

---

---

BIAS AND GUILT BEFORE INNOCENCE: HOW THE  
AMERICAN CIVIL LIBERTIES UNION SEEKS TO REFORM A  
SYSTEM THAT PENALIZES INDIGENT DEFENDANTS

*Candace White\**

For decades, the United States has debated the concept of a money-bail system, which has been documented to disenfranchise individuals of lower socioeconomic statuses.<sup>1</sup> Because the accused's financial status is often not assessed during bail and arraignment hearings, judges often set bail in excess of the defendant's financial means.<sup>2</sup> As a result, individuals who have not been convicted comprise sixty percent of jail populations,<sup>3</sup> and in cases where bail is set moderately low, "at \$500 or less, as it is in one-third of nonfelony cases—only 15 percent of defendants are able to come up with the money to avoid jail."<sup>4</sup>

In an attempt to rectify discriminatory practices, the United States, under the Obama administration, sought to provide guidance on criminal justice fines and fees,<sup>5</sup> however, these instructions were

---

\* J.D. Candidate, Albany Law School, 2020; B.S., Stetson University, 2017. I would like to thank Professor Christian Sundquist for his support and guidance in the composition of this Note. I would also like to thank Professors Mary Lynch and Peter Halewood for providing me with endless opportunities to further my legal career and for consistently pushing me to evaluate and critique the American criminal justice system.

<sup>1</sup> See Donald B. Verrilli, Jr., *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328, 330 n.13 (1982) ("The federal Bail Reform Act of 1966, 18 U.S.C. §§ 3146–3152 (1976), worked a significant change in this process on the federal level. Under the money-bail system a severe hardship was inflicted on the indigent. Found to pose only a slight risk of flight, but without resources to meet even a modest bail, indigent defendants often languished in jail pending trial.").

<sup>2</sup> See *What Is Bail? How Do I Pay Bail? What Is a Bond?*, JUSTIA, <https://www.justia.com/criminal/bail-bonds/> [<https://perma.cc/244M-V7A5>] [hereinafter *Bail and Bonds*].

<sup>3</sup> See TODD D. MINTON & DANIELA GOLINELLI, U.S. DEPT OF JUSTICE, JAIL INMATES AT MIDYEAR 2013 - STATISTICAL TABLES 1, 6 (2014), <https://www.bjs.gov/content/pub/pdf/jim13st.pdf> [<https://perma.cc/K7TD-9NS3>]; see also Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG., Aug. 16, 2015, at 38, <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html> [<https://perma.cc/FS6E-AVFP>] ("Of [individuals] in jails, 60 percent haven't been convicted of anything.").

<sup>4</sup> Pinto, *supra* note 3.

<sup>5</sup> See COUNCIL OF ECON. ADVISORS, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 5–6 (2015), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215\\_cea\\_fine\\_fee\\_bail\\_issue\\_brief](https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief)

repealed under the Trump administration.<sup>6</sup> At the local level, state lawmakers vastly differ in their perceptions of how to implement successful, nondiscriminatory bail procedures while also upholding the need for community safety, especially in cases where the defendant has been accused of committing a violent crime.<sup>7</sup> Several states, including New Jersey, Colorado, Kentucky, Alaska, and New York, have implemented some level of bail reform, with New Jersey and Alaska having entirely repealed their cash bail systems.<sup>8</sup> In lieu of cash bail systems, proponents of reform are turning to risk assessment tools, which rely upon algorithms to determine the predicate assessment of whether a defendant will return to court while also assessing the threat level that allowing high-risk defendants to be remanded poses to the community-at-large.<sup>9</sup> Such tools have flourished despite criticisms that the algorithms focus on racially motivated and biased factors, including the zip code in which the accused resides and the socioeconomic status of the offender, thus, rebranding and repackaging age-old discriminatory criminal justice tactics.<sup>10</sup>

On December 11, 2017, the American Civil Liberties Union (ACLU) announced through its Campaign for Smart Justice that it would begin advocating for states and the federal government to “end money bail and eliminate wealth-based pretrial detention.”<sup>11</sup> The

---

.pdf [<https://perma.cc/32TJ-VGL4>] [hereinafter FINES, FEES, AND BAIL].

<sup>6</sup> See Masood Farivar, *How US Attorney General Jeff Sessions Has Rolled Back Obama-era Policies*, VOA NEWS (Dec. 30, 2017, 5:55 AM), <https://www.voanews.com/a/us-attorney-general-jeff-sessions-roll-back-obama-policies/4185452.html> [<https://perma.cc/M89F-DZMD>].

<sup>7</sup> See, e.g., Jolie McCullough, *Gov. Greg Abbott's Influence Has Shifted Texas Bail Reform Efforts Toward a Bill that Would Give Him More Control*, TEX TR. (Mar. 18, 2019), <https://www.texastribune.org/2019/03/18/bail-reform-texas-legislature-damon-allen-act-bills/> [<https://perma.cc/HU7V-JHSD>] (discussing two competing bail reform bills that originated from the Texas State legislature).

<sup>8</sup> See H.B. 91, 29th Leg., 2d Sess. (Alaska 2016); H.B. 13-1236, 2013 Gen. Assemb. (Colo. 2013); H.B. 463, 2011 Gen. Assemb., Reg. Sess. (Ky. 2011); S.B. 946, 216th Leg. (N.J. 2014); S.B. 2101-A, 2019–2020 Leg., Reg. Sess. (N.Y. 2019).

<sup>9</sup> See PRETRIAL JUSTICE INST., PRETRIAL RISK ASSESSMENT: SCIENCE PROVIDES GUIDANCE ON ASSESSING DEFENDANTS 1–2 (2015), <https://www.ncsc.org/~media/Microsites/Files/PJCC/Pretrial%20risk%20assessment%20Science%20provides%20guidance%20on%20assessing%20defendants.ashx> [<https://perma.cc/NU43-ATYP>] [hereinafter SCIENCE PROVIDES GUIDANCE] (noting that risk assessment tools provide more equitable decisions than money-bond schedules or judicial intuition).

<sup>10</sup> SHIMA BARADARAN BAUGHMAN, *THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM* 72 (2018); see also Note, *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125, 1130 (2018) [hereinafter *Bail Reform and Risk Assessment*] (“The rise of bail reform activism and legislation has been sudden and meteoric.”).

<sup>11</sup> Press Release, ACLU, *ACLU Announces Nationwide Campaign to Support Movement to*

campaign's ultimate goal is to "combat racial disparities in the criminal justice system by challenging the injustices that have helped make America the world's largest incarcerator."<sup>12</sup> In its press release detailing the initiative, the ACLU asserted, "The money bail system was originally designed to ensure that people returned to court as their case progressed. It has since transformed into a system that targets those who cannot pay bail . . ."<sup>13</sup> Because the current system of bail is predicated upon discriminatory policies and practices, hundreds of thousands of indigent arrestees remain incarcerated each day; a systematic injustice that the ACLU seeks to reform through impact litigation and lobbying efforts advocating for the elimination of the cash-bail system.<sup>14</sup>

Part I of this Note assesses the concept of bail and discrimination. Part II evaluates modern bail practices and reform initiatives at the federal and state levels. Part III discusses the influence of the ACLU's position on state bail reforms initiatives and discusses the dichotomy between community needs recognized by state-level chapters of the organization and the varying goals of the national level chapter. This Note argues that to implement meaningful reform, states must work alongside groups such as the ACLU to either structure reform efforts to the individual needs of communities or eliminate bail systems, while simultaneously working to dismantle systemic issues of racism inherent in the American criminal justice system. While acknowledging the rise of empirical data analysis tools in jurisdictions implementing reform, this Note urges that risk assessment tools must be implemented only as a last resort and with ample safeguards to dismantle discriminatory and punitive pretrial punishments.

---

End Money Bail, (Dec. 11, 2017), <https://www.aclu.org/news/aclu-announces-nationwide-campaign-support-movement-end-money-bail> [<https://perma.cc/HFC7-L63A>] [hereinafter ACLU Announces Nationwide Campaign].

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *See id.*; *see also* ANDREA WOODS & PORTIA ALLEN-KYLE, ACLU SMART JUSTICE, A NEW VISION FOR PRETRIAL JUSTICE IN THE UNITED STATES 1 (2019), [https://www.aclu.org/sites/default/files/field\\_document/aclu\\_pretrial\\_reform\\_toplines\\_positions\\_report.pdf](https://www.aclu.org/sites/default/files/field_document/aclu_pretrial_reform_toplines_positions_report.pdf) [<https://perma.cc/36PQ-NNFU>] ("The ACLU's goals in the pretrial context are to dramatically reduce pretrial detention, eliminate wealth-based detention, and combat bias and systemic racism.").

## I. BAIL AND RACIAL DISCRIMINATION

A. *What Is Bail in the United States and How Does It Function?*

Bail in the United States refers to “the pretrial release of a criminal defendant after security has been taken for the defendant’s future appearance at trial.”<sup>15</sup> Bail has “been the answer of the Anglo-American system of criminal justice to a vexing question: what is to be done with the accused, whose guilt has not been proven, in the ‘dubious interval,’ often months long, between arrest and final adjudication.”<sup>16</sup> While bail is not intended as a punishment in itself, it does “secur[e] a defendant’s agreement to abide by certain conditions and return to court.”<sup>17</sup>

At a bail hearing, judges must consider numerous factors to establish the monetary value of bail to be imposed.<sup>18</sup> These considerations include “the severity of the alleged offense, the likelihood that the defendant will commit additional crimes after being released, and the chances that the defendant will flee the jurisdiction before trial.”<sup>19</sup> Additional considerations include whether the principal has “community ties, [a prior] history relating to drug or alcohol abuse, [a] criminal history, [or a] record of [missed] court appearances.”<sup>20</sup> Based upon these considerations, the judge is permitted to release the defendant on their own recognizance, set a personal bond, issue bail with specific terms of release, or deny bail outright.<sup>21</sup> Releasing the defendant on their recognizance allows the defendant to be “released from jail in exchange for signing an agreement promising to return to court and abide by other conditions.”<sup>22</sup> When a judge permits the defendant to sign a personal bond, the defendant may be released after signing a bond stating “that he or she will be liable for criminal, and in some cases civil,

---

<sup>15</sup> Verrilli, *supra* note 1, at 329.

<sup>16</sup> *Id.*

<sup>17</sup> *Bail and Bonds*, *supra* note 2.

<sup>18</sup> *See id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Justice Manual: Chapter 26. Release and Detention Pending Judicial Proceedings*, U.S. DEP’T JUSTICE, <https://www.justice.gov/jm/criminal-resource-manual-26-release-and-detention-pending-judicial-proceedings-18-usc-3141-et> [https://perma.cc/EEP6-MPXN] [hereinafter *Release and Detention Pending Judicial Proceedings*]; *see also* 18 U.S.C. 3142(g) (2012) (listing bail criteria).

<sup>21</sup> *See Bail and Bonds*, *supra* note 2.

<sup>22</sup> *Id.*

penalties if he or she fails to appear in court.”<sup>23</sup> If the judge sets bail with specific terms of release, the defendant may be released “by posting bail in the amount set by the court, either by paying it directly or obtaining a surety bond through a bail bond company.”<sup>24</sup> Finally, if the judge denies bail outright, the defendant is required to remain incarcerated.<sup>25</sup>

In cases where bail is imposed, judges are not required to evaluate the financial status of the accused, which results in the imposition of bail amounts that far exceed the accused’s financial abilities.<sup>26</sup> To account for this difference, bail bond companies will remunerate the full amount of bail for a defendant in exchange for a ten-to-twenty percent nonrefundable fee.<sup>27</sup> Where the defendant returns to court without issue, which occurs in more than seventy-five percent of cases,<sup>28</sup> the amount paid for the defendant’s pretrial release is refunded to the bondsman in full.<sup>29</sup> The percentage paid by the defendant to the bondsman, however, is not refunded.<sup>30</sup> As a condition of being released on a bail bond, a bond company is required to sign “a contract, known as a surety bond, in which it agrees to be liable for the full bail amount if the defendant fails to appear in court or otherwise forfeits his or her bail.”<sup>31</sup> Because the bond company becomes fully liable for a defendant’s nonappearance, it can “require the defendant to check in on a regular basis, or even [require that the

---

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *See id.*

<sup>26</sup> *See id.*; see also Curtis E.A. Karnow, *Setting Bail for Public Safety*, 13 BERKELEY J. CRIM. L. 1, 23 (2008) (“[J]udges usually do not know enough about the defendant’s financial resources to allow them to set meaningful, inhibitory bail . . .”). Notably, “in misdemeanor cases, which involve low bail schedules and nearly indigent defendants, . . . high case loads force the judge to operate on the least amount of information about the defendants’ personal and financial backgrounds.” *Id.* at 24.

<sup>27</sup> *Bail and Bonds*, *supra* note 2.

<sup>28</sup> See THOMAS H. COHEN & BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, STATE COURT PROCESSING STATISTICS, 1990–2004: PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 7 (2007), <https://www.bjs.gov/content/pub/pdf/prfdsc.pdf> [<https://perma.cc/P2K9-5DMQ>] (“From 1990 through 2004, . . . [a] bench warrant for failure to appear in court was issued for 23% of released defendants.”).

<sup>29</sup> See ACLU CAMPAIGN FOR SMART JUSTICE, SELLING OFF OUR FREEDOM: HOW INSURANCE CORPORATIONS HAVE TAKEN OVER OUR BAIL SYSTEM 49 (2017), [https://www.aclu.org/sites/default/files/field\\_document/059\\_bail\\_report\\_2\\_1.pdf](https://www.aclu.org/sites/default/files/field_document/059_bail_report_2_1.pdf) [<https://perma.cc/UB5L-WUPE>] [hereinafter SELLING OFF OUR FREEDOM] (“A private, for-profit bail bond agent files a bond with the court to guarantee a person’s appearance in court or pay of the bond in full. Money paid to the agent is not returned [to the defendant] at the end of the case.”).

<sup>30</sup> *See id.*

<sup>31</sup> *Bail and Bonds*, *supra* note 2.

defendant] consent to be monitored by the company.”<sup>32</sup>

*B. How Does Bail Discriminate on the Basis of Race?*

In principle, bail was developed to ensure an individual accused of a crime returned to court.<sup>33</sup> However, in practice, bail is nothing more than an age-old discriminatory policy wrapped in the guise of community safety.<sup>34</sup> Each day more than sixty percent of jail populations are composed of individuals who have yet to be convicted, and these individuals are often held for nonviolent misdemeanor charges.<sup>35</sup> While it is undeniable that bail “presses harder on the poor” who are unable to post even low amounts of bail, issues of racial bias also exist within the bail system.<sup>36</sup> Courts throughout the United States “set significantly higher bail amounts for black individuals than they do for white individuals, which is only compounded by the likelihood that people of color are more likely to serve pretrial time for accused crimes.”<sup>37</sup> In fact, “nearly every study on the impact of race in bail determinations has concluded that African Americans are subjected to pretrial detention at a higher rate and are subjected to higher bail amounts than are white arrestees with similar charges and similar criminal histories.”<sup>38</sup>

The Supreme Court has described the pretrial process as “perhaps the most critical period of the proceedings,”<sup>39</sup> so the impact of race in bail applications is quintessential as studies directly link outcomes on conviction rates and sentencing decisions to pretrial detention

---

<sup>32</sup> *Id.*

<sup>33</sup> See Karnow, *supra* note 26, at 5; Justin Sherman & Leah Abrams, *The Bail System Is Racist and Unjust. It Needs to Be Reformed*, REAL CLEAR POLY (Aug. 17, 2018), [https://www.realclearpolicy.com/articles/2018/08/17/the\\_bail\\_system\\_is\\_racist\\_and\\_unjust\\_it\\_needs\\_to\\_be\\_reformed\\_110764.html](https://www.realclearpolicy.com/articles/2018/08/17/the_bail_system_is_racist_and_unjust_it_needs_to_be_reformed_110764.html) [<https://perma.cc/MB8E-T29K>].

<sup>34</sup> See Sherman & Abrams, *supra* note 33.

<sup>35</sup> See MINTON & GOLINELLI, *supra* note 3, at 1 (“At midyear 2013, about 6 in 10 inmates were not convicted, but were in jail awaiting court action on a current charge—a rate unchanged since 2005.”); see also Cherise Fanno Burdeen, *The Dangerous Domino Effect of Not Making Bail*, ATLANTIC (Apr. 12, 2016), <https://www.theatlantic.com/politics/archive/2016/04/the-dangerous-domino-effect-of-not-making-bail/477906/> [<https://perma.cc/PKY8-7T24>] (“Most of the 12 million jail bookings in the United States each year are for low-level, nonviolent charges.”).

<sup>36</sup> Evan Horowitz, *The Trouble with Bail—and Some Alternatives*, BOS. GLOBE (Oct. 9, 2015, 12:00 AM), <https://www.bostonglobe.com/metro/2015/10/08/the-trouble-with-bail-and-some-alternatives/APjxJiBttCOyUCHGwe5gdI/story.html> [<https://perma.cc/G6GM-BUE3>].

<sup>37</sup> Sherman & Abrams, *supra* note 33.

<sup>38</sup> Cynthia E. Jones, “Give Us Free”: Addressing Racial Disparities in Bail Determinations, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 919, 938 (2013).

<sup>39</sup> See *United States v. Wade*, 388 U.S. 218, 225 (1967) (quoting *Powell v. Alabama*, 287 U.S. 45, 57 (1932)).

status.<sup>40</sup> “When bail and pretrial detention seem too costly, a quick plea can look like a path back to your old life.”<sup>41</sup> Accepting a plea deal, regardless of the defendant’s guilt, innocence, or the strength of the prosecution’s case, becomes appealing where an individual fears losing their job, hurting their family, or simply fears incarceration.<sup>42</sup> “By extension, racial differences in bail decision-making and pretrial detention may then impact the racial composition of incarcerated populations.”<sup>43</sup>

When evaluating how racial disparities come to exist in the context of bail, researchers have also found that for each correlation between race and all pretrial outcomes, black detainees “were less likely to be released on their own recognizance than white defendants” and black detainees “ages 18 through 29 received significantly higher bail amounts than all other types of defendants.”<sup>44</sup> Another study specifically noted that bail amounts for black arrestees tend to be \$9,923 higher on average than for white defendants.<sup>45</sup> The refusal to release black individuals on their own recognizance, and instead issue higher bail amounts, is often justified as necessary given the need to protect the community.<sup>46</sup> However, such justifications fail to acknowledge systemic racism inherent in the American criminal justice system.<sup>47</sup> Notably, black individuals “are more likely to be [stopped and] searched for contraband, . . . more likely to be charged with a serious offense, more likely to be convicted, and more likely to be incarcerated” than white defendants.<sup>48</sup> Further, the inherently racist nature of the War on Drugs has led to the overpolicing of black

---

<sup>40</sup> See Ellen A. Donnelly & John M. MacDonald, *The Downstream Effects of Bail and Pretrial Detention on Racial Disparities in Incarceration*, 108 J. CRIM. L. & CRIMINOLOGY 775, 779 (2018) (“A growing body of research has underscored how the inability to make bail and the experience of pretrial detention produces more guilty pleas, higher rates of conviction, and harsher sentences.”).

<sup>41</sup> Horowitz, *supra* note 36.

<sup>42</sup> See *id.*

<sup>43</sup> Donnelly & MacDonald, *supra* note 40, at 779.

<sup>44</sup> JUSTICE POL’Y INST., BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL 15 (2012), <http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf> [<https://perma.cc/C4V4-FAZG>].

<sup>45</sup> David Arnold et al., *Racial Bias in Bail Decisions*, 133 Q.J. ECON. 1885, 1885–86 (2018).

<sup>46</sup> See, e.g., *id.* at 1924 (finding that black defendants are more likely than white defendants to be classified as high risk).

<sup>47</sup> See CTR. ON RACE, INEQUALITY, AND THE LAW, N.Y.U. & ACLU, WHAT DOES FAIRNESS LOOK LIKE? CONVERSATIONS ON RACE, RISK ASSESSMENT TOOLS, AND PRETRIAL JUSTICE 12 (2018), <http://www.law.nyu.edu/sites/default/files/Final%20Report—ACLU-NYU%20CRIL%20Convening%20on%20Race%20Risk%20Assessment%20%20Fairness.pdf> [<https://perma.cc/4UFN-XESU>].

<sup>48</sup> Arnold et al., *supra* note 45, at 1885.

communities and discriminatory drug laws have directly targeted nonwhites.<sup>49</sup>

Because racism in the criminal justice system is so pervasive, actors in the system often do not readily recognize their own biases.<sup>50</sup> Researchers evaluating racial bias in bail decisions assert that “judges either knowingly or unknowingly discriminate against black defendants.”<sup>51</sup> Bail judges with conscious biases may “value the freedom of black defendants less than the freedom of observably similar white defendants,” while bail judges with unconscious bias may unknowingly use bail to overdetain black arrestees.<sup>52</sup> When considering that judges, especially inexperienced and part-time judges, harbor racial biases against defendants, it comes as no surprise that black detainees are less often released on their own recognizance and face higher bail fines, without consideration of their financial circumstances, than white pretrial detainees.<sup>53</sup>

Moreover, in cases where bail is set at “\$500 or less, as it is in one-third of nonfelony cases[, ]only 15 percent of defendants are able to come up with the money” required for release.<sup>54</sup> Recently, Sandra Bland and Kalief Browder, both black pretrial detainees, have gained national attention for their deadly encounters resulting from the money-bail system.<sup>55</sup> After having just moved from Chicago to Texas to begin a new job, Sandra Bland was arrested after a traffic stop for allegedly failing to use her turn signal and resisting arrest.<sup>56</sup> The judge set bail at \$5,000, however, neither she nor her family and

---

<sup>49</sup> See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 49, 52–54 (rev. ed. 2011).

<sup>50</sup> See generally Andrew E. Taslitz, *Racial Blindsight: The Absurdity of Color-Blind Criminal Justice*, 5 OH. ST. J. CRIM. L. 1, 3, 6–7 (2007) (“[M]uch of America is consciously blind to the harmful effect of racial biases on our individual and collective psychologies, yet is at some subconscious level quite aware of their presence.”).

<sup>51</sup> Arnold et al., *supra* note 45, at 1922.

<sup>52</sup> *Id.*

<sup>53</sup> See *id.* at 1903–06.

<sup>54</sup> Pinto, *supra* note 3.

<sup>55</sup> See Cherise Fanno Burdeen & Bruce D. Beaudin, *Justice System Too Costly for Unconvicted: Column*, USA TODAY (Aug. 5, 2016, 6:18 PM), <https://www.usatoday.com/story/opinion/policing/spotlight/2016/08/05/justice-system-too-costly-unconvicted-column/88275766/> [<https://perma.cc/NG4Q-YLTB>].

<sup>56</sup> See Sharon Grigsby, *Another Outrage in Sandra Bland Injustice: She Couldn't Find \$500 Bail*, DALLAS NEWS (July 27, 2015, 6:38 PM), <https://www.dallasnews.com/opinion/opinion/2015/07/27/another-outrage-in-sandra-bland-injustice-she-couldnt-find-500-bail> [<https://perma.cc/2KDF-QU7H>]; see also K.K. Rebecca Lai et al., *Assessing the Legality of Sandra Bland's Arrest*, N.Y. TIMES, <https://www.nytimes.com/interactive/2015/07/20/us/sandra-bland-arrest-death-videos-maps.html> [<https://perma.cc/M4L6-HP9B>] (discussing the legality of Sandra Bland's arrest).



friends, were able to procure the ten percent cash deposit at the time of the hearing.<sup>57</sup> Three days after she was arrested, Bland purportedly hanged herself in her jail cell.<sup>58</sup>

Kalief Browder was a sixteen-year-old high school student when he was arrested for allegedly stealing a backpack.<sup>59</sup> The judge initially set his bail at \$3,000, but his family was unable to afford to post bail at that time.<sup>60</sup> Several days later, his family procured the \$900 needed for his release, however, the judge revoked Browder's eligibility for bail as he was on probation at the time of his arrest.<sup>61</sup> Subsequently, Browder was sent to Rikers Island where he was brutalized by guards and inmates and was kept in solitary confinement for at least half of the time he was incarcerated.<sup>62</sup> Browder maintained his innocence and passed up plea offers that would have released him from the confines of Rikers Island, as he wanted the opportunity to prove his innocence in court.<sup>63</sup> Three years after his arrest, and never going to trial, the Bronx District Attorney's Office dismissed all charges against him and Browder was released.<sup>64</sup> Dealing with the trauma of jail and solitary confinement, Browder took his own life shortly thereafter.<sup>65</sup>

With "[h]alf of all suicides behind bars occur[ing] within the first 14 days of custody," these stories do not represent a shocking phenomenon,<sup>66</sup> but rather demonstrate a desolate reality for indigent and nonwhite offenders who are unable to post bail, or who are denied

---

<sup>57</sup> See Grigsby, *supra* note 56.

<sup>58</sup> See Lai et al., *supra* note 56.

<sup>59</sup> Jennifer Gonnerman, *Before the Law: A Boy Was Accused of Taking a Backpack. The Courts Took the Next Three Years of His Life*, NEW YORKER (Oct. 6, 2014), <https://www.newyorker.com/magazine/2014/10/06/before-the-law> [<https://perma.cc/U5PR-2Z5M>]; Alysia Santo, *No Bail, Less Hope: The Death of Kalief Browder*, MARSHALL PROJECT (June 9, 2015), <https://www.themarshallproject.org/2015/06/09/no-bail-less-hope-the-death-of-kalief-browder> [<https://perma.cc/TA2E-GJGU>].

<sup>60</sup> Santo, *supra* note 59.

<sup>61</sup> See Laurel Eckhouse, *California Abolished Money Bail. Here's Why Bail Opponents Aren't Happy.*, WASH. POST (Aug. 31, 2018, 6:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/08/31/california-abolished-money-bail-heres-why-bail-opponents-arent-happy/> [<https://perma.cc/5F42-XW7T>]; P.R. Lockhart, *New York's Justice System Failed Kalief Browder. Now the City Will Pay His Family \$3.3 Million.*, VOX (Jan. 25, 2019, 11:50 AM), <https://www.vox.com/2019/1/25/18196524/kalief-browder-estate-settlement-new-york-rikers> [<https://perma.cc/6XC7-7R5E>].

<sup>62</sup> See *id.*

<sup>63</sup> See Santo, *supra* note 59.

<sup>64</sup> See Gonnerman, *supra* note 59; Lockhart, *supra* note 61.

<sup>65</sup> See Lockhart, *supra* note 61.

<sup>66</sup> Shane Bauer, *Here's What Sandra Bland's Death Says About Our Broken Bail System*, MOTHER JONES (July 27, 2015), <https://www.motherjones.com/politics/2015/07/sandra-bland-bail-bond-system/> [<https://perma.cc/4M82-A37Q>].

bail because of assessments predicated upon racial stereotypes. While states across the nation are taking steps to reform their systems of bail to prevent these miscarriages of justice,<sup>67</sup> the vast majority of states still require detainees to pay cash bail or remain detained.<sup>68</sup>

## II. BAIL POLICIES AT THE FEDERAL AND STATE LEVELS

### A. *Federal Status of Bail*

At the federal level, judicial discretion is not unbridled in determining whether to grant bail as federal statutory schemes prescribe the judicial limitations of bail hearings.<sup>69</sup> In addition to statutory limitations, judges must also be conscientious of the Eighth Amendment's clause mandating that "[e]xcessive bail shall not be required."<sup>70</sup> Because the Eighth Amendment forbids excessive bail, clarification regarding the scope of excessiveness has been heavily litigated in the courts.<sup>71</sup> Moreover, while the Eighth Amendment repudiates excessive bail, the Federal Constitution does not unequivocally guarantee bail as a right.<sup>72</sup>

The Bail Reform Act of 1966 previously authorized judges to evaluate the nature of the charges in determining bail when the

---

<sup>67</sup> See An-Li Herring, *States and Cities Take Steps to Reform 'Dishonest' Bail System*, NPR (Dec. 17, 2016, 8:00 AM), <https://www.npr.org/2016/12/17/505852280/states-and-cities-take-steps-to-reform-dishonest-bail-system> [<https://perma.cc/A5UH-54KK>].

<sup>68</sup> See *Bail Reform*, ACLU, <https://www.aclu.org/issues/smart-justice/bail-reform> [<https://perma.cc/G7G3-MXS5>].

<sup>69</sup> See, e.g., 18 U.S.C. § 3142 (2012); see also *Legal Framework*, PRETRIAL JUST. CTR. FOR CTS., <https://www.ncsc.org/Microsites/PJCC/Home/Topics/Legal-Framework.aspx> [<https://perma.cc/MFM6-WNNS>] (discussing the implementation of the 1966 and 1984 Bail Reform Acts).

<sup>70</sup> U.S. CONST. amend. VIII.

<sup>71</sup> See CONG. RES. SERV., U.S. CONSTITUTIONAL LIMITS ON STATE MONEY-BAIL PRACTICES FOR CRIMINAL DEFENDANTS 5 (2019), <https://fas.org/spp/crs/misc/R45533.pdf> [<https://perma.cc/E8Q2-QABQ>] ("While the Eighth Amendment expressly prohibits excessive bail, it does not establish an absolute right to bail. Whether an accused has a right to bail depends on how expansively a court interprets the provision."); see also *United States v. Salerno*, 481 U.S. 739, 754–55 (1987) ("Nothing in the text of the Bail Clause [of the Eighth Amendment] limits permissible Government considerations solely to questions of flight. The only arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil. . . . We believe that when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, . . . the Eighth Amendment does not require release on bail.").

<sup>72</sup> See *Carlson v. Landon*, 342 U.S. 524, 545–46 (1952) ("[I]n criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the [Eighth] Amendment fails to say all arrests must be bailable.").

alleged crime was a noncapital offense.<sup>73</sup> “[W]here defendants were not released on their own recognizance,” either due to an indication that the defendant posed a flight risk or that they were accused of a capital offense, “judges were to levy the least restrictive conditions of release necessary to assure the defendant’s appearance.”<sup>74</sup> This “presumption favoring release”<sup>75</sup> was intended to curb excessive bail where indigent offenders would not otherwise be able to afford the fees imposed by courts.<sup>76</sup> While this reform protected an indigent defendant’s liberty interests, concerns arose over public safety, as the safety of the community-at-large was not being assessed.<sup>77</sup>

During the 1980s, “public concern over rising crime rates . . . focused in part on crimes attributed to defendants on release pending trial or appeal.”<sup>78</sup> To reduce crime rates, Attorney General William French Smith launched the Fugitive Investigative Strike Teams, which sought to “apprehend[] fugitives, including federal bail jumpers and pretrial or postconviction release violators.”<sup>79</sup> In two and a half years, the teams apprehended approximately 7,000 persons.<sup>80</sup> Congress, however, sought to create reforms by amending the existing legislation to reduce instances of bail jumping and pre-trial release violations.<sup>81</sup> To initiate such changes, Congress revised the Bail Reform Act of 1966, amending its most relevant sections to permit judicial discretion in assessing whether the accused presented a threat to the community.<sup>82</sup> In 1984, Congress enacted subsection (e) to 18 U.S.C. § 3142:

(e) Detention.— If, after a hearing . . . the judicial officer finds

<sup>73</sup> See 18 U.S.C. § 3146(b) (repealed 1984); *Legal Framework*, *supra* note 69.

<sup>74</sup> *Legal Framework*, *supra* note 69; see also 18 U.S.C. § 3146(a) (repealed 1984).

<sup>75</sup> Donald P. Lay & Jill De La Hunt, *The Bail Reform Act of 1984: A Discussion*, 11 WM. MITCHELL L. REV. 929, 934 (1985).

<sup>76</sup> See *id.* at 932, 933–44; see also Bail Reform Act of 1966, Pub. L. 89-465 § 2, 80 Stat 214 (1966) (codified as amended at 18 U.S.C. §§ 3146–52 (2012)) (“The purpose of [the Bail Reform Act of 1966] is to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest.”).

<sup>77</sup> Lay & De La Hunt, *supra* note 75, at 934.

<sup>78</sup> *Id.* at 930.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> See *id.*

<sup>82</sup> See *id.* (“Congress again voiced its concern in the Bail Reform Act of 1984. The principal features of the 1984 Act allow the detention of certain defendants pending trial or appeal if they are found to be, among other things, community safety hazards.”); see also 18 U.S.C. § 3142(g)(4) (2012).

that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, [such judicial officer] shall order the detention of the person before trial.<sup>83</sup>

Subsection (e) remains largely intact despite the decades since its enactment,<sup>84</sup> and “require[s] judges to deny release on bail if they were satisfied that the crimes the accused was charged with were serious, and that the accused was likely, while out on bail, to commit more crimes of that sort.”<sup>85</sup>

In 1987, the Supreme Court affirmed the Bail Reform Act of 1984, as amended, in its *United States v. Salerno* decision.<sup>86</sup> The Court held that “[n]othing in the text of the Bail Clause [of the Eighth Amendment] limits permissible Government considerations solely to questions of flight.”<sup>87</sup> Additionally, the Court reasoned that

[w]hile the Government’s general interest in preventing crime is compelling, . . . this interest is heightened when the Government musters convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community. Under these narrow circumstances, society’s interest in crime prevention is at its greatest.<sup>88</sup>

By upholding the Bail Reform Act of 1984, the Supreme Court effectively acknowledged the right of lower court judges to evaluate myriad compelling interests during bail application proceedings.<sup>89</sup> Since the *Salerno* decision, the federal government has ebbed and flowed between encouraging the reduction of the use of monetary penalties and encouraging district courts to issue bail regardless of

---

<sup>83</sup> Bail Reform Act of 1984, P.L. 98-473, § 203, 98 Stat. 1837, 1976, 1978–79 (codified as amended at 18 U.S.C. § 3142(e) (2012)).

<sup>84</sup> See 18 U.S.C. § 3142(e) (2012).

<sup>85</sup> MICHAEL LOUIS CORRADO, PRESUMED DANGEROUS: PUNISHMENT, RESPONSIBILITY, AND PREVENTATIVE DETENTION IN AMERICAN JURISPRUDENCE 12 (2013).

<sup>86</sup> See *United States v. Salerno*, 481 U.S. 739, 755 (1987).

<sup>87</sup> *Id.* at 754.

<sup>88</sup> *Id.* at 750.

<sup>89</sup> See *id.* at 751–52 (“The judicial officer charged with the responsibility of determining the appropriateness of detention is guided by statutorily enumerated factors, which include the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender, and the danger to the community.”).

the defendant's financial limitations.<sup>90</sup>

The Act, as amended, has subsequently opened the door for federal courts throughout the nation to use bail as a means to further preventive detention.<sup>91</sup> Under the guise of protecting the community, courts are free to compel incarceration based on loose standards, guided by conscious and unconscious biases that inherently and disproportionately affect those of a lower socioeconomic status and nonwhite communities.<sup>92</sup> When held on bail, an individual deemed innocent until proven guilty is locked in a cell, subjected to cavity searches, and is barred from communicating at their leisure with their legal counsel to prepare a defense.<sup>93</sup> Thus, when discussing the

---

<sup>90</sup> See, e.g., Rebecca Beyer, *DOJ Rescinds Guidance on Excessive Court Fines and Fees: Civil Rights Advocates See Continued Rollback of Reforms*, ABA J. (April 1, 2018, 2:50AM), [http://www.abajournal.com/magazine/article/doj\\_rescinds\\_guidance\\_excessive\\_court\\_fines\\_fees](http://www.abajournal.com/magazine/article/doj_rescinds_guidance_excessive_court_fines_fees) [<https://perma.cc/2C4M-KMU5>] (“In December [of 2017], U.S. Attorney General Jeff Sessions revoked Obama-era guidance warning local courts against engaging in the common practice of fining poor defendants in misdemeanor and civil infraction cases in order to boost revenue. These practices had been decried as unlawful moneymaking ventures that preyed on poor and minority residents.”).

<sup>91</sup> See CHARLES DOYLE, CONG. RES. SERV., BAIL: AN OVERVIEW OF FEDERAL CRIMINAL LAW 4–5 (2017), <https://fas.org/sgp/crs/misc/R40221.pdf> [<https://perma.cc/R8DQ-EA7Q>] (“In 1984, Congress amended federal bail law to permit the use of preventive detention in certain limited instances when the accused posed a danger to the public or particular members of the public. Three years later, the Supreme Court in *Salerno* held that the legislation offended neither the Eighth Amendment’s Excessive Bail Clause nor the Fifth Amendment’s Due Process Clause.”); see also *Legal Framework*, *supra* note 69 (“Some jurisdictions have enacted legislation specifically authorizing the use of preventive detention for defendants considered too dangerous to release pretrial . . .”).

<sup>92</sup> See Horowitz, *supra* note 36; see also Donnelly & MacDonald, *supra* note 40, at 796 (“Observed characteristics . . . contribute to ‘explained’ differences in processing outcomes by race. ‘Unexplained’ racial differences in processing outcomes come from unobserved factors, which could be due to omitted variables or racial bias and discrimination.”); *id.* at 812; Lay & De La Hunt, *supra* note 75, at 951–52 (“The judiciary has an interest in the fair and efficient administration of justice. Some aspects of the 1984 Act promote this interest, but many do not. The presumptions raised in the pre-trial detention proceedings, the standards a defendant must meet in seeking bond pending appeal, and the general, although statistically erroneous, assumption that pretrial release is somehow ‘responsible’ for the increase in crime rates: all of these factors have a negative impact on the courts. Interlocutory appeals may become commonplace, and judges who must render a decision on a petition for bail and then determine the merits may be viewed as biased. Frequent use of the 1984 Act’s most restrictive provisions will have a detrimental effect on the defendant, the courts, and society.”).

<sup>93</sup> See *United States v. Salerno*, 481 U.S. 739, 755 (1987) (Marshall, J., dissenting) (“This case brings before the Court for the first time a statute in which Congress declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue, if the Government shows to the satisfaction of a judge that the accused is likely to commit crimes, unrelated to the pending charges, at any time in the future. Such statutes, consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the police state, have long been thought incompatible with the fundamental human rights protected by our Constitution.”); see also Daniel C. Richman, *The Story of United States v. Salerno: The Constitutionality*, 12 FORDHAM L. FACULTY COLLOQUIUM PAPERS, Apr.

shift toward a more lenient finding of excessiveness pursuant to the Eighth Amendment, it is critical to understand that an individual is not only stripped of liberty before a finding of guilt is ever made, but one must also understand that individuals unable to afford bail also lose the ability to freely prepare their defense,<sup>94</sup> a restriction that has resulted in higher levels of guilty pleas among pretrial detainees.<sup>95</sup>

In March 2016, under the guidance of the Obama administration, a letter offering advice on bail applications was published “after a 2015 Department of Justice [DOJ] report on its investigation into policing in Ferguson, Missouri,” indicated that the city “‘routinely issued arrest warrants . . . without any ability-to-pay determination’—in part to increase [the city’s] revenue.”<sup>96</sup> Following the report on Ferguson’s for-profit scheme, “the DOJ and the White House held a meeting on the connections between poverty and the criminal justice system.”<sup>97</sup> Together, the White House and the DOJ “offered seven ‘basic constitutional principles’ to help courts ‘protect individual rights.’”<sup>98</sup> The letter aimed to “implement new approaches designed to reduce inequities and inefficiencies of fines, fees, and bail while maintaining an effective criminal justice system.”<sup>99</sup>

Despite the sentiment for the federal government to reduce the use of monetary penalties,<sup>100</sup> which have been proven to disproportionately affect indigent offenders,<sup>101</sup> in 2017, Attorney General Jeff Sessions abated the Obama-era policy.<sup>102</sup> In doing so, Attorney General Sessions stated that the policy, as implemented by

---

2005, at 11–12 (detailing the deprivation of defendants’ rights in *Salerno*).

<sup>94</sup> Verrilli, *supra* note 1, at 357 (“A defendant’s access to counsel and ability to assist in locating witnesses are hampered by incarceration.”).

<sup>95</sup> See Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 234 (2018) (“[R]eleased defendants are substantially less likely to be convicted of any offense due to a reduction in guilty pleas . . .”).

<sup>96</sup> Beyer, *supra* note 90; see also Letter from Vanita Gupta, Principal Deputy Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice & Lisa Foster, Dir., Office for Access to Justice, U.S. Dep’t of Justice, to Colleagues (Mar. 14, 2016), <https://finesandfeesjusticecenter.org/content/uploads/2018/11/Dear-Colleague-letter.pdf> [<https://perma.cc/2WK9-L8LE>] [hereinafter Dear Colleague Letter].

<sup>97</sup> Beyer, *supra* note 90; see also Dear Colleague Letter, *supra* note 96, at 1–2.

<sup>98</sup> Beyer, *supra* note 90.

<sup>99</sup> FINES, FEES, AND BAIL, *supra* note 5, at 9.

<sup>100</sup> See *id.* at 9.

<sup>101</sup> See *id.* at 4 (“Fines and fees create large financial and human costs, all of which are disproportionately borne by the poor. High fines and fee payments may force the indigent formerly incarcerated to make difficult trade-offs between paying court debts and other necessary purchases.”).

<sup>102</sup> See Farivar, *supra* note 6.

the aforementioned letter, was “unnecessary, outdated, inconsistent with existing law, or otherwise improper.”<sup>103</sup> In addition to revoking the letter penned under President Obama’s administration, Attorney General Sessions also issued a memo<sup>104</sup> “barring the [DOJ] from using the so-called guidance letters to create de facto regulations.”<sup>105</sup> In an address to the Federalist Society, Jeff Sessions stated, “We have prohibited all Department of Justice components from issuing any guidance that purports to impose new obligations on any party outside the executive branch.”<sup>106</sup> The recall of the letter has faced extreme backlash with critics claiming that the Trump administration seeks to criminalize poverty and initiate a “return to debtors’ prisons.”<sup>107</sup>

### B. *Status of Bail at the State Level*

Since 1984, states have generally permitted judicial discretion in evaluating both the likelihood that a defendant will return to court as well as assessing the threat the accused poses to the community.<sup>108</sup> However, bail laws continue to differ in varying jurisdictions.<sup>109</sup>

---

<sup>103</sup> Press Release, Office of Pub. Affairs, Dep’t of Justice, Attorney General Jeff Sessions Rescinds 24 Guidance Documents (Jul. 3, 2018), <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-24-guidance-documents> [<https://perma.cc/PZ2J-WCU7>]; Farivar, *supra* note 6.

<sup>104</sup> See Memorandum from Office of the Attorney Gen. on Prohibition on Improper Guidance Documents (Nov. 16, 2017), <https://www.justice.gov/opa/press-release/file/1012271/download> [<https://perma.cc/E6HT-TGKA>].

<sup>105</sup> Charlie Savage, *Justice Dept. Revokes 25 Legal Guidance Documents Dating to 1975*, N.Y. TIMES (Dec. 21, 2017), <https://www.nytimes.com/2017/12/21/us/politics/justice-dept-guidance-documents.html> [<https://perma.cc/CC58-Q6SU>].

<sup>106</sup> *Id.*

<sup>107</sup> Farivar, *supra* note 6.

<sup>108</sup> See *Legal Framework*, *supra* note 69; see also Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1415–16 (2017) (“In the years that followed [the *Salerno* decision], almost all states adopted statutes explicitly allowing judges to consider dangerousness as a factor in pre-trial release.”).

<sup>109</sup> See generally AMBER WIDGERY, NAT’L CONFERENCE STATE LEGISLATURES, TRENDS IN PRETRIAL RELEASE: STATE LEGISLATION 1 (2015), [http://www.ncsl.org/Portals/1/Documents/cj/pretrialTrends\\_v05.pdf](http://www.ncsl.org/Portals/1/Documents/cj/pretrialTrends_v05.pdf) [<https://perma.cc/S2ND-D34F>] [hereinafter TRENDS IN PRETRIAL RELEASE].

State laws provide a framework for judges and other local officials to determine who is eligible for release and under what conditions. In recent years, state legislation has concentrated largely on individualizing the pretrial process by focusing on specific defendants or offense categories. From 2012 to 2014, 261 new laws in 47 states addressed pretrial policy. Notable enactments have covered risk assessments, victim-specific pretrial procedures, victim-specific conditions, pretrial services and diversion programs. These actions of state legislatures contribute to efforts underway nationally to improve

While most states follow the standard enumerated in *United States v. Salerno*,<sup>110</sup> other jurisdictions mandate that judges must abide by strict guidelines in determining whether bail is appropriate.<sup>111</sup> These guidelines include schedules, which have a designated dollar value of bail predetermined for each crime.<sup>112</sup> According to Lindsey Carlson, former general counsel of the Pretrial Justice Institute,

bail schedules are procedural schemes that provide judges with standardized money bail amounts based upon the offense charged, regardless of the characteristics of an individual defendant. These schedules might formally be promulgated through state law, or informally employed by local officials. They may be mandatory or merely advisory, and may provide minimum sums, maximum sums, or a range of sums to be imposed for each crime.<sup>113</sup>

The constitutionality of these schedules has been “called into question in a series of class action suits.”<sup>114</sup> In *Varden v. City of Clanton*,<sup>115</sup> the Department of Justice filed a statement of interest asserting,

It is the position of the United States that, as courts have long recognized, any bail or bond scheme that mandates payment of pre-fixed amounts for different offenses in order to gain pre-trial release, without any regard for indigence, not only violates the Fourteenth Amendment’s Equal Protection Clause, but also constitutes bad public policy.<sup>116</sup>

The National Center for State Courts notes that the judgments in

---

pretrial justice.

*Id.*

<sup>110</sup> See *Legal Framework*, *supra* note 69.

<sup>111</sup> See generally TRENDS IN PRETRIAL RELEASE, *supra* note 109 (evaluating varying bail considerations imposed by state laws).

<sup>112</sup> See *Legal Framework*, *supra* note 69; see also *Jones v. City of Clanton*, No. 2:15cv34-MHT, 2015 U.S. Dist. LEXIS 121879, at \*6–7 (M.D. Ala. Sept. 14, 2015) (quoting *Pugh v. Rainwater*, 572 F.2d 1053, 1056–57 (5th Cir. 1978)) (discussing the legality of bail schedules).

<sup>113</sup> Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion?*, CRIM. JUST., Spring 2011, at 12, 13.

<sup>114</sup> *Legal Framework*, *supra* note 69.

<sup>115</sup> See *Jones*, 2015 U.S. Dist. LEXIS 121879, at \*1; Statement of Interest of the United States at 1, *Varden v. City of Clanton*, 2:15-cv-00034-MHT-WC (M.D. Ala. Feb. 13, 2015).

<sup>116</sup> Statement of Interest, *supra* note 115, at 1.



*Varden* and similar matters have aligned with the Department of Justice's position and have resulted in the subsequent cessation of bond schemes by courts in most jurisdictions where a claim has been filed.<sup>117</sup>

Despite the discontinuation of bond schemes in varying localities, the majority of states have continued to issue bail rulings based on the *Salerno* decision, furthering what some call "the preventive state."<sup>118</sup> In states that do not rely on bail schedules, judges are often required to rely on guidelines in making their determinations.<sup>119</sup> While such guidelines differ based on jurisdiction, to determine bail,

the accused—with, or often without, the assistance of counsel—will present factors including the seriousness of the charge, prior criminal history, and the health or well-being of any potential victim. If the accused isailable—which has traditionally been the case for low-level, misdemeanor offenses—the judicial officer will then consider general background information regarding the accused, whether there are supervisory methods in place if the defendant is released pending trial, and the state's interest in pretrial detention.<sup>120</sup>

In addition to these varying considerations, some jurisdictions require the court to engage in some "fact-finding on the underlying criminal matter in arraignments, [which requires] judges to weigh existing evidence against the defendant . . . before [the case] has begun."<sup>121</sup> While there are numerous considerations to bear in mind, a judge must make their decision on the bail application in the span of only a few minutes.<sup>122</sup>

The majority of state and local courts provide judges with "vast discretion to make pre-trial release decisions that take into account

---

<sup>117</sup> See Greg Hurley, *The Constitutionality of Bond Schedules*, NAT'L CTR. FOR ST. CTS. (2016), <https://www.ncsc.org/sitecore/content/microsites/trends/home/Monthly-Trends-Articles/2016/The-Constitutionality-of-Bond-Schedules.aspx> [<https://perma.cc/N9SB-M8YX>]; see also Yang, *supra* note 108 at 1402–03 ("[F]ixed bail schedules that allow for pre-trial release for only those who can afford to pay bail violate the Fourteenth Amendment, calling into question the constitutionality of a long-established practice in the U.S. criminal justice system.").

<sup>118</sup> See Yang, *supra* note 108, at 1415–16.

<sup>119</sup> See *id.* at 1454–55.

<sup>120</sup> James A. Allen, Note, *Making Bail: Limiting the Use of Bail Schedules and Defining the Elusive Meaning of "Excessive" Bail*, 25 J.L. & POL'Y 637, 663 (2017).

<sup>121</sup> Dorothy Weldon, Note, *More Appealing: Reforming Bail Review in State Courts*, 118 COLUM. L. REV. 2401, 2421 (2018).

<sup>122</sup> See *id.*

factors such as ‘providing due process to those accused of [a] crime, maintaining the integrity of the judicial process by securing defendants for trial, and protecting victims, witnesses and the community from threat, danger or interference.’”<sup>123</sup> Seldom must judges explain their decisions on bail, thus, “there is little accountability when bail is set on the basis of factors beyond judges’ statutory and constitutional mandate.”<sup>124</sup> This practice becomes especially problematic because “[m]ost states lack any guarantee of judicial review of bail conditions beyond the habeas [corpus] remedy.”<sup>125</sup> Moreover, the assistance of counsel is not unanimously guaranteed during these proceedings, leaving the accused to appear before the judge *pro se* or pay out of pocket for counsel.<sup>126</sup>

### 1. State Models on Bail Policies

“After *Salerno*, states were apt to amend their bail statutes to mirror the federal policy established by the Supreme Court and detailed by the 1984 Act, allowing more arrestees to be detained because of potential dangerousness.”<sup>127</sup> As a result of shifting public opinion regarding bail, states have employed an array of policies in an attempt to assuage due process and equal protection concerns.<sup>128</sup> These frameworks include the Georgia, California, Texas, and case-by-case models.<sup>129</sup>

States following the Georgia model “set mandatory minimum bail amounts for felonies and allow counties to create similar bail

---

<sup>123</sup> Yang, *supra* note 108, at 1415–16.

<sup>124</sup> Weldon, *supra* note 121, at 2422.

<sup>125</sup> *Id.* at 2427. A writ of habeas corpus is a “writ[] employed to bring a person before a court . . . to ensure that the person’s imprisonment or detention is not illegal.” *Id.* at 2414 (alteration in original). Notably, “[p]rocedural rules for the granting of hearings and further fact-finding pursuant to habeas claims vary state to state.” *Id.* at 2415.

<sup>126</sup> *See id.* at 2428 (“Access to counsel during this first proceeding is rare, and defendants frequently appear without representation.”); *see also* Court Order at 1, *Bairefoot v. City of Beaufort*, 312 F. Supp. 3d 503 (D.S.C. 2019) (No. 9:17-2759-RMG) (“Each of the named Plaintiffs allege that they were prosecuted, convicted and incarcerated . . . without being provided court-appointed counsel as indigent people facing incarceration upon conviction of a crime and were not informed of their right to counsel prior to receiving a sentence of incarceration . . .”). In the settlement reached by the towns and the ACLU, the municipalities agreed to provide, among other things, representation at bail hearings and a written statement of defendants’ rights during bail and arraignment hearings, and to grant defendants the ability to prove to a judge they are unable to afford bail by filling out an ability-to-pay form. *See id.* at 2–3.

<sup>127</sup> Allen, *supra* note 120, at 653.

<sup>128</sup> *See id.* at 656.

<sup>129</sup> *See id.* at 656–62.

schedules for misdemeanors to ‘promote uniformity and fairness, and to facilitate and ensure the early setting of bond[s].’<sup>130</sup> While this may promote uniformity and efficiency to a degree, it is also “directly at odds with the Supreme Court’s guidance to make bail determinations based on individual circumstances.”<sup>131</sup>

States following the California model “provide bail schedules but are explicit in their deference to the judicial officer’s assigned amount.”<sup>132</sup> These schedules provide a ceiling on the financial amount imposed to encourage judicial discretion.<sup>133</sup> While this model, similar to the Georgia model, promotes uniformity and efficiency, critics note that bail determinations vary drastically from county-to-county, and while uniformity is promoted, it is not realized in practice.<sup>134</sup>

States following the Texas model “attempt to avoid interference with a judicial officer’s discretion.”<sup>135</sup> As such, this model encourages states to permit local officials to designate bail policies.<sup>136</sup> However, critics have found that in certain counties, hearing officers “follow[] the prescheduled bail amounts in 88.9% of misdemeanor cases,”<sup>137</sup> thus indicating judicial discretion is stymied.

Finally, states following the case-by-case model traditionally align with the “Supreme Court’s individualized bail determination standard.”<sup>138</sup> These states do not enact bail schedules but rather employ “general clauses to assign bail based on a set of transcribed circumstances.”<sup>139</sup> Such clauses or statutes “are typically broadly construed, allowing judges to weigh a multitude of surrounding circumstances in case-by-case determinations.”<sup>140</sup> While proponents praise this model for its reliance on judicial discretion, critics assert that judicial officers in many, if not most of these statutes, do not require “judges to address an *indigent* individual’s financial status.”<sup>141</sup>

---

<sup>130</sup> *Id.* at 656 (alteration in original).

<sup>131</sup> *Id.* at 657.

<sup>132</sup> *Id.* at 658.

<sup>133</sup> *See id.*

<sup>134</sup> *See id.* at 658–59.

<sup>135</sup> *Id.* at 659.

<sup>136</sup> *See id.* at 659–60.

<sup>137</sup> *Id.* at 660.

<sup>138</sup> *Id.* at 661.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 661–62.

## 2. Bail Funds

While advocates and opponents of each model assert varying notions of why the aforementioned frameworks are either successful or continue to disenfranchise individuals on the basis of race or socioeconomic status,<sup>142</sup> one thing is certain: individuals across the United States are still being detained before a conviction is obtained based on their inability to afford bail.<sup>143</sup> In response to this issue, advocates across the nation have come together to create bail funds.<sup>144</sup> Bail funds encourage individuals to donate funds to either state or national organizations, which then pay the bail of those individuals “who would otherwise be detained pretrial.”<sup>145</sup> “Once a defendant who has been sponsored by the fund stands trial the money is repaid to the fund.”<sup>146</sup>

The ACLU National Bail Fund was one of the first large-scale organized funds in the United States.<sup>147</sup> Created in 1920 as a response to mass hysteria surrounding the Red Scare, the fund sought to oppose the actions of the United States government in detaining individuals based on their political ideology.<sup>148</sup> The fund operated on the premise of anonymity of its donors and assured contributors the funds would be delineated to detainees by a committee of trustees.<sup>149</sup> The fund operated successfully until 1941.<sup>150</sup> Today over twenty bail funds exist throughout the nation and these groups continue to “rais[e] awareness through their work, target[] specific groups as a political strategy, and work[] towards jail

---

<sup>142</sup> See *id.* at 656–62.

<sup>143</sup> See *id.* at 683 (“Pretrial detention solely due to an inability to post bail tends to unjustly perpetuate criminality and poverty. Pressures from pretrial detention not only have an impact because of a financial burden to pay bail amounts, but can also lead to loss of employment, housing, or even child custody. . . . Thus, indigent detainees frequently face an uphill battle for their defense in a system that incentivizes them to admit guilt in exchange for their release.”).

<sup>144</sup> See Robin Steinberg et al., *Freedom Should Be Free*, BAIL PROJECT (2018), <https://bailproject.org/freedom-should-be-free/> [<https://perma.cc/A89Y-4QGG>] (describing the purpose of bail funds and how and where to donate); see also *National Bail Fund Network: Directory of Community Bail Funds*, COMMUNITY JUST. EXCHANGE, <https://www.communityjusticeexchange.org/nbnf-directory> [<https://perma.cc/YR5V-JGKY>] [hereinafter *Directory of Community Bail Funds*] (listing various bail funds organized by state and national organizations).

<sup>145</sup> Allen, *supra* note 120, at 665–66; see also Steinberg et al., *supra* note 144; *Directory of Community Bail Funds*, *supra* note 144.

<sup>146</sup> Allen, *supra* note 120, at 665–66.

<sup>147</sup> Steinberg et al., *supra* note 144.

<sup>148</sup> See *id.*

<sup>149</sup> See *id.*

<sup>150</sup> See *id.*

population reduction and broader decarceration.”<sup>151</sup> Generally, these funds are formed by “municipalities who finance them by appropriating a part of the public budget, or are funded through community groups who raise money from their peers and whose members make personal contributions to the fund.”<sup>152</sup> Municipalities favor joining or creating bail fund programs because “the use of public money is well-spent [as it offsets] the typically high cost of detaining an inmate.”<sup>153</sup> Bail funds have been successful and have even spread to immigration courts to aid those seeking asylum or fighting deportation.<sup>154</sup> While each fund is operated according to the articles of incorporation and bylaws of its organization, each reflects the notion “that no [person] should be imprisoned until he [or she] has been tried and sentenced.”<sup>155</sup> While bail funds are a useful tool to aid indigent pretrial detainees, the funds are “only a solution for providing financial assistance to those low-risk defendants eligible *after* bail has already been imposed—these funds do not address the problem of why excessive bails are so often imposed in the first place.”<sup>156</sup>

### 3. Bail Reform Initiatives and Risk Assessment Tools

To address the issue of discriminatory bail practices, states have attempted to enact legislation aimed at reforming the respective models of bail employed within their jurisdictions.<sup>157</sup> In 2017, states—including Kentucky, Colorado, and New Jersey—began encouraging or requiring state courts to rely upon risk assessment tools to predetermine whether an individual qualifies for pretrial release.<sup>158</sup> Washington, D.C., has relied upon an “effective pretrial system with almost no money bail” since the 1960s.<sup>159</sup> In the District,

---

<sup>151</sup> *Id.*

<sup>152</sup> Allen, *supra* note 120, at 666.

<sup>153</sup> *Id.*

<sup>154</sup> See Steinberg et al., *supra* note 144.

<sup>155</sup> *Id.*

<sup>156</sup> Allen, *supra* note 120, at 666–67.

<sup>157</sup> See, e.g., *Bail Reform and Risk Assessment*, *supra* note 10, at 1130 (describing the varying reform efforts throughout the United States).

<sup>158</sup> See *id.*

<sup>159</sup> *Id.*

PSA was among the handful of pioneer pretrial agencies established in the 1960s. The work of PSA started under the auspices of the D.C. Bail Project in 1963 with a Ford Foundation grant. . . . It is of [the] foremost importance to note that PSA’s governing statute precludes [the agency] from supervising surety bail releases in the D.C. Superior

94% of pretrial detainees are released, “90% of whom make their court appointments, and 98% of whom are not rearrested for a violent crime pretrial.”<sup>160</sup> Additionally, nonprofit organizations are providing financial support to efforts designed to “eliminate money bail in at least thirty-six states.”<sup>161</sup> While many of these efforts have focused on encouraging states to implement risk assessment tools,<sup>162</sup> opponents note that these tools integrate biases into their algorithms.<sup>163</sup>

Pretrial risk assessment tools vary based on the assessments and algorithms used by the coder,<sup>164</sup> however, most “use actuarial data to predict how likely it is that someone will miss an upcoming court date or commit a crime before trial.”<sup>165</sup> “Risk assessment tools may also be deficient because the data that inform the tools come from an environment where the only pretrial options are jail and personal recognizance.”<sup>166</sup> Notably, New Jersey relies on the Public Safety Assessment (PSA) tool, developed by the Laura and John Arnold Foundation.<sup>167</sup> To determine the probability of whether a defendant will fail to appear in court or will commit a crime while released on bail, the PSA analyzes nine risk factors:<sup>168</sup>

1. Age at current arrest
2. Current violent offense
- 2A. Current violent offense and 20 yrs. old or younger

---

Court [as the agency is] among a minority of pretrial agencies in the nation that do[es] not recommend financial bond.

*PSA's History*, PRETRIAL SERVICES AGENCY FOR D.C., <https://www.psa.gov/?q=about/history> [<https://perma.cc/EGT3-ZB87>].

<sup>160</sup> *Bail Reform and Risk Assessment*, *supra* note 10, at 1130.

<sup>161</sup> *Id.*

<sup>162</sup> See Jon Schuppe, *Bail Reform on America's Justice System: Post Bail*, NBC NEWS (Aug. 22, 2017), <https://www.nbcnews.com/specials/bail-reform> [<https://perma.cc/D6NU-7GL3>] (“Philanthropic organizations are funding projects in more than three-dozen states to eliminate bail and adopt algorithm-based risk-assessment tools.”).

<sup>163</sup> See Julia Angwin, et al., *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [<https://perma.cc/CWC9-VA85>] (“In 2014, then U.S. Attorney General Eric Holder warned that the risk scores might be injecting bias into the courts. . . . ‘Although these measures were crafted with the best of intentions, . . . they may exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system and in our society.’”).

<sup>164</sup> See Schuppe, *supra* note 162 (discussing various risk assessment tools including Wisconsin's COMPAS tool and the Public Safety Assessment tool).

<sup>165</sup> *Bail Reform and Risk Assessment*, *supra* note 10, at 1131.

<sup>166</sup> *Id.* at 1132.

<sup>167</sup> See *id.* at 1131.

<sup>168</sup> See *id.*

3. Pending charge at the time of the offense
4. Prior misdemeanor conviction
5. Prior felony conviction
- 5A. Prior conviction (misdemeanor or felony)
6. Prior violent conviction
7. Prior failure to appear in the past two years
8. Prior failure to appear older than two years
9. Prior sentence to incarceration<sup>169</sup>

The risk assessment tool, using a statistical analysis of these factors, computes: (1) “a failure to appear score”; (2) “a new criminal activity score”; and (3) “a new violent criminal activity score.”<sup>170</sup> These tools mathematically calculate risks associated with pretrial release, however, they do not automatically indicate whether an individual should be denied bail; policymakers must predetermine the range in which a scaled score would require the revocation of bail.<sup>171</sup>

While these algorithms do evaluate individualized data points, the assessments fail to recognize that an individual may be more likely to return to court when there is adequate communication between pretrial services and the defendant regarding upcoming court dates, or when the resources needed to transport oneself to the courthouse are provided to the detainee.<sup>172</sup> Moreover, the algorithms and subsequent assessments “depend upon criminal justice data that is neither neutral nor objective.”<sup>173</sup> “[A]ctuarial tools dependent on ‘demographic, socioeconomic, family, and neighborhood variables’” will only intensify racial and socioeconomic bias, thus, further imposing bail against indigent detainees for prejudicial reasons.<sup>174</sup> While it may logically be asserted that one “might be able to fix the model faster than you can fix a judge,”<sup>175</sup> these algorithms inherently rely upon data points determined relevant by a criminal justice system that

---

<sup>169</sup> *Risk Factors Formulas*, PUB. SAFETY ASSESSMENT, <https://www.psapretrial.org/about/factors> [<https://perma.cc/LVD4-S5EY>]; see also *Bail Reform and Risk Assessment*, *supra* note 10, at 1131 (listing same factors and demonstrating how the algorithm calculates a new criminal activity score based on the six-point scale and rate of failure).

<sup>170</sup> *Bail Reform and Risk Assessment*, *supra* note 10, at 1131 (internal quotation marks omitted).

<sup>171</sup> See *id.* at 1132.

<sup>172</sup> See *id.* Resources provided to a defendant can include a bus pass. *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> Schuppe, *supra* note 162.

has been shaped by [the United States'] legacy of slavery and racial discrimination, by decades of mass incarceration, by preventative policing and profiling that targets minority communities, by a gulf between those who vote on criminal justice and those who are affected by it, and by the explicit and implicit biases of people working in the system.<sup>176</sup>

A study published by ProPublica found the formula used to determine the new criminal activity score “was particularly likely to falsely flag black defendants as future criminals, wrongly labeling them this way at almost twice the rate as white defendants.”<sup>177</sup> Additionally, the study found “[w]hite defendants were mislabeled as low risk more often than black defendants.”<sup>178</sup> The authors of the report note that as of 2016, “[t]here have been few independent studies of these criminal risk assessments.”<sup>179</sup> Of the limited studies that have been conducted, one study, which analyzed nineteen varying risk assessment tools commissioned for use in the United States, found that “in most cases, validity had only been examined in one or two studies’ and . . . ‘frequently, those investigations were completed by the same people who developed the instrument.’”<sup>180</sup>

Northpointe, a private, for-profit company that developed the risk assessment tool prominently used throughout the nation, attempted to dispute ProPublica’s findings.<sup>181</sup> In response to the dispute, ProPublica asserted, “[Northpointe] does not publicly disclose the calculations used to arrive at the defendant’s risk scores, so it is not possible for either defendants or the public to see what might be driving the disparity.”<sup>182</sup> Subsequently, Northpointe released the basics of its formula, namely, “a set of scores derived from 137 questions that are either answered by defendants or pulled from criminal records.”<sup>183</sup> The questions posed to detainees include: “Was

---

<sup>176</sup> *Bail Reform and Risk Assessment*, *supra* note 10, at 1132.

<sup>177</sup> Angwin et al., *supra* note 163 ; *see also id.* (“[S]cores assigned to more than 7,000 people arrested in Broward County, Florida, in 2013 and 2014 [were obtained] and checked to see how many were charged with new crimes over the next two years, the same benchmark used by the creators of the algorithm.”).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *See id.*; Ed Young, *A Popular Algorithm Is No Better at Predicting Crimes than Random People*, ATLANTIC (Jan. 17, 2018), <https://www.theatlantic.com/technology/archive/2018/01/equivant-compas-algorithm/550646/> [<https://perma.cc/CSC6-NXQ3>].

<sup>182</sup> *See* Angwin et al., *supra* note 163.

<sup>183</sup> *Id.*



one of your parents ever sent to jail or prison?’ ‘How many of your friends/acquaintances are taking drugs illegally?’ and ‘How often did you get in fights while at school?’”<sup>184</sup> Detainees must also indicate whether they approve of phrases like “‘A hungry person has a right to steal’ and ‘If people make me angry or lose my temper, I can be dangerous.’”<sup>185</sup>

Where studies are completed on the reliability and validity of measures of risk assessment tools by third-party researchers—as opposed to the private companies developing the software programs—disparities are being discovered at alarming rates.<sup>186</sup> In 2016, researchers Jennifer Skeem and Christopher T. Lowenkamp “examined the validity of a risk assessment tool . . . used to make probation decisions for about 35,000 federal convicts.”<sup>187</sup> The researchers noted previous studies’ findings that the risk assessment tools used produced “higher average criminal history score[]” for black defendants.<sup>188</sup> Additionally, the researchers found that biased designs of risk assessment tools generate disparities in suggested outcomes, and despite efforts to mitigate such disparities, “[t]here will always be bad instruments (e.g., tests that are poorly validated) and good instruments ‘used inappropriately (e.g., tests with strong validity evidence for one type of usage put to a different use for which there is no supporting evidence).’”<sup>189</sup>

As discussed above, the prevailing research and literature demonstrate that both conscious and unconscious biases have been built into various risk assessment tools, but supporters assert that although “the algorithms cannot fully shed the race or class bias inherent in the data, they are a net improvement over the current system in which judges’ and prosecutors’ biases are opaque and unknown.”<sup>190</sup> While states fumble with the best means of implementing bail reforms, the intrinsic bias that comes along with such tools must constantly be recognized and rejected by state lawmakers if these tools are to be utilized.

### III. THE ACLU’S INFLUENCE ON THE ADOPTION OF

---

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *See, e.g., id.*

<sup>187</sup> *Id.*

<sup>188</sup> Jennifer L. Skeem & Christopher T. Lowenkamp, *Risk, Race, & Recidivism: Predictive Bias and Disparate Impact*, 54 *CRIMINOLOGY* 680, 683 (2016).

<sup>189</sup> *Id.* at 706.

<sup>190</sup> *Bail Reform & Risk Assessment*, *supra* note 10, at 1132–33.

## REFORM INITIATIVES

In 2017, the ACLU's Campaign for Smart Justice initiated a program designed to reduce mass incarceration rates by, among other means, advocating for the termination of cash-bail and wealth-based pretrial detention practices.<sup>191</sup> This nationwide initiative includes "targeted litigation, communications, and legislative advocacy."<sup>192</sup> While the ACLU's national organization indicated its campaign would be achieved through the aforementioned strategic initiatives, state chapters of the organization have also pursued impact litigation<sup>193</sup> as their main tactic in furtherance of the agenda.<sup>194</sup>

Recently, the ACLU and similar civil rights groups have sued localities in California and Texas for discriminatory bail practices, and each states' legislature has subsequently attempted to introduce bail reform legislation.<sup>195</sup> During California's 2018 legislative session, the ACLU of California worked alongside state legislators to draft a bill that would have ended "predatory lending practices of the for-profit bail industry," while creating a race-neutral risk assessment tool.<sup>196</sup> However, during the bill's inception, state

---

<sup>191</sup> See ACLU Announces Nationwide Campaign, *supra* note 11.

<sup>192</sup> *Id.*

<sup>193</sup> Impact litigation is defined as the "[p]lanning, preparing, and filing or defending [of] law suits focused on changing laws or on the rights of specific groups of people. Impact litigation is brought or defended typically when the case affects more than one individual even if there is one individual involved." *Litigation: Impact*, HARV. L. SCH., <https://hls.harvard.edu/dept/opia/what-is-public-interest-law/public-interest-work-types/impact-litigation/> [https://perma.cc/V3RN-7UFP].

<sup>194</sup> See, e.g., Class Action Complaint at 1, 3–4, *Mock v. Glynn Cty.*, 2019 U.S. Dist. LEXIS 110723 (S.D. Ga. Mar. 9, 2018) (No. 2:18-cv-00025) (showing ACLU brought suit against Glynn County, Georgia, seeking a permanent injunction to the county's discriminatory bail system); Brief for the American Civil Liberties Union Foundation et al. as *Amici Curiae* in support of Appellees at 1–4, *O'Donnell v. Harris Cty.*, No. 17-20333 (5th Cir. Aug. 10, 2017) (showing ACLU and other state criminal justice reform organizations brought suit against Harris County's wealth-based detention system). Both cases helped the ACLU achieve their goal. See *Mock v. Glynn Cty.*, 2019 U.S. Dist. LEXIS 110723, \*2 (S.D. Ga. 2018) (quoting *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978)) (settling with the County agreeing to amend its bail policies); *O'Donnell v. Harris Cty.*, 227 F. Supp. 3d 706, 754 (S.D. Tex. 2016) (finding in favor of the plaintiffs).

<sup>195</sup> See, e.g., *In re Humphrey*, 228 Cal. Rptr. 3d 513, 522 (Cal. Ct. App. 2018) (showing lawsuit against the State of California by the Civil Rights Corps and the public defender's association); Application for Leave to File Amicus Curiae Brief and Proposed Brief of Social Scientist *Amici Curiae* in Support of Respondent Kenneth Humphrey, *In re Humphrey*, No. S247278 (Cal. Oct. 9, 2018) [hereinafter Social Scientist Brief for Respondent] (showing on appeal to the California Supreme Court, the ACLU filed an amicus brief in support of the respondent, Kenneth Humphrey); S.B. 10, 2017–2018 Leg., Reg. Sess. (Cal. 2018); H.B. 2020, 86th Leg., Reg. Sess. (Tex. 2019).

<sup>196</sup> Press Release, ACLU, ACLU of California Changes Position to Oppose Bail Reform

legislators proposed alternative methods of reform that the ACLU in turn opposed, causing the organization to withdraw its support.<sup>197</sup> In Texas, the group has actively brought lawsuits against various counties in an attempt to influence the state to adopt unbiased bail procedures and has been critical of reform efforts that seek to introduce the use of risk assessment tools in bail applications.<sup>198</sup>

A. *What Is the National Chapter of the ACLU's Stance on Insurance Companies in the Bail System and on the Shift Towards Risk Assessment Tools?*

In May 2017, the national ACLU chapter published *Selling Off Our Freedom*, a guide to understanding the role of private insurance companies in the bail system.<sup>199</sup> The guide notes that throughout the nation, fewer than ten prominent private insurance companies “underwrite a significant majority of the approximately \$14 billion in bail bonds issued in the United States each year.”<sup>200</sup> The largest global players of this elite group include Tokio Marine America, Fairfax Financial Holdings Limited, Randall & Quilter Accredited Surety, and Endeavour Capital.<sup>201</sup> In researching the industry, the ACLU found that these private insurance companies along with bond agents profit between \$1.4 and \$2.4 billion a year from individuals seeking pretrial release.<sup>202</sup> Even worse though, agents working for the bail bond companies are responsible for any losses incurred as a result of the issuance of a bail bond, so bondsmen only grant bonds to those deemed low-risk.<sup>203</sup> To ensure the bondsmen do not incur any losses, they shift any risks associated with an individual failing to return to court on to the families of those released by holding the families liable for any costs or expenses involved with the accused

---

Legislation (Aug. 20, 2018), <https://www.aclunc.org/news/aclu-california-changes-position-oppose-bail-reform-legislation> [<https://perma.cc/2GLT-CNSK>] [hereinafter ACLU of California Changes Position]; see also Cal. S.B. 10.

<sup>197</sup> See ACLU of California Changes Position, *supra* note 196.

<sup>198</sup> See, e.g., *Daves v. Dallas Cty*, 341 F. Supp. 3d 688, 690 (N.D. Tex. 2018); see also Brief for the American Civil Liberties Union Foundation et al., *supra* note 194 (supporting law suit); WOODS & ALLEN-KYLE, *supra* note 14, at 1 (“The ACLU’s goals in the pretrial context are to dramatically reduce pretrial detention, eliminate wealth-based detention, and combat bias and systemic racism.”).

<sup>199</sup> SELLING OFF OUR FREEDOM, *supra* note 29.

<sup>200</sup> *Id.* at 2.

<sup>201</sup> See *id.* at 23–24.

<sup>202</sup> *Id.* at 7.

<sup>203</sup> See *id.* at 24, 28.

jumping bail.<sup>204</sup> In 2014 and 2015, bail insurers reported zero losses, thereby demonstrating the low risk and high reward the industry yields as a result of incarcerating an individual before the detainee is ever found guilty.<sup>205</sup>

Moreover, the ACLU reported that through the lobbying efforts of the American Bail Coalition, for-profit bail insurance corporations can ensure their dominance over the legal system while maximizing profits with little to no oversight or consequence.<sup>206</sup> These for-profit bail companies rely on the American Legislative Exchange Council (ALEC) to sponsor legislation and at least twelve bills have recently passed as a result of the group's efforts, thus expanding the role of for-profit bail companies in the bail system.<sup>207</sup>

As a result of these findings, the national chapter of the ACLU has shifted its advocacy efforts towards "abolish[ing] the for-profit bail industry."<sup>208</sup> Additionally, the organization recommends that where states continue to employ for-profit bail models, "state and federal regulators, attorneys general, and legislators must immediately investigate the industry and conduct ongoing oversight."<sup>209</sup> Finally, the group urges that states must be cognizant of community needs.<sup>210</sup>

While the ACLU notes that viable alternatives to bail exist, such as through the implementation of diversion programs, or through arranging automated reminders about court appearances,<sup>211</sup> it also acknowledges that the nation is moving towards a technological approach to bail where risk assessment tools are used to make bail determinations.<sup>212</sup> Because the devil is in the details concerning the methods of coding the risk assessment algorithms, the national chapter of the ACLU urges that algorithms must be designed and

---

<sup>204</sup> *See id.* at 24.

<sup>205</sup> *See id.* at 24, 29 ("A November 2016 report by Maryland's Office of the Public Defender found that over a five-year period, 'more than \$75 million in bail bond premiums were charged in cases that were resolved without any finding of wrongdoing,' more than twice the premium charged in cases resulting in a conviction in [a] District Court.")

<sup>206</sup> *See id.* at 2, 40 ("[T]he American Legislative Exchange Council (ALEC), [a] privatization lobby[ing] group, [has] successfully writ[ten] and pass[ed] their own custom laws in state legislatures nationwide, while very effectively derailing alternatives and reforms.")

<sup>207</sup> *See id.* at 9, 40.

<sup>208</sup> *Id.* at 46.

<sup>209</sup> *Id.*

<sup>210</sup> *See id.*

<sup>211</sup> *See id.* at 47.

<sup>212</sup> *See* Diana Budds, *Biased AI Is a Threat to Civil Liberties. The ACLU Has a Plan to Fix It*, FAST CO. (July 25, 2017), <https://www.fastcompany.com/90134278/biased-ai-is-a-threat-to-civil-liberty-the-aclu-has-a-plan-to-fix-it> [<https://perma.cc/NW6A-S2VT>].

implemented to ensure “algorithmic accountability.”<sup>213</sup> The organization has acknowledged that artificial intelligence (AI) tools are not perfect but, “by making a commitment to antiracist and egalitarian values and frameworks for accountability, . . . well-intended reformers [can] ensure that these new tools are used for the public good.”<sup>214</sup> This commitment requires oversight, which can be accomplished through algorithmic impact assessments (AIAs).<sup>215</sup> The goal of such assessments would be to (1) “[p]rovide the public with information about the systems that decide their fate”; (2) “[g]ive external researchers meaningful access to review and audit systems”; (3) “[i]ncrease public agencies’ capacity and expertise to assess fairness, due process, and disparate impact in automated decision systems”; and (4) “[s]trengthen due process by offering the public the opportunity to engage with the AIA process before, during, and after the assessment.”<sup>216</sup> This oversight, initially taken by watchdog groups such as the ACLU, and eventually by the public,<sup>217</sup> would ultimately decrease the discriminatory application of bail decisions determined by risk assessment tools.<sup>218</sup>

Despite the availability of mechanisms for oversight, in March of 2019, the ACLU released a report entitled *A New Vision for Pretrial Justice in the United States*, asserting that “[t]he ACLU [now] rejects the use of risk assessment instruments to inform or support decisions about who loses their liberty after an arrest.”<sup>219</sup> The report goes on to note that “[r]isk assessment instruments have not been shown to fix bias in pretrial decision-making, even as a supplement to decisions made by judges.”<sup>220</sup> In place of commissioning risk

---

<sup>213</sup> See Vincent Southerland, *With AI and Criminal Justice, the Devil Is in the Data*, ACLU (Apr. 9, 2018, 11:00 AM), <https://www.aclu.org/issues/privacy-technology/surveillance-technologies/ai-and-criminal-justice-devil-data> [<https://perma.cc/ALC3-DTLW>].

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* Algorithmic Impact Assessments are a framework proposed by AI Now, and are designed to “hold public agencies accountable to their automated decision-making.” *Id.*; see also AI Now Institute, *Algorithmic Impact Assessments: Toward Accountable Automation in Public Agencies*, MEDIUM (Feb. 21, 2018), <https://medium.com/@AINowInstitute/algorithmic-impact-assessments-toward-accountable-automation-in-public-agencies-bd9856e6fdde> [<https://perma.cc/AG4T-4KY6>] [hereinafter *Algorithmic Impact Assessments*] (describing AIAs and their goals).

<sup>216</sup> *Algorithmic Impact Assessments*, *supra* note 215.

<sup>217</sup> See, e.g., *id.*; *Research*, AI NOW INSTITUTE, <https://ainowinstitute.org/research.html> [<https://perma.cc/TP8H-7G7L>]; Southerland, *supra* note 213.

<sup>218</sup> See, e.g., DILLON REISMAN ET AL., ALGORITHMIC IMPACT ASSESSMENTS: A PRACTICAL FRAMEWORK FOR PUBLIC AGENCY ACCOUNTABILITY 7, 12, 21 (2018), <https://ainowinstitute.org/aiareport2018.pdf> [<https://perma.cc/U633-H527>].

<sup>219</sup> WOODS & ALLEN-KYLE, *supra* note 14, at 1.

<sup>220</sup> *Id.*

assessment tools created by private companies, thereby perpetuating private profiteering in systems of bail, the ACLU recommends, among other things,

reduc[ing] the harms of the pretrial process[,] . . . [e]liminat[ing] pretrial profiteering[,] . . . [c]reat[ing] a wide net of people eligible for mandatory and presumptive pre-booking release with no conditions[,] . . . [and] [f]acilitat[ing] speedy individualized release hearings—distinct from “detention hearings”—with necessary due process protections.<sup>221</sup>

Through the implementation of such reforms, the ACLU notes that “95 percent of people [will be] released before trial.”<sup>222</sup> Consequently, after the release of the March 2019 report, the ACLU has restructured its advocacy efforts towards policies that abate the use of risk assessment tools.<sup>223</sup>

*B. What Are the ACLU’s Reform Efforts in California?*

On August 28, 2018, after forty years of attempting to reform its system of bail, California state legislators signed Senate Bill 10 (“SB 10”), a bill abolishing the state’s monetary bail system.<sup>224</sup> The bill purportedly came as a response to *In re Humphrey*,<sup>225</sup> a state court case where a sixty-three-year-old man was held on a \$600,000 bail

---

<sup>221</sup> *Id.* at 1–4.

<sup>222</sup> *Id.* at 1, 9.

<sup>223</sup> See Southerland, *supra* note 213.

<sup>224</sup> See *In re Humphrey*, 228 Cal. Rptr. 3d 513, 516 (Ct. App. 2018) (“[T]he Legislature initiated action. Senate Bill No. 10 (2017–2018 Reg. Sess.), the California Money Bail Reform Act of 2017, was introduced at the commencement of the current state legislative session. The measure, still before the Legislature, opens with the declaration that modernization of the pretrial system is urgently needed in California, where thousands of individuals held in county jails across the state have not been convicted of a crime and are awaiting trial simply because they cannot afford to post money bail or pay a commercial bail bond company.”); NAT’L TASK FORCE ON FINES, FEES, AND BAIL PRACTICES, BAIL REFORM: A PRACTICAL GUIDE BASED ON RESEARCH AND EXPERIENCE 23 (2019), <https://www.ncsc.org/~media/Files/PDF/Topics/Fines%20and%20Fees/format%20revisions/Bail%20reform%20guide%203%2012%2019.ashx> [<https://perma.cc/5ST7-QNGR>] [hereinafter BAIL REFORM, A PRACTICAL GUIDE]; Vanessa Romo, *California Becomes First State to End Cash Bail After 40-Year Fight*, NPR (Aug. 28, 2018, 10:49 PM), <https://www.npr.org/2018/08/28/642795284/california-becomes-first-state-to-end-cash-bail> [<https://perma.cc/CYP9-MF4F>].

<sup>225</sup> See Ashley Mullen, *Incarceration or E-Carceration: California’s SB 10 Bail Reform and the Potential Pitfalls for Pretrial Detainees* (May 2019) (submitted for Cornell Law Library Prize for Exemplary Student Research Papers), <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1016&context=cclsrp> [<https://perma.cc/Y8M5-LUZP>].

for allegedly stealing a bottle of cologne and \$5.<sup>226</sup> The California Court of Appeal for the First Appellate District held the state's cash-bail system was unconstitutional as it denied indigent defendants their Fourteenth Amendment right to due process and equal protection by incarcerating such individuals based solely on their socioeconomic status.<sup>227</sup> In dicta, the court noted,

Money bail . . . has no logical connection to protection of the public, as bail is not forfeited upon commission of additional crimes. Money bail will protect the public only as an incidental effect of the defendant being detained due to his or her inability to pay, and this effect will not consistently serve a protective purpose, as a wealthy defendant will be released despite his or her dangerousness while an indigent defendant who poses minimal risk of harm to others will be jailed.<sup>228</sup>

While the Civil Rights Corps and San Francisco's Public Defender's Office brought the suit against the Attorney General of California, the ACLU, along with several other groups, filed *amicus curiae* briefs in support of Mr. Humphrey.<sup>229</sup> The ACLU's brief "address[ed] the issue of preventive detention under the California Constitution,"<sup>230</sup> arguing pursuant to article I, section 12, the California Constitution only permits pretrial detention in a limited set of cases, for which SB 10 explicitly restricts.<sup>231</sup> Further, a group of social scientists submitted a brief reiterating the pervasive effects that incarceration has on an individual's physical well-being as well as on the case disposition.<sup>232</sup> The brief asserts that "pretrial detention increases the severity of the sentences defendants receive" and that "pretrial detention increases the probability of receiving a jail sentence among misdemeanor defendants."<sup>233</sup>

---

<sup>226</sup> See *In re Humphrey*, 228 Cal. Rptr. 3d at 518–19. The \$600,000 amount initially ordered was subsequently reduced to \$350,000. *Id.* at 522.

<sup>227</sup> See *id.* at 523, 544–45.

<sup>228</sup> *Id.* at 528–29.

<sup>229</sup> *Id.* at 517–18; Application for Leave to File *Amici* Brief and Proposed Brief of *Amici Curiae* ACLU of Northern California, et al. in Support of Respondent Kenneth Humphrey, *In re Humphrey*, No. S247278 (Cal. Oct. 9, 2018) [hereinafter ACLU Amicus Brief for Respondent].

<sup>230</sup> ACLU Amicus Brief for Respondent, *supra* note 229, at 12.

<sup>231</sup> See *id.* at 14.

<sup>232</sup> See Social Scientist Brief for Respondent, *supra* note 195, at 3, 7.

<sup>233</sup> *Id.* at 12; see also Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J.L. & ECON. 529, 530–31 (2017).

Prior to the commencement of *In re Humphrey*, the ACLU of Northern California, along with several other social justice organizations, state legislators, the governor, and the chief justice of the California Supreme Court, sought to introduce legislation reforming California's bail system.<sup>234</sup> The intent of the bill was to "require, among other things, that pretrial services conduct individualized assessments and [to ensure] that no one is incarcerated solely on inability to pay."<sup>235</sup> After negotiations ended and drafts were circulated, the proposed bill, known as SB 10, vastly differed from the proposed legislation that the ACLU of Northern California had initially sponsored and supported.<sup>236</sup> Under SB 10, which was to take effect in October 2019, local courts would have been required to subject persons charged with felonies "to a pretrial risk assessment conducted by Pretrial Assessment Services."<sup>237</sup> Additionally, the bill required local "courts to establish [the] pretrial assessment services."<sup>238</sup> This would have resulted in elected judges having "a significant amount of control over the development of [the risk] assessment tools, and [would have given] judges a lot of control to decide who is detained."<sup>239</sup> Although the law was passed, a ballot initiative will now go to voters in the November 2020 election as a result of public backlash surrounding the bill.<sup>240</sup> "Needing 365,880 signatures by registered voters within 90 days [of the bill's enactment], a coalition called Californians Against the Reckless Bail Scheme picked up more than 575,000 signatures in 70 days to put SB 10 on the November 2020 ballot . . . ."<sup>241</sup>

---

<sup>234</sup> See ACLU, BAIL REFORM ACTIVIST TOOLKIT: A GUIDE TO TAKING ACTION ON THE CALIFORNIA MONEY BAIL REFORM ACT (2017) [hereinafter ACLU ACTIVIST TOOLKIT], <https://www.aclunc.org/sites/default/files/ActivistToolkit-8%2010%2017.pdf> [<https://perma.cc/F3C5-YHT3>]; *Bail: Pretrial Release (SB 10)*, ACLU, <https://www.aclunc.org/our-work/legislation/bail-pretrial-release-sb-10> [<https://perma.cc/44FU-PGFK>].

<sup>235</sup> ACLU ACTIVIST TOOLKIT, *supra* note 234.

<sup>236</sup> ACLU of California Changes Position, *supra* note 196 ("Unfortunately, this amended version of SB 10 is not the model for pretrial justice and racial equity that the ACLU of California envisioned, worked for, and remains determined to achieve. We oppose the bill because it seeks to replace the current deeply-flawed system with an overly broad presumption of preventative detention.").

<sup>237</sup> S.B. 10, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

<sup>238</sup> *Id.*

<sup>239</sup> Scott Shackford, *ACLU Turns Against California Bail Reform Bill It Helped Craft*, REASON (Aug. 20, 2018, 4:30 PM), <https://reason.com/2018/08/20/aclu-turns-against-california-bail-reform/> [<https://perma.cc/RXF5-C7H9>].

<sup>240</sup> See Michael McGough, *The Fate of California's Cash Bail Industry Will Now Be Decided on the 2020 Ballot*, SACRAMENTO BEE (Jan. 17, 2019, 12:04 PM), <https://www.sacbee.com/news/state/california/article224682595.html>.

<sup>241</sup> *Id.*



Among those actively advocating against the enactment of SB 10 has been the ACLU.<sup>242</sup> An original sponsor and supporter, the ACLU's Northern California chapter withdrew support when legislators shifted SB 10's purpose "to replace the current deeply-flawed system with an overly broad presumption of preventative detention."<sup>243</sup> Specifically, the organization could not support the bill provided that the algorithms built into the risk assessment tools would not protect against racial bias.<sup>244</sup> Risk assessment algorithms cannot adequately protect against racial bias because they are likely to consider factors such as arrests without convictions.<sup>245</sup> Such considerations would specifically target and affect communities of color given that minority communities are overpoliced, resulting in higher arrest rates among nonwhites than whites.<sup>246</sup> In evaluating this factor, the disparity in bail applications would be greater for minorities living in overpoliced communities, as they would be given a higher score indicating that bail should be outright denied.<sup>247</sup> Moreover, each county would be given discretion in creating its own tools, or to purchase a predesigned algorithm from an established company or nonprofit.<sup>248</sup> This would ultimately allow counties to purchase or create predatory algorithms that have built-in biases.<sup>249</sup>

In a press release explaining why the ACLU chose to withdraw support, the chapter stated that SB 10 "falls short of critical bail reform goals and compromises . . . fundamental values of due process and racial justice."<sup>250</sup> While advocating against the bill in its current form has aligned the ACLU with the interests of the for-profit bail industry, the interests of each remain distinct and the ACLU of Northern California has vowed to continue to support bail reform and

---

<sup>242</sup> See Press Release, Abdi Sontani, Executive Director, ACLU of N. Cal., ACLU of Northern California Statement on Referendum to Repeal Bail Reform Legislation (Nov. 20, 2018) <https://www.aclunc.org/news/aclu-northern-california-statement-referendum-repeal-bail-reform-legislation> [<https://perma.cc/YM6G-S33J>] [hereinafter ACLU of Northern California Statement].

<sup>243</sup> ACLU of California Changes Position, *supra* note 196.

<sup>244</sup> See *id.*

<sup>245</sup> See "Not in it for Justice": How California's Pretrial Detention and Bail System Unfairly Punishes Poor People, HUM. RTS. WATCH (Apr. 11, 2017), <https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly> [<https://perma.cc/N47W-KAYC>]; Shackford, *supra* note 239.

<sup>246</sup> See "Not in it for Justice": How California's Pretrial Detention and Bail System Unfairly Punishes Poor People, *supra* note 245.

<sup>247</sup> See *id.*

<sup>248</sup> See S.B. 10, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

<sup>249</sup> See *supra* Section II.B.3.

<sup>250</sup> ACLU of California Changes Position, *supra* note 196.

racial justice efforts throughout the state.<sup>251</sup> If California's ultimate goal is to abolish predatory bail practices, it must once again work alongside the ACLU, and similar social justice groups, to ensure that risk assessment tools are not employed as yet another way to discriminate against indigent and nonwhite detainees.

While proponents of SB 10 deem the legislative action "the biggest victory this nation's ever seen with respect to money bail," others urge that "if you give up an opportunity for a substantial reduction in the jail population by passing a watered-down reform, then you may give up an opportunity to revisit that issue for another 20 years."<sup>252</sup> Until voters decide the issue in 2020, California is now left with varying practices of bail, as numerous counties have adopted risk assessment tools, whereas other counties continue to rely on bail schedules.<sup>253</sup> In the interim, the ACLU and similar groups "will continue to vigorously support efforts that move California forward, advance racial justice and create a pretrial justice system wherein freedom from unnecessary detention is the norm."<sup>254</sup>

### C. *What Are the ACLU's Reform Efforts in Texas?*

In Texas, federal judges have dubbed Harris and Dallas Counties' bail practices unconstitutional, sparking a statewide conversation about whether a bail reform initiative needs to pass the state legislature.<sup>255</sup> In *O'Donnell v. Harris County*, a class-action suit brought by the Texas Fair Defense Project and Equal Justice Under Law,<sup>256</sup> Chief U.S. District Judge Lee H. Rosenthal found that bail policies in Harris County were unconstitutional as they violated the Equal Protection and Due Process Clauses of the Constitution.<sup>257</sup>

---

<sup>251</sup> See ACLU of Northern California Statement, *supra* note 242 ("Make no mistake, the bail industry is not interested in equal justice or equal protection under the law, they are seeking to turn back the clock to protect their bottom line. Furthermore, any implicit or explicit suggestion that the ACLU stands with or supports the bail industry is patently false.").

<sup>252</sup> Jeremy B. White, *California Ended Cash Bail. Why Are so Many Reformers Unhappy About It?*, POLITICO (Aug. 29, 2019), <https://www.politico.com/magazine/story/2018/08/29/california-abolish-cash-bail-reformers-unhappy-219618> [<https://perma.cc/3TKG-J999>].

<sup>253</sup> See *id.*

<sup>254</sup> ACLU of Northern California Statement, *supra* note 242.

<sup>255</sup> See *Daves v. Dallas Cty.*, 341 F. Supp. 3d 688, 697 (N.D. Tex. 2018); *O'Donnell v. Harris Cty.*, 251 F. Supp. 3d 1052, 1067 (S.D. Tex. 2017); Jolie McCullough, *Texas House Approves Bail Reform Bill After Removing Amendment that Could Keep More Poor People in Jail*, TEX. TR. (May 8, 2019), <https://www.texastribune.org/2019/05/09/texas-house-passes-bill-reforming-bail/> [<https://perma.cc/9HEY-CHYH>].

<sup>256</sup> See *O'Donnell*, 251 F. Supp. 3d 1052.

<sup>257</sup> See *id.* at 1160.

Judges in Harris County, one of the most populous counties in the nation,<sup>258</sup> were found to be sentencing individuals arrested on misdemeanor charges, who were unable to afford bail, for longer periods of time than those financially able to afford bail.<sup>259</sup> Chief Judge Rosenthal also found that “of the 50,000 people arrested in Harris County on Class A or Class B misdemeanors in 2015, fewer than 10 percent were released on unsecured personal bonds.”<sup>260</sup> Thus, “even if hearing officers were not acting deliberately, the county had been using money bail as a form of preventive detention.”<sup>261</sup> In light of such findings, Chief Judge Rosenthal issued a temporary injunction requiring Harris County to release all individuals charged with misdemeanor offenses without bail.<sup>262</sup>

In 2018, the Fifth Circuit reviewed the decision on appeal.<sup>263</sup> While the ACLU was not a party to the original suit, the national chapter and the ACLU Foundation of Texas filed an *amicus curiae* brief in support of Chief Judge Rosenthal’s original decision.<sup>264</sup> Upon review, the Fifth Circuit found that the injunction was overbroad, and instructed the lower court to refine the injunction.<sup>265</sup> On remand, Chief Judge Rosenthal asserted that during bail hearings,

an impartial decisionmaker must conduct an individual[ized] assessment of whether the prescheduled or other amount of secured money bail, or other financial condition of release, is needed and adequate to provide sufficient sureties or whether nonfinancial conditions of release will reasonably assure appearance and public safety.

. . . .

The purpose of this requirement is to provide each

---

<sup>258</sup> See *Texas Counties by Population*, TEX. DEMOGRAPHICS, [https://www.texas-demographics.com/counties\\_by\\_population](https://www.texas-demographics.com/counties_by_population) [<https://perma.cc/SCM2-PBR3>].

<sup>259</sup> See *ODonnell*, 251 F. Supp. 3d at 1106.

<sup>260</sup> Gabrielle Banks, *Harris County Bail System Unconstitutional, Federal Judge Rules*, HOUSTON CHRON. (Apr. 28, 2017, 4:29 PM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-bail-system-unconstitutional-11108210.php> [<https://perma.cc/79V2-XA4P>].

<sup>261</sup> *Id.*; see also *ODonnell*, 251 F. Supp. 3d at 1111 (“In Harris County, secured financial conditions of release in misdemeanor cases effectively function as detention orders only against the indigent.”).

<sup>262</sup> See *ODonnell*, 251 F. Supp. 3d at 1161.

<sup>263</sup> *ODonnell v. Harris Cty.*, 892 F.3d 147, 152 (5th Cir. 2018).

<sup>264</sup> See Brief for the American Civil Liberties Union Foundation et al. as *Amici Curiae* Supporting Appellees at 27, *ODonnell v. Harris Cty.*, 892 F.3d 147 (2018) (No. 17-20333).

<sup>265</sup> See *ODonnell*, 892 F.3d at 164 (quoting *Doe v. Veneman*, 380 F.3d 807, 818 (5th Cir. 2004)).

misdemeanor arrestee timely protection for the state-created liberty interest in being bailable by sufficient sureties and to prevent the automatic imposition of prescheduled or other secured money bail unless each misdemeanor arrestee has received adequate process to ensure individualized consideration of whether any secured financial condition of release is needed to provide sufficient sureties.<sup>266</sup>

Civil Rights Corps, one of the original legal groups to bring the *ODonnell* suit, found that “[a]s of June 2018, over 11,500 people had been released from the Harris County jail pursuant to the court’s preliminary injunction, and many more were released as a result of changed practices.”<sup>267</sup>

Judges in Dallas County were subsequently accused of imposing predetermined bail bond amounts without consideration of the financial status of the accused.<sup>268</sup> In *Daves v. Dallas County*, the ACLU and other civil rights groups filed a class-action lawsuit predicated on the *ODonnell* decision.<sup>269</sup> The court found that following an arrest,

[v]ideo evidence . . . reveal[ed] that arraignments typically last[ed] under 30 seconds, and consist[ed] of the Magistrate Judge: (1) calling the arrestee by name, (2) informing the arrestee of the crime he or she is accused of and the bail associated with that crime, and (3) asking the arrestee if he or she is a United States citizen.<sup>270</sup>

U.S. District Court Judge Godbey’s opinion acknowledged that “[w]ealthy arrestees—regardless of the crime they are accused of—who are offered secured bail can pay the requested amount and leave.

---

<sup>266</sup> *ODonnell v. Harris Cty.*, No. H-16-1414, 2018 U.S. Dist. LEXIS 101653, at \*20–21 (S.D. Tex. June 18, 2018).

<sup>267</sup> *Harris County, Tx.: Bail*, CIV. RIGHTS CORPS, <https://www.civilrightscorps.org/work/wealth-based-detention/harris-county-tx-bail> [<https://perma.cc/5ZA3-JDUR>]; see also Banks, *supra* note 260.

<sup>268</sup> See *Daves v. Dallas Cty.*, 341 F. Supp. 3d 688, 690 (N.D. Tex. 2018); Jolie McCullough, *Federal Judge Rules Against Dallas County Bail Practices*, TEX. TR. (Sept. 20, 2018, 9:00 PM), <https://www.texastribune.org/2018/09/20/dallas-bail-sytem-judge-order/> [<https://perma.cc/DT9X-9G96>] (“Most jurisdictions in Texas and the country, including Dallas, rely primarily on a money bail system, where defendants can pay a bond amount set by a fixed schedule for their release. If they can’t pay, they’re often stuck in jail.”).

<sup>269</sup> *Daves*, 341 F. Supp. 3d at 690, 697–98.

<sup>270</sup> *Id.* at 692.

Indigent arrestees in the same position cannot.”<sup>271</sup> The court granted a preliminary injunction.<sup>272</sup>

In August 2018, despite the findings in Harris and Dallas Counties of discriminatory bail practices, Governor Greg Abbott announced the Damon Allen Act, which proffered “a set of proposals to reform the bail system in Texas to protect law enforcement and enhance public safety.”<sup>273</sup> The proposal came after an individual who was released on a \$15,500 bond for previous charges of assault allegedly shot a Texas state trooper in 2017.<sup>274</sup> At the bond hearing, the judge was unaware that the defendant had previously been convicted and the decision to release the accused was based solely on the crime brought before the judge.<sup>275</sup> In his proposal, Governor Abbott advocated for “judges and magistrates who set bail [to] be informed of the defendant’s full criminal history” and that “a statewide case management system” should be implemented “so judges and magistrates would have all the relevant information at bail settings.”<sup>276</sup> Further, the proposal urged that judges must consider “the safety of law enforcement . . . when setting bail.”<sup>277</sup>

Following the proposal, State Senator John Whitmire and State Representative Andrew Murr introduced Senate Bill 628 (“SB 628”), a bipartisan effort, to reform Texas’s current state of bail.<sup>278</sup> If passed, the bill will require judges in each respective county to implement risk assessment tools during bail hearings.<sup>279</sup> While the

---

<sup>271</sup> *Id.* at 694.

<sup>272</sup> *See id.* at 697–98.

<sup>273</sup> *Governor Abbott Announces “Damon Allen Act”*, ABBOTT GOVERNOR (Aug. 7, 2018), <https://www.gregabbott.com/governor-abbott-announces-damon-allen-act/> [https://perma.cc/4XFT-KTWN].

<sup>274</sup> Jolie McCullough, *Gov. Greg Abbott’s Influence Has Shifted Texas Bail Reform Efforts Toward a Bill that Would Give Him More Control*, TEX. TR. (Mar. 18, 2019, 12:00 PM), <https://www.texastribune.org/2019/03/18/bail-reform-texas-legislature-damon-allen-act-bills/> [https://perma.cc/G29Q-UCT7].

<sup>275</sup> *See* Jolie McCullough, *Tex. Gov. Greg Abbott Proposes Bail Reform After Death of DPS Trooper*, LONGVIEW NEWS-J. (Aug. 7, 2018), [https://www.news-journal.com/texas-gov-greg-abbott-proposes-bail-reform-after-death-of/article\\_f0c0f614-9a91-11e8-a0a9-975b3ddc333d.html](https://www.news-journal.com/texas-gov-greg-abbott-proposes-bail-reform-after-death-of/article_f0c0f614-9a91-11e8-a0a9-975b3ddc333d.html) [https://perma.cc/SB5C-9ANK] [hereinafter McCullough, *Tex. Gov.*].

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *See* S.B. 628, 86th Leg., Reg. Sess. (Tex. 2019); Jolie McCullough, *Courts Have Called Texas Bail Practices Unconstitutional. Will That Push This Year’s Reform Efforts to Success?*, FORT WORTH BUS. PRESS (Feb. 4, 2019), [http://www.fortworthbusiness.com/news/courts-have-called-texas-bail-practices-unconstitutional-will-that-push/article\\_d7c06454-28c3-11e9-a762-63c162a896d6.html](http://www.fortworthbusiness.com/news/courts-have-called-texas-bail-practices-unconstitutional-will-that-push/article_d7c06454-28c3-11e9-a762-63c162a896d6.html) [https://perma.cc/4GGV-LRS6] [hereinafter McCullough, *Courts Have Called Texas Bail Practices Unconstitutional*].

<sup>279</sup> *See* Tex. S.B. 628 § 3; McCullough, *Courts Have Called Texas Bail Practices Unconstitutional*, *supra* note 278.

bill does differ from that of Governor Abbott's proposal, it includes the proposal to "inform[] judicial officers of a defendant's full criminal history and [requires magistrates and judges to] weigh[] law enforcement safety in bail decisions."<sup>280</sup>

Despite bipartisan support for SB 628, critics stress that questions meant to weigh the safety of law enforcement officers in risk assessment algorithms that will ultimately decide whether or not to release an individual on bail are inherently discriminatory.<sup>281</sup> One such critic, Tarsha Jackson,

[the] criminal justice director of the Texas Organizing Project, a nonprofit that advocates for low-income communities and people of color, said that . . . giving special consideration to charges like evading arrest or assault on law enforcement—charges that can be used by officers to harass black and Latino defendants—would only hurt those who are most vulnerable to the cash bail system.<sup>282</sup>

Additionally, in March 2019, Texas State Representative Kyle Kacal introduced a second Damon Allen Act, House Bill 2020 ("HB 2020"), requiring that "[a] pretrial risk assessment of the defendant shall be conducted using a standardized risk assessment tool developed by the Bail Advisory Program."<sup>283</sup> This bill requires the governor's office to establish the program's algorithm, noting that any "relevant facts or circumstances may be considered" in addition to the result of the risk assessment and the factors already enumerated in the relevant statute.<sup>284</sup> Critics of the bill note that while the legislation "requires a risk-assessment tool, . . . [the bill] lacks details about how the tool would be used. It's also depressingly vague about keeping people from unnecessarily languishing in jail pretrial. There are no guidelines or specifics."<sup>285</sup>

---

<sup>280</sup> See McCullough, *Courts Have Called Texas Bail Practices Unconstitutional*, *supra* note 278; *see also* Tex. S.B. 628 § 5.

<sup>281</sup> See McCullough, *Courts Have Called Texas Bail Practices Unconstitutional*, *supra* note 278; McCullough, *Tex. Gov.*, *supra* note 275.

<sup>282</sup> McCullough, *Tex. Gov.*, *supra* note 275.

<sup>283</sup> H.B. 2020 § 3, 86th Leg., Reg. Sess. (Tex. 2019); *Greg Abbott Undermines Criminal Justice Reform*, MY SAN ANTONIO (Apr. 1, 2019, 4:58 PM), <https://www.mysanantonio.com/opinion/editorials/article/Greg-Abbott-undermines-criminal-justice-reform-13733225.php> [<https://perma.cc/MC9P-ALB8>].

<sup>284</sup> Tex. H.B. 2020 §§ 3, 4; *see Greg Abbott Undermines Criminal Justice Reform*, *supra* note 283.

<sup>285</sup> *Greg Abbott Undermines Criminal Justice Reform*, *supra* note 283.

Currently, SB 628 has not been passed by the Texas Senate and has been adjourned *sine die*.<sup>286</sup> HB 2020, however, has been passed by the House on May 10, 2019 and was received by the Senate on May 13, 2019.<sup>287</sup> Because the Texas legislative session ended on May 27, 2019, HB 2020 was also adjourned *sine die*.<sup>288</sup> Whether the bill will pass the Texas Senate and proceed to Governor Abbott for a vote will be left for the 2020 legislative session.<sup>289</sup> Regardless of whether the bill passes or dies in that session, this is the second time that bail reform initiatives have been brought before the Texas legislature during recent sessions.<sup>290</sup> However, unlike previous proposals, this is the first year in which there is also political pressure from the governor and from civil rights groups to amend the state's bail reform policy.<sup>291</sup>

Despite reform efforts that promote a presumption of preventative detention, the ACLU's statewide chapter has made its presence known through its use of targeted impact litigation.<sup>292</sup> After the *ODonnell* and *Daves* decisions, the ACLU has continued to bring class-action lawsuits against counties across Texas in pursuit of driving bail reform.<sup>293</sup> Additionally, a senior staff attorney at the ACLU, Trisha Trigilio, has begun sending letters to county officials suggesting measures that can be "take[n] to avoid a lawsuit, such as ending pretrial detention for misdemeanor and state jail felony

---

<sup>286</sup> See *TX SB628*, LEGISCAN, <https://legiscan.com/TX/bill/SB628/2019> [<https://perma.cc/LP4T-AVBT>].

<sup>287</sup> See *TX HB2020*, LEGISCAN, <https://legiscan.com/TX/bill/HB2020/2019> [<https://perma.cc/H6YA-MTK3>].

<sup>288</sup> See 86TH LEGISLATURE, REGULAR SESSION DEADLINES FOR ACTION UNDER HOUSE AND SENATE RULES (2019), <https://capitol.texas.gov/tlodocs/DeadlineActionCalendar.pdf> [<https://perma.cc/PW7Q-AC79>]; *TX SB2020*, *supra* note 287.

<sup>289</sup> See American-Statesman Editorial Bd., *Editorial: Texas Lawmakers Fixed Some Policies, Left Others Broken*, STATESMAN (May 28, 2019, 4:17 PM), <https://www.statesman.com/opinion/20190528/editorial-texas-lawmakers-fixed-some-policies-left-others-broken> [<https://perma.cc/T49C-N9CW>].

<sup>290</sup> See S.B. 1338, 85th Leg., Reg. Sess. (Tex. 2017); see also McCullough, *Courts Have Called Texas Bail Practices Unconstitutional*, *supra* note 278 ("Whitmire blamed his 2017 bill's failure on the powerful bail bond industry . . . He said last session that bail bond companies opposed the bill because it would cut into their cash flow . . .").

<sup>291</sup> See McCullough, *Courts Have Called Texas Bail Practices Unconstitutional*, *supra* note 278; Greg Abbott *Undermines Criminal Justice Reform*, *supra* note 283 ("Abbott has thrown his weight behind a second Damon Allen Act . . .").

<sup>292</sup> See ACLU Announces Nationwide Campaign, *supra* note 11; *supra* notes 193–195 and accompanying text.

<sup>293</sup> See, e.g., Twyla Carter, *The Case Against Galveston County's Pretrial Detention System Survives the Government's Challenge*, ACLU (Jan. 18, 2019, 5:30 PM), <https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/case-against-galveston-countys-pretrial-detention> [<https://perma.cc/QP3V-B649>].

arrests.”<sup>294</sup> When counties cease to cooperate, litigation ensues.<sup>295</sup> If the counties or the Texas legislature choose not to heed the advice or efforts of the ACLU, the group will likely continue to push for reform through impact litigation and lobbying efforts as it has done in California.

### CONCLUSION

By acknowledging the differing political perceptions that individual states have from that of the nation, the ACLU and similar social justice organizations have been able to tailor advocacy efforts to the specific needs of communities and localities.<sup>296</sup> This has proven to be an effective method at compelling reform as these organizations have been able to induce discussions and reform efforts through impact litigation and lobbying strategies.<sup>297</sup> While states such as California and Texas still have a long way to go in developing and implementing just and unbiased systems of bail, the idea of reform in the United States is no longer novel.

With states across the country working to implement varying means of bail reform, it is critical to assess and eliminate implicit bias at every stage.<sup>298</sup> For advocacy efforts to effectively target and eliminate pretrial bias and discrimination, legislators, judges, and activists must concede that pretrial detention based on community safety encumbers the presumption of innocence by encouraging preventative detention.<sup>299</sup> Additionally, until states acknowledge that the current systems of bail disenfranchise and discriminate against people of color, the country cannot move towards meaningful reform. Such an acknowledgment requires consideration of the fact that institutionalized racism is the backbone of the United States’

---

<sup>294</sup> Michael Barajas, *Galveston Lawsuit Is Writing on the Wall for Other Counties that Haven’t Ended ‘Wealth-Based Detention’*, TEX. OBSERVER (Apr. 10, 2018, 2:38 PM), <https://www.texasobserver.org/galveston-lawsuit-is-writing-on-the-wall-for-other-counties-that-havent-ended-wealth-based-detention/> [<https://perma.cc/75YC-KW9E>].

<sup>295</sup> *See, e.g., id.*

<sup>296</sup> *See* CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCH., MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 4 (2016), <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf> [<https://perma.cc/4E9X-PU4B>].

<sup>297</sup> *See, e.g.,* Barajas, *supra* note 294.

<sup>298</sup> *See, e.g.,* Southerland, *supra* note 213.

<sup>299</sup> *See id.* (“Any system that relies on criminal justice data must contend with the vestiges of slavery, de jure and de facto segregation, racial discrimination, biased policing, and explicit and implicit bias, which are part and parcel of the criminal justice system. Otherwise, . . . automated tools will simply exacerbate, reproduce, and calcify the biases they are meant to correct.”).



criminal justice system, and to eliminate pretrial bias, the entire criminal justice system must be overhauled.<sup>300</sup>

Because the existing research and literature regarding risk assessment tools demonstrate that the algorithms predominantly used across the nation fail to eliminate bias in the pretrial stage, reform efforts must evolve to reflect the growing concern of machine bias.<sup>301</sup> Simply put, reform efforts implementing risk assessments are inadequate; to determine whether an individual is eligible for bail predicated on factors such as the zip code of their residence or the incarceration status of their parents repackages bail to place the bias on the machine instead of the judge.<sup>302</sup> Consequently, to create meaningful reform, states must work alongside civil rights groups, such as the ACLU, to ensure that new policies and reform efforts do not merely rebrand age-old discriminatory bail tactics. If states do not heed the advice of civil rights groups, costly litigation will ensue and the sentiment of creating effective bail reform will be in vain.

---

<sup>300</sup> See *Racial Justice, What's at Stake*, ACLU, <https://www.aclu.org/issues/racial-justice> [<https://perma.cc/Y5A2-HWMK>]; Sherman & Abrams, *supra* note 33.

<sup>301</sup> See *supra* note 10 and accompanying text.

<sup>302</sup> See Southerland, *supra* note 213; *supra* note 184 and accompanying text.