyzed the jail population on October 3, 2018. The new study updates a 2013 New Jersey Jail Population Study by Luminosity Inc., conducted in partnership with the Drug Policy Alliance, which analyzed the jail population on October 3, 2012. The 2013 study found that nearly 40 percent of New Jersey’s jail population was incarcerated because of an inability to post bail; 12 percent remained in jail on bails of $2,500 or less.

A comparison of the jail population six years apart revealed the following:

- There were 6,000 fewer people incarcerated on October 3, 2018 than on the same day in 2012.

- Only 4.6 percent of individuals in jail on October 3, 2018 were held on bail of $2,500 or less, compared to 12 percent on the same day in 2012;

- On October 3, 2018, 47 percent of the jail population consisted of people charged with or sentenced for at least one violent offense, compared to 35 percent on the same day in 2012.

- Nearly 75 percent of the 2018 jail population consisted of defendants charged with or sentenced for the most serious offenses.

The jail population study in 2013 revealed that more than two-thirds of defendants held in jail were members of racial and ethnic minority groups. A fundamental mission of CJR is to ensure that all defendants are treated equally under the criminal justice system, regardless of race, ethnicity, or gender. The 2018 Jail Population Study shows that approximately 3,000 fewer black, 1,500 fewer white, and 1,300 fewer Hispanic individuals were incarcerated under CJR.
Results from the 2014/2017 research study align with the findings from both jail population studies. Criminal Justice Reform in 2017 reduced the disparity between black and white defendants in terms of the amount of time spent in jail from arrest until initial pretrial release as well as the average number of days spent in jail awaiting trial.

For defendants who secured pretrial release, the time from either complaint issuance or arrest until initial pretrial release for black defendants decreased by 5.7 days from 2014 to 2017, while the time for white defendants decreased by 2.4 days. The time in jail awaiting trial for black defendants decreased by 10 days from 2014 to 2017, and the time for white defendants decreased by 5 days.

Despite those significant improvements, the jail population studies found that on October 3, 2012 and 2018, the racial makeup of defendants in New Jersey’s jails remained similar in some areas. Although the percentage of black women in jail decreased from 44 percent to 34 percent, black men continued to make up more than 50 percent of the male jail population. The overrepresentation of black males in the pretrial jail population remains an area in need of further examination by New Jersey’s criminal justice system as a whole.

Together, the findings detailed in the 2014/2017 Research Project and the comparisons of the 2013 and 2018 Jail Population Studies reflect a criminal justice system that prioritizes both fairness and public safety.

2018 Performance

This report closes with an update on CJR’s performance in 2018. Among the highlights:

- When no detention motions were filed, courts met the 48-hour deadline for making a release decision 99.6 percent of the time. In 81.9 percent of cases, a release decision was made within 24 hours.

- Only 102 defendants were ordered by courts to post monetary bail, out of a total of 44,383 CJR-eligible defendants. Bail was ordered in 90 of those cases for violations of pretrial monitoring, for example, when a defendant failed to appear in court as required.
• Prosecutors filed detention motions in 49 percent of cases in which a complaint-warrant was issued. Prosecutors withdrew or the court dismissed 4,819 motions. Judges granted 51.2 percent of the remaining 16,930 motions.

• 8,669 defendants were ordered detained in 2018. Out of the universe of 135,009 defendants charged by complaint-summonses or complaint-warrants in 2018, the rate of pretrial detention was 6.4 percent, and 93.5 percent of defendants were released pretrial. Out of 44,383 defendants charged by complaint-warrants, the rate of pretrial detention was 19.5 percent, and 80.2 percent of defendants were released pretrial.

The Annual Report highlights a continuing critical need to identify and implement a sustainable way to fund CJR’s Pretrial Services Program. As the Judiciary has stressed from the outset of CJR, paying for the Pretrial Services Program through an increase in court filing fees in 2014 has created a structural deficit and is not a permanent workable solution. The resulting funding imbalance has increased each year. Even with careful limits on staffing levels, which are at the bare minimum to meet the program’s needs, and aggressive cost-control measures for electronic monitoring and drug testing, annual expenses for the program exceeded revenues from filing fees in fiscal year 2018 for the first time -- as expected. Projected annual deficits are expected to fully deplete what remains of the modest reserves that accumulated during the start-up period before January 1, 2017. Those reserves have been drawn on each year since. We estimate that the program will face an overall negative funding balance in late fiscal year 2020 and early fiscal year 2021.

The legislative and executive branches have been fully supportive of CJR throughout its development. We respectfully urge them to address the approaching funding crisis.

Finally, the Annual Report provides an update on technology and an addendum on the Judiciary’s eCourts electronic filing initiative.
II.

2014 pre-CJR / 2017 CJR

RESEARCH PROJECT
COMPARING CRIMINAL JUSTICE REFORM TO
MONEY BAIL SYSTEM

The overarching goal of Criminal Justice Reform to create a fairer system includes several components. The system is equitably designed to release lower-risk individuals into the community subject to appropriate pretrial monitoring conditions. Higher-risk individuals are detained to ensure community safety. Assessments of those risk levels are guided by objective and evidence-based criteria.

To assess the impact of CJR on New Jersey’s criminal justice system, it is worthwhile to compare it to the system of money bail that came before. Thus, members of the Research Collaborative, including social science researchers and data scientists from the Judiciary’s Quantitative Research Unit and two independent organizations (University of Chicago – Crime Lab New York and Luminosity), conducted a one-time comprehensive 2014/2017 Research Project to compare outcomes under the two systems.

The Research Project compared outcomes and performance measurements for two groups -- defendants issued either a complaint-summons or a complaint-warrant in 2014 and in 2017. Researchers generated Public Safety Assessment (PSA) risk results for each defendant and collected data from the first 22 months of CJR as well as comparable data from a 22-month period in 2014 and 2015. They tracked both groups of defendants until final disposition of a case or October 31 of the following year, whichever came first. This ensured identical follow-up periods for both the 2014 pre-CJR and 2017 CJR groups.

For several reasons, pre-CJR data from 2014 proved far more challenging to compile than 2017 data. New Jersey did not introduce a master statute table until March 2016, which made the comparison of certain charges a challenge. Fingerprint records, where available, are a unique verifiable identifier for an individual across data systems. Fingerprinting rates were dramatically lower pre-CJR; only 24 percent of defendants were fingerprinted in 2016, as compared to 88 percent in 2017. With the development of eCourts, the Judiciary improved processes for case transfer and tracking, which made it easier to track criminal cases remanded to Municipal Court or downgraded to lesser charges. Finally, as a result of changes in court rules, case-related policies and practices were more consistent in 2017 than in 2014. Those issues made it more difficult to identify and track people using the 2014 data. As such, small changes in performance and outcome measures should be interpreted with caution.
It should be noted that the Research Project includes all defendants charged with disorderly persons and indictable offenses issued by both complaint-summons and complaint-warrant, without separating these groups. This is an important distinction from the 2018 performance update starting on page 29. There are several reasons why all defendants charged with disorderly persons and indictable offenses were examined in the comparison study regardless of the type of complaint issued.

First, the population of defendants issued a complaint-summons or a complaint-warrant varied dramatically before and since the start of CJR, with more lower-risk defendants now being issued a summons. Notably, in 2014, 54 percent of defendants were issued a complaint-summons compared to substantially more, 71 percent, in 2017. Limiting the research to only defendants issued a complaint warrant would result in biased samples and an inequitable comparison. Finally, as mentioned above, CJR resulted in changes in court rules and case-related policies and practices, as well as more consistent practices in 2017. For all of those reasons, it was necessary to include in the study all defendants charged with disorderly persons and indictable offenses on both complaint-summons and complaint-warrants to provide the most equitable comparison.

The key performance measures for the two groups focused on outcomes related to community safety -- new criminal activity and court appearance rates -- as well as performance measures related to the amount of time defendants spent in jail pretrial. Again, for purposes of the study, pretrial release included situations when a summons was issued, when a warrant was issued and the defendant was released ROR or on pretrial monitoring or posted bail, and when a defendant was released from jail.

**MEASURING RISK -- PERFORMANCE AND OUTCOMES**

A cornerstone of CJR is a system of pretrial release that reasonably assures a defendant’s appearance in court when required and protects the community. Overall, the new system is working as intended through the use of the Public Safety Assessment (PSA) to guide pretrial release determinations, pretrial monitoring of release conditions, and detention of the highest-risk defendants.

**Public Safety Assessment Performance**

The Research Project compared outcomes for defendants in 2014 (pre-CJR) and 2017 (CJR). To understand those outcomes, we first consider the performance of the PSA --
the risk-assessment tool. (For more specific details about the PSA, see the *Measuring and Managing Risk* section on page 30.)

Developed from national research data and initially validated in 2015 for use in New Jersey, the PSA relies on objective, race- and gender-neutral risk factors to assess the likelihood that a defendant will be charged with a new crime or fail to show up for court while on pretrial release. The PSA provides judges with objective analysis to assist in making informed decisions about pretrial release and crafting conditions of release.

As part of the PSA, a defendant receives a risk score ranging from 1 to 6 on two separate scales -- new criminal activity (NCA) and failure to appear in court (FTA); 1 signifies the lowest risk level and 6 the highest. The PSA also includes a flag to indicate whether the defendant presents an elevated risk of being charged with committing a new violent crime\(^2\) while on pretrial release.

For purposes of the study, researchers generated PSA results for all defendants issued complaint-summonses and complaint-warrants in 2014 and 2017, and then compared the predicted risk scores to actual rates of failure to appear and alleged new criminal activity. The review found that the PSA is operating as designed and classifies defendants’ risk levels with remarkable accuracy. As PSA risk scores increased, the defendants’ actual failure rates (i.e., new criminal activity and failure to appear) increased. For example, only 9.7 percent of defendants who received an NCA score of “1” were charged with a new indictable crime or disorderly persons offense while on pretrial release; 61.6 percent of defendants with NCA scores of “6” were charged with new criminal offenses while on pretrial release. Failure to appear rates were categorized with similar accuracy with respect to court appearances.

The PSA’s New Violent Criminal Activity flag also proved to be an accurate predictor of future risk of new violent crime. Defendants marked with a new violent criminal activity flag were three times more likely to be charged with committing a new violent crime while on release (14.4 percent) than defendants who did not receive a flag (4.8 percent).

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\(^{2}\) Examples of violent offenses include murder, homicide, manslaughter, assault involving physical injury (including domestic assault), kidnapping, abduction, human trafficking, person-to-person sex offenses (such as rape and sexual assault), robbery, carjacking, and terrorism. A charge of attempt, solicitation, or conspiracy to commit any of those offenses is considered a violent offense.
New Criminal Activity

No criminal justice system can ensure that all defendants will strictly adhere to the conditions of their pretrial release while they await trial. But statistics show that predictions of an increase in crime under CJR did not materialize.

Crime rates for the State reported to date, particularly for violent crimes, have decreased since the start of CJR, according to the New Jersey State Police Uniform Crime Report.

A comparison of defendants from 2014 and 2017 showed that the rate of alleged new criminal activity for individuals released pretrial under CJR was virtually the same as the rate for defendants under the cash bail system.

As shown in Fig. 1:

- The percentage of defendants charged with a new indictable crime while awaiting trial was 12.7 percent in 2014 and 13.7 percent in 2017.

- The percentage of defendants charged with new disorderly persons offenses increased less than 2 percent, from 11.5 percent in 2014 to 13.2 percent in 2017.

Measuring new indictable crimes and new disorderly persons offenses together, the rate of defendants charged with new criminal activity increased slightly from 24.2 percent in 2014 to 26.9 percent in 2017.

Again, small changes in outcome measures should be interpreted with caution and likely do not represent meaningful differences.
Looking solely at defendants released pretrial in 2017, less than 3 percent were accused of committing a No Early Release Act (NERA) or Graves Act offense. More specifically, in 2017:

- 1.6 percent of defendants on pretrial release were charged with a serious offense mandating no early release (NERA) from prison upon conviction; and

- 0.7 percent of defendants were charged with a non-NERA Graves Act gun offense as their primary offense while on pretrial release.

**Court Appearances**

In addition to community safety, court appearance is a critical component of pretrial justice. The average court appearance rate was more than 89 percent in both 2014 and 2017. Defendants showed up on average for 92.7 percent of pretrial court appearances in 2014 and 89.4 percent of court appearances in 2017. (Fig. 2). That includes court appearances for municipal disorderly persons events, criminal post-indictment events,
and family court events\(^3\) for defendants issued either a complaint-summons or a complaint-warrant.

![Court Appearance Rate](image)

**Fig. 2**

Despite the slight decrease in court appearance rates, cases were still being completed in roughly the same amount of time under CJR as in 2014. As shown in Fig. 3, for cases that began in 2014, 80.4 percent were completed within a 22-month period; in 2017, the percentage was 78.2.

The similar rates of cases disposed (Fig. 3), as well as the similar rates for new criminal activity (Fig. 1), suggest that defendants are returning for trial after missing an appearance and not fleeing.

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\(^3\) When a prosecutor downgrades criminal charges related to a violation of a domestic violence restraining order, defendants are required to appear in family rather than criminal court.
FAIRNESS AND EQUITY

CJR balances an individual’s constitutional rights with the need for community safety -- to create a fairer system of pretrial justice. Today’s CJR process relies primarily on pretrial release by non-monetary means, based on a determination of a defendant’s likelihood to appear in court or pose a danger to the community. In 2014, the criminal justice process relied, for the most part, on the imposition of money bail as a means to secure release into the community.

The negative effects of pretrial incarceration are well documented. Pretrial incarceration can lead to devastating and spiraling consequences for the accused and their families, from loss of housing, employment, and custody of children to interruptions of education and health care.⁴

Moreover, pretrial incarceration impairs a defendant’s ability to prepare a defense and increases the likelihood of conviction and other negative legal outcomes. The potential for negative consequences increases with each day a defendant spends in jail pretrial while presumed innocent.

A comparison of the two systems shows that, under CJR, defendants spend less time in jail pretrial than under a monetary bail system.

- Under the CJR system in 2017, low-risk defendants were more likely to be issued a summons and thereby avoid being sent to jail altogether.

- Under the bail system in 2014, defendants issued a warrant too often waited in jail for months or years, while presumed innocent, to have their day in court, because they could not post bail.

- Under CJR, defendants issued a warrant were released quickly because initial hearings for pretrial release were held within 24 to 48 hours of commitment to jail and defendants were no longer required to post bail to secure their pretrial freedom.

**Summons/Warrant Decision**

With the advent of CJR on January 1, 2017, the Judiciary made changes to court rules, and the Attorney General issued directives to law enforcement officers statewide. Both developments brought greater consistency and fairness to the charging process and the issuance of complaints.

As required by the CJR law, defendants charged with a crime or offense on a complaint-warrant issued by a judicial officer are considered “eligible defendants” and are sent to jail. Soon after, a hearing is held, and a judge considers information presented by the parties and Pretrial Services, including the risk assessment, to make an informed release decision. Defendants charged with a crime or an offense on a complaint-summons do not face pretrial commitment to jail and instead receive a date to appear in court.

The warrant-summons decision is informed by a number of factors: the results of a preliminary PSA, which law enforcement can run; revised court rules, and directives the Attorney General issued to guide law enforcement officials. Because of added objective information early in the process -- about a defendant’s criminal past, history of court appearances, and risk results -- as well as early screening by prosecutors, far more defendants have been properly categorized as lower risk and released on a complaint-
summons without first going to jail. In turn, defendants categorized as higher risk are arrested on complaint-warrants. They are thus eligible for CJR, and Pretrial Services prepares a risk assessment, consistent with the CJR law.

In 2014, under the monetary bail system, 69,469 of defendants (54 percent) received a complaint-summons and 60,266 (46 percent) received a complaint-warrant. Three years later, under the CJR system, the percentage of complaint-summonses issued increased sharply. In 2017, law enforcement and judicial officers issued 98,473 summonses to 138,763 defendants (71 percent) and released them. The remaining 40,290 defendants (29 percent) went to jail initially on a warrant. (Fig. 4).

The increase in the number of complaint-summonses is significant. Had law enforcement officers sought complaint-warrants in 2017 at the same rate they did in 2014, more than 24,000 additional lower-risk defendants would have gone to jail before they could be released pretrial.
**Time to Pretrial Release for Summons and Warrants**

The Research Project examined pretrial release timeframes for defendants issued either a complaint-summons or a complaint-warrant in calendar year 2014 and 2017. Pretrial release in this context included situations where defendants did not go to jail, went to jail and were released ROR or on conditions, and posted bail.

The study revealed that the percentage of defendants released pretrial stayed virtually the same. In 2014, 94 percent of defendants were released while their cases were pending; in 2017, 95.6 percent were released while their cases were pending.

The chart below (Fig. 5) shows that, in 2014, defendants issued a complaint-summons or complaint-warrant spent an average of 7.4 days in custody until their initial pretrial release. In 2017, they spent an average of 3.7 days in custody. As noted earlier, to ensure an equitable comparison, all defendants charged with disorderly persons and indictable offenses issued by both complaint-summons and complaint-warrant are included. Judges released nearly all defendants charged with warrants in 2017 within 24 to 48 hours when prosecutors did not file a motion for pretrial detention.

Viewed from another perspective, defendants issued a complaint-warrant were committed to jail at virtually the same rate under both systems. In 2014, 32.1 percent of defendants were issued a complaint-warrant and went to jail following arrest. In 2017, the percentage of defendants committed to the jail decreased slightly, to 31.8 percent.

The key difference -- and one of the driving factors in the decline in New Jersey’s pretrial jail population -- is that, under CJR, defendants spent half as much time in jail from the time of commitment to when they are initially released pretrial.
Days from Complaint Issuance or Arrest to Initial Pretrial Release
All Defendants

Note: This chart includes complaint-summons and complaint-warrants. For purposes of this comparison, defendants released on the same day (including on a complaint-summons) were counted as one day until pretrial release.

Fig. 5

CJR defendants overall benefitted from quicker release. As the chart below (Fig. 6) shows, the average time to initial release dropped most significantly for black defendants, from 10.7 days to 5.0 days. For white defendants, the number of days to initial release dropped from 5.3 days to 2.9 days.
Total Time in Jail Pretrial

The Research Project also analyzed the total amount of time defendants issued a complaint-warrant spent in jail -- including those released pretrial, those detained, and those who failed to post bail. The average time defendants spent in jail pretrial for the 22 months studied in 2014 was 62.4 days. The average time dropped to 37.2 days in 2017 -- a decrease of 40 percent. (Fig. 7).
The time in jail for black defendants was reduced by 10.3 days, and time in jail for white defendants was reduced by 5.2 days. (Fig. 8).
The shorter length of commitments to jail under CJR has resulted in a significant decline in the daily jail population. On average, the population of New Jersey’s jails declined by a few thousand defendants per day in 2017. That translates to more than 750,000 fewer jail beds over the course of a year.
III.

JAIL POPULATION STUDIES

2012 vs. 2018
Impact on County Jail Population

One of the prime catalysts that led to the adoption of CJR was a study Dr. Marie VanNostrand of Luminosity, Inc. conducted in 2013. It found that, on October 3, 2012, nearly 40 percent of New Jersey’s jail population was incarcerated because of an inability to post bail, including 12 percent who remained jailed on bails of $2,500 or less. The study also found that more than two-thirds of jailed inmates were members of racial and ethnic minority groups.

Six years later, in 2018, the Administrative Office of the Courts, with the assistance of Luminosity, conducted an update to the Jail Population Study. The new analysis found that, on October 3, 2018, the number of inmates in custody declined dramatically, with 6,000 fewer people incarcerated in 2018 compared to 2012.

The percentage of defendants held in jail on bails of $2,500 or less dropped from 12 percent (1,547 of 12,003 defendants) in 2012 to 4.6 percent (390 of 8,482 defendants) in 2018. Most of those 390 defendants (60.5 percent) were ordered to post bail in Municipal Court and were not eligible for CJR. Of the 154 Superior Court defendants held on $2,500 bail or less, 137 defendants had initially been released on a summons or on their own recognizance but were ordered to post bail after failing to appear for a scheduled court appearance. The significant decline in defendants held on low amounts of bail is expected to continue, particularly as Municipal Court reforms are implemented.

Moreover, on October 3, 2018, the make-up of defendants held in jail, as it relates to the severity of the alleged or sentenced offense, had changed as follows:

- On October 3, 2012, 35 percent of the jail population included inmates charged with or sentenced for one or more violent offense; and

- On October 3, 2018, the number of inmates charged with or sentenced for one or more violent offense rose to 47 percent.
Further analysis of the charge distribution for those in jail on October 3, 2018 revealed that nearly 75 percent of the population had been charged with or sentenced for an offense of a serious nature.⁵ (Fig. 9).

**Jail Population by Race/Ethnicity/Gender**

A comparison of the October 3, 2012 and October 3, 2018 jail population studies shows that almost all demographic groups benefitted from CJR.

- Viewed by gender, the studies show 5,600 fewer men and 600 fewer women incarcerated pretrial in 2018, as compared to 2012.

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⁵ Serious offenses include either a violent offense, a NERA violation, or an offense of the first- or second-degree. A similar comparison for 2012 is not available because New Jersey did not introduce a master statute table to categorize criminal charges and include degrees until 2016.
• Viewed by race and ethnicity, approximately 3,000 fewer black defendants, more than 1,500 fewer white defendants, and 1,300 fewer Hispanic individuals were incarcerated under CJR.\textsuperscript{6}

Although the total jail population has decreased, with reductions in all demographic categories, the racial and ethnic makeup within New Jersey’s jail population has remained largely the same. As shown in Fig. 10:

• Black defendants made up 54 percent of the jail population in 2012 and 54 percent of the population in 2018.

• The white jail population rose slightly, from 28 percent in 2012 to 30 percent in 2018.

• The Hispanic population declined slightly from 18 to 16 percent.

\textbf{Total Jail Population Demographics}

\begin{figure}[h]
\centering
\includegraphics[width=0.5\textwidth]{chart.png}
\caption{Fig. 10}
\end{figure}

\textsuperscript{6} Other racial groups and individuals whose race is unknown account for the difference in numbers by gender and race.
Distribution by race among the male jail population remained consistent as well. One notable change was among females: the percentage of black females in the jail population decreased from 44 to 34 percent in 2018, and the percentage of white females in the jail population rose from 44 to 54 percent.
IV.

CRIMINAL JUSTICE REFORM

2018 PERFORMANCE
The comparison of data from 2014 and 2017 highlights trends in pretrial outcomes across the criminal justice system. The following analysis provides an update to the CJR data presented in our 2017 Annual Report.

**PRETRIAL DECISION-MAKING PROCESS**

**Measuring and Managing Risk**

The PSA, an objective risk assessment developed by the Laura and John Arnold Foundation, works to measure risk through an analysis of the defendant’s criminal record and court history. The Decision Making Framework (DMF), which the Supreme Court has approved, works to manage risk by setting forth policies that ensure consistent pretrial release recommendations throughout the state.

Together, the PSA and DMF measure the risk defendants pose and recommend the least restrictive means to manage that risk. The PSA and DMF help Pretrial Services staff offer recommendations for release and assist judges who make actual pretrial release decisions. Together, the tools help guide judges in their decision-making; they do not replace judicial discretion. When determining the appropriate conditions of release tailored to a particular defendant, judges also take into account specific facts presented by the prosecution and defense. Although no pretrial release system can ensure that a defendant will not commit an offense after release, or will show up for all court hearings, judges in New Jersey now have the benefit of an informed, objective analysis to assess pretrial release.

**Pretrial Release Decisions**

Under the CJR law, courts must hold a first appearance hearing and make a pretrial release decision within 48 hours of an eligible defendant’s commitment to jail, unless the prosecutor makes a motion for pretrial detention.

In 2018, the courts met the 48-hour deadline 99.6 percent of the time (22,552 out of 22,634 defendants). In the vast majority of cases, 81.9 percent, judges made initial pretrial release decisions within 24 hours. (Fig. 11).

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The CJR law outlines the conditions of release that a court may impose. Taking into consideration the recommendation from Pretrial Services staff as well as information provided by the prosecution and defense, the judge decides the appropriate release conditions based on a defendant’s risk, the severity of his or her charges, and other legally relevant factors.

Typically, courts release the lowest-risk defendants on their own recognizance (ROR) without any need for monitoring. Defendants who pose greater risks may be released subject to conditions, like more frequent contacts with Pretrial Services staff. Courts may place defendants who pose a more elevated risk on home detention or electronic monitoring.

Trial judges do not have independent authority to detain defendants pretrial. Only prosecutors are authorized to file applications for pretrial detention in appropriate cases. Absent a detention motion by the prosecutor, a defendant must be released.
The following chart (Fig. 12) provides a breakdown of initial release decisions in 2018:

![Initial Release Decisions for Criminal Justice Reform Eligible Defendants 2018](chart)

Note: These graphs plot initial release decisions for criminal justice reform eligible defendants who were arrested on or after January 1, 2018 on a warrant. Defendants who only received a summons are not included in these graphs. The graphs also do not include defendants whose cases were addressed prior to release decisions (1,861) or cases still pending (112).

Fig. 12

As noted earlier, in calendar year 2018, out of 44,383 CJR-eligible defendants, the court ordered 102 defendants to post monetary bail. Of those matters, the vast majority (90) of bails were ordered for violations of pretrial release conditions, such as failure to appear at a required court event, and not as part of the initial release determination.

**Pretrial Monitoring**

If a defendant is released on monitoring, Pretrial Services works with the defendant to ensure compliance with any conditions the court imposes. Monitoring may include requiring defendants to report to Pretrial Services by phone or in person, and, in some cases, electronic monitoring. To promptly assess and respond to emergent monitoring alerts, certain aspects of the program function on a 24-hour-per-day schedule.
Violations of Monitoring and Revocation of Pretrial Release

Pretrial Services staff use an automated system to record a defendant’s compliance with conditions of pretrial release. When court intervention is required, staff file a violation of monitoring notice and schedule the defendant to appear at a review hearing. The court also may issue a bench warrant for a defendant’s arrest.

If a defendant violates a condition of release -- for example, by allegedly committing a new offense or by failing to appear for a court date -- the prosecutor can file a motion to revoke the defendant’s pretrial release. When such a motion is filed, the court schedules the matter for a hearing at which the prosecution and defense have the opportunity to present evidence and arguments. The court may then continue, modify, or revoke the defendant’s conditions of release.

Prosecutors filed a total of 3,052 motions to revoke release in 2018. Of those, 1,943 required a judicial decision. The court granted 1,094 motions, or 56.3 percent, and denied 849 motions, or 43.7 percent. The prosecution withdrew or the court dismissed the remaining 1,109 motions.

**Fig. 13**

**Motions to Revoke Filed**

<table>
<thead>
<tr>
<th>Year</th>
<th>Total of 3,052 motions</th>
</tr>
</thead>
<tbody>
<tr>
<td>2018</td>
<td></td>
</tr>
</tbody>
</table>

**Motions to Revoke: Granted, Denied, Withdrawn or Dismissed**

- **Granted**: 1,094
- **Denied**: 849
- **Withdrawn or Dismissed**: 1,109

**Motions to Revoke: Granted or Denied**

- **Granted**: 56.3%
- **Denied**: 43.7%
**Pretrial Detention Decisions**

Under CJR, prosecutors may seek to detain defendants charged on a complaint-warrant without the opportunity for release. Pretrial detention motions are limited to indictable charges and domestic violence related disorderly persons charges. The prosecution has the burden to demonstrate that no combination of conditions or level of monitoring is sufficient to reasonably assure the safety of the community.

If the prosecutor files a detention motion, a Superior Court judge holds a pretrial detention hearing -- usually within three to five days of the filing -- so that both the prosecution and defense can present evidence. If the court orders a defendant detained, CJR’s speedy trial law sets specific timeframes that require the case to proceed to indictment and trial. If those timeframes are not met, the defendant can be released from jail.

Statistics from the first two years of CJR reveal that prosecutors filed pretrial detention motions in 2018 at a slightly higher rate than the year before. Specifically, in 2018, prosecutors filed pretrial detention motions in 49 percent of cases in which a warrant was issued. In 2017, prosecutors filed detention motions in 43.7 percent of warrant cases.

Of the 21,749 pretrial detention motions filed in 2018, prosecutors withdrew or the court dismissed 4,819 motions. For the remaining 16,930 motions, judges granted 8,669 detention motions (51.2 percent) and denied 8,261 (48.8 percent). (Fig. 14). By way of comparison, of the 19,366 motions filed in 2017, prosecutors withdrew or the court dismissed 5,350. Of the remaining 14,016 detention motions, judges granted 8,043 (57.4 percent) and denied 5,973 (42.6 percent).
The following chart (Fig. 15) depicts the different outcomes in 2018 for defendants charged on a warrant:
To place the detention statistics in a broader context, the rate of pretrial detention for all defendants, including those released on a summons, was 6.4 percent in 2018 and 5.6 percent in 2017. The following chart (Fig. 16) depicts the different outcomes for all defendants charged, both on a complaint-summons or a complaint-warrant:
**Speedy Trial**

If the court orders an eligible defendant detained pretrial, the defendant is subject to the speedy trial provisions of the CJR law. The timeframes recognize a fundamental tenet of the criminal justice system: that defendants held in jail before trial are entitled to have their cases heard expeditiously. The new law contains the following time limits:
- Pre-indictment, a defendant cannot remain in jail for more than 90 days.

- Post-indictment, a defendant cannot remain in jail for more than 180 days before the start of his or her trial.

- Overall, a defendant cannot be held in jail for more than two years before the start of a trial.

The timeframes can be extended under the statute for events such as competency hearings, drug or alcohol treatment, and pretrial motions. The Judiciary’s automated system tracks the statutorily required speedy trial timeframes along with any excludable time and provides alerts to court staff when defendants approach any time limits. The information is easily accessible to the parties and the court.

**Decline in Jail Population**

New Jersey’s pretrial jail population continued to decline in 2018. As the following chart (Fig. 17) shows, the decline began in 2015 when Superior and Municipal Courts across the state, along with prosecutors and defense counsel, reviewed their local pretrial jail populations in preparation for CJR. In 2017, the first year of CJR, the pretrial jail population decreased another 19 percent, from 7,058 to 5,718 defendants. In 2018, the pretrial jail population declined an additional 13 percent to 4,995 defendants. In total, New Jersey’s pretrial jail population has declined 43.9 percent since December 31, 2015.
PRETRIAL SERVICES PROGRAM OPERATIONS AND FUNDING

Revenue and Expenses

Annual expenses for the Pretrial Services Program in calendar year 2018 exceeded revenues from annual filing fees for the first time since the implementation of CJR. Even with close monitoring of staffing levels and cost-control measures in the areas of electronic monitoring and drug testing, the structural funding deficit is projected to continue unless funding changes are made. Projected annual deficits will leave the Pretrial Services Program with a negative balance by late fiscal year 2020-early fiscal year 2021.

The solution to this impending program funding crisis is straightforward. Like other state-run programs, the Pretrial Services Program should be funded from the state budget rather than from filing fees. To accomplish that, revenues collected from filing fees should go to the State Treasury. Pretrial Services Program staff positions, in turn, should be removed from the current Dedicated Fund positions to Direct State Service positions, thereby moving staff salary costs to the regular state budget and fringe benefit costs to the Interdepartmental Account. Those changes require legislative action and the support of the Governor.
Since November 17, 2014, the Judiciary has collected a total of $171.2 million from the authorized increase in court fees. That continues to be the main funding source for CJR. That approach, however, is not sustainable.

As of December 31, 2018, in accordance with the statutory requirements, the Judiciary allocated funds collected from increased court filing fees as follows:

(1) $88.4 million to the Pretrial Services Program;
(2) $40.6 million to Legal Services of New Jersey;
(3) $40.2 million for eCourts; and
(4) $2 million to the discretionary account.

To date, the Judiciary has expended or encumbered a total of $61.8 million for Pretrial Services, leaving a balance of $26.6 million. That surplus is largely due to the program’s relatively modest start-up costs. Prior to January 1, 2017, we did not need full staffing to carry out the responsibilities the new law imposed. Thanks to prudent hiring, we were able to save some revenue from filing fees before the program’s official start date. That is no longer possible. A full complement of Pretrial Services staff is needed to prepare more than 40,000 PSAs annually and monitor tens of thousands of defendants placed on pretrial release, among other tasks.

For eCourts, the Judiciary has expended or encumbered $22.7 million to date, leaving a balance of $17.5 million.

The Judiciary also has expended or encumbered $7 million for software for Pretrial Services and for eCourts, with $3.8 million coming out of Pretrial Services funding.

Electronic monitoring cost $565,163 in calendar year 2018. Per diem payments to authorized Municipal Court judges for handling Centralized Judicial Processing hearings totaled $778,000 for the year. Staff salaries for the calendar year totaled $22.5 million.

In the first three full fiscal years of collections, fiscal years 2016, 2017, and 2018, the Judiciary collected $44.1 million, $41 million, and $40.5 million, respectively. As of the date of this report, fiscal year 2019 collections are tracking at about 1 percent below fiscal year 2018 for the same timeframe.

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9 See Addendum – Development, Maintenance and Administration of eCourts.


**Pretrial Services Unit Staffing**

In 2018, the Judiciary’s Pretrial Services Program continued to operate six days per week, including holidays and weekends, to meet the statutory requirement that all pretrial release decisions occur within 48 hours of a defendant’s commitment to jail.

To limit the expenditure of county resources, the Judiciary conducts holiday and weekend hearings through virtual courtrooms that offer the same protection and functions as in-person hearings without the need to open courthouses. The public can view the sessions on the Judiciary’s website, www.njcourts.gov, via LiveStream technology.

If a defendant is released on monitoring, Pretrial Services works with the defendant to ensure compliance with any conditions the court imposes. Monitoring may include requiring defendants to report to Pretrial Services by phone or in person, and in some cases electronic monitoring. To promptly assess and respond to emergent monitoring alerts, certain aspects of the program function on a 24-hour-per-day schedule.

Statewide, in addition to the judges assigned to hear these matters, a total of 297 staff positions are dedicated to the Pretrial Services Program. That represents an increase of 30 positions from 2017. Based on current needs, we do not anticipate significant further growth in staff size.

**Pretrial Services Monitoring**

Pretrial Services staff monitor eligible defendants from the time of release until final disposition. Defendants may elect to receive text messages, emails, or phone call reminders of their court events. The frequency of staff contact with a defendant on court-ordered pretrial monitoring is based on the level of risk the defendant poses. Monitoring can range from monthly phone calls to weekly visits and, in some circumstances, home detention and electronic monitoring. When court intervention is required because of noncompliance, staff will file a violation of monitoring notice and schedule the defendant to appear before a judge at a review hearing.

Pretrial Services staff review and respond to monitoring alerts and, depending on the circumstances, contact law enforcement or the defendant. Emergent alerts occur 24 hours per day for a variety of reasons, including a defendant’s entry into a prohibited zone, leaving home when ordered to home detention, or tampering with an electronic monitoring device. In fewer than one-third of counties across the state, county jails have assumed responsibility for receiving and responding to emergent electronic monitoring alerts. In the remaining counties, Pretrial Services staff perform those functions.
The cost to monitor defendants subject to electronic monitoring is $4.19 per defendant per day. During 2017 and 2018, the Judiciary undertook a review of the electronic monitoring process to better manage resources while still ensuring public safety. Expenditures on electronic monitoring dropped significantly in the second year of CJR, from $784,017 in 2017 to $565,163 in 2018.

**Access to Services**

To help ensure an eligible defendant’s pretrial success, it is imperative that adequate services be made available to those on release. The CJR law sets forth conditions of pretrial release that a court may order when releasing a defendant on pretrial monitoring. The lack of available and affordable community-based substance abuse treatment, mental health treatment, and housing assistance programs continues to present a significant challenge for defendants on pretrial release who are in need of these services.

Prior to the implementation of CJR, each county compiled a list of available community resources. Pretrial Services uses the lists to refer defendants in need to local services. However, those services are in short supply and often not affordable. Where a free program exist, it can take months for space to become available.

The Judiciary continues to partner with county officials and officials from the state Department of Human Services to find solutions for defendants in need.

**Technology**

The continued digital transformation of the CJR process is a collaborative effort among criminal justice partners. It is fueled by the shift from a paper-driven process to a fully electronic one. To keep pace and extend the system’s maturity, enhancements and new application modules designed to assist in analytics and data sharing continue to evolve.

The Judiciary enhanced the eCDR application throughout 2018 to make electronic monitoring orders and mug shot images immediately available to law enforcement. That enables officials to respond quickly to violations. The Judiciary also created a Law Enforcement Dashboard to allow law enforcement officers to access real-time data on defendants subject to electronic monitoring. Additionally, the Judiciary enhanced its speedy trial application, which calculates potential release dates for pretrial defendants and provides immediate notification to interested parties when courts remand, downgrade, or dismiss a case.
Before CJR, law enforcement fingerprinted only 30 percent of defendants. In 2018, law enforcement officers fingerprinted more than 94 percent of defendants using LiveScan before the issuance of a complaint, making it easier to identify people across systems and save time.

![Statewide Live Scan Compliance](image)

**Fig. 18**

**COURT DECISIONS AND RULE CHANGES**

In 2018, the Supreme Court continued to develop a robust body of case law applicable in CJR matters:

In *State v. S.N.*, 231 N.J. 497 (2018), the Court held that the proper standard of appellate review of pretrial detention decisions is whether the trial court abused its discretion by relying on an impermissible basis, by relying on irrelevant or inappropriate factors, by failing to consider all relevant factors, or by making a clear error in judgment.

In *State v. Dickerson*, 232 N.J. 2 (2018), the Court concluded that the affidavit supporting a search warrant disclosed in discovery need not be disclosed as a matter of course. The Court also held that, to the extent that the trial court’s order of release served as a “sanction” for the State’s perceived failure to meet its discovery obligation, the release order was improper.
In the consolidated appeals in State v. Mercedes and State v. Travis, 233 N.J. 152 (2018), the Court revised Rule 3:4A(b)(5) to make clear that a recommendation against a defendant’s pretrial release that is based only on the type of offense charged cannot justify detention by itself -- unless the charge is encompassed by N.J.S.A. 2A:162-19(b).

In State v. Pinkston, 233 N.J. 495 (2018), the Court held that the CJR Act provides defendants a qualified right to summon adverse witnesses. The Court held that, when seeking to call an adverse witness, a defendant must present a proffer about the anticipated testimony of the witness and its relevance to the issue of probable cause, and show how the anticipated testimony would rebut or diminish the State’s evidence in support of detention in a material way.

Finally, in State v. Hyppolite, 236 N.J. 154 (2018), the Court considered the appropriate remedy when the State fails to disclose exculpatory evidence before a detention hearing. The Court held that when exculpatory evidence is disclosed after a detention hearing, judges should use a modified materiality standard to decide whether to reopen the hearing. If there is a reasonable possibility that the result of the detention hearing would have been different had the evidence been disclosed, the hearing should be reopened.
VI. CONCLUSION AND NEXT STEPS

Criminal Justice Reform in New Jersey replaced a cash bail system that had roots in the State’s 1776 Constitution.

The first two years of CJR demonstrate that commitment and cooperation among all branches of government -- executive, legislative, and judicial -- and all levels of government -- state, county, and municipal -- can bring about not just legislative change, but a fundamental change in the culture of our criminal justice system. The systemwide collaborative effort in support of CJR also included the defense bar, both public and private; prosecutors at the state and county levels; all levels of law enforcement, including Sheriffs and Wardens; various community groups; and the public.

The Research Project produced for this report demonstrates that CJR is operating as intended and has resulted in a fairer criminal justice system that respects and balances constitutional rights, the presumption of innocence, and community safety.

New Jersey’s jail population is no longer comprised of large numbers of lower-risk defendants, charged with less serious offenses, who cannot afford to post bail. The pretrial jail population has declined consistently, and defendants now held in jail pretrial because of CJR are more likely to present a significant risk of flight or danger to the community.

Defendants charged with low-level offenses spend less time in jail pretrial under CJR. As a result, they avoid the spiraling, life-changing consequences of being detained for weeks and months while presumed innocent. The use of bail has largely been relegated to defendants who fail to appear in court.

The research conducted for this report also shows that the risk assessment tool used for CJR is an accurate and effective tool that is working as expected. New Jersey judges now have the benefit of an informed and objective analysis when making pretrial release decisions. Unlike in the past, judges today can also consider a defendant’s risk to the community in deciding whether to detain the individual pretrial.

Defendants released pretrial under CJR are not ignoring reporting or court dates at a substantially higher rate than under the bail system; nor are they creating a greater risk to the community. CJR defendants appear, on average, at nearly 90 percent of their court hearings, and their cases are disposed of in roughly the same amount of time as defendants under the cash bail system.
Even with these successes, the Judiciary remains committed to a continuous review of CJR’s performance and already has engaged researchers to study key areas that need further improvements. For example, the Judiciary plans to bolster its efforts to notify defendants charged with disorderly persons offenses about upcoming court appearances to further improve court appearance rates.

The Judiciary’s ongoing review will also examine areas for improvement in the PSA, such as quantifying and incorporating in the risk-assessment process particular risks posed by defendants charged with domestic violence offenses.

In addition, the Judiciary recognizes the need to continue to examine the effect of CJR on racial disparity in the criminal justice system and to ensure that all defendants are treated equally by the courts. There are several thousand fewer black defendants in jail overall under CJR, and black females now make up a lower percentage of the female jail population. However, black defendants continue to represent a disproportionate percentage of the male jail population.

Insufficient resources to provide community-based substance abuse treatment, mental health treatment, and housing assistance to those on pretrial release remains a substantial concern. Adequate services must be made available if more defendants are to succeed in complying with conditions of pretrial release.

The Pretrial Services Program also faces an impending funding crisis. There is a continuing critical need to identify and implement a sustainable means to fund the program. The current method -- which relies on annual court filing fees -- is not a workable approach. As predicted at the outset of CJR, the model in place has a built-in structural deficit, and within the next year, will result in an actual funding deficit.

The Judiciary remains committed to working with all stakeholders and partners in the criminal justice system to address these and other issues and properly balance constitutional rights and public safety. We will continue to strive to create and maintain the best possible criminal justice system for New Jersey and try to serve as a model for others.
ADDENDUM

DEVELOPMENT, MAINTENANCE and ADMINISTRATION of eCOURTS

The Judiciary is engaged in a multifaceted initiative to convert its legacy information technology systems, based on mainframe databases, into a modern integrated eCourts electronic filing, electronic storage, and electronic case management application. Over the years, the Judiciary has collected millions of party and case records, currently maintained in numerous decades-old databases, which require rebuilding from the ground up. Four essential functionalities support this concerted effort to transform the Judiciary into the digital age:

(1) Electronic filing and information exchange between the court and attorneys;

(2) The establishment of electronic case files;

(3) The maintenance of electronic records management systems that provide attorneys and the public with appropriate access to case information; and

(4) Modern case management systems that will enable the Judiciary to track, dispose of, report on, and share data with our government partners.

The various systems described below represent a significant undertaking and a bold push toward the Chief Justice’s vision of total modernization. Despite the progress that has been made in the areas of eFiling, several more years of work are required to complete our goals of replacing all systems from both front-end eFiling to back-end case management.

eCourts Supreme Court: Implemented in 2017

The Offices of the Attorney General, Public Defender, and County Prosecutors are all filing electronically in the Supreme Court. The Judiciary presently is expanding electronic filing to include private attorneys in criminal matters, and the next expansion will include private attorneys in civil matters. The application provides for electronic access by counsel, Justices, and Supreme Court staff to all electronically filed documents.

eCourts Appellate Division: Implemented June 2013

eCourts Appellate was initially available in criminal cases in which the Public Defender filed the motion and the Attorney General or County Prosecutor was the responding party. The system has progressively added new case types or case filers over the last several years, including Children in Court, Family, Pretrial Detention (CJR) appeals, and as of January 1, 2018, civil cases under mandatory eFiling. System use of both Judiciary Account Charge System (JACS) and credit cards has enabled access to the entire bar for filing. With the advent of eFiling, data and documents are transmitted to the appellate case management system, which has ensured access to these data and documents by the bar, the court, and staff. In addition, eFiling will assist with instant notifications of submissions, document review at the touch of a button, and record retention.
eCourts Criminal: Implemented July 2014

The Judiciary in 2014 implemented eCourts Criminal, the first eCourts application. At the outset, it provided the attorneys the ability to efile motions, responses, and briefs. The Judiciary has since expanded the application to include almost all other documents filed in the Criminal Division. The Superior Court Clerk’s Office has converted thousands of archived paper records to digital images and added them to the eCourts system.

eCourts Tax: Implemented February 2015

The introduction of electronic filing in the Tax Court was instrumental in reducing significant data entry and processing backlogs. This project automated case initiation and complaint docketing. Added functionality allows non-attorneys, such as municipal assessors, municipal clerks, and county boards of taxation, the ability to receive electronic notification of a new case or judgment and to access the Electronic Case Jackets. Attorneys will be able to file with a credit card by the summer of 2019. Pro Se eFiling is also currently being developed with a pilot expected by the end of 2019.

eCourts Probation Electronic Case Jacket: Implemented June 2016

An eCourts electronic case jacket was implemented for the Probation Division in June 2016, eliminating most paper files and allowing simultaneous access to probation information by judges and staff. The Probation case jackets also include embedded hyperlinks to other eCourts electronic files in the Criminal, Family, and Municipal Divisions, eliminating delays and gaps between divisions. eCourts Probation will be expanded to include a mobile application for ISP in July 2019 and case management functions by December 2019.

eCourts Foreclosure: Implemented September 2016

eCourts Foreclosure, in September 2016, replaced the Judiciary Electronic Filing and Imaging System (JEFIS), implemented in 1995. In eCourts Foreclosure, attorneys can electronically file documents from complaint through judgment processing. Attorneys can also access electronic case files and automated notifications between attorneys of record and the court. County clerks and sheriffs can access eCourts Foreclosure Electronic Case Jackets to verify judgments of foreclosure.

eCourts Special Civil DC: Implemented September 2016

eCourts Special Civil DC pertains to cases with a demand amount of less than $15,000, and focuses on the replacement of an older electronic filing system, the Judiciary Electronic Filing and Imaging System (JEFIS). In eCourts Special Civil DC, attorneys can electronically file documents from complaint through post judgment. Attorneys of record and the court can access Electronic Case Jackets and receive automated notifications.

eCourts Family FM (Dissolution/Divorce) case jacket archived cases: Implemented November 2016

This eCourts project provides judges and court staff with easy access to archived files. Thousands of paper records converted to digital images are now easily accessible for court proceedings or to fulfill
records requests from the public. This application has eliminated significant delays in accessing older records from the Superior Court Clerk’s Office records warehouse in Trenton. eCourts FM will be expanded to include eFiling, automatic notification, and case management. Pilot expected in April 2020.

**eCourts Criminal – Criminal Justice Reform: Implemented January 2017**

eCourts Criminal required enhancement to accommodate the many tasks involved in Criminal Justice Reform (CJR), including automation of the Public Safety Assessment (PSA) risk assessment tool utilized by judges to inform their release decisions. Such automation helps Pretrial Services Program staff manage cases and prepare orders. Additional applications include a pretrial monitoring system, detailed tracking mechanism for speedy trial dates and electronic bench warrants processing for defendants on electronic monitoring. Planned enhancements in March 2019 include automation of detention, release, and revoke release orders that will result in improved data collection.

**eCourts Municipal: Implemented January 2017**

This broad initiative, integral to CJR, provides an enhanced and improved complaint system for law enforcement statewide. It includes a Live Scan fingerprint interface, developed in partnership with the New Jersey State Police, which connects a defendant’s complaint, arrest record, fingerprint record, and criminal history. The system utilizes the data from the LiveScan fingerprint interface to populate the criminal complaint and calculate the PSA risk score.

The system gives prosecutors the ability to review and modify charges on a complaint before a finding of probable cause. After a finding of probable cause and issuance of a summons or warrant, the complaint is stored in the eCourts Municipal Electronic Case Jacket, and is accessible by the court, prosecutors, attorneys, law enforcement, and the county jails. Plans for enhancements to eCourts Municipal include allowing attorneys to file motions and cross reference other municipal cases, including disorderly persons and traffic offenses.

**eCourts Special Civil Small Claims (SC) case jacket: Implemented September 2017**

eCourts Special Civil SC pertains to cases with a demand amount of less than $3,000. This ongoing project provides an electronic case jacket, enabling simultaneous access by judges, court staff, and attorneys. It also provides for centralized processing of court-generated notices. Implementation began with the placement of select notices in the case jacket and it was expanded to include additional notices and documents.

**eCourts Special Civil Landlord Tenant (LT) case jacket: Implemented September 2017**

eCourts Special Civil LT pertains to cases with a dispute between the landlord and a tenant. This ongoing project provides an electronic case jacket, enabling simultaneous access by judges, court staff, and attorneys. Implementation began with the placement of all notices in the case jacket and will be expanded to include eCourts eFiling, auto docketing, case management, and centralized printing functionality. Pilot expected by the end of 2019.
**eCourts Civil Law: Implemented December 2017**

The end result of this project will be the electronic filing of all documents from complaint through final judgment. It includes access to electronic case files and automated notifications between attorneys of record and the court. Rollout for pilot counties began in March 2017; all counties were operational by the end of 2017. Enhancements are being planned to include an arbitration program module, which will allow for electronic notification to parties and arbitrators. Pilot expected in early 2020.

**eCourts Family Children in Court (CIC) Dockets: Implemented September 2017 & June 2018**

This eCourts project focuses on electronic filing in child neglect cases initiated by the Attorney General’s Office on behalf of the New Jersey Division of Child Protection and Permanency, the Office of Parental Representation, and the Office of the Law Guardian. Four different docket / case types -- FN, FC, FG, FL -- have been implemented in 2017 and 2018. Enhancements are being made to include motion filing and order processing. This will result in reduction in data entry tasks and more efficient case management.

**eCourts Family (FD) Case Jacket: To be implemented May 2019**

This eCourts project focuses on a case jacket for non-dissolution matters. The FD Case Jacket has been developed (Dec 2016), however, the judiciary is working with Division of Family Development on an interface to provide the Uniform Summary Support Order into the FD case jacket. Additional documents are being reviewed for future uploading.

**eCourts Family (FJ): To be implemented December 2019**

This eCourts project focuses on automating the process of filing juvenile delinquency complaints. Building on enhancements made to eCDR for Criminal Justice Reform, this will enable the timely entry of juvenile matters as well as improved data collection on juvenile complaints.
Administrative Office of the Courts

STUART RABNER
Chief Justice

GLENN A. GRANT, J.A.D.
Acting Administrative Director of the Courts

April 2019
New York’s Bail Reform Law
Summary of Major Components

On April 1, 2019, New York State passed sweeping criminal justice reform legislation that eliminates money bail and pretrial detention for nearly all misdemeanor and nonviolent felony cases. The measure goes into effect in January 2020. This summary explains the reform’s potential implications.

**Money Bail and Pretrial Detention Are Eliminated in Most Cases**

- **Misdemeanors:** Money bail is eliminated with only two exceptions: sex offense misdemeanors and criminal contempt charges for an order of protection violation in a domestic violence case. Also, straight pretrial detention (“remand”) is eliminated in all misdemeanor cases.

- **Nonviolent Felonies:** Both money bail and pretrial detention are eliminated in virtually all nonviolent felonies, with a limited number of exceptions: witness intimidation or tampering, conspiracy to commit murder, felony criminal contempt charges involving domestic violence, and a limited number of offenses against children, sex offenses, and terrorism-related charges.

- **Violent Felonies:** Money bail and detention are still permitted in virtually all violent felonies, except for specific sub-sections of burglary and robbery in the second degree. Bail and detention are also permitted in cases classified as Class A felonies, most of which also involve violence. A notable caveat is that bail and detention are eliminated for all Class A drug felonies, with the sole exception of operating as a major trafficker.

Overall, of the almost 205,000 criminal cases arraigned in New York City in 2018, only 10 percent would have been eligible for money bail under the new law.

**Judges Are Required to Consider Financial Resources When Setting Bail**
Even where money bail remains permissible, the new law imposes new requirements designed to ensure that defendants can afford bail when it is set. First, the court must always set at least three forms of bail and must include a partially secured or unsecured bond—two of the least onerous forms. A partially secured bond allows defendants (or their friends or family) to pay 10 percent or less of the total bail amount up front; the balance is only paid if the defendant skips court. An unsecured bond works the same way, but no up-front payment is required. Just as important, the law requires judges to consider each defendant’s ability to pay bail before setting an amount.

**Judges Are Encouraged to Release Defendants While Their Cases Are Pending**
The bail reform law includes specific provisions encouraging courts to release defendants “on recognizance” while their cases are pending. In these cases, defendants are under no restriction and must simply appear at their appointed court dates. The court must release defendants on recognizance unless they pose “a risk of flight.”
The Legislation Allows for Conditions of Release Other Than Money Bail in Certain Circumstances

In those cases where a risk of flight exists, the legislation requires judges to set the “least restrictive alternative and condition or conditions that will reasonably assure the principal’s return to court.” Examples that courts are likely to use include supervised release, enhanced court date reminders, travel restrictions, or limitations on firearms or weapons possession during the pretrial period. At a minimum, the law also requires that all released defendants be reminded of any upcoming court appearances by text, phone, email, or first-class mail—and each defendant must be able to select a preferred notification method.

Electronic monitoring is allowed for 60 days (with an option to renew) in the following cases: (1) felonies, (2) misdemeanor domestic violence, (3) misdemeanor sex offenses, (4) misdemeanors where the defendant was convicted of a violent felony in the past 5 years, and (5) a limited number of circumstances where a judge finds that defendants have engaged in pretrial misbehavior. The law states that electronic monitoring may only be ordered if “no other realistic non-monetary condition or set of non-monetary conditions will suffice to reasonably assure a principal’s return to court.”

Other Key Reform Provisions

- **Risk Assessment**: Courts may consider information from formal release assessment tools that are designed to predict a defendant’s likelihood of appearing in court. Any such tools are required to be publicly available, free of racial or gender bias, and validated for predictive accuracy. Release decisions may not be based on an assessment of the defendant’s future dangerousness or risk to public safety.

- **Bench Warrant Grace Period**: The new law prohibits courts from issuing a warrant for 48 hours whenever a defendant fails to appear, unless the defendant is charged with a new crime or there is evidence of a “willful” failure to appear. During the 48-hour period, the defense attorney can contact the defendant and encourage a voluntary return.

- **Responses to Noncompliance**: The new law allows courts to revoke release conditions and set new conditions, including money bail and detention, in response to specified forms of pretrial misbehavior. They include committing a new felony where the defendant was initially charged with a felony, intimidating a witness, persistently and willfully failing to appear at scheduled court dates, or violating an order of protection. In such cases, the court must first hold a hearing where the defendant may present evidence or cross-examine witnesses.

Potential Impacts

The precise effects of the law cannot be predicted in advance, since they partly depend on how new provisions are implemented on the ground. However, a preliminary analysis suggests that the bail reform law will significantly reduce pretrial detention. Currently in New York City, 43 percent of the almost 5,000 people detained pretrial would have been released under the new legislation as they would no longer be eligible for either bail or detention. (This analysis excludes people held pretrial for a parole violation or after a sentence is imposed.) The impacts outside of New York City could be even greater, because many upstate jurisdictions currently have higher rates of detention with misdemeanors.

For More Information

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Digitizing the Carceral State

Book Review by Dorothy E. Roberts

APR 26, 2019
132 Harv. L. Rev. 1695

The full text of this Book Review may be found by clicking on the PDF link to the left.

Many life-changing interactions between individuals and state agents in the United States today are determined by a computer-generated score. 1


Government agencies at the local, state, and federal levels increasingly make automated decisions based on vast collections of digitized information about individuals and mathematical algorithms that both catalogue their past behavior and assess their risk of engaging in future conduct. 2


Big data, predictive analytics, and automated decisionmaking are used in every major type of state system, including law enforcement, national security, public assistance, health care, education, and child welfare. 3

The federal government has pumped billions of dollars not only into its own data reservoirs, but also into state and local efforts to digitize government operations. 4


Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor (https://www.amazon.com/Automating-Inequality-High-Tech-Profile-Police/dp/1250074312)

Government officials claim their expanding use of big data will improve the accuracy, efficiency, and neutrality of their decisions. 5

5. See Press Release, White House, supra note 3 (announcing a convening hosted by the White House, the U.S. Department of Health and Human Services, and Think of Us to “discuss ways to improve our foster care system through the use of technology”); see also William M. Grove et al., Clinical Versus Mechanical Prediction: A Meta-Analysis, 12 Psychol. Assessment 19, 19 (2000) (finding that mechanical predictions of human health and behavior “were about 10% more accurate than clinical predictions”). But see Miller, supra note 3, at 118–22 (discussing the technological and methodological limitations of predictive systems).

But big data has been met by a tremendous chorus of alarm. These concerns have centered paradoxically on claims that there is both too little and too much automation. On one hand, some scholars and advocates have criticized the “digital divide” created by the unequal distribution of access to technological innovations. 6

6. For example, adopting online platform technologies that move away from a face-to-face model for handling legal disputes may enhance access to justice by giving more people opportunities to interact with government agencies such as state courts. 7

7.
and to utilize government assistance such as legal services.  


On the other hand, numerous commentators have pointed to the dangers of state overreach on big data. These dissents warn that the mushrooming technological surveillance of citizens threatens to invade individuals’ privacy and erode government accountability at an unprecedented scale.  


According to this view, citizens should demand more regulation to protect their personal data and subject automated decisionmaking to greater public scrutiny.  

10. See O’Neil, supra note 1, at 213-14.

The European Union, for example, recently enacted a new data privacy law “designed to give individuals the right to control their own information.”  


While important, these concerns about access to and protection from big data fail to capture a critical aspect of automation’s danger to society. Government digitization is not inherently or universally beneficial or harmful. Rather, the outcomes of big data depend on the particular ideologies, aims, and methods that govern its use. In the United States today, government digitization targets marginalized groups for tracking and containment in order to exclude them from full democratic participation. The key features of the technological transformation of government decisionmaking — big data, automation, and prediction — mark a new form of managing populations that reinforces existing social hierarchies. Without attending to the ways the new state technologies implement an unjust social order, proposed reforms that focus on making them more accurate, visible, or widespread will make oppression operate more efficiently and appear more benign.

**Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor** by political scientist Virginia Eubanks significantly advances our understanding of the threat to social equality posed by government use of big data by examining how it functions in public assistance programs. Based on in-depth investigations of three systems, she describes how their eligibility determinations, which are based on computerized risk assessments, constitute a modern system for regulating poor and working-class people. Eubanks systematically explores the automated eligibility system the state of Indiana adopted for its welfare services (pp. 39–83), the electronic registry of unhoused people living in Los Angeles’s Skid Row (pp. 84–126), and the statistical model used in Allegheny County, Pennsylvania, that is an adaptation of a model developed by researchers in New Zealand to score
families according to 132 variables that predict future cases of child maltreatment (pp. 127–73). Each program illustrates a different aspect of high-tech shadow mechanisms for regulating the poor: they divert poor people from public resources (Indiana); classify and criminalize them (Los Angeles); and punish them based on predictions of their future behavior (Allegheny County) (pp. 179–82). Eubanks’s analysis extends beyond concerns about data privacy and access to data to unveil “the new digital infrastructure of poverty relief” constructed with high-tech monitoring tools (p. 11). Eubanks argues that government agencies are using computer technologies to “target, track, and punish” poor people in ways that divert attention from the need for social change and erode democracy for everyone (p. 178). Thus, Automating Inequality expands the literature criticizing how government use of big data reflects existing social inequalities to show how big data helps agencies structure state programs to create new punitive and antidemocratic modes of social control.

Eubanks’s investigation of digitized public welfare programs refutes dominant perspectives that view the growth of big data as both a positive and a negative development. First, Eubanks shows that agencies’ reliance on computer software to generate risk scores doesn’t make decisionmaking more objective (pp. 142, 153). The algorithms the agencies use build biases into decisionmaking processes, shielding agency determinations even more from government accountability (pp. 79, 167). Second, Eubanks finds that high-tech tools don’t radically improve state agencies’ ability to address poverty (pp. 197–200). Rather, she concludes that technological innovations reconstitute the nineteenth-century poorhouse as a modern day “digital poorhouse” (p. 12). The contemporary system is undergirded with the same ideologies that blame poor people for their disadvantaged social position but upgraded with the ability to monitor and punish them more efficiently (pp. 12, 17). Today’s digital revolution is but the latest in a history of innovations in poverty management. “[T]he new regime of data analytics is more evolution than revolution,” Eubanks writes. “It is simply an expansion and continuation of moralistic and punitive poverty management strategies that have been with us since the 1820s” (p. 37).

Finally, Eubanks’s analysis reveals that proposals to bridge the “digital divide” by assuring greater inclusion in technological progress badly miss the mark. “I found that poor and working-class women in my hometown of Troy, New York, were not ‘technology poor,’ as other scholars and policy-makers assumed,” observes Eubanks. “Data-based systems were ubiquitous in their lives . . .” (p. 8). Big data critics who decry a universal invasion of the public’s privacy make a similar mistake by failing to attend to the way state surveillance concentrates on poor people with an intensity unknown to middle-class and wealthy Americans. To tackle the government’s expanding reliance on automated analytics, we must understand it in terms of the particular ways it is structured to reinforce unjust hierarchies of power.

Eubanks’s astute interpretation of big data analytics as poverty management provides critical yet partial insight into modern day state oppression. Automating Inequality shines a needed spotlight on government assistance programs the public is more likely to view as benevolent than as punitive. The key aspects Eubanks highlights — big data collection, automated decisionmaking, and predictive analytics — also characterize expanding high-tech approaches to criminal justice. 

https://harvardlawreview.org/2019/04/digitizing-the-carceral-state/
Taking account of both civil and criminal state surveillance systems reveals a coherent carceral form of governance that extends far beyond prisons to deal with problems caused by structural inequalities by punishing the very people suffering most from them (p. 177). In addition, all of the oppressive features Eubanks describes result from racism as much as disdain for poor people. Computerized risk assessments and determinations regulate people on the basis of race as well as economic status: “Though these new systems have the most destructive and deadly effects in low-income communities of color, they impact poor and working-class people across the color line” (p. 12).  


Her central insight, that digital systems are structured to maintain an unjust class order, applies equally to the systems’ reinforcement of white supremacy.

In this Review, I expand Eubanks’s focus on state welfare programs to include a broader range of systems, with particular attention to the criminal justice system, and Eubanks’s focus on poverty management to include white supremacy. This more comprehensive analysis illuminates how computerized prediction is fundamental to the ideology, methods, and impact of the modern mode of social control in the United States— the digitized carceral state. My analysis of the role big data, automation, and prediction play in carceral governance proceeds as follows. Part I provides a holistic portrait of the carceral state, which extends beyond prisons to encompass multiple institutions that are supposed to serve people’s needs. This punitive regime includes criminal law enforcement, education, and health care, as well as the poverty-relief and child-protection systems Eubanks describes. By examining the way the prison, foster care, and welfare systems operate together to punish black mothers in particular, I show the importance of attending to racism, along with sexism and classism, in understanding the proliferation of carceral responses to social inequality. Part II explores how automated decisionmaking works to implement carceral governance. Despite claims that computerized prediction is objective, its databases and algorithms build in unequal social structures and ideologies that create new modes of state surveillance and control in marginalized communities. Adding to Eubanks’s focus on poverty management, I argue that racism is central to the carceral state’s reliance on prediction and embedded in predictive policing. Part III concludes by advocating for an abolitionist approach to contesting the digitized carceral state. While agreeing with Eubanks’s call to dismantle the digital poorhouse rather than reform it, I argue that acknowledging racism’s crucial role in carceral governance accentuates the need for explicitly antiracist strategies to build a viable movement for change.

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**Tags:** Policing, Poverty Law, Race and the Law, Surveillance, Technology
Bail Reform: New Directions for Pretrial Detention and Release

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BAIL REFORM:
NEW DIRECTIONS FOR PRETRIAL DETENTION AND RELEASE

Megan Stevenson & Sandra G. Mayson
March 13, 2017

ABSTRACT

Our current pretrial system imposes high costs on both the people who are detained pretrial and the taxpayers who foot the bill. These costs have prompted a surge of bail reform around the country. Reformers seek to reduce pretrial detention rates, as well as racial and socio-economic disparities in the pretrial system, while simultaneously improving appearance rates and reducing pretrial crime. The current state of pretrial practice suggests that there is ample room for improvement. Bail hearings are often cursory, with no defense counsel present. Money-bail practices lead to high rates of detention even among misdemeanor defendants and those who pose no serious risk of crime or flight. Infrequent evaluation means that the judges and magistrates who set bail have little information about how their bail-setting practices affect detention, appearance and crime rates. Practical and low-cost interventions, such as court reminder systems, are under-utilized. To promote lasting reform, this chapter identifies pretrial strategies that are both within the state’s authority and supported by empirical research. These interventions should be designed with input from stakeholders, and carefully evaluated to ensure that the desired improvements are achieved.
INTRODUCTION

The scope of pretrial detention in the United States is vast. Pretrial detainees account for two-thirds of jail inmates and 95% of the growth in the jail population over the last twenty years.1 There are eleven million jail admissions annually; on any given day, local jails house almost half a million people who are awaiting trial.2 The U.S. pretrial detention rate, compared to the total population, is higher than in any European or Asian country.3

Pretrial detention has profound costs. In fiscal terms, the total annual cost of pretrial jail beds is estimated to be $14 billion, or 17% of total spending on corrections.4 At the individual level, pretrial detention can result in the loss of employment, housing or child custody, in addition to the loss of freedom. Pretrial detention also affects case outcomes. No fewer than five empirical studies published in the last year, deploying quasi-experimental design, have shown that pretrial detention causally increases a defendant’s chance of conviction, as well as the likely sentence length.5 The increase in convictions is primarily an increase in guilty pleas among defendants who otherwise would have had their charges dropped. The plea-inducing effect of detention undermines the legitimacy of the criminal justice system itself—especially if some of those convicted are innocent. Finally, two recent studies have found evidence that pretrial detention increases the likelihood that a person will commit future crime.6 This may be because jail exposes defendants to negative peer influence,7 or because it has a destabilizing effect on defendants’ lives.

Given the costs of pretrial detention, one might expect that detention decisions would be made with care. This is not how the system currently operates. For the most part, whether a person is detained pretrial depends solely on whether he can afford the bail amount set in his case. Nationwide, nine out of ten of felony defendants who were detained pretrial in 2009 (the last year for which the data is published) had bail set, and would have been released if they had posted it.8 Even at relatively low bail amounts, detention rates are high. In Philadelphia, between 2008 and 2013, 40% of defendants with bail set at $500 remained jailed pretrial.9 Over the same time period

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2Id. at 3.
3Roy Walmsley, World Pre-trial/Remand Imprisonment List 2-6 (Int’l Centre for Prison Studies, 2013).
6Gupta et al, supra; Heaton et al, supra. Stevenson and Dobbie et al tested for future-crime effects but found none.
9Stevenson, supra note 5, at 12.
in Houston, more than half of all misdemeanor defendants were detained pending trial; their average bail amount was $2,786.\textsuperscript{10} Some pretrial detainees are facing very serious charges, but most are not: At least as of 2002, 65% of pretrial detainees were held on non-violent charges only, and 20% were charged with minor public-order offenses.\textsuperscript{11} The hearings at which bail is set—and which have such serious consequences—are typically rapid and informal.

In the last few years, the hefty costs of pretrial detention have generated growing interest in bail reform. Jurisdictions around the country are now rewriting their pretrial law and policy. They aspire to reduce pretrial detention rates, as well as socio-economic disparities in the pretrial system, without increasing rates of non-appearance or pretrial crime. The overarching reform vision is to shift from the “resource-based” system of money bail to a “risk-based” system, in which pretrial interventions are tied to risk rather than wealth.\textsuperscript{12} To accomplish this, jurisdictions are implementing actuarial risk assessment and reducing the use of money bail as a mediator of release. The idea is that defendants who pose little statistical risk of failing to appear or committing pretrial crime can be released without bail or onerous conditions. Riskier defendants can be released under supervision, and detention can be reserved for those so likely to flee or commit serious harm that the risk cannot be managed in any less intrusive way.

This chapter offers a critical discussion of central pretrial reform initiatives, drawing on recent scholarship. We hope to provide readers with a deeper understanding of ongoing academic and policy debates around key reform goals: reducing the use of money bail, reducing racial disparities in pretrial detention, implementing actuarial risk assessment, rationalizing pretrial detention, and tailoring conditions of release. In each area we note the current direction of reform, survey relevant scholarship, and offer our own perspective on the best prospects for effective and lasting change. We evaluate pretrial reform initiatives on the basis of several criteria: efficacy in promoting public safety and court appearance, intrusiveness to individual liberty, cost, and distributive effects (effects on racial or socio-economic disparity).\textsuperscript{13} Part I provides background. Part II is our substantive discussion. Part III identifies key reform priorities.

\textsuperscript{10} Heaton \textit{et al.}, supra note 4, Tbl. 1.

\textsuperscript{11} Doris S. James, Bureau of Justice Statistics, Profile of Jail Inmates, 2002 – B.J.S. Special Report, at 3 (July 2004).

\textsuperscript{12} See, \textit{e.g.}, Christopher Moraff, \textit{U.S. Cities Are Looking for Alternatives to Cash Bail}, Next City (March 24, 2016); PRETRIAL JUSTICE INSTITUTE, RATIONAL AND TRANSPARENT BAIL DECISION MAKING: MOVING FROM A CASH-BASED TO A RISK-BASED PROCESS (2012).

I. THE PRETRIAL SYSTEM

A. Structure and History

The pretrial phase begins when a judicial officer or grand jury determines that there is probable cause to support a criminal charge, and it ends when the charge is adjudicated or dismissed. Once the state has charged someone, it has a strong interest in ensuring the integrity of the ensuing proceeding—including ensuring that the defendant appears in court and does not interfere with witnesses or evidence. The state also has an interest, as it always does, in preventing future crime, and some defendants may be particularly crime-prone. So the core goals of the pretrial system are to (1) ensure defendants’ appearance, (2) prevent obstruction of justice, and (3) prevent other pretrial crime, all while minimizing intrusions to defendants’ liberty.\(^\text{14}\)

Since the Founding, the primary mechanism for ensuring defendants’ appearance has been money bail, or a “secured financial bond.”\(^\text{15}\) A defendant deposits the specified bail amount with the court as security for his appearance at future proceedings. If he does appear, the deposit is returned at the conclusion of the case. This system has inspired three waves of reform. The first, in the 1960s, sought to reduce the pretrial detention of the poor by limiting the use of money bail in favor of unsecured release (“release on recognizance”).\(^\text{16}\) But rising crime during the 1970s and 1980s prompted a second reform movement, this time directed at incapacitating dangerous defendants.\(^\text{17}\) The Bail Reform Act of 1984 authorized federal courts to order pretrial detention without bail on the basis of a defendant’s dangerousness.\(^\text{18}\) Many states followed suit. Every jurisdiction except New York also authorized courts to consider public safety in imposing bail or other conditions of release.\(^\text{19}\) More recently, money bail has been on the rise and rates of release on recognizance have declined.\(^\text{20}\) The current wave of reform seeks to reverse that trend.

B. Current Practice

In practice, bail hearings are a messy affair. Every person who is arrested is entitled to a judicial determination, within forty-eight hours, that there is probable cause to believe she has committed a crime.\(^\text{21}\) Many jurisdictions combine this with a bail hearing (or “pretrial release hearing”). It is common for such hearings to last only a few minutes. They are often held over

\(^{14}\)ABA Standards, supra, § 10-1.1.

\(^{15}\)See Schnacke, supra note 13, 21-40; cf. William Blackstone, 4 Commentaries on the Laws of England 296 (1807) (explaining that an accused required to give bail must “put in securities for his appearance, to answer the charge against him”).


\(^{17}\)See generally Goldkamp, supra.


\(^{19}\)Goldkamp, supra note 16, at 56 & n.57.

\(^{20}\)Thomas H. Cohen & Brian A. Reaves, Bureau of Justice Statistics, Pretrial Release of Felony Defendants in State Courts 2 (2007) (from 1990-1994, 41% of pretrial releases were on recognizance and 24% were by cash bail; from 2002-2004, 23% of releases were on recognizance and 42% were by cash bail); Reaves, supra note 8, at 15 (“Between 1990 and 2009, the percentage of pretrial releases involving financial conditions rose from 37% to 61%).

videoconference, and often with no defense counsel present. The presiding official may be a magistrate rather than a judge, and may not even be a lawyer. Available evidence suggests that the bail judges do not often take the time to make a careful determination about what bail an arrestee can realistically afford. Some jurisdictions use bail schedules that prescribe a set bail amount for each offense.\textsuperscript{22} In others, statutory law directs bail judges to consider various factors in imposing bail or alternative conditions of release.\textsuperscript{23} These statutes provide little guidance about how to weigh the factors, or which conditions of release are appropriate to manage different pretrial risks.

In most cases a monetary bail amount is set, and in most cases the defendant need not pay it directly to be released. Three mechanisms have developed for subsidizing bail. The dominant one is the commercial bail bond industry.\textsuperscript{24} Commercial bail bondsmen charge defendants a non-refundable fee—usually around ten percent of the total bail amount—for the service of posting the bond. Because of concern about the effect of this industry on defendants’ incentive to appear and on the fairness of the process, some jurisdictions have outlawed it. Others have developed their own partial-deposit systems, which allow defendants to obtain release by depositing only a percentage of the total bail amount with the court.\textsuperscript{25} The third, less common, mechanism is the community bail fund: a non-profit organization that posts bail on defendants’ behalf.\textsuperscript{26}

C. Law and Policy

The Supreme Court has affirmed that “[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”\textsuperscript{27} A panoply of federal constitutional provisions protect pretrial liberty. Most importantly, perhaps, the Equal Protection and Due Process Clauses prohibit the state from conditioning a person’s liberty on payment of an amount that she cannot afford unless it has no other way to achieve an important state interest.\textsuperscript{28} Since 2015, a number of federal district courts have held that fixed money-bail schedules which

\textsuperscript{22} Pretrial Justice Institute, Pretrial Justice in America: A Survey of County Pretrial Release Policies, Practices and Outcomes 7 (2010) (reporting that 64% of surveyed counties use a bail schedule).


\textsuperscript{24} Cohen & Reaves, supra note 20, at 4 (showing that 48% of all pretrial releases studied were based on financial conditions, most of which—33% of all releases—were on surety bond); About Us, AM. BAIL COALITION, www.americanbailcoalition.org (last visited Jan. 31, 2017) ("The American Bail Coalition is a trade association made up of national bail insurance companies . . .").


\textsuperscript{26} See Jocelyn Simonson, Bail Nullification, _ Mich. L. Rev. _101, 117 (forthcoming 2017) (noting that community bail funds have proliferated recently, motivated by “beliefs regarding the vileness of pretrial detention”).


\textsuperscript{28} See, e.g., Bearden v. Georgia, 461 U.S. 660, 672-73 (1983) (holding that to “deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine . . . would be contrary to the fundamental fairness required by the Fourteenth Amendment”); see also Statement of Interest of the United States at 1, Varden v. City of Clanton, No. 2:15-cv-34-MHT-WC (M.D. Ala., Feb. 13, 2015) (“incarcerating individuals solely because of their inability to pay for their release . . . violates the Equal Protection Clause of the Fourteenth Amendment.” (citing Tate, 401 U.S. at 398; Williams v. Illinois, 399 U.S. 235, 240-41 (1970); Smith v. Bennett, 365 U.S. 708, 709 (1961)). But see Brief for Amici Curiae Am. Bail Coalition et al., Walker v. Calhoun, 16-10521 (11th Cir. June 21, 2016) (arguing that this line of caselaw has no application in the pretrial context).
do not take ability to pay into account violate these provisions. Relatedly, the Eighth Amendment prohibits “excessive” bail. This requires an individualized bail determination: Bail must be “reasonably calculated” to ensure the appearance of a particular defendant. The Bail Clause permits detention without bail, but may prohibit any burden on a defendant’s liberty that is excessive “in light of the perceived evil” it is designed to address. The Due Process Clause prohibits pretrial punishment. It also requires that any detention regime be carefully tailored to achieve the state’s interest and include robust procedural protections for the accused. The Sixth Amendment, finally, requires that counsel be appointed for an indigent defendant at or soon after her initial appearance in court. It remains an open question whether defendants have a Sixth Amendment right to representation at the bail hearing itself.

Beyond the federal Constitution, federal statutory law and state law regulate pretrial practice. In the federal system, the Bail Reform Act lays out a comprehensive pretrial scheme. At the state level, there is wide variation in pretrial legal frameworks. Approximately half of state constitutions include a right to release on bail in non-capital cases. The other half allow for detention without bail in much broader circumstances. Most states also have statutes that structure pretrial decision-making.

In the policy realm, the American Bar Association has codified standards on pretrial release that represent the mainstream consensus among scholars about best practices in the pretrial arena. Three core principles are worth highlighting. First, wealth cannot be the factor that determines whether a defendant is released or detained pretrial. Secondly, money bail should be set only to mitigate flight risk (not threats to public safety) and as a last resort. Finally, the state should always use the least restrictive means available to mitigate flight or crime risk. Ultimately, though, it is local implementation that truly shapes pretrial practice. There is huge variance across counties with respect to the timing of bail hearings, the presence of counsel, the qualifications and


30 U.S. Const. amend. VIII ("[e]xcessive bail shall not be required").

31 Stack v. Boyle, 342 U.S. 1, 5 (1951) (emphasis added).


33 Id. at 748-52.

34 Id. at 747, 750-52. The Supreme Court upheld the federal pretrial detention regime against (inter alia) a procedural due process challenge on the ground that it provided for an adversarial hearing, guaranteed defense representation, requirements that the state prove "by clear and convincing evidence that an arrestee presents an identified and articulable threat" and that the court provide "written findings of fact" and "reasons for a decision to detain," as well as immediate appellate review. Id. at 751-52.


36 See id. at 212 n.15 (reserving judgment on that question).


38 WAYNE R. LAFAVE ET AL., CRIM. PROC. § 12.3(b) (3d ed.).

39 ABA STANDARDS, supra note 13.

40 Id. §§ 10-1.4(c)-(e), 10-5.3.

41 Id.

42 Id. § 10-5.2.
training of bail judges, the resources allocated for bail hearings, the prevalence of commercial bondsmen, the customary standards for bail-setting, and the availability of alternatives to detention or money bail.

II. PRETRIAL REFORM INITIATIVES

A. Reducing the Use of Money Bail

Reducing reliance on monetary bail is a central goal of many pretrial reform advocates. The use of monetary bail, by definition, disadvantages the poor; defendants who have resources or access to credit are more likely to secure release than those who do not. This fact is not only unjust. It also means that money-bail systems that do not meaningfully account for defendants' ability to pay are inefficient at managing flight and crime risk, and likely to be unconstitutional.\textsuperscript{43} Although implementing procedures to assess defendants' ability to pay may help, it is difficult to assess accurately.

It is possible to operate an effective pretrial system with minimal reliance on money bail. The District of Columbia, for instance, has been running its pretrial system largely without it since the 1960s. Nearly all D.C. defendants are released on recognizance or with non-monetary conditions; a small percentage are ordered detained. For the last six years, appearance rates have remained at or above 87% and rearrest rates at or below 12%—far better than national averages.\textsuperscript{44}

Replicating the D.C. model is no easy feat, however. The District benefits from an experienced and well-funded pretrial services agency. Without that infrastructure, limiting or eliminating money bail is likely to reduce appearance rates as well. The best empirical research on this topic found that money bail increased appearance rates by 3-7 percentage points over release on recognizance.\textsuperscript{45} Increased rates of non-appearance can result in significant expense to the court system and the police. These costs may be outweighed by the benefits of reduced money bail (improved public safety, if release is based on crime risk; lower detention rates; and the elimination of an unjust mechanism of release), but they are still important considerations. Reformers who seek to limit money bail should pursue other methods to increase appearance rates, such as court reminders.

B. Reducing Racial Disparities in Detention Rates

\textsuperscript{43} See supra notes 28-31 and accompanying text.

\textsuperscript{44} See Pretrial Services Agency for the District of Columbia, Congressional Budget Justification and Performance Budget Request Fiscal Year 2017, 1, 23 (Feb. 2016). Nationally, 16% of released defendants were rearrested and 17% missed a court date in 2009, the last year for which data is published. Reaves, supra note 8, at 20-21.

The most recent available data shows that, in 2002, black defendants made up 43% of the pretrial detainee population despite constituting only 13% of the total population. A second core objective of pretrial reform is to reduce this racial disparity in pretrial detention. In order to pursue this goal effectively, it is important to understand how such disparities arise.

First, arrest itself, as well as criminal history information, may reflect racially disparate past practices. For example, residents of heavily policed minority neighborhoods are arrested for drug offenses at disproportionately high rates relative to the rate of offending. Even superficially colorblind methods of making pretrial custody decisions will embed these disparities. This is not an easy problem to fix, as actual criminal behavior is unmeasurable and decision-making in criminal justice has long relied on the criminal record as its proxy. Nonetheless, educating judges about this type of disparity (or using sophisticated risk-assessment algorithms to adjust for it) may ameliorate the problem.

Secondly, bail judges may harbor explicit or implicit racial bias, which is to say that they may set higher bail or place more onerous conditions of release on minority defendants than otherwise similar white defendants. A typical approach to measuring this type of bias is to see whether minority defendants have higher bail than white defendants after controlling for variables like charge type, criminal history and age. Using this approach, many studies have found evidence of bias. As the number and specificity of controls increase, however, this measure of bias tends to shrink or disappear. Baradaran and McIntyre find no evidence that judges set bail higher for black defendants than white defendants once predicted crime-risk (a function of a defendant’s specific charge and criminal history) is accounted for. Stevenson finds no evidence that bail is systematically set higher or lower for black defendants in Philadelphia, conditional on the charge and criminal record. While racial bias certainly exists, differential treatment of similarly situated defendants on the basis of race does not appear to be a substantial contributor to racial disparities in pretrial detention.

Third, racial disparities may result from differing levels of wealth or access to credit across races. For example, Stevenson finds that, in Philadelphia, only 46% of black defendants with bail set at $5000 (and who need only to pay a $500 deposit on order to be released) post bail, compared to 56% of non-black defendants. Stevenson estimates that 50% of the race gap in detention rates in Philadelphia is accounted for by differences in the likelihood of posting bail. The other 50% is due to the fact that black defendants in this dataset are, on average, facing more serious charges, have lengthier criminal records and accordingly have higher bail set. Similarly, Demuth finds that black defendants do not have bail set at higher levels than white defendants, but finds that the

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47 See, e.g., Shima Baradaran and Frank McIntyre, Race, Prediction and Pretrial Detention, 10 J. EMPIRICAL L. STUD. 741 (2013).
49 Baradaran and McIntyre, supra note 47.
50 Stevenson, supra note 5, at 23.
51 Id. at 4.
52 Id. at 25.
odds of detention for blacks are almost twice as large because they are less likely to post bail. To the extent that racial disparities in pretrial detention rates are a direct function of socioeconomic disparity, reducing reliance on money bail should ameliorate them.

Finally, racial disparities in pretrial detention rates can arise from disparities in criminal prosecution (charged offenses and past records, which in turn affect bail and release decisions) that reflect actual differences in rates of criminal offending. It is extremely difficult to isolate this source of disparity. But to the extent that differential crime rates contribute to racial disparities in pretrial detention, the only long-term solution is to redress the underlying causes of the divergent rates.

C. Improving Pretrial Process

Pretrial reform necessarily entails some changes to pretrial process. The following five approaches hold particular promise.

Release Before the Bail Hearing

Jurisdictions can reduce the number of people who require a bail hearing in the first place by increasing the use of citation rather than arrest, and by authorizing direct release from the police station (stationhouse release). The process of arrest is obtrusive, time-consuming, expensive, and potentially damaging to community-police relations. Jurisdictions including Philadelphia, New York, New Orleans and Ferguson have recently begun substituting citations and summons for arrest for some categories of crime. Even for crimes that require arrest, defendants who pose little risk of flight or future crime should be identified rapidly and released. Risk assessment tools may be helpful in identifying good candidates. Kentucky, for example, uses a risk assessment tool to identify defendants who are eligible for station-house arrest.

Slowing Down the Bail Hearing

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53 Stephen Demuth, *Racial and Ethnic Decisions in Pretrial Release and Outcomes*, 41 CRIMINOLOGY 874, 894 (2003) (Demuth finds that Hispanics have higher bail set than whites, although that could be due to citizenship status.)

54 See ABA STANDARDS §§ 10-1.3 (“Use of citations and summonses”); 10-2.1–10.3.3 (encouraging jurisdictions to employ citations and summons broadly in lieu of arrest for minor offenses, and providing specific guidelines); Rachel Harmon, *Why Arrest?*, 115 MICH. L. REV. 2 (2017).


Currently, bail hearings in many jurisdictions are shockingly short: only a few minutes per case.\footnote{See, e.g., Length of a Bail Hearing In North Dakota: 3 Minutes, NAT'L CTR. FOR ACCESS TO JUST. (Jan. 25, 2013); Injustice Watch Staff, Change Difficult as Bail System's Powerful Hold Continues Punishing the Poor, INJUSTICE WATCH (Oct. 14, 2016). In both Philadelphia and Harris County, bail hearings are only a few minutes long on average. Heaton et al., supra note 5; Stevenson, supra note 5, at 5.} It is hard to imagine that two minutes are sufficient to effectively evaluate the risk of failure to appear, risk of serious crime, whether detention or conditions of release are necessary, and, if money bail is used, ability to pay. Taking more care during the bail hearing is likely to improve the courts’ ability to evaluate risk and determine appropriate pretrial conditions. While slowing down the bail hearing would, ceteris paribus, increase costs, a bail hearing should only be required for defendants at risk of losing liberty. If more people charged with low-level offenses were released before the bail hearing, the courts would have more time and resources to devote to evaluating whether detention or conditions of release are necessary for the remaining defendants.

Providing Counsel

Decreasing the number of defendants who require a bail hearing would also lower the costs of supplying defense counsel to those at risk of losing their liberty. Currently, many jurisdictions do not provide counsel to indigent defendants at the bail hearing.\footnote{Pretrial Justice in America: A Survey of County Pretrial Release Policies, Practices, and Outcomes (Pretrial Justice Institute, 2009), at 8; Douglas L. Colbert, Prosecution Without Representation, 59 BUFF. L. REV. 333, 389 (2011).} Sixth Amendment doctrine holds that defendants have the right to effective assistance of counsel at all “critical stages” of criminal proceedings.\footnote{Rothgery v. Gillespie County, 554 U.S. 191, 199, 212 (2008).} The recent studies showing that pretrial detention substantially increases a defendant’s likelihood of conviction and length of sentence support an argument that the bail hearing is a “critical stage”.\footnote{See sources cited in supra note 5. For additional arguments that defendants do or should have the right to representation at bail hearings, see, e.g., Alexander Bunin, The Constitutional Right to Counsel at Bail Hearings, 31 CRIM. JUST., Spring 2016, at 23, 47; Douglas L. Colbert et al., Do Attorneys Really Matter?: The Empirical and Legal Case for the Right of Counsel at Bail, 23 CARDOZO L. REV. 1719, 1763-83 (2002); Douglas L. Colbert, Prosecution Without Representation, 59 BUFF. L. REV. 333, 335 (2011); Charlie Gerstein, Note, Plea Bargaining and the Right to Counsel at Bail Hearings, 111 MICH. L. REV. 1513, 1516 (2013); The Constitution Project Nat’l Right to Counsel Comm., Don’t I Need a Lawyer?: Pretrial Justice and the Right to Counsel at First Judicial Bail Hearing (2015); Sixth Amendment Center & Pretrial Justice Institute, Early Implementation of Counsel: The Law, Implementation, and Benefits (2014).} While providing counsel at the bail hearing would come at some expense, the presence of counsel is also useful to the system as a whole: lawyers can provide information that may help a judge determine which defendants can be safely released. Furthermore, initiating defense representation at the bail hearing would facilitate early and more effective investigation, plea negotiations, and case resolutions.

Information and Feedback

The judges and magistrates who set bail may not be fully aware of how their decisions translate into detention rates. It may surprise some to learn how high detention rates can be even at relatively low amounts of bail. For example, 40% of Philadelphia defendants with bail set at
$500 – who need only pay a $50 deposit to secure their release – remain detained pretrial.\textsuperscript{61} While it is conceivable that these detention rates are the result of well-considered policies, it is possible that the magistrates are unaware of how difficult it can be for defendants to come up with even relatively small sums of money. Increasing the flow of information and feedback to judges, magistrates and policymakers may reduce the incidence of these seemingly irrational outcomes.

**Court Reminders**

There are many reasons why a defendant may not appear in court beyond willful flight from justice. A defendant may not know when her court date is, have forgotten about it, or have failed to make adequate preparations (such as arranging time off from work). For these defendants, court reminders in the form of mail notifications, phone calls or automated text messages may greatly increase appearance rates. The available research shows that phone-call reminders can increase appearance rates by as much as 42%, and mail reminders can increase appearance rates by as much as 33%.\textsuperscript{62,63} Entrepreneurial technology firms now offer automated, individually customized text-message reminders.\textsuperscript{64} While the efficacy of this type of reminder has not yet been evaluated, it holds considerable promise. Finally, improving court websites so that defendants can easily locate information relevant to their case should increase the likelihood of appearance. All of these methods come at relatively low cost and offer potentially significant savings.

**D. Implementing Actuarial Risk Assessment**

Actuarial risk assessment is central to contemporary bail reform.\textsuperscript{65} Reformers aspire to improve the accuracy and consistency of pretrial decision-making by assessing each defendant’s statistical risk of non-appearance and rearrest in the pretrial period, and providing this assessment to judges along with a recommendation for pretrial intervention. Pretrial risk assessment holds great promise, but also raises cause for concern.

**The Promise of Risk Assessment**

There is reason to be optimistic about the actuarial turn in pretrial practice. Risk assessment tools should reduce the subjective, irrational bias that distorts judicial decision-making. They may

\textsuperscript{61} See supra note 9.

\textsuperscript{62} Tim R. Schnacke, Michael R. Jones, and Dorian W. Wildermand, *Increasing Court Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Project and Resulting Court Date Notification Program*, 48 COURT REVIEW 86, 89 (2012) (telephone live-caller experiment); Brian H. Bornstein et al., *Reducing Courts’ Failure to Appear Rate By Written Reminders*, 19 PSYCH., PUB. POLICY & L. 70 (2013).

\textsuperscript{63} These numbers, however, are best thought of as upper bounds on the effect of court reminders. These studies were randomized control trials – the “gold standard” in research – but only the “treatment on the treated” results were reported, which makes causal interpretation difficult. See Schnacke and Bornstein, supra.

\textsuperscript{64} See, e.g., *About Uprtrust*, http://www.uptrust.co/#about-uptrust-section.

also mitigate judicial incentives to over-detect by absolving judges of personal responsibility for
“mistaken” release decisions.66 And recent studies argue that tying pretrial detention directly to
statistical risk can minimize detention rates while maximizing appearance rates, public safety, or
both. Analyzing a dataset from the seventy-five largest urban counties in the U.S., Baradaran and
McIntyre find that the counties could have released 25% more felony defendants pretrial and
reduced pretrial crime if detention decisions had been made on the basis of statistical risk.67 In
Philadelphia, Richard Berk and colleagues conclude that deferring to the detention
recommendations of a machine-learned algorithm in domestic violence (DV) cases could cut the
rearrest rate on serious DV charges (over two years) from 20% to 10%.68 Jon Kleinberg and
colleagues, working with New York City data, find that delegating detention decisions to a
machine-learned algorithm could “reduce crime by up to 24.8% with no change in jailing, or
reduce jail populations by 42.0% with no increase in crime,” while also reducing racial disparities
in detention.69

The strength of this evidence should not be overstated, however. All empirical work
comparing actuarial assessment to judicial pretrial decision-making has serious handicaps. One is
that algorithmic pretrial tools are developed on the basis of pretrial outcomes (e.g. rearrest, non-
appearance) for defendants who were released in the past. It may be that the defendants who were
not released were categorically riskier. Without knowing how they would have behaved if released,
it is impossible to fully compare the algorithm’s performance to the judge’s.70 A second problem
with the claim that actuarial risk assessment is better at predicting rearrest and non-appearance
than judges is that judges’ predictions are not observed in the data; only detention status is
observed. Detention status does not necessarily reflect a judicial prediction, because judges
generally do not decide who to detain. They are charged instead with setting affordable bail that is
a sufficient incentive to achieve a range of objectives. Their predictions may affect the amount of
bail set, but whether a defendant winds up detained is also a function of his ability to pay (and how
accurately the judge has assessed it), his willingness to pay, and whether other circumstances (like
a detainer) prevent release. It is impossible to compare actuarial and judicial predictions when
judicial predictions are not observed. A randomized control trial (RCT) would help to evaluate the
utility of pretrial risk assessment, but has not yet been performed.

Concerns over Accuracy, Racial Equality, and Contestability

Pretrial risk assessment has also sparked controversy in the popular press. In 2016, news
outlet ProPublica published a study that claimed to have discovered that the COMPAS, a

prominent risk assessment tool, was “biased against blacks.”\textsuperscript{71} It also opined that the COMPAS was “remarkably unreliable in forecasting violent crime,” and only “somewhat more accurate than a coin flip” in predicting pretrial rearrest generally.\textsuperscript{72} Finally, the article noted that statistical generalization may be at odds with individualized justice, and that proprietary risk assessment tools like the COMPAS pose transparency concerns. These critiques—regarding accuracy, racial equality, and contestability—represent core concerns with actuarial assessment.

Debate about accuracy would benefit from an acknowledgement that no method of prediction is one hundred percent accurate. It is particularly hard to predict low-frequency events like violent crime. The ProPublica article concluded that the COMPAS was “remarkably unreliable” on the basis that “[o]nly 20 percent of the people predicted to commit violent crimes actually went on to do so [in a two-year window].”\textsuperscript{73} But that is much higher than the base rate.\textsuperscript{74} An algorithm that can identify people with a 20% chance of rearrest for violent crime provides useful knowledge.\textsuperscript{75} The policy-relevant question is not whether a tool is “accurate,” but rather what statistical information it provides, whether that information represents an improvement over the status quo, and whether it can justifiably guide pretrial decision-making.

The concern for racial equality is similarly complex. The most obvious source of racial bias in prediction would be if an algorithm treated race as an independently predictive factor, or over-weighted factors that correlate with race, like zip code, relative to their predictive power.\textsuperscript{76} But none of the pretrial risk assessment tools in current use race as an input factor; the dominant tool, the Public Safety Assessment, relies exclusively on criminal history information.\textsuperscript{77} Two people of different races with the same criminal history will thus receive the same risk score. Nonetheless, risk assessment can have disparate impact across racial groups. In fact, if the base rate of the predicted outcome (e.g. rearrest) differs across racial groups, statistical risk assessment necessarily will have disparate impact.\textsuperscript{78} This was the source of the disparity that ProPublica documented: the black defendants in its dataset had higher arrest-risk profiles, on average, than

\textsuperscript{71} Julia Angwin \textit{et al.}, \textit{Machine Bias}, PROPUBLICA.COM (May 23, 2016).
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} William Dieterich \textit{et al.}, \textit{COMPAS Risk Scales: Demonstrating Accuracy Equity and Predictive Parity} (Technical Report, Northpointe Inc., July 2016). \textit{See also} Baradaran & McIntyre, supra note 47 (finding that, among all felony defendants in a national dataset, rate of pretrial rearrest for a violent felony was 1.9%).
\textsuperscript{75} In fact, other pretrial risk assessment tools classify defendants as high-risk at substantially lower probabilities of rearrest. \textit{See} Mayson, supra note 65.
\textsuperscript{78} \textit{Where} base rates differ across two groups, it is impossible to ensure that predictions are equally accurate for each group and also ensure equal false positive and false negative rates unless prediction is perfect. \textit{See} Alexandra Chouldechova, \textit{Fair Prediction with Disparate Impact: A Study of Bias in Recidivism Prediction Instruments} (working paper, Oct. 24, 2016); Jon Kleinberg, Sendhil Mullainathan, and Manish Raghavan, \textit{Inherent Trade-Offs in the Fair Determination of Risk Scores}, PROCEEDINGS OF INNOVATIONS IN THEORETICAL COMPUTER SCIENCE (ITCS) (forthcoming 2017); Julia Angwin & Jeff Larsen, \textit{Bias in Criminal Risk Scores Is Mathematically Inevitable, Researchers Say}, PROPUBLICA.COM (Dec. 30, 2016).
the white.\textsuperscript{79} There is no easy way to prevent this result.\textsuperscript{80} Nor is it good reason to reject actuarial risk assessment, because subjective risk assessment will have the same effect. It is possible to modify an algorithm to equalize outcomes across racial groups, but usually requires treating defendants with the same observable risk profiles differently on the basis of race.\textsuperscript{81}

The third set of concerns with pretrial risk assessment are procedural. If people cannot meaningfully contest the basis of their risk score, actuarial risk assessment might violate due process by denying a meaningful opportunity to be heard.\textsuperscript{82} This problem arises with proprietary algorithms like the COMPAS and with “black-box” machine-learned algorithms, although there are ways to make machine-learned algorithms more transparent.\textsuperscript{83} A related concern is that no algorithm will take account of every relevant fact about a given individual. For this reason, most scholars believe that judges must retain discretion to vary from the recommendations of a risk assessment tool, and jurisdictions have universally followed this practice.\textsuperscript{84}

Best Practice in Risk Assessment

Given these concerns, and the limitations of existing research, jurisdictions implementing pretrial risk assessment should keep a number of best practices in mind.

First, risk assessment tools should be intelligible to the people whose lives they affect: To the greatest extent possible, the identity and weighting of risk factors should be public. Relatedly, tools that rely on objective data are preferable to tools that include subjective components.

Second, stakeholders should take care in determining what risks to assess. At present, many tools measure pretrial “failure,” a composite of flight- and crime-risk. But these two risks are different in kind and call for different responses.\textsuperscript{85} As a number of studies have demonstrated, risk assessment can attain greater accuracy—and produce more useful information—if it measures them separately.\textsuperscript{86} Within each category, moreover, further divisions are warranted. For instance, most tools currently define crime risk as the likelihood of arrest for anything at all, including minor offenses. If society’s core concern is violent crime, then assessing the risk of any arrest is counterproductive; people at highest risk for any arrest are not at highest risk of arrest for violent crime in particular, and vice versa.\textsuperscript{87} Targeting those at highest risk for any arrest also introduces unnecessary racial disparity in prediction, because arrest rates for low-level and drug offenses are

\textsuperscript{79} See Dieterich et al., supra note 74; Julia Angwin & Jeff Larsen, ProPublica Responds to Company’s Critique of Machine Bias Story, PROPUBLICA.COM (June 29, 2016).

\textsuperscript{80} This kind of disparate impact is not a constitutional violation; equal protection prohibits only formal or intentional discrimination on the basis of race. See, e.g., Washington v. Davis, 426 U.S. 229 (1976).


\textsuperscript{82} See, e.g., Hamilton, supra note 76.


\textsuperscript{84} But see Wiseman, Fixing Bail, supra note 66 (arguing against such discretion).


\textsuperscript{86} See, e.g., Baradaran & McIntyre, Predicting Violence, supra note 67; Kleinberg et al., Human Decisions and Machine Predictions, supra note 69.

\textsuperscript{87} Baradaran & McIntyre, Predicting Violence, supra note 67, at 528-29; see also Public Safety Assessment, supra note 77 (using mostly different factors to predict arrest versus arrest for violent crime).
skewed across racial groups vis-à-vis offending rates.\textsuperscript{88} Focusing on the risk of re-arrest for violent crime avoids these problems.

Third, criminal justice stakeholders should also take care to communicate accurately about risk assessment. If a risk assessment tool measures the likelihood of arrest, it is inaccurate to say that it measures the risk of “new criminal activity.” Risk assessment tools should be cautious in the communication of risk assessments as well. Terms like “high-risk” embed a normative evaluation.\textsuperscript{89} To avoid unduly influencing courts’ or stakeholders’ judgment about the significance of a given statistical risk, an actuarial tool should report its assessment in numerical terms: “Statistical analysis suggests that this defendant has an X% chance of Y event within Z time period if released unconditionally.”\textsuperscript{90}

Fourth, criminal justice stakeholders should confront the value judgments that a detention regime guided by risk assessment will entail.\textsuperscript{91} Someone must decide what degree of statistical risk justifies detention. Either the developers of risk assessment tools will make that judgment implicitly, by choosing the “cut point” at which a risk is determined to be high and detention is recommended, or stakeholders can make it and direct the design of the tool accordingly. Similarly, any predictive system (including subjective risk assessment) will perpetuate underlying racial and socio-economic disparities in the world, and stakeholders should determine how best to respond to this reality.

Fifth, it is imperative that actuarial risk assessment tools are implemented carefully and monitored closely, with rigorous data collection and analysis.

\textit{A. Rationalizing Pretrial Detention}

A reform model in which defendants are detained based on risk rather than ability to post bail requires that courts have authority to order pretrial detention directly. In states that still have a broad constitutional right to pretrial release, bail reform may thus require amendment of the state constitution.\textsuperscript{92} This poses significant logistical challenges and raises the difficult question of when detention is warranted. In the 1970s and 80s, when the first preventive detention regimes were implemented, critics argued that due process and the Excessive Bail Clause categorically prohibit detention without bail.\textsuperscript{93} The Supreme Court rejected that position in \textit{United States v. Salerno}.\textsuperscript{94}

\textsuperscript{88} Baradaran & McIntyre, Race, Prediction and Pretrial Detention, supra note 49, at 21. Similarly, some people are at high risk for “flight” because they have powerful incentives to abscond; others are just likely to struggle with the logistics of attending court. See Lauryn P. Gouldin, Defining “Flight Risk” (working paper). As risk assessment technology improves, it should distinguish between these risks.

\textsuperscript{89} See Jessica Eaglin, Constructing Recidivism Risk for Sentencing (working paper, Aug. 12, 2016); Moving Beyond Money, supra note 13, at 21.

\textsuperscript{90} This is the “positive predictive value” of a risk classification. See, e.g., Chouldechova, supra note 78.

\textsuperscript{91} See generally Eaglin, supra note 89; Mayson, supra note 65.

\textsuperscript{92} New Jersey has recently completed this process. Its constitution now provides that “pretrial release may be denied” if a court finds that no condition of release would “reasonably” ensure appearance, protect the community, or prevent obstruction of justice. N.J. Const., art. 1, § 11 (effective Jan. 1, 2017). The state legislature has enacted statutory rules to guide these decisions. New Jersey P.L. 2014, c. 31, eff. Jan. 1, 2017 (codified at NJ ST 2A:162-15 et seq.).


\textsuperscript{94} 481 U.S. 739, 754-55 (1987).
But it did not specify what type or degree of risk is sufficient to justify detention, beyond the broad principles that pretrial detention must not constitute punishment or be excessive in relation to its goals. Even if the Constitution imposes little substantive constraint, the question of when pretrial detention is justified is also a moral one. 55

It is clear that some defendants should not be detained. To begin with, detention is not justified if a less restrictive and cost-effective alternative would adequately mitigate whatever risk a defendant presents. Samuel Wiseman suggests, for instance, that detention should rarely be imposed as a response to flight risk, because electronic monitoring will nearly always reduce the risk to a reasonable level. 56 A related principle is that detention is unwarranted for defendants who pose little risk of flight or committing pretrial crime. The great promise of risk assessment is to identify this group and ensure their release. Finally, misdemeanor pretrial detention should be rare. Defendants charged with misdemeanors generally do not pose a grave crime risk, and incentives to abscond should be weakest in low-level cases. Some research suggests that misdemeanor pretrial detention has lasting criminogenic effects, 97 thus generating more crime than it prevents. 98

Pretrial detention in misdemeanor cases also appears particularly likely to skew the fairness of the adjudicative process, 99 because a guilty plea often means going home. 100 Scholars speculate that this dynamic may be a major cause of wrongful convictions. 101

Beyond these classes of defendants, there is no easy answer to the question of when pretrial detention is warranted. Some scholars have suggested that it is justified when its benefits outweigh its costs. 102 Others have advocated for additional criteria, 103 or community involvement in

55 A few contemporary scholars have argued that pretrial detention based on general dangerousness categorically violates the presumption of innocence. See, e.g., Shima Baradaran, Restoring the Presumption of Innocence, 72 OHIO ST. L.J. 723 (2011); R.A. Duff, Pre-Trial Detention and the Presumption of Innocence, in PREVENTIVE JUSTICE 128 (A.J. Ashworth et al., eds., 2013). This argument has no legal traction in the United States, because the Supreme Court has held that the presumption of innocence is merely “a doctrine that allocates the burden of proof in criminal trials.” Bell v. Wolfish, 441 U.S. 520, 533 (1979). As Richard L. Lipke has noted, furthermore, it is difficult to specify what a presumption of innocence would require in the pretrial context. See Richard L. Lipke, TAMING THE PRESUMPTION OF INNOCENCE (2016).

56 Samuel R. Wiseman, Pretrial Detention and the Right to Be Monitored, 123 YALE L.J. 1344 (2014). Wiseman focuses on money bail that results in detention, but the argument applies to direct detention as well.

97 See Heaton et al., supra note 5.

98 Heaton et al. find that Harris County could have saved an estimated $20 million and avverted thousands of new arrests by releasing every misdemeanor defendant detained on a bail amount of $500 or less between 2008 and 2013. Id. at 72.

99 Misdemeanor defendants detained pretrial in Harris County, Texas (2008-2013) were 25% more likely to be convicted than statistically indistinguishable defendants who were not detained, due almost entirely to the increased likelihood of pleading guilty. These results indicate that approximately 28,300 defendants would not have been convicted but for their detention. Id.

100 Jenny Roberts, Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts, 45 U.C. DAVIS L. REV. 277, 308 (2011) (“In such cases, defendants must generally choose between remaining in jail to fight the case or taking an early plea with a sentence of time served or probation.”); cf. MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 9-10 (1979) (reporting that in sample of more than 1600 cases, “twice as many people were sent to jail prior to trial than after trial”).


103 See, e.g., Richard L. Lipke, Pretrial Detention without Punishment, 20 RES PUBLICA 111, 122 (2014) (arguing that detention on the basis of crime-risk is justified only if the defendant is likely to commit a serious crime in the pretrial phase, no
detention decisions.\textsuperscript{104} This important debate should continue. As a baseline, jurisdictions seeking to craft new pretrial detention regimes should ensure that:

a) Pretrial release is the default, and detention is a "carefully limited exception."\textsuperscript{105}

b) Detention procedures include, at minimum, the protections noted by the Supreme Court in \textit{United States v. Salerno} (including an adversary hearing and right to immediate appeal).\textsuperscript{106}

c) Detention requires clear and convincing evidence that (1) there is a substantial probability the defendant will commit serious crime in the pretrial phase or abscond from justice, and (2) no conditions of release can reduce the risk below that probability threshold. Jurisdictions should specify what numerical probability qualifies as substantial and what crime qualifies as serious for this purpose.

\textbf{B. Implementing Non-Monetary Conditions of Release}

In order to limit the use of money bail and reduce detention rates, bail reformers advocate non-financial conditions of release as an alternative for defendants who pose some pretrial risk. This section surveys the literature evaluating three common conditions: required meetings with pretrial officers, drug testing, and electronic monitoring. The emphasis is on high-quality studies such as randomized control trials (RCTs); evidence from the probation or parole context is included if there is a lack of quality research in the pretrial context.

Meetings with a pretrial officer

The requirement of meeting periodically (in person or over the phone) with a pretrial officer is one of the most common conditions of release. Pretrial supervision is an expensive intervention, as it requires the time of a salaried employee of the state. It imposes time burdens on the defendant, and, in increasing the requirements of release, increases the likelihood that the defendant will fail to fulfill them.

There is no good evidence to support this practice. A small experiment conducted by John Goldkamp, in which defendants were randomly assigned to low-supervision or high-supervision conditions, finds no difference in appearance rates or rearrest across the two groups, either for low risk or moderate-high risk defendants.\textsuperscript{107} An experiment in the 1980s randomly assigned

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\textsuperscript{104} Less restrictive means can prevent it, and there is "substantial evidence" of the defendant's guilt on a serious charge); Jeffrey Manns, \textit{Liberty Takings: A Framework for Compensating Pretrial Detainees}, 26 CARDOZO L. REV. 1947, 1953 (2005) (arguing that the state should compensate detained defendants for their lost liberty); see also Mayson, \textit{supra} note 65 (noting that there is no clear justification for pretrial detention for dangerousness if the state could not detain an equally dangerous person not accused of any crime).

\textsuperscript{105} Id., at 751-52.

\textsuperscript{106} Id., at 751-52.

\textsuperscript{107} John S. Goldkamp and Michael D. White, \textit{Restoring Accountability in Pretrial Release: the Philadelphia Pretrial Release Supervision Experiments}, 2 J. EXPERIMENTAL CRIMINOLOGY 143, 154 (2006). They also include a non-experimental analysis that compares outcomes for a baseline group in a prior period who were not under supervision against the experimental groups, who
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defendants to either more intensive pretrial supervision or less intensive supervision plus access to services (vocational training or drug/alcohol counseling). It found no difference in appearance rate or rearrest across the groups.\textsuperscript{108} Very little other research exists. A correlational study funded by the Laura and John Arnold Foundation showed that pretrial supervision is correlated with increased appearance rates but is not generally correlated with reductions in new criminal activity.\textsuperscript{109} This study was conducted across multiple jurisdictions that varied in their use of, and definition of, pretrial supervision. Correlational studies are generally considered weak evidence, so it is hard to draw firm conclusions from these results.

There are several well-executed studies on required meetings with supervising officers in the probation and parole context. An RCT in Philadelphia that reduced the frequency of required meeting with probation officers found no effect on new charges or re-incarceration.\textsuperscript{110} An RCT evaluating the benefits of intensive probation (which, among other things, involves extra meetings with probation officers) shows no evidence that these meetings decrease criminal behavior.\textsuperscript{111} The intensive supervision does, however, increase the likelihood that a defendant will be re-incarcerated due to a technical violation, at considerable cost to the state. Another study evaluating the effects of abolishing post-release supervision showed similar results: a decreased likelihood of re-incarceration due to technical violations, but little effect on crime.\textsuperscript{112}

More high-quality research on the efficacy of pretrial supervision is needed. At the moment, the practice is far from “evidence-based”, and the best available research shows no benefits. Indeed, the arguments for why it might be effective are fairly tenuous. Supervision implies a watchful eye and the guidance of a capable authority in troubling situations. Periodic meetings with a pretrial officer are unlikely to serve these functions. If a defendant is engaging in illicit behavior, she has every incentive to hide this from the pretrial officer, and the officer has no knowledge of such activities beyond what the defendant chooses to share. There are thus scant reasons to believe that meetings alone will have a deterrent effect or that the pretrial officer will have the information necessary to intervene if troubles arrive. Given its expense and intrusiveness, required check-ins with the pretrial officer should not be considered a core part of the portfolio of pretrial options unless better evidence emerges to support its use.

\textbf{Drug Testing}

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had varying levels of supervision. This is a weak research design, since the baseline data related to circumstances and events from four years before the experimental data, and many things could have changed in between.


The use of drug testing during the pretrial period has been shown to be ineffective at reducing failure-to-appear rates or pretrial rearrest rates in a number of randomized control trials. These studies mostly date from around the time when drug-testing was broadly implemented: in the late 1980s and 1990s. A large RCT in Washington DC showed that defendants who were assigned to drug testing were no less likely to have a pretrial arrest or non-appearance than those who were randomly assigned to drug treatment or release without conditions. Another sizeable RCT in Wisconsin and Maryland also found that drug testing had no benefit relative to release without testing. Several other randomized trials showed similar results. Unfortunately, these results have been ignored, and drug testing continues to be a mainstay condition of pretrial release.

The last decade has seen a surge of optimism about the benefits of drug testing in the probation context. A famous study from Hawaii’s HOPE project showed that drug testing paired with “swift, certain and fair” sanctions can effectively reduce drug use and re-incarceration for people on probation. In this formulation, people receive immediate but light sanctions for each failed drug test. Unfortunately, the successes of the HOPE program have proven difficult to replicate. Multiple RCTs have found that drug-testing programs built on swift, certain and fair principles are no more effective than status quo procedures.

While not as obtrusive as electronic monitoring, drug testing poses burdens on the defendant who must report for testing whenever notified. The state must pay the lab costs and the salaries of the monitoring officers. Researchers may yet find the key to the effective implementation of drug testing, but the best available evidence shows no indication that it is worth the costs or intrusions.

Electronic Monitoring

There is limited high-quality research on the efficacy of electronic monitoring (EM) in the pretrial period. However, there is growing evidence that electronic monitoring reduces criminal activity for defendants in the probation or parole context. (The evidence is more mixed on EM’s effect on technical violations or return to custody.) Electronic monitoring has been found to reduce crime relative to traditional parole for gang members and sex offenders in California—although it increased the likelihood of returning to custody for gang members,

due to an increased likelihood of technical violations. A study in Florida found that EM reduced technical violation, reoffending and absconding relative to those placed on unmonitored home arrest; a subsequent Florida study found the EM reduced probation revocation and absconding relative to probation as usual. A high-quality study in Argentina finds that electronic monitoring reduces recidivism relative to incarceration; other quasi-experimental studies in Europe find that electronic monitoring decreases recidivism and welfare dependency relative to incarceration. Additional high-quality research is important to assess the efficacy of EM at preventing flight and pretrial crime in the U.S.

Whatever benefit EM provides comes at substantial cost. EM is a significant burden on a person’s liberty. It places strain on family relationships, makes it difficult to find employment, and can lead to shame and stigma. Surveys of people serving sentences find that EM is considered only slightly less onerous than incarceration. EM is also costly to the state. Purchasing the equipment, monitoring individuals, and responding to violations entails considerable expense. Many jurisdictions charge fees for monitoring that burden the poor and often cannot be paid. Once EM is available, finally, it may be overused. In one survey, supervising officers believed (on average) that a third of the people they supervised on EM did not need to be on EM because they posed no danger to society. In conclusion: EM should be used selectively, and only as an alternative to detention.

III. Conclusion

The pretrial system is ripe for reform. An optimal pretrial system will maximize appearance rates while minimizing both intrusions to defendants’ liberty and pretrial crime. The central principle that unites best practices in the pretrial arena is that any pretrial restraint on liberty should be tailored to the specific risk a defendant presents, and should be the least restrictive means available to reasonably reduce the risk. Given our existing knowledge about the operation of the pretrial system and the efficacy of pretrial interventions, jurisdictions pursuing reform should prioritize the following strategies.

120 The California and Florida studies used propensity score matching, which raises some concerns that those placed on EM differ in unobservable characteristics from the control group, leading to bias in the estimator. However, those on EM are generally higher risk than those on regular probation/parole suggesting that the bias would lead these papers to understate the effects if anything.
122 See Bales, supra note 119 at 89-95
124 See Bales, supra note 119 at 102-103.
125 Id. at 104.
1. **Improve pretrial process** by granting immediate release for low-risk defendants and, for others, providing a thorough hearing with defense counsel present before imposing detention or conditions of release.

2. **Provide defendants notice of upcoming court dates** through phone calls or automated text-message reminders. Make court websites easy to navigate.

3. **Implement actuarial risk assessment** cautiously and transparently, with continuous evaluation by an independent third party. Assess and report flight risk and dangerousness separately, and assess dangerousness in terms of risk of arrest for violent crime rather than for any rearrest at all.

4. **Detain defendants only if there is a substantial probability** the defendant will commit serious crime in the pretrial phase or abscond from justice, and less intrusive methods such as electronic monitoring cannot adequately reduce that risk. Determine what level of risk warrants detention in a transparent process.

5. **Use conditions of release parsimoniously**, since few have been demonstrated to be effective and many involve non-trivial impositions on liberty.

6. **Limit money bail** as a condition of release to prevent detention on the basis of poverty.

7. **Pursue further research on the efficacy of pretrial interventions.** Pilot new pretrial initiatives through randomized controlled trials in collaboration with an academic partner, in order to rigorously measure their efficacy and identify necessary improvements.

These strategies will of course require investment, financial and political. But they have the potential to produce significant returns for defendants and taxpayers alike. If the momentum for pretrial reform translates into action, we can inaugurate a more effective and more humane system of pretrial justice.