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NJ Bail Reform: Addressing Wealth Inequality but Not Racial Disparities

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TABLE OF CONTENTS

I.	<u>INTRODUCTION</u>	1
II.	<u>THE HISTORY OF BAIL AND CALLS FOR REFORM IN THE U.S.</u>	3
A.	The History of Bail Reform in the United States	3
B.	Rationales for New Bail Reform	5
III.	<u>NEW JERSEY INSTITUTES BAIL REFORM</u>	8
A.	The Joint Committee on Criminal Justice	8
B.	The Criminal Justice Reform Act	9
C.	The First 48 Hours	10
D.	The Pretrial Detention Hearing	11
E.	Amendments to the Act- Broad Discovery in Pretrial Hearings	12
F.	New Jersey’s Pretrial Risk Assessment Tool (The Public Safety Assessment)	13
G.	Impact of New Jersey’s Bail Reform	15
IV.	<u>NEW JERSEY’S BAIL REFORMS UNDER A MICROSCOPE</u>	16
A.	Assessing the Early Returns of NJ’s Reforms Against the Original Rationales	16
B.	Concerns with the Public Safety Assessment (PSA)	20
C.	Other States’ Attempts at Bail Reform	23
V.	<u>LOOKING AHEAD IN NEW JERSEY</u>	27
A.	Finding the Balance Between Harms Averted and Harms Imposed While Accounting for Racial Disparities in the Justice System.....	27
B.	Auditing, Reporting, and Evolving	29

I. INTRODUCTION

Imagine you are 20 years old. You live in a modest apartment in a low-income neighborhood in New Jersey, splitting the rent with a roommate while you attend school and work as many hours as your employer has available to make ends meet. You arrive home one day to learn your roommate managed to pick up a new big-screen TV, and with football season around the corner you are happy to help him mount it on the wall.

The next morning there is a knock on the door and two uniformed officers place you and your roommate under arrest for possession of stolen property. Your bail is set at \$2,500. Unable to afford the cost, you are forced to sit in jail as you await trial. Weeks pass. Classes go unattended. Shifts are missed at work. Prosecutors offer a plea deal that includes probation, but you are hesitant to adopt a record for a crime that you never committed. Instead, you sit in jail for 4 months before your roommate admits to having stolen the TV. You are subsequently released.

No crime was committed, but a price has been paid. Four months in prison likely cost you your job, your good standing in class, and potentially your home—assuming rent went unpaid due to a lack of income. You spent that time in jail not for a crime you were guilty of or a risk you posed to the community, but because you could not afford the cost of bail. These collateral costs, solely related to pre-trial detention, can be devastating for an individual, their future, their family, and their community.

Now imagine the same circumstances except your parents are willing are willing to loan you \$2,500. You post bail, get released from jail, attend your classes, and make every shift of work for the next four months. In the meantime, you are free and able to prepare to fight the charges against you before the charges are eventually dropped. These scenarios involve the same individual, the same charges, and the same bail amount- but one person could afford to pay to

avoid sitting in jail for months, and the other could not. Worse yet, under the cash-bail system described here, a person charged with a much more serious, violent offense may have bail set at one million dollars, but so long as they can put together that large sum of money they will not have to sit in a concrete cell while they await trial.

Cash bail, in practice, is not informed by proper considerations and is an unfair, seemingly arbitrary means of determining which offenders are detained pre-trial. The system's disproportionate discrimination against the poor and ethnic minorities has resulted in a decades-long call for reform in the United States. Some states, including New Jersey in 2017, have enacted bail reforms in effort to reduce an overcrowded prison population and curb discriminatory practices in the justice system.¹

Notably, analysis of the early returns of these implemented reforms will vary based on the reader's preconceived assumptions and goals regarding their implementation. Specifically, this paper considers particular goals of reform, including (1) the reduction of New Jersey's pre-trial prison population, (2) curing socio-economic prejudice in pre-trial detention determinations, and (3) addressing racial disparities in the pre-trial prison population. The initial data indicates that New Jersey's reforms have been effective in reducing the total population of pre-trial defendants and limiting the impact of socio-economic status on detention determinations but has not successfully impacted racial disproportionalities in the state's pre-trial prison population.

¹ *Criminal Justice Reform Information Center*, N.J. CTS., <http://njcourts.gov/courts/criminal/reform.html> (last visited Apr. 7, 2021).

II. THE HISTORY OF BAIL AND CALLS FOR REFORM IN THE US

A. The History of Bail Reform in the United States

In the American colonies, presumptions favoring pre-trial release had been carried over from England.² “Personal sureties” from family or friends served to incentivize and ensure that the accused party would abide by the conditions of one’s release and attend their court hearings at a later date.³ After the Declaration of Independence was signed in 1776, most states enacted their own constitutions that included provisions for bail laws, including protections against “excessive bail.”⁴

Later, Congress passed the Judiciary Act of 1789 which stipulated that for “all arrests in criminal cases, bail shall be admitted, except where the punishment may be death”, and established judicial discretion in setting bail.⁵ Soon after, the Eight Amendment of the United States Constitution, adopted in 1791, ordered that “[e]xcessive bail shall not be required”, establishing the right of the accused to have an opportunity for pre-trial release.⁶ Notably, the Supreme Court extended this provision to the States and state-court defendants in 2019.⁷

In 1966 Congress passed the Bail Reform Act, which mandated that federal non-capital case defendants should be released with the least restrictive conditions necessary to ensure their appearance in court.⁸ The act also provided several factors for a judge to consider with respect to conditions provided for a defendant’s release, including the accused’s family, community ties, employment history, and past record of court appearances.⁹ The Act also required the release of

² John-Michael Seibler and Jason Snead, *The History of Cash Bail*, THE HERITAGE FOUND. (Aug. 25, 2017), <https://www.heritage.org/courts/report/the-history-cash-bail>.

³ Id.

⁴ Id.

⁵ Judiciary Act of 1789, 1 Stat. 73, § 33 (1789).

⁶ U.S. Const. amend. XIII.

⁷ *Timbs v. Indiana*, 139 S. Ct. 682, 689-690 (2019).

⁸ 18 U.S.C. § 3146(a)-(g).

⁹ Id.

non-capital defendants unless the judge had specific reasons to believe they would not appear for trial.¹⁰ Several states soon adopted their own, similar statutes.¹¹ Notably, none of this legislation accounted for socio-economic concerns regarding the bail system.

Rising fears of crime nationwide led to Congress passing the Bail Reform Act of 1984.¹² The Act allowed federal courts to detain arrestees pending trial where it is demonstrated by clear and convincing evidence that no release conditions could reasonably assure the safety of the community, rather than merely a showing that the defendant was a flight risk.¹³ This law was challenged in U.S. v. Salerno, where two men, including Salerno, had been charged under the Racketeer Influenced and Corrupt Organizations Act (RICO).¹⁴ The government sought to detain Salerno pre-trial, alleging that as the head of a powerful crime family, Salerno posed a threat to community safety.¹⁵ The Supreme Court upheld the constitutionality of detaining a defendant, holding that there was no Eighth Amendment bar to the government “pursuing compelling interests” such as public safety “through regulation of pre-trial release.”¹⁶ The Court also noted that “Congress did not formulate the pre-trial detention provisions as punishment for dangerous individuals”, and thus did not violate the Eighth Amendment’s ban on cruel and unusual punishment.¹⁷

Today, commercial bail has grown into a \$2 billion industry as bond agents charge exorbitant fees for helping keep defendants out of jail, with threats of being sent behind bars if

¹⁰ 18 U.S.C. § 3146(a)-(g).

¹¹ Stephanie Wykstra, *Bail Reform, Which Could Save Millions of Unconvicted People from Jail, Explained*, VOX (Oct. 17, 2018, 7:30 AM), <https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice-inequality>.

¹² *Id.*

¹³ 18 U.S.C. § 3142(f).

¹⁴ *United States v. Salerno*, 481 U.S. 739, 743 (1987).

¹⁵ *Id.*

¹⁶ *Id.* at 753.

¹⁷ *Id.* at 747.

payments are missed—further exacerbating the disparate impact this system has on those with a lower socio-economic status.¹⁸ A system designed to provide financial incentives for the accused to attend later court hearings has resulted in nearly half a million unconvicted people—disproportionately poor people of color—sitting in jails simply awaiting trials.¹⁹

B. Rationales for New Bail Reform

The monetary bail system, in its current form, provides defendants claiming innocence only two choices with respect to ensuring their pre-trial discharge: post the designated bail amount, or arrange for a bond to secure their release from jail. Regardless of the crime committed or the potential danger to the public, if a defendant can afford to post bail the defendant will be released while awaiting trial. This methodology of release based on one's ability to pay is an arbitrary and unfair approach to pre-trial release that does little to incentivize defendants to appear in court, and instead serves to "criminalize poverty".²⁰ Such a system would permit a wealthy person with resources that could render them a flight-risk to be released after committing a serious crime while a poor person sits in jail for a lesser offense, strictly based on the ability to post bail. This fact reinforces the concept that cash bail judgments are not being informed by proper considerations.

Further, aside from the arbitrariness of using a defendant's financial means to determine their pre-trial release, studies have demonstrated that the likelihood of being assigned cash bail in an initial arraignment can vary wildly from day-to-day and judge-to-judge.²¹ The decisions of

¹⁸ Jessica Silver-Greenberg & Shalia Dewan, *When Bail Feels Less Like Freedom, More Like Extortion*, N.Y. Times, (Apr. 1, 2018), <https://www.nytimes.com/2018/03/31/us/bail-bonds-extortion.html>.

¹⁹ Wykstra, *supra* note 11.

²⁰ Mark. F. Bernstein, *How New Jersey Made a Bail Breakthrough*, Princeton Alumni Wkly. (Nov. 2020), <https://paw.princeton.edu/article/how-new-jersey-made-bail-breakthrough>.

²¹ Anna Maria Barry-Jester, *You've Been Arrested. Will You Get Bail? Can You Pay It? It May All Depend On Your Judge.*, FIVETHIRTYEIGHT (Jun. 19, 2018), <https://fivethirtyeight.com/features/youve-been-arrested-will-you-get-bail-can-you-pay-it-it-may-all-depend-on-your-judge/>. (A New York City study by the Legal Aid Society found that defendants charged with a misdemeanor in 2017 had between a 2 and 26% chance of the judge setting cash bail for release, depending on which judge was randomly assigned to the court on a given day. For felonies, the chances of being assigned cash bail were anywhere between 30 and 69%).

judges with respect to cash bail determinations have far reaching, downstream consequences for defendants. Even a few days in jail can cost a person their job, their housing, or custody of children.²² Defendants who are detained pre-trial and unable to post bail are more likely to be convicted, either by trial or by plea deal—often times in effort to avoid further jailtime²³—and have a lower chance of being sentenced to probation rather than jail than those who are released.²⁴ Notably, a Texas study found that “those who come from poorer zip codes were substantially more likely to be detained than those from wealthier zip codes” at a rate of more than 2-to-1.²⁵

Given the strain that a prolonged absence can have, financially and emotionally, on their families, many poor defendants choose to plead guilty to the pending charges even if they are innocent in order to secure release.²⁶ While pleading provides temporary relief, the criminal record that often results can subsequently negatively impact an individual’s future housing, employment, and education prospects.²⁷ As a result of these findings, critics have raised constitutional due process and equal protection concerns with “a money bail system that selectively detains the poor.”²⁸

These socio-economic considerations also tie closely to racial disparities in the justice system. A 2018 New Jersey study found that 42.8% of all high-poverty neighborhoods in the state were majority-Black, and 35.9% were majority-Hispanic.²⁹ New Jersey’s state population is only

²² Paul Heaton, Sandra Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev., 711, 713, (2017).

²³ Id. at 714.

²⁴ Id. at 750.

²⁵ Id. at 737. (The authors note that is possible that the data reflects “differential offending by defendants from lower-income zip codes”, including, potentially, more serious offenses that would lead to hire expectant bail amounts).

²⁶ Bernstein, *supra* note 20.

²⁷ *Pretrial Justice Reform*, AM. CIV. LIBERTIES UNION N.J., <https://www.aclunj.org/theissues/criminaljustice/pretrial-justice-reform> (last visited Apr. 7, 2021).

²⁸ Heaton, *supra* note 22, at 714.

²⁹ William Stocovaz, *The Geography of Poverty and Race in New Jersey*, N.J. FUTURE (Oct. 2020), <https://www.njfuture.org/wp-content/uploads/2020/10/The-Geography-of-Poverty-and-Race-in-New-Jersey-Oct-2020.pdf>.

12.7% Black and 19.9% Hispanic.³⁰ Notably, Black men compose 54% of those incarcerated in New Jersey³¹, and they are imprisoned at a rate more than 12 times that of white individuals in the state.³² Another study found that neighborhoods with the highest incarceration rates were predominantly Black and had high child poverty and male unemployment rates.³³ Laws targeting lower income individuals—including cash bail systems—have downstream effects that disproportionately harm some racial groups more than others.

Conversely, proponents of the monetary cash system—namely the \$2 billion cash bail industry, some prosecutors, and some law enforcement officials—stress that the posting of bail provides a “financial incentive to make sure the person show[s] up for court” and claim that criminals are no longer afraid to commit crimes “because they know at the end of the day, they’re going to be released.”³⁴ Others worry that the elimination of cash bail would lead to “dangerous and violent offenders [being] cut loose from jails and shoved into communities where innocent people suffer.”³⁵

³⁰ Stocovaz, *supra* note 29.

³¹ Joe Hernandez, *N.J. Officials Finally Release Data on Bail Reform. Their Conclusion? It’s Working*, WHYY.ORG (Apr. 2, 2019), <https://whyy.org/articles/n-j-officials-have-finally-released-data-on-bail-reform-their-conclusion-its-working/>.

³² Elizabeth Weill-Greenberg, *New Jersey Has the Highest Black/white Youth Commitment/Detention Disparity Rate in the Country*, N.J. INST. FOR SOC. JUST. (Sept. 15, 2017), <https://www.njisj.org/institute>.

³³ Adam Looney & Nicholas Turner, *Work and Opportunity Before and After Incarceration*, THE BROOKINGS INSTITUTION (Mar. 2018), https://www.brookings.edu/wpcontent/uploads/2018/03/es_20180314_looneyincarceration_final.pdf.

³⁴ Sarah Wallace, *‘Nobody’s Afraid to Commit Crimes’: Cops, Victims Blast Overhaul of NJ Bail System*, NBCNEWYORK.COM (May 18, 2017, 8:56 PM), <https://www.nbcnewyork.com/news/local/bail-reform-new-jersey-criminals-streets-law-jail-investigation/141250/>.

³⁵ Reuben Francis, *New Jersey Is Proving That Bail Reform Works*, TALK POVERTY (Apr. 26, 2019), <https://talkpoverty.org/2019/04/26/new-jersey-bail-reform-works/>.

III. NEW JERSEY INSTITUTES BAIL REFORM

A. The Joint Committee on Criminal Justice

In 2013, the New Jersey Drug Policy Alliance conducted a study of the state’s jail population.³⁶ The study observed that on a given day, more than 1,500 people—12 percent of the state’s total incarcerated population—were being detained because they were unable to post bail of \$2,500 or less.³⁷ More than half of that group was being held on an unpaid bail of less than \$500.³⁸ None of that group had yet been convicted of a crime.³⁹ Overall, nearly 75 percent of New Jersey’s 15,000 inmates were simply awaiting trial or sentencing.⁴⁰ Moreover, nearly 40 percent of the state’s total prison population had the option to post bail but were financially unable to do so,⁴¹ and defendants were found to have been detained for an average of 314 days as they awaited trial.⁴² Additionally, the study also observed that 71 percent of the prison population was either Black or Hispanic.⁴³

Upon receipt of this report, New Jersey Supreme Court Chief Justice Stuart Rabner assembled the Joint Committee on Criminal Justice (“The Committee”) to consider reforms for the state’s pre-trial justice system, including the monetary bail system.⁴⁴ The Committee included “representatives from the judiciary, the governor’s office, the attorney general’s office, the public defender’s office, both houses of legislature, and nongovernmental officials such as private

³⁶ *Pretrial Justice Reform*, *supra* note 27.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Diana Dabruzzo, *New Jersey Set Out to Reform Its Cash Bail System. Now, the Results Are In.*, ARNOLD VENTURES (Nov. 14, 2019), <https://www.arnoldventures.org/stories/new-jersey-set-out-to-reform-its-cash-bail-system-now-the-results-are-in/>.

⁴¹ *Id.*

⁴² Maddie Hanna, *N.J. Rethinks Bail- Who Gets Out, Who Stays Jailed*, Phila. Inquirer (Jan 1, 2017), https://www.inquirer.com/philly/news/local/20170101_N_J__rethinks_bail_-_who_gets_out__who_stays_jailed.html.

⁴³ Admin. Office of the Cts., *Report of the Joint Committee on Criminal Justice* (Mar. 10, 2014), <https://www.njcourts.gov/courts/assets/criminal/finalreport3202014.pdf>.

⁴⁴ Bernstein, *supra* note 20.

criminal-defense attorneys and The American Civil Liberties Union.”⁴⁵ In 2014, the Committee, with no dissenters, recommended comprehensive bail reform in New Jersey, which resulted in The Criminal Justice Reform Act (“The Act”).⁴⁶

B. The Criminal Justice Reform Act (CJRA)

The Criminal Justice Reform Act passed in November 2014 and went into effect on January 1, 2017.⁴⁷ The Act replaced New Jersey’s reliance on monetary bail, and instead allowed for pretrial detention of defendants who present such a serious risk of danger, flight, or obstruction that no combination of monetary bail or release conditions would be adequate to guarantee their appearance in court.⁴⁸ The Act promotes an “objective evaluation of each defendant’s risk level and consideration of conditions of release that pretrial services officers will monitor.”⁴⁹

Particularly, The Act sought to “rely primarily on ‘pretrial release by non-monetary means to reasonably assure’ that a defendant will ‘appear in court when required,’ will not endanger ‘the safety of any other person or the community,’ and ‘will not obstruct or attempt to obstruct the criminal justice process.’”⁵⁰ Only with a finding of clear and convincing evidence that “no condition or combination of condition” would achieve those goals may a court order a defendant be held pending trial.⁵¹ Additionally, the legislation included a speedy trial provision, which stated that, excluding time for reasonable delays, “defendants cannot remain in jail for more than 90 days before the return of an indictment, or more than 180 days after indictment and before the start of

⁴⁵ Bernstein, *supra* note 20.

⁴⁶ *Id.*

⁴⁷ *Pretrial Justice Reform*, *supra* note 27.

⁴⁸ N.J.S.A. 2A:162-18(a)(1).

⁴⁹ *State v. Robinson*, 229 N.J. 44, 54 (2017) (citing to N.J.S.A. 2A:162-17).

⁵⁰ *Robinson*, N.J. 44 at 55 (citing to N.J.S.A. 2A:162-15).

⁵¹ *Id.*

trial.”⁵² The Act also has a stated “fundamental mission . . . to ensure that all defendants are treated equally under the criminal justice system, regardless of race, ethnicity, or gender.”⁵³

Furthermore, The Committee anticipated that the proposed changes would reduce the number of people detained pre-trial—an average of 9,000 a day—at least in half.⁵⁴ The resulting reduction in state costs—each pre-trial detainee is estimated to cost approximately \$100 a day—could also prove significant.⁵⁵

C. The First 48 Hours

Under the Act, where a complaint-warrant is issued charging a person with an indictable offense, the defendant “shall be temporarily detained to allow the Pretrial Services Program to prepare a risk assessment and recommend conditions of release.”⁵⁶ Prosecutors then present the findings of the Pretrial Services Program’s risk assessment to the court.⁵⁷ Following this assessment and presentation of findings the court must make a pretrial release decision for the defendant within 48 hours after the eligible defendant’s commitment to jail.⁵⁸ Defendants will either be: (a) released on their own recognizance or on execution of an unsecured appearance bond; (b) released on the least restrictive non-monetary condition or conditions to reasonably assure the defendant’s appearance in court, the safety of any person or the community, and that the defendant will not obstruct the criminal justice process; (c) released on monetary bail other than an unsecured

⁵² Robinson, 229 N.J. at 56 (citing to N.J.S.A. 2A:162-22(a)(1)(a), (a)(2)).

⁵³ Glenn A. Grant, J.A.D., *Report to the Governor and the Legislature*, N.J. JUDICIARY (Apr. 2019), <https://www.njcourts.gov/courts/assets/criminal/2018cjrannual.pdf?c=sT7>.

⁵⁴ Kate Zernike, *Panel Proposes Changes to New Jersey Bail System*, N.Y. Times (Mar. 20, 2014), <https://www.nytimes.com/2014/03/21/nyregion/panel-recommends-significant-changes-to-new-jersey-bail-system.html>.

⁵⁵ *Id.*

⁵⁶ Robinson, 229 N.J. at 55 ((citing to N.J.S.A. 2A:162-16(a)).

⁵⁷ *Id.*

⁵⁸ N.J.S.A. 2A:162-16(b)(1).

appearance bond; or (d) detained in jail, upon motion of the prosecutor, pending a pretrial detention hearing.⁵⁹

Notably, prosecutors are only able to seek detention of defendants under limited circumstances. Prosecutors may only seek detention:

[W]hen an eligible defendant is charged with:

- (1) any crime of the first or second degree enumerated under [N.J.S.A. 2C:43-7.2(d)];
- (2) any crime for which the eligible defendant would be subject to an ordinary or extended term of life imprisonment;
- (3) any crime if the eligible defendant has been convicted of two or more offenses under paragraph (1) or (2) of this subsection;
- (4) any crime enumerated under [N.J.S.A. 2C:7-2(b)(2)] or crime involving human trafficking pursuant to [N.J.S.A. 2C:13-8] or [N.J.S.A. 52:17B-237 et al.] when the victim is a minor, or the crime of endangering the welfare of a child under N.J.S.A. 2C:24-4;
- (5) any crime enumerated under N.J.S.A. 2C:43-6(c);
- (6) any crime or offense involving domestic violence as defined in [N.J.S.A. 2C:25-19(a)]; or
- (7) any other crime for which the prosecutor believes there is a serious risk that:
 - (a) the eligible defendant will not appear in court as required;
 - (b) the eligible defendant will pose a danger to any other person or the community;or
 - (c) the eligible defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure or intimidate, a prospective witness or juror.⁶⁰

D. The Pretrial Detention Hearing

When a prosecutor applies to the court for pretrial detention for a defendant, that defendant is held pending a hearing.⁶¹ At the hearing, the defendant has the right to counsel, to testify, to call and cross examine witnesses who appear, and to present information by proffer or otherwise.⁶² Where there is no indictment, a prosecutor “shall establish probable cause that the eligible

⁵⁹ Robinson, 229 N.J. at 55-56 (citing to N.J.S.A. 2A:162-16(b)(2)(a-d)).

⁶⁰ N.J.S.A. 2A:162-19(a)).

⁶¹ Robinson, 229 N.J. at 57.

⁶² Id. at 58. (citing to N.J.S.A. 2A:162-19(e)(1)).

defendant committed the predicate offense.”⁶³ At the hearing, the court is permitted to take into account:

- a. The nature and circumstances of the offense charged;
- b. The weight of the evidence against the eligible defendant, except that the court may consider the admissibility of any evidence sought to be excluded;
- c. The history and characteristics of the eligible defendant, including: (1) the eligible defendant's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and (2) whether, at the time of the current offense or arrest, the eligible defendant was on probation, parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under federal law, or the law of this or any other state;
- d. The nature and seriousness of the danger to any other person or the community that would be posed by the eligible defendant's release, if applicable;
- e. The nature and seriousness of the risk of obstructing or attempting to obstruct the criminal justice process that would be posed by the eligible defendant's release, if applicable; and
- f. The release recommendation of the pretrial services program obtained using a risk assessment instrument under [N.J.S.A. 2A:162- 25].⁶⁴

At the conclusion of the hearing, any order of detention by the court must be supported by “clear and convincing evidence.”⁶⁵ A judge’s order for a defendant to be detained pretrial must also “include written findings of fact.”⁶⁶ Conversely, if a judge orders a defendant to be released contrary to the recommendation made in the pretrial risk assessment, the judge must explain their reasoning in the order.⁶⁷

E. Amendments to the Act- Broad Discovery in Pretrial Hearings

After the New Jersey Legislature instituted the Act, the New Jersey Supreme Court asked the Committee to propose amendments to the court rules implementing the new law.⁶⁸ Among its

⁶³ N.J.S.A. 2A:162-19(e).

⁶⁴ N.J.S.A. 2A:162-20.

⁶⁵ N.J.S.A. 2A:162-19(e).

⁶⁶ N.J.S.A. 2A:162-21(a).

⁶⁷ N.J.S.A. 2A:162-23(a)(2).

⁶⁸ Robinson, 229 N.J. at 59.

proposed amendments, the Committee recommended a broad discovery rule whereby a prosecutor seeking pretrial detention “shall provide all relevant material in its possession” to the defendant.⁶⁹ Dissenters within the Committee noted that a “complete discovery” requirement would be overly burdensome for prosecutors, and proposed that prosecutors seeking detention should be required to disclose “all statements or reports . . . that relate to the facts upon which the prosecutor relies in these motions.”⁷⁰ The Court eventually adopted a rule closer to the dissenter’s proposal, requiring prosecutors seeking pretrial detention to “provide defendant with all statements or reports in its possession relating to the pretrial detention application”, including the disclosure of all exculpatory evidence, no later than 24 hours prior to the hearing.⁷¹

This rule is more favorable to defendants than federal law, as it provides defendants broader discovery rights than does the federal system.⁷² In State v. Robinson, Chief Justice Rabner stated that rule 3:4-2(c) requiring “broad discovery” where a prosecutor seeks pretrial detention is justified because it sees that a defendant “accused of a crime and subject to possible detention is better able to challenge the State’s application and presentation.”⁷³

F. New Jersey’s Pretrial Risk Assessment Tool (The Public Safety Assessment (“PSA”))

To assist prosecutors and judges in determining whether to seek to detain or release a defendant pretrial, the Act permits the use of a risk-assessment tool.⁷⁴ The New Jersey Judiciary adopted the Public Safety Assessment (“PSA”) as its objective risk-assessment tool.⁷⁵ Designed and developed by the Laura and John Arnold Foundation in 2013, the PSA uses a database of over 1.5 million cases from more than 300 jurisdictions in attempt objectively identify factors that that

⁶⁹ Robinson, 229 N.J. at 60.

⁷⁰ Id.

⁷¹ Id. at 60-61 (citing to N.J. Court Rules, R. 3:4-2(c)(1)(B)).

⁷² Id. at 61.

⁷³ Id. at 68.

⁷⁴ Dabruzzo, *supra* note 40.

⁷⁵ Id.

“best predict whether a defendant will be arrested for a new crime, be arrested for a new violent crime, or fail to return to court” on their assigned date.⁷⁶ As an “objective” tool, the PSA “gives no consideration to race, gender, education, socioeconomic status, or neighborhood.”⁷⁷ Specifically, the objective risk-assessment tool considers nine factors to assess the likelihood of pretrial success:

- (1) The defendant’s age at current arrest;
- (2) Whether the alleged crime is a violent offense, and if so, whether the defendant is age 20 or older;
- (3) Any additional pending charge(s) against the defendant at the time of the current arrest;
- (4) Any prior misdemeanor convictions on the defendant’s record;
- (5) Any prior felony convictions on the defendant’s record;
- (6) Any prior violent convictions on the defendant’s record ;
- (7) Failures to appear in court in the past two years;
- (8) Failure to appear in court two or more years ago; or
- (9) Prior sentences to incarceration⁷⁸

At the conclusion of this automated pretrial process, the PSA provides predictions for three pretrial outcomes relating to a defendant’s (1) risk of failure to appear (FTA), (2) risk for new criminal activity (NCA), and (3) the risk for new violent criminal activity (NVCA).⁷⁹ The FTA and NCA risks are provided on a scale of 1 to 6, with 6 being the highest.⁸⁰ The NVCA risk is determined by the presence or absence of a “violence flag”.⁸¹ In addition to providing risk scores, the PSA “recommends whether to release a defendant and what, if any, conditions of release to impose.”⁸² Notably, the PSA’s assessment is not dispositive of a defendant’s pretrial fate because, ultimately, it is the trial judge’s decision whether to release the defendant after considering the

⁷⁶ *Pretrial Justice Reform*, *supra* note 27.

⁷⁷ *Id.*

⁷⁸ *About the Public Safety Assessment*, ADVANCING PRETRIAL POL’Y & RES. (last visited Apr. 7, 2021), <https://advancingpretrial.org/psa/factors/>.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Robinson, 229 N.J. at 62.

PSA in conjunction with other relevant information.⁸³ Where a determination is made to release a defendant, the pre-trial services division oversees the conditions of release which “can range from wearing an electric monitor to periodic check-ins with court staff, either in person or remotely.”⁸⁴

G. Impact of New Jersey’s Bail Reform

In April 2019, New Jersey’s Administrative Office of the Courts (AOC) released the Report to the Governor and the Legislature regarding the early returns of the CJRA since its implementation.⁸⁵ The report found that the state’s pretrial population declined by 44% from the end of 2015 to the end of 2018.⁸⁶ An analysis of the jail population on October 3, 2018 revealed that there were 6,000 fewer detainees than on the same date in 2012.⁸⁷ Of those detained pretrial on October 3, 2018, only 4.6% were being held on bail of \$2,500 or less, down from 12% six years prior.⁸⁸ Meanwhile, defendants charged with or sentenced for at least one violent offense made up 47% of the detained population in 2018 compared to 35% on the same date in 2012, indicating that fewer violent offenders were able to secure their release simply because they were able to afford to post their bail, however expensive it may have been.⁸⁹ Further, while the average defendant spent 62.4 days in jail pretrial in 2014, that time had decreased 40% to 37.2 days in 2017.⁹⁰

The study also found that rates of recidivism and failure to appear for court increased very slightly among defendants released pretrial.⁹¹ In 2017, 26.9% of defendants released from jail before their trials were charged with another new indictable offense, up from 24.2% in 2014.⁹²

⁸³ Robinson, 229 N.J. at 62 (referencing N.J.S.A. 2A:162-20).

⁸⁴ Bernstein, *supra* note 20.

⁸⁵ Grant, *supra* note 53.

⁸⁶ Dabruzzo, *supra* note 40.

⁸⁷ Id.

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ Id.

⁹¹ Grant, *supra* note 53.

⁹² Hernandez, *supra* note 31.

Court appearance rates among the released defendants remained high but decreased slightly from 92.7% to 89.4% over the same period.⁹³ Notably, state court officials stated that these increases of 2.7% and 3.3%, respectively, were “statistically insignificant” and that “small changes in outcome measures should be interpreted with caution and likely do not represent meaningful differences.”⁹⁴

Still, while the jail’s overall population has decreased, the report revealed that disparities in the racial and ethnic makeup of the state’s jails remained the same.⁹⁵ While 3,000 fewer Black, 1,500 fewer White, and 1,300 fewer Hispanic defendants were detained pretrial in 2018 than on the same date in 2012, Black men accounted for 54% of the state’s jail population at each juncture, including after the bail reforms were instituted.⁹⁶ Markedly, the percentage of Black women detained pretrial dropped from 44% to 34% over that time.⁹⁷ In the study, the AOC acknowledged that “the overrepresentation of black males in the pretrial jail populations remains an area in need of further examination by New Jersey’s criminal justice system as a whole.”⁹⁸

IV. NEW JERSEY’S BAIL REFORMS UNDER A MICROSCOPE

A. Assessing the Early Returns of NJ’s Reforms Against the Original Rationales

The degree to which one finds New Jersey’s bail reforms successful will hinge upon what that person’s rationales and goals for the reforms were in the first place. A person interpreting these early returns must be honest about what bail reform can realistically achieve to provide fair and balanced analysis of the data.

Firstly, an individual seeking to prioritize the elimination of socioeconomic disparities with respect to pretrial release determinations is likely very satisfied with the reform’s early returns.

⁹³ Hernandez, *supra* note 31.

⁹⁴ Id.

⁹⁵ Id.

⁹⁶ Roman Gressier, *Racial Disparities in NJ Bail Persist Despite Reforms: Report*, THECRIMEREPORT.ORG (Apr. 4, 2019), <https://thecrimereport.org/2019/04/04/racial-disparities-in-nj-bail-persist-despite-reforms-report/>.

⁹⁷ Id.

⁹⁸ Francis, *supra* note 35.

The statistics provided in the AOC report appear to demonstrate that the CJRA is effective in addressing arbitrary distinctions in the system based on wealth. As such, “thousands of defendants who have not been convicted of a crime and are presumed innocent under the law will be free to remain with their families and their communities while they await their day in court.”⁹⁹ This not only helps lower-income individuals continue to maintain their jobs, schooling, pay their rent, and care for loved ones, but also exposes fewer people to the negative effects of serving time behind bars strictly because they could not afford to pay the court. Fewer individuals being held pretrial also means fewer instances of detained defendants facing unfair disadvantages in the system, including higher rates of pleading guilty, being convicted, and receiving more prison sentences for longer periods of time at trial.

Conversely, violent or higher-risk defendants who pose a threat to the community or present a substantial flight risk may no longer be granted release simply because they could afford to post their bail, however expensive it may be. That only 4.6% of pretrial detainees were being held on bail of less than \$2,500 in 2018, down from 12% from six years prior, is evidence of a pretrial playing field that is leveling out.

Meanwhile, a person primarily concerned with reducing the overall pretrial jail population in New Jersey would also find the AOC report encouraging. A 44% reduction in the overall pretrial jail population within three years is an impressive accomplishment. The greater-than-25-day reduction of the average amount of time defendants spent in jail pretrial from 2014 to 2018 was also a triumph for the CJRA, indicating greater efficiency in the system. Moreover, the “statistically insignificant” increases in recidivism and missed court appearances among released defendants appear to suggest that concerns of critics regarding the release of accused individuals

⁹⁹ Francis, *supra* note 35.

were unfounded.¹⁰⁰ Given these statistics, the study concluded that the PSA had been “remarkably accurate” in assessing the risk to the community and of non-appearance posed by defendants.¹⁰¹ Not to be ignored, these illuminating findings also raise questions and concerns with respect to past injustices that can no longer be corrected, why the previous system remained in place so long, and why it is still used in the majority of jurisdictions around the country.

On the other hand, individuals, organizations, and legislatures primarily concerned with addressing racial disparities in the makeup of New Jersey’s prison population would likely find that the instituted reforms fell short of their goals. Despite the CJRA’s stated “fundamental mission . . . to ensure all defendants are treated equally under the criminal justice system, regardless of race, ethnicity, or gender”, the report found that Black men made up 54% of individuals detained pretrial in 2017—a figure identical to the pre-CRJA numbers in 2012—despite making up only 15% of New Jersey’s population.¹⁰² In response to these findings, the ACLU acknowledged the AOC’s “commitment to continue addressing racial disparities,” but affirmed that “[a] system that reduces the number of incarcerated people but does not improve racial disparities is simply not good enough.”¹⁰³ The AOC conceded in the report that “the overrepresentation of black males in the pretrial jail population remains an area in need of further examination by New Jersey’s criminal justice system as a whole.”¹⁰⁴

¹⁰⁰ Notably, the AOC report did not provide detailed information regarding the nature of the “new indictable crimes” that pre-trial releasees were charged with. As such, it cannot be determined whether there was a rise in particular violent crimes by these defendants.

¹⁰¹ Dabruzzo, *supra* note 40.

¹⁰² Reuven Blau, *New Jersey No-Bail System Eyed By New York Leaders Reckons With Bias Risk*, THECITY.NYC (Mar. 6, 2020, 4:05 AM), <https://www.thecity.nyc/justice/2020/3/6/21210469/new-jersey-no-bail-system-eyed-by-new-york-leaders-reckons-with-bias-risk>.

¹⁰³ *ACLU-N.J. Responds to Release of 2018 Criminal Justice Reform Full-Year Report*, AM. CIV. LIBERTIES UNION (Apr. 2, 2019), <https://www.aclu.org/press-releases/aclu-nj-responds-release-2018-criminal-justice-reform-full-year-report>.

¹⁰⁴ Grant, *supra* note 53.

Notably, the statistics regarding race reveal that there are issues within the justice system that are seemingly beyond the purview of bail reform. That the disproportionate number of Black men detained pretrial remained flat despite the reform's successful reduction of the prison population suggests that race-related inequalities in the system may be connected to already existing racial disparities earlier in the criminal justice process. This theory invites a closer critique of procedures that may have inconsistent race applications and implications during defendants' initial interactions with police, at the booking stage, and at the charging stage. Specifically, there is data to suggest that policing procedures such as stop-and-frisk disproportionately target Black and Hispanic citizens.¹⁰⁵ Further studies have shown that "Black defendants face significantly more severe charges than whites, even after controlling for characteristics of the offense, criminal history, defense counsel type, age and education of the offender, and crime rates and economic characteristics of the jurisdiction."¹⁰⁶ The full causative nature of these areas requires further study beyond the scope of this paper.

It is also important to recognize that the AOC, a division of the New Jersey Judiciary, conducting a study of its own implementations of these reforms could leave room for bias, intended or unintended, in the methodology of the study that could lead to skewed results and analysis. For example, after Cook County, Illinois adopted new bail reform measures in 2017, the Office of the Chief Judge of the Cook County Courts reviewed and reported on the effects of the measures two years later.¹⁰⁷ This study concluded that the release of thousands of defendants pretrial did not

¹⁰⁵ *Stop-and-Frisk Data*, AM. CIV. LIBERTIES UNION N.Y. (last visited Apr. 7, 2021), <https://www.nyclu.org/en/stop-and-frisk-data> (The NYPD's 2019 Report indicated that of 13,459 stops recorded that year, 59% were black, 29% were Latinx, and 9% were white).

¹⁰⁶ Jennifer Turner & Jamil Dakwar, *Racial Disparities in Sentencing*, AM. CIV. LIBERTIES UNION (October 27, 2014), https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf.

¹⁰⁷ St. of Ill. Circuit Ct. of Cook County, *Bail Reform in Cook County*, (May 2019), <http://www.cookcountycourt.org/Portals/0/Statistics/Bail%20Reform/Bail%20Reform%20Report%20FINAL%20-%20Published%2005.9.19.pdf>.

result in any increase in crime.¹⁰⁸ However, a 2020 independent study of the Cook County reforms conducted by two professors at the University of Utah College of Law (UUCL) refuted those findings and reported a substantial increase in crime by pretrial releasees.¹⁰⁹ The study found that new, violent crimes committed by releasees were largely undercounted, and raised questions as to whether the bail reform measures conflicted with public safety priorities.¹¹⁰ While the authors were not studying or interpreting New Jersey's data, they dove deeply into the Cook County data to discover and express concerns.

Similarly, some critics of the CJRA in New Jersey were quick to emphasize the increases in the percentage of defendant releasees who were charged with new offenses while awaiting trial (2.7% increase) and those who did not appear in court (3.3% increase), labeling the figures “non-insignificant” in direct contrast to the AOC's interpretations.¹¹¹ Further research, similar to the UUCL study, critiquing the AOC's methods and data analysis would go a long way to confirming or disputing the AOC's findings on New Jersey's bail reforms.

B. Concerns with the Public Safety Assessment (PSA)

Regarding the CJRA's ineffectiveness in addressing the disproportionate racial makeup of New Jersey's pretrial prison population, many criminal justice activists and organizations point to the CRJA's use of the Public Safety Assessment (PSA) as a reason for the perpetual disparities. Critics of such algorithmic risk assessments include University of Georgia Law professor Sandra Mayson, who notes that “[a]lgorithmic assessment carries a scientific aura, which can produce unwarranted deference or a mistaken impression of objectivity.”¹¹² Mayson challenges the

¹⁰⁸ *Bail Reform in Cook County*, *supra* note 107 at 1.

¹⁰⁹ Paul Cassell & Richard Fowles, *Does Bail Reform Increase Crime? An Empirical Assessment of the Public Safety Implications of Bail Reform in Cook County, Illinois*, Wake Forest L. Rev, Forthcoming (February 19, 2020).

¹¹⁰ *Id.* at 14.

¹¹¹ Rafael A. Mangual, *How New Jersey Did Bail Reform Better Than New York*, N.Y. Post (Jan. 11, 2020, 12:35 PM), <https://nypost.com/2020/01/11/how-new-jersey-did-bail-reform-better-than-new-york/>.

¹¹² Sandra Mayson, *Bias In, Bias Out*, 128 Yale L. J., 2218, 2280 (2019).

objectivity of these practices, observing that “in a racially stratified world, any method of prediction will project the inequalities of the past into the future.”¹¹³ Consequently, using past data on arrest that disproportionately impacts Black individuals over White ones will result in “predictive analysis [that] will project it to happen more frequently to Black people than to white people in the future.”¹¹⁴ Notably, arrest rates in most places for nearly all crimes have shown racial disparities for decades.¹¹⁵ As such, criminal history data is bound to be distorted and inherently biased, which, in turn, will distort the findings and results of pretrial risk assessments.

These concerns about potential bias in the PSA led one prominent pretrial reform group to rescind its support for New Jersey's bail reform. The Pretrial Justice Institute (PJI) was instrumental in New Jersey's adoption of the PSA in 2014 and heavily advocated for its use across the nation to reduce the ballooning prison population.¹¹⁶ In 2017 the PJI gave New Jersey's bail system the only “A” rating in the country.¹¹⁷ However, they revoked that grade in early 2020, finding that such pretrial assessment tools are “derived from data reflecting structural racism and inequality that impact our court and law enforcement policies and practices,” and that use of the data perpetuates those racial inequalities.¹¹⁸ The PJI pointed specifically to the flat demographics of New Jersey's prison population despite the near elimination of cash bail in modifying their evaluation of the state's bail system.¹¹⁹

In addition to the PJI, more than 100 civil rights, digital justice, and community-based organizations, including the ACLU and NAACP, signed a joint statement condemning the use of

¹¹³ Mayson, *supra* note 112 at 2225.

¹¹⁴ *Id.* at 2224.

¹¹⁵ *Id.* at 2253.

¹¹⁶ Tom Simonite, *Algorithms Were Supposed to Fix the Bail System. They Haven't*, WIRED (Feb 19, 2020, 8:00 AM), <https://www.wired.com/story/algorithms-supposed-fix-bail-system-they-havent/amp>.

¹¹⁷ Bernstein, *supra* note 20.

¹¹⁸ *Updated Position on Pretrial Risk Assessment Tools*, PRETRIAL JUST. INSTITUTE (Feb. 7, 2020), <https://www.pretrial.org/wp-content/uploads/Risk-Statement-PJI-2020.pdf>.

¹¹⁹ Simonite, *supra* note 116.

predictive pretrial risk assessment tools.¹²⁰ The statement laid out civil rights concerns regarding the data that is inputted into the system and gave recommendations for modifying the tools in jurisdictions that already have them in place.¹²¹ These suggestions included community involvement in the design of the algorithms, as well as independent auditing of the tools to ensure that the measures result in reducing jail populations and effectively address racial disparities.¹²²

Lastly, there is little research to confirm exactly how the results and recommendations of the PSA are used by judges.¹²³ While PSA predictions are intended to “inform pretrial release conditions” rather than be dispositive their own¹²⁴, whether judges rely on them entirely or ignore them completely in making pretrial release decisions likely varies from jurisdiction to jurisdiction and judge to judge.¹²⁵ This makes collecting data on the use of the tools in courtrooms more difficult to collect and analyze.¹²⁶

On the other hand, in her paper, Mayson suggests that “the default alternative--subjective risk assessment--is very likely to be worse.”¹²⁷ Mayson points to recent studies that confirm that “risk assessments completed using structured approaches produce estimates that are more reliable and more accurate than unstructured risk assessments.”¹²⁸ While algorithms can be examined and analyzed, subjective assessments are less accountable and transparent and often contain their own implicit or unconscious biases.¹²⁹

¹²⁰ *The Use of Pretrial “Risk Assessment” Instruments: A Shared Statement of Civil Rights Concerns*, CIVILRIGHTSDOCS.INFO (July 30, 2018), <http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf>.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Wykstra, *supra* note 11.

¹²⁴ *About the Public Safety Assessment*, *supra* note 77.

¹²⁵ Angele Christin, *The Mistrials of Algorithmic Sentencing*, LOGIC (Dec. 1, 2017), <https://logicmag.io/justice/the-mistrials-of-algorithmic-sentencing/>.

¹²⁶ *Id.*

¹²⁷ Mayson, *supra* note 112, at 2277.

¹²⁸ *Id.* at 2278.

¹²⁹ *Id.* at 2279.

C. Other States' Attempts at Bail Reform

New Jersey is not the only state that sought to implement reforms of their cash-bail system in effort to reduce the prison population and alleviate racial and socio-economic disparities in the penal system. Other states have made efforts to reduce or eliminate the use of cash bail with differing legislation and varying results of success.

In New York, mandatory cash bail evaluations were eliminated for most misdemeanor and non-violent felony charges as of the start of 2020.¹³⁰ However, unlike New Jersey, New York initially chose not to provide judges with ultimate discretion regarding whether a defendant poses a threat to the public safety and should be detained pretrial.¹³¹ While judges in the state were only previously permitted to consider a defendant's flight risk in setting their bail, many judges previously still had discretion to set higher bail amounts for repeat offenders or individuals deemed likely to commit another crime.¹³² New Jersey, on the other hand, requires that risk of flight and potential danger to the community be considered in by judges in making pretrial release determinations.¹³³ Following heavy backlash prior to and just after the law took effect, after only three months New York's bail reform bill was amended to expand the number and types of crimes for which judges could impose cash bail.¹³⁴ The revised list included almost all violent felonies, second degree burglary, sex offenses, and all charges alleged to have caused a person's death.¹³⁵

The amendments also expanded judges' discretion, permitting them to consider a defendant's criminal history and status in setting cash bail and providing a wider selection of

¹³⁰ Jesse McKinley, Alan Feuer, & Luis Ferre-Sadurni, *Why Abolishing Bail for Some Crimes Has Law Enforcement on Edge*, N.Y. Times (Dec. 31, 2019), <https://www.nytimes.com/2019/12/31/nyregion/cash-bail-reform-new-york.html>.

¹³¹ Id.

¹³² McKinley, *supra* note 130.

¹³³ Id.

¹³⁴ Taryn A. Merkl, *New York's Latest Bail Law Changes Explained*, BRENNAN CENTER FOR JUST. (Apr. 16, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/new-yorks-latest-bail-law-changes-explained>.

¹³⁵ Id.

conditions—from travel restrictions to counseling—to be imposed on releasees.¹³⁶ Further, despite the expansion of bail-eligible offenses, a judge is not required to impose bail and may instead choose to release defendants under one or more conditions.¹³⁷

Markedly, New York’s bail reform legislation did not adopt a risk-assessment tool.¹³⁸ While the law does not prohibit or require the use of such methods, assessment used must be “empirically validated and free from discrimination on the basis of race, national origin, sex, or any other protected class.”¹³⁹ The lack of an adopted risk assessment tool was not an oversight, as several organizations, including Citizen Action New York, actively advocated for their omission in the reforms over concerns of inherent discrimination based on race and socioeconomic status.¹⁴⁰ The balance between leveling an unfair bail system and ensuring public safety continues to be a divisive political issue within the state.¹⁴¹

Meanwhile, in February 2021, Illinois became the first state to completely abolish the use of cash bail to secure defendants’ release from jail pretrial.¹⁴² The Illinois Pre-Trial Fairness Act (725 ILCS 185) will take effect on July 1, 2021, but the elimination of cash bail will begin in January 2023.¹⁴³ Instead of cash bail, judges may detain a defendant where they “might willfully flee from prosecution or if they are ‘a real and present threat to the safety of a specific, identifiable person.’”¹⁴⁴ As in New Jersey, judges will have final discretion to decide whether those conditions

¹³⁶ Merkl, *supra* note 134.

¹³⁷ *Id.*

¹³⁸ H. Rose Schneider, *New York and New Jersey Limit Cash Bail for Crimes. But There’s One Major Difference*, DEMOCRATANDCHRONICLE.COM (Dec. 17, 2019), <https://www.democratandchronicle.com/story/news/politics/albany/2019/12/17/ny-and-nj-limit-cash-bail-crimes-but-theres-one-major-difference/2668074001/>.

¹³⁹ *Id.*

¹⁴⁰ Schneider, *supra* note 138.

¹⁴¹ McKinley, *supra* note 130.

¹⁴² Cheryl Corley, *Illinois Becomes 1st State To Eliminate Cash Bail*, NPR (Feb 22, 2021, 9:35 PM), <https://www.npr.org/2021/02/22/970378490/illinois-becomes-first-state-to-eliminate-cash-bail>.

¹⁴³ *Id.*

¹⁴⁴ Isaac Scher, *Illinois Will End Cash Bail—And Limit Use of High-Tech Incarceration*, THE INTERCEPT (Jan. 17, 2021, 7:00 AM), <https://theintercept.com/2021/01/17/illinois-cash-bail-reform/>.

apply and a defendant should be held, though all pretrial hearings will begin with the assumption that the defendant should be released.¹⁴⁵

Still, despite efforts of some groups to ban the use of pretrial risk assessments, the tools will be available to provide recommendations for Illinois judges in their pretrial detention deliberations, though their use is not mandated.¹⁴⁶ The algorithm's recommendations are to be used as suggestion only, and data about the algorithms will be published regularly.¹⁴⁷ The bill also mandates that all results of any risk assessment must be forwarded to defense lawyers who may rebut and challenge the findings.¹⁴⁸ Moreover, skeptics of risk assessment tools are viewing the bill with cautious optimism, as the legislation also includes prison reform, new guidelines for training police, addressing the use of force, and a process for decertifying police officers who commit misconduct.¹⁴⁹ Ideally, these additional reforms will help alleviate causes of racial disparity earlier in the criminal justice process.

Additionally, the Illinois reforms also regulate the use of electronic monitoring as a means of surveillance, which advocates say is an “alternative form of incarceration” that can be just as punitive, invasive, and restrictive as being put in jail.¹⁵⁰ Prosecutors will bear the burden to prove that the court has reason to monitor the releasee.¹⁵¹ This proof must be offered prior to any surveillance, and, if sufficient, is to be revisited after 60 days.¹⁵² Further, in another legislative first, a defendant's time with an electric monitor will be considered time “served” and is to be

¹⁴⁵ Scher, *supra* note 144

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Ben Szalinski, *Illinois Set to Become First State to Eliminate Cash Bail Under Sweeping Criminal Justice Reform Law*, USA TODAY (Feb. 24, 2021, 4:10 PM), <https://www.usatoday.com/story/news/nation/2021/02/24/illinois-become-first-state-eliminate-cash-bail/4575046001/>.

¹⁵⁰ Scher, *supra* note 144.

¹⁵¹ *Id.*

¹⁵² *Id.*

subtracted from any court sentence.¹⁵³ Overall, Illinois’ bail reform has “some of the strictest restrictions on who can be incarcerated pretrial.”¹⁵⁴

Conversely, though the California State Legislature approved a measure in 2018 that would have abolished cash bail in the state, that legislation, Proposition 25, was defeated by voters at the ballot box in the November 2020 election.¹⁵⁵ The law would have required those charged with most misdemeanor offenses to be released from custody within 12 hours.¹⁵⁶ Other defendants would have undergone risk assessments, with judges having final say over their release.¹⁵⁷ The measure was heavily opposed by the bail industry, who spent more than \$10 million on a campaign to defeat it.¹⁵⁸ Also, some advocates of bail reform such as the Human Rights Watch, also opposed the bill, stating that it uses “racially biased risk assessment tools [and] gives judges nearly unlimited discretion to incarcerate.”¹⁵⁹

Undeterred, California lawmakers have continued to introduce bail reform bills aimed at eliminating unfair bail practices and racial and socioeconomic disparities.¹⁶⁰ Two new bills would move to “set bail at \$0 for misdemeanors and ‘low-level felonies’ and require money to be refunded if an arrestee makes all their court appearances, their charges are dropped, or their case is dismissed.”¹⁶¹ Opponents of cash bail intend to continue to fight for bail reform in California with “presumption of innocence as its guiding principle.”¹⁶²

¹⁵³ Scher, *supra* note 144.

¹⁵⁴ *Id.*

¹⁵⁵ Patrick McGreevy, *Prop. 25, Which Would Have Abolished California’s Cash Bail System, is Rejected By Voters*, L.A. TIMES (Nov. 4, 2020, 8:49 PM), <https://www.latimes.com/california/story/2020-11-03/2020-california-election-prop-25-results>.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ McGreevy, *supra* note 155.

¹⁵⁹ *Id.*

¹⁶⁰ Maria Dinzeo, *California Lawmakers Up Ante Against Money Bail With Pair of Bills*, COURTHOUSENEWS.COM (Jan. 27, 2021), <https://www.courthousenews.com/california-lawmakers-up-ante-against-money-bail-with-pair-of-bills/>.

¹⁶¹ *Id.*

¹⁶² *Id.*

V. LOOKING AHEAD IN NEW JERSEY

A. Finding the Balance Between Harms Averted and Harms Imposed While Accounting for Racial Disparities in the Justice System

Properly assessing the strengths and weaknesses and successes and failures of New Jersey's bail reform requires an honest assessment of the intended goals and realistic purview of the endeavor. That Black men are still disproportionately represented in New Jersey prisons after these reforms indicates that racial disparity in the justice system may be an issue outside the purview of bail reform. This realization is valuable in that more attention can be focused on other, earlier stages of criminal justice, including initial police interactions, the booking stage, and the charging stage. The reforms' ineffectiveness in this area may be disappointing, but it does not mean that other goals were not achieved.

The early returns of the CJRA indicate that limiting the use of cash bail pretrial is an effective means of reducing a ballooning prison population. It is also apparent that curbing the use of cash bail as the predominant means of securing a defendant's pretrial release helps level the playing field for the less-wealthy and abates the use of wealth as an arbitrary and unfair determiner of who may or may not go home to their families, communities, and jobs. The statistics show that thousands of detainees could be released from prison while awaiting trial with "statistically insignificant" increases in new crimes committed by releasees or failures to appear in court.

This balance of preventing future harms to society and imposing harms on defendants was closely examined by University of Georgia School of Law professor Sandra Mayson and University of Virginia School of Law professor Megan Stevenson.¹⁶³ Their research indicated two general principles regarding pretrial detention: "(1) detention must avert greater harm (by

¹⁶³ Megan Stevenson & Sandra Mayson, *Pretrial Detention and the Value of Liberty*, VA Pub. L. & Legal Res. Paper No. 2021-14, (February 16, 2021). Available at SSRN: <https://ssrn.com/abstract=3787018>.

preventing crime) than it inflicts (by depriving a person of liberty), and (2) prohibitions against pretrial punishment mean that the harm experienced by the detainee cannot be discounted in the cost-benefit analysis.”¹⁶⁴ In their research, the professors asked respondents to “choose between being the victim of certain crimes or being jailed for varying time periods.”¹⁶⁵ The results indicated that “even short periods of incarceration impose grave harms, such that a person must pose an extremely high risk of serious crime in order for detention to be justified.”¹⁶⁶ People who are detained risk losing their sources of income and, consequentially, their homes, cars, ability to care for loved ones, and the stability of their families and communities. These consequences experienced by detainees and those connected to them are too impactful to ignore when weighing potential harms of detention or release.¹⁶⁷ New Jersey’s bail reforms, which resulted in the release of thousands of defendants who may have otherwise been detained, is seemingly effective at alleviating some of these concerns.

However, New Jersey’s regular practice of using of risk assessment tools- namely the Public Safety Assessment- risks allowing racial inequalities earlier in the criminal justice process to bleed into pretrial detention hearings and result in jailtime for additional defendants. The PSA’s use of data regarding the legal histories of minority defendants- who are more likely to have police interactions than their White counterparts- may be skewed due to preexisting injustices, which, in turn, skews the results and recommendations of the PSA algorithm. New Jersey legislatures would be wise to follow the lead of Illinois in taking steps to reform police training (including use of

¹⁶⁴ Stevenson, *supra* note 163 at 5.

¹⁶⁵ Id. at 6.

¹⁶⁶ Id. (This “contingent valuation” survey method does not account for variables regarding the specific nature of the burglary hypothetically committed against the respondent, including, for example, whether the crime occurs at the victim’s home, what property was taken, or whether the assailant carried a weapon. The infinite number of variables in such a hypothetical scenario make a true balancing test between victimization and jailtime extremely difficult).

¹⁶⁷ While the impacts of detention on detainees must be considered in any balancing test, so too must the direct and consequential harms that have been suffered by the victim of the defendant’s alleged crime.

force guidelines), as well as measures to hold offending officers responsible for misconduct. These actions could address some of the racial disparities that enter the system prior to the pretrial stage.

B. Auditing, Reporting, and Evolving

Further, New Jersey lawmakers should closely monitor the results of Illinois' bail reforms once they take hold in 2023. Results from the complete elimination of cash bail could lead to an entirely new perspective on the lengths to which bail reform can safely go in limiting pretrial detention without significant consequences. Illinois' regulation of and restrictions on electronic monitoring will also be worthy of close analysis, as the overuse of such conditions can prove just as punitive and invasive as incarceration in some cases, effectively replacing one form of surveillance with another. Illinois' success in promoting liberty interests and saving money on electronic monitoring equipment, maintenance, and supervision could prove promising for New Jersey.

Finally, New Jersey must be diligent in appointing outside analysts and auditors to consistently monitor and report on statistics coming from the New Jersey Judiciary. Not only must there be fact-checks on the judiciary itself, but an outside perspective on the data coming from the state's court system and prisons is essential to promoting honesty and fairness. To demonstrate full transparency and openness, and in the active pursuit of stated objectives, New Jersey would be wise to appoint a committee of scholars, analysts, and criminal justice experts from outside the state's system to investigate and evaluate the bail and pre-trial detainment/release data provided by the state judiciary and other official sources. Such analysis can remove concerns regarding conflicts of interest in the release of state statistics while also providing valuable context for the records. Also, independent studies, such as the 2020 review of the Cook County Court's report on bail reforms, can reveal inconsistencies, flaws, or discrepancies that will prove useful in designing

subsequent legislation, but may have otherwise gone unrealized. Continuous reporting on the statistics will enable lawmakers to keep track of encouraging or disconcerting trends in detainment figures and consider and take courses of action to address and improve on the existing measures. The goal of New Jersey's bail reform should not be to merely replace a bad system with a less-bad system, but to continuously improve and evolve into a more-perfect system that curbs unfairness and inequality and promotes liberty and justice for all.