

GUILTY OF POVERTY: HOW BAIL REFORM  
EFFORTS IN CALIFORNIA WILL FAIL LIKE  
THEIR FEDERAL PREDECESSORS

Sara E. Planthaber

ISSN 0041-9915 (print) 1942-8405 (online) • DOI 10.5195/lawreview.2020.722  
<http://lawreview.law.pitt.edu>



This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 United States License.



This site is published by the University Library System of the University of Pittsburgh as part of its D-Scribe Digital Publishing Program and is cosponsored by the University of Pittsburgh Press.

# GUILTY OF POVERTY: HOW BAIL REFORM EFFORTS IN CALIFORNIA WILL FAIL LIKE THEIR FEDERAL PREDECESSORS

Sara E. Planthaber\*

“Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?”<sup>1</sup>

## INTRODUCTION

In 2009, Mr. William Cedric Wheeler was charged with stealing money from his long-time employer.<sup>2</sup> Despite having no prior criminal history and denying the charges, he was arrested, charged, and faced bail set significantly outside of his means.<sup>3</sup> Terrified of being sent to jail and leaving his six children fatherless, he made a plea deal to pay \$3,069.80 in restitution.<sup>4</sup> Even though he avoided jail, he then had a criminal record and struggled to get a job as a result.<sup>5</sup> He fell behind on his child support payments to his ex-wives and was only able to pay \$1,000 towards his debt because his tax refunds were withheld, which further limited his income.<sup>6</sup> Things were starting to look up for Mr. Wheeler when he got a steady job at a hotel in 2012,

---

\* Candidate for J.D./MSW, May 2021, University of Pittsburgh School of Law and School of Social Work; B.A. Swarthmore College, 2017. The author would like to thank her parents for their support and for all the wonderful trips to baseball stadiums, Christopher Dellana for comments on earlier drafts, and Professors David Harris and Chaz Arnett for source recommendations.

<sup>1</sup> *Bandy v. United States*, 81 S. Ct. 197, 198 (1960).

<sup>2</sup> Shaila Dewan, *When Bail Is Out of Defendant's Reach, Other Costs Mount*, N.Y. TIMES (June 10, 2015), <https://www.nytimes.com/2015/06/11/us/when-bail-is-out-of-defendants-reach-other-costs-mount.html>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

but then tragedy struck yet again when he suffered a stroke, rendering him unable to work and saddling him with an ever-growing pile of medical bills.<sup>7</sup> He remained unable to pay his child support and was arrested with restitution set at \$2,069.80, the exact amount he had been unable to pay prior to his stroke.<sup>8</sup> During his six week stay in jail, he lost his job, his home, and his car.<sup>9</sup> When he was interviewed by the *New York Times*, Mr. Wheeler, his wife, and their two young children were living in the back of a van because, most nights, they could not even afford to pay for an inexpensive motel room.<sup>10</sup>

Mr. Wheeler is a tragic, but not unique, victim of the money-driven criminal justice system in the United States. Some experts have estimated that up to nine out of every ten defendants are held pretrial due to their inability to afford bail.<sup>11</sup> This means that many people are incarcerated for crimes they did not commit and for longer periods of time than they would have served if they had been found guilty of the underlying crime charged.<sup>12</sup> The practice of pretrial detention is the equivalent of being punished without a day in court, and the imposition of unaffordable bail seems to reflect a principle contrary to the Anglo-American judicial principle of “innocent until proven guilty.”<sup>13</sup> Defendants are only subjected to the bail system

---

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

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* *But see id.* (describing a man who was photographed and identified as damaging police cars had his bail set at \$500,000. He had someone pay for it anonymously and he was permitted to leave despite his obvious dangerousness after only spending about a week in jail.); John S. Goldkamp, *Criminal Law: Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 14 (1985) (noting that in the District of Columbia, Wisconsin, and the federal jurisdiction, financial conditions are prohibited when the goal of pretrial detention is to contain the danger posed by defendants).

<sup>10</sup> Dewan, *supra* note 2.

<sup>11</sup> Cherise Fanno Burdeen, *The Dangerous Domino Effect of Not Making Bail*, THE ATLANTIC (Apr. 12, 2016), <https://www.theatlantic.com/politics/archive/2016/04/the-dangerous-domino-effect-of-not-making-bail/477906/>.

<sup>12</sup> Dewan, *supra* note 2.

<sup>13</sup> See Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 773 (2011) (arguing that the justice system fails to recognize that the presumption of innocence applies to pretrial proceedings as well as at trial); see also Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. REV. 837, 853 (noting that most state statutes are written such that the first level of evaluation is whether defendants should be released on their own recognizance because it reinforces the idea of a presumption of innocence. But this practice has decreased significantly in the past several decades, with more people being let out on bail or not at all.).

when they cannot afford the arbitrary price put on their freedom,<sup>14</sup> which over the course of many years has made bail more of a “predicate for detention” rather than a “condition of release.”<sup>15</sup>

In most cases of pretrial detention, the judge sets a bail<sup>16</sup> amount soon after arrest.<sup>17</sup> If defendants appear for their first hearing, they get the bail money back with court-imposed fees deducted.<sup>18</sup> Conversely, an unsecured bond allows defendants to

---

<sup>14</sup> Lydia D. Johnson, *The Politics of the Bail System: What’s the Price for Freedom?*, 17 SCHOLAR 171, 175 (2015).

<sup>15</sup> Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 714 (2018).

<sup>16</sup> Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 599 (2017) (defining bail as the value of property or an amount of money where, if paid, allows defendants to be released before the date of their first hearing).

<sup>17</sup> However, it is important to note that judges are not the only ones who have played a part in bail evolving in this way. Judges may, in fact, have very little discretion in deciding how much to set an individual’s bail, which gives much more power to prosecutors. See Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 1963–64 (2005). Like in Mr. Wheeler’s case, prosecutors can overcharge defendants, making them seem more dangerous than they are, which pushes judges to make very high bail determinations, or in some cases, not allow defendants out on bail at all. *Id.* at 1962. *But see* “Not in it for Justice”: How California’s Pretrial Detention and Bail System Unfairly Punishes Poor People, HUMAN RIGHTS WATCH (Apr. 11, 2017), <https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly> [hereinafter HUMAN RIGHTS WATCH] (arguing that prosecutors can contend that a defendant is too dangerous to release with conditions but are willing to release the same defendant if they plead guilty). Prosecutors are subject to a perverse incentive structure that encourages these practices; prosecutors may suffer serious occupational consequences (like damage to their professional reputation) for not securing convictions, especially if a case goes to trial, but they suffer no penalties for raising a significant number of charges against defendants to try and scare them to plead guilty. Manns, *supra* note 17, at 1962. In fact, prosecutors often get a positive reputation in their communities for keeping criminals out of the community when they overcharge defendants and force them to plead guilty. *Id.* at 1967. *But see* Joshua J. Luna, Comment, *Bail Reform in Colorado: A Presumption of Release*, 88 U. COLO. L. REV. 1067, 1085–86 (2017) (arguing that in cases where a defendant is forced into a guilty plea regardless of actual guilt, communities are in fact not safer because the real perpetrator is still on the streets). Prosecutors need only prove that there is “clear and convincing” evidence that defendants are a serious flight risk to convince a judge to detain them pretrial, which is markedly lower than the “beyond a reasonable doubt” standard required to secure a conviction in a criminal case. Manns, *supra* note 17, at 1969 (discussing how prosecutors establish a case for pretrial detention). See generally Jeffrey Standen, *Legal Issues and Sociolegal Consequences of the Federal Sentencing Guidelines: The End of the Era of Sentencing Guidelines: Apprendi v. New Jersey*, 87 IOWA L. REV. 775, 792–802 (2002) (arguing that prosecutors help defendant’s secure lower sentences than they would if sentenced by a judge).

<sup>18</sup> Simonson, *supra* note 16, at 599.

be released on their own recognizance<sup>19</sup> at the pretrial stage,<sup>20</sup> but if they fail to appear for their next court date, they are responsible for paying the full bail amount.<sup>21</sup> In some jurisdictions, judges do not have the power to set their own bail amounts because they are controlled by bail schedules.<sup>22</sup> Bail schedules are offense-specific and set a predetermined bail amount in which judges are mandated by statute<sup>23</sup> to set bail within a given range.<sup>24</sup> Many people have criticized bail schedules as having a disproportionate effect on minority communities<sup>25</sup> and further note that bail schedules also disproportionately punish low-income communities.<sup>26</sup> Conversely, many other jurisdictions do not have a bail schedule, and thus judges in those jurisdictions have the opportunity to impose their own conditions of release, even nonfinancial ones.<sup>27</sup> Bail practices in these jurisdictions have also been criticized for

---

<sup>19</sup> Personal recognizance is permitted release without the requirement of financial payment, but if the defendant fails to appear for their next court date, the personal recognizance bond is revoked and the person has to pay the full value of what the bond would have been. *See Johnson, supra* note 14, at 186.

<sup>20</sup> Hayley E. Miller, Note, *Taming the Wild West: Using Unsecured Bail Bonds in Nevada's Pretrial-Release Program*, 16 NEV. L.J. 1239, 1240 (2016).

<sup>21</sup> Thanithia Billings, Note, *Private Interest, Public Sphere: Eliminating the Use of Commercial Bail Bondsmen in the Criminal Justice System*, 57 B.C. L. REV. 1337, 1347 (2016).

<sup>22</sup> *Id.* at 1346.

<sup>23</sup> *See, e.g.*, MONT. CODE ANN. § 45-5-206(3)(a)(i) (2017) (“An offender convicted of partner or family member assault shall be fined an amount not less than \$100 or more than \$1,000 . . . .”); FLA. 5TH JUD. CIR. AO A-2006-06-A (listing each offense and the bail amounts judges in Citrus, Hernando, Lake, Marion, and Sumter Counties must impose on a defendant charged with a given offense); ILL. SUP. CT., R. 526(a) (“[A] person arrested for a traffic offense . . . shall post bail in the amount of \$ 120 . . .”).

<sup>24</sup> Billings, *supra* note 21, at 1346.

<sup>25</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, 655 (2017) (noting that some people refer to bail schedules as a fine or tax for being arrested). *See generally* Wendy R. Calaway & Jennifer M. Kinsley, *Rethinking Bail Reform*, 52 U. RICH. L. REV. 795, 811–15 (2018) (discussing litigation in several states around the use of bail schedules).

<sup>26</sup> *Cf.* Kyle Rohrer, Comment, *Why Has the Bail Reform Act Not Been Adopted by the State Systems?*, 95 OR. L. REV. 517, 537–38 (2017) (arguing that bail schedules take away the power of judges to make individual determinations, leading to more low-income defendants unnecessarily held pre-trial whereas dangerous offenders are released if they can afford bail).

<sup>27</sup> Gouldin, *supra* note 15, at 726–27. Some examples of this include undergoing psychiatric, medical, or substance treatment, complying with curfews, refraining from associating with certain people, or remaining in the custody of a third party. *But see id.* at 702 (noting that some judges have used their discretion to impose bizarre conditions of release, such as to write a book report or to take their wife bowling, and neither were required to justify why that particular condition was the “least restrictive” way to mitigate the chance of flight or dangerousness).

inconsistently imposing conditions of release and confinement, as described in more detail below.

In the absence of bail schedules, judges are supposed to balance the liberty interests of an individual with social risks, including the risk of nonappearance, their criminal history, and the threat they pose to the surrounding community.<sup>28</sup> Due to the impossibility of judges predicting with absolute certainty the risk of releasing defendants,<sup>29</sup> judges have traditionally managed these risks by imposing money bail.<sup>30</sup> In practice, when determining bail, judges tend to put the most weight on defendants' past criminal record and the seriousness of the crime with which they are charged.<sup>31</sup> While giving judges discretion may seem like the best way to ensure defendants are evaluated fairly, it also leads to significant variations in bail amounts.<sup>32</sup> For example, an empirical study using data from judges in Philadelphia County and Miami-Dade County shows there is significant variation between how lenient judges are in both the imposition of bail as well as the amount of bail, meaning that even within the same system judges are not consistent with their determinations.<sup>33</sup>

Due to judges' varying determinations and the fact that they often do not consider individualized financial situations,<sup>34</sup> many defendants who are in pretrial detention are there because they cannot afford their assigned bail amount, not

---

<sup>28</sup> Manns, *supra* note 17, at 1960–61. *But see* Rohrer, *supra* note 26, at 522 (arguing that a judge's balancing of flight risk and dangerousness has led to a steep increase in the number of pre-trial detentions, which runs contrary to the supposed presumption of innocence in the United States justice system).

<sup>29</sup> Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 514 (2012).

<sup>30</sup> Gouldin, *supra* note 15, at 697.

<sup>31</sup> Manns, *supra* note 17, at 1961; *see* Baradaran & McIntyre, *supra* note 29, at 536 (arguing that considering these factors is justified because studies have shown that defendants who have a long history of previous arrests are more likely to be arrested in the future). *But cf. id.* (arguing that a history of reoffending could be a result of the interaction of other factors). However, it is worth noting that many judges do not, and some cannot, take defendants' financial circumstances into account when deciding bail. *See* Manns, *supra* note 17, at 1961.

<sup>32</sup> Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1464 (2017).

<sup>33</sup> *Id.* It is also worth noting that Philadelphia has established bail guidelines and Miami-Dade has a bail schedule, which typically would help with the inconsistency of awarding bail but did not in this case. *Id.*

<sup>34</sup> *But see* Eli Hager, *Six States Where Felons Can't Get Food Stamps*, THE MARSHALL PROJECT (Feb. 4, 2016), <https://www.themarshallproject.org/2016/02/04/six-states-where-felons-can-t-get-food-stamps> (noting that the District of Columbia court system does not use money bail, though there have been some significant, and deadly, consequences when people were released and then reoffended).

because they were deemed too dangerous to be awarded bail.<sup>35</sup> For example, on Rikers Island in New York City, up to 40% of the prison population is incarcerated due to inability to pay bail.<sup>36</sup> This means that people are being punished for their poverty rather than criminal guilt, which is outside the purview of the criminal justice system.<sup>37</sup> Some scholars have argued that innocent defendants held pretrial will be more likely to commit a crime upon release because many lose their jobs and, with that, their ability to feed their families, pay rent, as well as other costs of living, which forces them to endure the consequences of their confinement long after release.<sup>38</sup>

The majority of prisoners in county jails are held pretrial and most of those incarcerated are deemed “low-risk” either by a formal assessment tool or the arresting officer.<sup>39</sup> This has significant implications on county budgets, with all county jails spending approximately \$9 billion a year on pretrial detention.<sup>40</sup> On the federal level, in 2009 the National Association of Counties estimated that over one-third of felony defendants were held pretrial because they could not afford bail.<sup>41</sup> This evidence points to an acute, dire need for criminal justice reform in the area of bail practices.

The California Money Bail Reform Act of 2017 (“CMBRA”) makes California the most recent state to pass legislation on bail reform.<sup>42</sup> California’s reform is not

---

<sup>35</sup> Manns, *supra* note 17, at 1958. Defendants who are unable to afford bail can be held for weeks, months, or, in extreme cases, years for their day in court. Billings, *supra* note 21, at 1341. Due to budget constraints in many jurisdictions, these defendants are often housed with the general prison population, exposing them to violence and serious criminal activity. Luna, *supra* note 17, at 1084.

<sup>36</sup> Billings, *supra* note 21, at 1339–40.

<sup>37</sup> Calaway & Kinsley, *supra* note 25, at 798.

<sup>38</sup> Manns, *supra* note 17, at 1972; see Baradaran & McIntyre, *supra* note 29, at 538 (noting that defendants held pretrial were twice as likely to be rearrested than those who were released pretrial: 2.9% vs. 1.9% respectively).

<sup>39</sup> Natalie R. Ortiz, *County Jails at a Crossroads: An Examination of the Jail Population and Pretrial Release*, 2 NAT’L ASS’N COUNTIES 1 (2015). Low risk is defined as “inmates and/or detainees [that] are at a lower risk of committing certain behaviors than other groups within the criminal justice population, as identified at booking by the jail with the use of a validated risk assessment tool.” *See id.* at 3.

<sup>40</sup> *Id.* at 2.

<sup>41</sup> *Id.* at 8.

<sup>42</sup> S.B. 10, 2017 Leg., Reg. Sess. (Cal. 2018).

unique; several other states have amended their bail practices,<sup>43</sup> but California's efforts were notable because their criminal justice system is one of the largest in the country.<sup>44</sup> The federal government also instituted reforms in the 1960s and 1980s, both of which failed to achieve significant, long-term positive impacts on the size of the federal prison population.<sup>45</sup> California's law is set to be voted on in a November 2020 referendum, but assuming it is enacted, the natural question is whether it will have the intended impact, or whether it will similarly fail like past federal efforts. A comparison and prediction of the fate of California's reform can be made by looking at the text of the CMBRA and the social context of California today and comparing it to the text of the federal reforms and the social context of the United States in 1966 and 1984.

This Note argues that the language of the CMBRA and relevant social context of California today are sufficiently similar to those of the Federal Bail Reform Act of 1984. Specifically, both laws give judges significant authority in determining bail amounts, and, in both cases, the social context includes a primary focus of preventing crime. This concern for deterring crime unfairly targets communities of color. This approach is in direct contrast with the more neutral considerations found in the Federal Bail Reform Act of 1966.<sup>46</sup> Even though California's law establishes pretrial service agencies to assist judges in their determinations, there is no language that imposes consequences on judges who deviate from the recommendations. Because of this deference given to judges, and the vast differences among individual judges' perception of defendants, California's reform will likely not have a profound impact on the number of people incarcerated pretrial.

In Part I, this Note will evaluate the history and evolution of bail in the United States, highlighting the implications of the current system on families and broadly discussing how bail varies among states. In Part II, the Federal Bail Reform Acts of 1966 and 1984 will be analyzed, with particular focus on their language, the prevailing social and legislative contexts in which they were passed, the deviations from their expected impacts, and why those deviations can be interpreted as failed

---

<sup>43</sup> See discussion *infra* Part I.B.

<sup>44</sup> SARAH LAWRENCE, WARREN INST. ON LAW & SOC. POLICY, CALIFORNIA IN CONTEXT: HOW DOES CALIFORNIA'S CRIMINAL JUSTICE SYSTEM COMPARE TO OTHER STATES? 5–8 (2012). California is ranked twentieth in prison incarceration rate, eleventh in parolees per capita, second in per capita spending on corrections, and sixth in annual cost per prisoner in the country. *Id.*

<sup>45</sup> See discussion *infra* Part II.

<sup>46</sup> The Bail Reform Act of 1966 placed an emphasis on ensuring appearance at trial and minimizing flight risk. See *infra* text accompanying notes 86–106.



reform.<sup>47</sup> Part III will detail California's criminal justice context, including statistics on incarceration and the legal atmosphere around bail prior to California's reform and will analyze the text of CMBRA. Part IV will compare the language of the CMBRA and attendant social context in California with the language of the federal acts and attendant social contexts in the United States in 1966 and 1984. Part IV will also make a prediction on the outcome of California's law based on its similarities to, and differences from, the prior acts. This Note will conclude by predicting the economic and social impacts on the prison system and prison population.

## I. BAIL IN THE UNITED STATES: PAST AND PRESENT

### A. *Development of the Bail System*

The United States' conception of bail was inherited from British law, which had made it illegal to impose excessive fines pretrial.<sup>48</sup> After the United States gained

---

<sup>47</sup> The author would like to note that while a textual and contextual predictive lens is an important one for pending legislation, this Note does not seek to minimize or sterilize the profound, disparate impact the bail-based criminal justice system has on communities, especially communities of color and lower-income communities. See Lisa Foster, *Injustice Under Law: Perpetuating and Criminalizing Poverty Through the Courts*, 33 GA. ST. U. L. REV. 695, 699 (2017) (noting that African Americans and Hispanics are at least twice as likely as whites to be detained pretrial for non-violent drug arrests). In general, African Americans are detained at five times the rate of whites. Calaway & Kinsley, *supra* note 25, at 798. The utilization of supposedly objective tools still leads to racially-biased results, where African Americans are twice as likely to be labeled a "high risk" to reoffend than whites, which is not rooted in reality. HUMAN RIGHTS WATCH, *supra* note 17. A study by Human Rights Watch found that controlling for criminal history, whites labeled "low risk" were more likely to reoffend than African Americans labeled as low risk (47.7% vs. 28%), showing how such designations are flawed predictors of future behavior. *But see id.* (arguing that the racist outcomes of risk assessment tools are a product of broader racism found in the criminal justice system). The impact on low-income communities is particularly acute because being arrested has a profound impact on an individual's access to public benefits, which could push those that use public benefits and their families further into poverty. See Gouldin, *supra* note 15, at 694. Defendants with an outstanding warrant do not have access to their public benefits, and if defendants are pressured to plea to an offense for fear of getting a harsher sentence at trial, they may be disqualifying themselves from benefits such as public housing and SNAP, depending on the state and type of offense. See Hager, *supra* note 34. While laws may not directly improve the daily lives of most people, at the very least laws should not be more disproportionately harmful; they should seek to achieve justice and produce fair results. Investigations into the impact of laws such as California's on vulnerable communities is necessary, and it is the responsibility of policymakers to ensure that such information is used responsibly to inform further legislation.

<sup>48</sup> Kyle Harrison, Note, *Penal: SB 10: Punishment Before Conviction? Alleviating Economic Injustice in California with Bail Reform*, 49 U. PAC. L. REV. 533, 538 (2018). The basis in English law has a long history, including with the Magna Carta (1215), Statute of Westminster I (1275), Petition of Right (1628), Habeas Corpus Act (1679), and the English Bill of Rights (1689). See Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 917–20 (2013) (detailing the impact of these documents on the creation of due process protections in state constitutions in the United States).

independence from the British, the Eighth Amendment to the Constitution, which holds that “excessive bail shall not be required, nor excessive fines imposed,”<sup>49</sup> signaled the Founders’ adoption of this Anglo-jurisprudential idea.<sup>50</sup> In addition, the Judiciary Act of 1789 dictated that non-capital defendants should be given an opportunity to be released on bail and defendants accused of capital crimes could be awarded bail if the judge allowed it.<sup>51</sup> The Judiciary Act of 1789 provided clear guidance to judges by detailing which offenses were bailable, putting limitations on judicial authority,<sup>52</sup> and explicitly stating that the purpose of imposing bail was to assure defendants’ appearance at trial.<sup>53</sup> However, state legislators remained concerned that defendants could flee into the wilderness and avoid appearing for trial, with little hope of law enforcement ever finding them.<sup>54</sup> This fear was somewhat remedied in the 1800s, when the bail bond industry was established to make sure defendants appeared for trial and to prevent overcrowding of jails<sup>55</sup>—though court decisions during that time reinforced the importance of pretrial release.<sup>56</sup>

However, the emergence of the bail bond industry in the late 1800s signaled a departure from using bail to ensure defendants’ appearance at trial,<sup>57</sup> and this shift in ideology continued through the twentieth century. During the 1950s, federal and

---

<sup>49</sup> U.S. CONST. amend. VIII. *But see* *Stack v. Boyle*, 342 U.S. 1, 5 (1951), *superseded by statute*, Bail Reform Act of 1984, 18 U.S.C. § 3142 (2016) (ruling that bail that is higher than necessary to ensure the presence of the defendant at his hearing is excessive under the Eighth Amendment. It also reinforced the idea that bail was instituted to ensure a defendant’s appearance at trial.); Gouldin, *supra* note 13, at 847 (noting that the Supreme Court has done little to enforce any protection against excessive bail).

<sup>50</sup> Gouldin, *supra* note 15, at 697–98. However, a notable difference between the Eighth Amendment and the English Bill of Rights is that the Eighth Amendment does not provide a guarantee of bail, nor does it specify which offenses are bailable, whereas the English Bill of Rights does contain these provisions. Luna, *supra* note 17, at 1071.

<sup>51</sup> Yang, *supra* note 32, at 1411.

<sup>52</sup> Johnson, *supra* note 14, at 175.

<sup>53</sup> *Id.*

<sup>54</sup> Luna, *supra* note 17, at 1072.

<sup>55</sup> Harrison, *supra* note 48, at 539.

<sup>56</sup> *See* *Coffin v. United States*, 156 U.S. 432, 454 (1895) (arguing that the availability of pretrial release is vital because it reinforces that people are innocent until proven guilty, and pretrial release helps protect that right). *But see* *Bell v. Wolfish*, 441 U.S. 520, 533 (1979) (ruling that the presumption of innocence is only applicable in a criminal trial and does not extend to pretrial hearings, signaling a departure from a focus on maintaining a presumption of innocence).

<sup>57</sup> Billings, *supra* note 21, at 1342.

state legislators were given more power to determine the parameters of bail, including which crimes were bailable, but noted that conditions of release must be tailored to each individual case.<sup>58</sup> This history demonstrates a departure from bail being used as a way to ensure appearance at trial and its transformation into a means to punish individuals accused of a crime. However, that trend has exhibited itself differently in the court systems of individual states.

### B. *Variations Among States*

Many states have reformed their criminal justice system, although these reforms have manifested in several different ways. For example, in New Mexico, judges are forbidden from detaining a “low-risk” offender who cannot pay bail; in New Jersey they have eliminated bail and moved to a risk assessment system; and in some states, like Kentucky, Oregon, Wisconsin, and Illinois, commercial bail bondsman have been banned.<sup>59</sup> In addition, the Kentucky legislature passed a bill which states that a judge must begin every case with the presumption that defendants should be released and, before the judge implements release conditions, must show the defendant constitutes “a flight risk, is unlikely to appear for trial, or is likely to be a danger to the public if released.”<sup>60</sup>

The use of pretrial assessment agencies and tools is a particularly common method of reform.<sup>61</sup> They were initially instituted to counteract judicial overuse of bail as a method of release.<sup>62</sup> Pretrial assessment tools use a point system, assigning values to details like criminal history and ties to the community, to try to return for subsequent court dates.<sup>63</sup> One jurisdiction that is famous for its use of a pretrial

---

<sup>58</sup> *Id.* at 1348–49.

<sup>59</sup> Harrison, *supra* note 48, at 541.

<sup>60</sup> Miller, *supra* note 20, at 1254. After the implementation of this law, defendants’ appearances at their next court hearing increased by one percent. *Id.*

<sup>61</sup> Johnson, *supra* note 14, at 190.

<sup>62</sup> *Id.* But see Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303 (2018) (revealing that, inter alia, after a small, initial increase in pretrial release after instituting a risk assessment program, these effects largely disappeared when judges returned to their old habits).

<sup>63</sup> Johnson, *supra* note 14, at 190. See generally *id.* at 191–93 (noting that the bail bond industry has used its power as a powerful lobbying group to advocate against this system, arguing that the implementation of such programs is costly to taxpayers with little reciprocal insurance of safety); see also Collette Richards & Drew Griffin, *States Are Trying to Change a System That Keeps Poor People in Jail. The Bail Industry Is Blocking Them*, CNN (Aug. 30, 2019), <https://www.cnn.com/2019/08/30/us/bail-reform-bonds-lobbying-invs/index.html> (noting that the bail bond industry has “derailed, stalled, or killed reform efforts in nine states, which combined cover more than one-third of the country’s population”).

service agency is the District of Columbia, which has its own agency conducting risk assessments on defendants<sup>64</sup> and financial conditions are not a conclusive factor in determining if a defendant should be held pretrial.<sup>65</sup> In other words, if a defendant cannot afford money bail and is deemed low-risk, the agency will recommend a non-monetary bail option.<sup>66</sup> While this system has been successful, in that over ninety percent of defendants are released pretrial and none are held because of an inability to pay,<sup>67</sup> it is worth noting that the District is a small jurisdiction and this system may not operate as well in every jurisdiction.

To cite just a few examples, some jurisdictions in Colorado use a system which lists factors for judges to consider and provides guidance for scoring and weighing the factors.<sup>68</sup> The Colorado Pretrial Assessment Tool looks at a number of factors with points associated with each factor, tallies the totals, and assigns defendants a risk score.<sup>69</sup> Defendants are then assigned into one of four categories of risk, which a judge then uses to determine what pretrial release, if any, defendants should be given.<sup>70</sup> However, because circumstances may affect what a judge should do in an individual case, Colorado law allows a judge to review the findings and disagree with the agency's determination.<sup>71</sup> These tools have been criticized for their lack of empirical validity, with most scholars arguing for their use in addition to other methods of reform.<sup>72</sup>

---

<sup>64</sup> Billings, *supra* note 21, at 1359–60.

<sup>65</sup> *Id.* at 1360.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Miller, *supra* note 20, at 1255–56. Colorado still uses secured money bail in 69% of cases, but those released by unsecured bail were less likely to miss dates or reoffend. *Id.* at 1256.

<sup>69</sup> Gouldin, *supra* note 13, at 868–69.

<sup>70</sup> *Id.*

<sup>71</sup> Miller, *supra* note 20, at 1257.

<sup>72</sup> See Calaway & Kinsley, *supra* note 25, at 811–15; see also Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218 (2019) (arguing that the algorithms in risk assessment tools rely on police data, which is plagued by racist police techniques, and that risk assessment tools should more clearly identify and define risks without this racist basis); Jessica Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59 (2017) (noting that the factors analyzed by risk assessment tools are often created by people without consideration of the legal significance of those factors).

Most state and local jurisdictions give judges the freedom to set bail or detain suspects due to a concern for public safety or fear of flight.<sup>73</sup> In most states' determination of bail status, they take little to no consideration of defendants' financial status<sup>74</sup> and prosecutors have the power to gloss over any conversation about the potential risk to the community because most hearings are done quickly and often without representation for defendants.<sup>75</sup>

### C. *Implications for Families*

While the procedural and legal significance of pretrial detention is important and will be discussed at length throughout this Note, it is worth acknowledging that these legal decisions have significant impacts on not only defendants, but also on their families. While most courts do not consider the impacts on defendants' families,<sup>76</sup> they are relevant to any discussion of bail because the disproportionate application of bail affects these individuals most directly.

The process of bail really begins with a judge or other officer setting a bail amount for defendants.<sup>77</sup> Defendants' lives may be decided by what the judge establishes as their bail. For example, if defendants can afford the bail amount, they can continue going to school, working, and consulting with an attorney on a defense strategy. However, if they cannot afford their bail, they are then incentivized to plead guilty, whether or not they are guilty.<sup>78</sup>

As discussed previously, there is no disincentive for prosecutors electing to overcharge criminal defendants to force them into a plea deal.<sup>79</sup> A study by the Federal Reserve found that 47% of Americans would be unable or would have to

---

<sup>73</sup> Simonson, *supra* note 16, at 599.

<sup>74</sup> Calaway & Kinsley, *supra* note 25, at 806 (noting that some states voluntarily adopted a system permitting consideration of defendants' financial means in bail determinations).

<sup>75</sup> Miller, *supra* note 20, at 1245. *But see* DeWolfe v. Richmond, 76 A.3d 962, 973 (Md. 2012) (ruling that low-income defendants are entitled to an attorney during their pretrial hearing). This case is noteworthy because attorneys can advocate for defendants to be released on their own recognizance based on factors judges are supposed to consider.

<sup>76</sup> See *United States v. Colombo*, 616 F. Supp. 780 (E.D.N.Y. 1985), *rev'd*, 777 F.2d 96 (2d Cir. 1985) (exemplifying a case where a judge considered the implications on a defendant's family, employment, and other sociological factors).

<sup>77</sup> See *supra* text accompanying notes 16–27.

<sup>78</sup> Simonson, *supra* note 16, at 589.

<sup>79</sup> See Manns, *supra* note 17, at 1963–64.

borrow money or sell property to pay \$400 in the case of an emergency.<sup>80</sup> This shows that bail does not even have to reach \$500 for it to have a devastating effect on the most economically vulnerable of the population. If defendants or their family cannot afford to pay the full assigned bail amount, low-income defendants only have two options outside of a guilty plea: They can pay 10% of the bail amount to a bail bondsman, who will cover the rest of the cost but will expect the full amount plus interest regardless of the outcome of the case, or they can choose not to pay for bail and instead spend days, weeks, or months incarcerated, with the possibility of being released without charges.<sup>81</sup> Especially for low-income families, these outcomes present a no-win situation that leaves no real choice other than to take a guilty plea.

There is generally no recourse for defendants who are never convicted or charged with a crime to receive compensation for their time spent incarcerated,<sup>82</sup> which is significant because many defendants who were incarcerated for long periods of time are often faced with unemployment, eviction, or other consequences of being isolated from their community upon release.<sup>83</sup> Long-term pretrial incarceration creates greater isolation of defendants from their family, friends, and job, which over time wears on them and makes them more likely to accept a prosecutor's plea bargain even when they are innocent.<sup>84</sup> This three-way conflict of outcomes creates a no-win situation for most low-income defendants and their families. Pretrial detention can also have serious implications for the outcome of defendants' cases, with defendants who are detained pretrial being less likely to have their charges dropped, more likely to be convicted at trial, and more likely to have longer sentences than those who are released before trial.<sup>85</sup> This means that the consequences of incarceration are felt longer and more acutely by families of people who are incarcerated pretrial.

---

<sup>80</sup> HUMAN RIGHTS WATCH, *supra* note 17.

<sup>81</sup> Manns, *supra* note 17, at 1948–49 (“[P]lacing defendants in pretrial detention creates tremendous pressure for guilty pleas regardless of actual culpability . . . without the constitutional protection of trials.”).

<sup>82</sup> *Id.* at 1952.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 1951.

<sup>85</sup> Billings, *supra* note 21, at 1343; *see also* Yang, *supra* note 32, at 1421–22; Gouldin, *supra* note 13, at 860; Paul Heaton et al., *The Downstream Consequences of Misdemeanor Detention*, 69 STAN. L. REV. 711, 725 (2017). *But see id.* at 714 (arguing that a system which effectively holds the most dangerous defendants pretrial would expect this outcome).

This overview of the bail system in the United States demonstrates that reform is needed to address the inherent injustices in this system. Like many social justice reforms before it, bail reform comes in waves.<sup>86</sup> In order to understand current reform efforts, it is important to acknowledge and study previous waves. An evaluation of past reform attempts is necessary because “reforms that build on the existing system without addressing the cracks in the foundation are doomed to repeat current mistakes.”<sup>87</sup>

## II. PAST BAIL REFORM EFFORTS: THE FEDERAL BAIL REFORM ACTS OF 1966 AND 1984

This Part will evaluate the Federal Bail Reform Acts (“FBRA”) of 1966 and 1984. For each law, an analysis of the social and legislative contexts, relevant language, and a comparison of its expected and then actual impact will be explored, including a discussion of why each law failed to achieve its expected outcome. Part A will discuss the FBRA of 1966 and Part B will discuss the FBRA of 1984.

### A. *The Federal Bail Reform Act of 1966*

#### 1. Social and Legislative Context

The FBRA of 1966 marked the first time since the Judiciary Act of 1789 that the federal government addressed the issue of bail.<sup>88</sup> The Act was inspired by the Manhattan Bail Project founded in New York City in 1961, which convinced some judges to use a risk-assessment system to decide whether defendants should be released on monetary bail.<sup>89</sup> The Manhattan Bail Project was successful in that the number of defendants released pretrial increased from 14% before the Project to more than 60% after its implementation, with over 98% of defendants returning for their subsequent hearings.<sup>90</sup>

---

<sup>86</sup> Simonson, *supra* note 16, at 622 (characterizing the period from the mid-1990s to the present as the third wave of bail reform).

<sup>87</sup> Gouldin, *supra* note 15, at 696.

<sup>88</sup> Miller, *supra* note 20, at 1244.

<sup>89</sup> See Rachel Smith, Note, *Condemned to Repeat History? Why the Last Movement for Bail Reform Failed, and How This One Can Succeed*, 25 GEO. J. POVERTY L. & POL’Y 451, 454–55 (2018) (discussing the origins and evolution of the Manhattan Bail Project, which continues today as the Vera Foundation).

<sup>90</sup> *Id.* at 455. *But see id.* at 457 (arguing that the Manhattan Bail Project reinforced inequality under a guise of objective assessment because it put a strong emphasis on consistent employment history, which, due

After the success of the Manhattan Bail Project, researchers from the Ford Foundation and other institutions began studying the burdens of pretrial detention and noticed the repercussions it had on defendants' conviction rates, with defendants released pretrial having significantly lower conviction rates than those held pretrial.<sup>91</sup> Many of the researchers criticized the way judges were permitted to indirectly detain allegedly dangerous defendants pretrial by setting unattainable bail amounts.<sup>92</sup>

The United States government, in the 1960s, was focused on alleviating the effects of poverty,<sup>93</sup> and research revealing that income-based inequality was inherent in the bail system sparked a call for reform.<sup>94</sup> President Lyndon Johnson recognized this trend when he said, “[B]ecause of the bail system, the scales of justice [were] weighed not with fact nor law nor mercy. They [were] weighed with money.”<sup>95</sup> Reformers also wanted to eliminate the use of unnecessary pretrial detention, especially for defendants in urban areas where the jails tended to be more crowded.<sup>96</sup> The next Part will illustrate how these relative contexts impacted the way the FBRA of 1966 was written.

## 2. Language of the Act

As stated, the FBRA of 1966 primarily sought to eliminate an individual's financial status as a barrier to release.<sup>97</sup> Readers of the Act need look no further than the Act's purpose to notice this influence, which reads: “The purpose of this Act 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 [in

---

to discriminatory employment practices, many populations already affected by bail are unable to keep (e.g., minorities, people with disabilities, etc.)).

<sup>91</sup> *Id.* at 455.

<sup>92</sup> Goldkamp, *supra* note 9, at 3–4 (“Many critics condemned the then prevailing system of cash bail that allowed judges to detain defendants indirectly by setting unaffordable bail without giving reasons and for questionable purposes, chiefly to confine defendants ‘preventatively’ whom they viewed as dangerous.”).

<sup>93</sup> Harrison, *supra* note 48, at 540.

<sup>94</sup> Heaton et al., *supra* note 85, at 719.

<sup>95</sup> Gouldin, *supra* note 13, at 860–61.

<sup>96</sup> Goldkamp, *supra* note 9, at 2.

<sup>97</sup> Floralyann Einesman, *How Long Is Too Long? When Pretrial Detention Violates Due Process*, 60 TENN. L. REV. 1, 4 (1992).



court].”<sup>98</sup> Therefore, the goal of the legislation was to ensure defendants’ appearance in court.<sup>99</sup> In order to achieve that objective, judges were required to individually assess each defendant to determine whether they were a flight risk.<sup>100</sup> The FBRA of 1966 was somewhat unique in that it allowed judges to inject their own discretion in assessing a defendant’s flight and safety risk. This included allowing them to consider such factors as a defendant’s criminal record<sup>101</sup> and the weight of evidence against the defendant at the time of the hearing.<sup>102</sup>

Specifically, the language of the FBRA of 1966 presumes that all non-capital criminal defendants should be released on personal recognizance and bail should only be used where a court decides it is the only condition that will ensure a defendant’s appearance at their next hearing.<sup>103</sup> Under this Act, judges are required to choose the “least restrictive” means of ensuring defendants’ appearance at trial and provides a list of non-financial alternative conditions of release, but they are more restrictive than release on personal recognizance alone.<sup>104</sup> However, only the judge can decide whether to require bail and, if the judge concludes that bail will not ensure a defendant’s appearance, can utilize other conditions.<sup>105</sup>

In sum, the language of the FBRA of 1966 clearly states its intention to ensure defendants appear at trial. The Act also captures the zeitgeist of the 1960s by undercutting the role of financial conditions on the release of a defendant. Notably, the Act’s language not only includes a commitment to ensuring defendants’

---

<sup>98</sup> Bail Reform Act of 1966, Pub. L. No. 89–465, 80 Stat. 214 (codified as 18 U.S.C. §§ 3146–3152 (1982)), *repealed by* Bail Reform Act of 1984, 18 U.S.C. § 3142 (1984).

<sup>99</sup> Goldkamp, *supra* note 9, at 5.

<sup>100</sup> *See generally* 18 U.S.C. § 3146(a), (b) (stipulating that a judge can put restrictions on a defendant’s release (or in extreme cases detain him) if a defendant is deemed a flight risk. A judge must consider a defendant’s ability to pay before imposing money bail as well as other methods of ensuring a defendant appears at the next hearing.).

<sup>101</sup> Yang, *supra* note 32, at 1413.

<sup>102</sup> 18 U.S.C. § 3146(b). This consideration is significant because the more evidence which exists tending to implicate the defendant, the less likely a defendant will be released. It is also important to note that any restrictions placed on defendants would have to be decided at a hearing in front of a judge, ensuring that defendants would have some platform to discuss their case, in person. *See generally id.* § 3146(a).

<sup>103</sup> Harrison, *supra* note 48, at 539–40.

<sup>104</sup> *See* 18 U.S.C. § 3146(a)(1)–(5). Examples include restricting travel or placing the defendant in the custody of an individual, making pretrial detention, absent an extreme circumstance, very difficult because judges have many other options.

<sup>105</sup> Johnson, *supra* note 14, at 177.

appearance at trial, but also provides judges a written mandate to ensure the use of least restrictive conditions.<sup>106</sup> The Act takes this commitment a step further when it provides judges a list of alternative conditions of release which focus on ensuring appearance without the imposition of financial conditions. However, there is no enforcement mechanism to ensure judges are adhering to these practices. In fact, as will be discussed in the next section, this lack of legislative mandate, coupled with a significant allowance of judicial discretion, stymied any chance of profound reform efforts.

### 3. Intended vs. Actual Impact and Reasons for Failed Reform

The FBRA of 1966 sought to make “the release of defendants without money bail the norm, rather than the exception.”<sup>107</sup> The Act’s influence led many federal district courts to establish pretrial service programs, which provided judges with information about defendants that would help them make a more accurate determination of defendants’ likelihood to appear for trial.<sup>108</sup> However, few of these early pretrial service programs continued long-term, and those that did were provided little to no financial support from the government.<sup>109</sup> On the state level, within five years of the Act’s enactment, only about twelve states revised their laws to reflect the federal government’s focus on eliminating the impact of financial considerations.<sup>110</sup> In addition, very few states passed legislation limiting the influence of the commercial bail bond industry,<sup>111</sup> and no state passed criminal justice reform laws similar to the FBRA of 1966.<sup>112</sup> Despite this, the Act did generate positive change: Between 1962 and 1971, pretrial release rates for felony defendants increased from 48% to 67%.<sup>113</sup> Nevertheless, most commentators consider the FBRA of 1966 a failed effort at reform, though opinions differ as to why.

---

<sup>106</sup> See 18 U.S.C. § 3146(a)(1)–(5).

<sup>107</sup> Yang, *supra* note 32, at 1412.

<sup>108</sup> Luna, *supra* note 17, at 1078.

<sup>109</sup> Billings, *supra* note 21, at 1349.

<sup>110</sup> Miller, *supra* note 20, at 1244.

<sup>111</sup> Warren L. Miller, *The Bail Reform Act of 1966: Need for Reform in 1969*, 19 CATH. U. L. REV. 24, 44 (1969).

<sup>112</sup> Foster, *supra* note 47, at 698–99.

<sup>113</sup> Baradaran & McIntyre, *supra* note 29, at 551.

One reason often given for the failure of the FBRA of 1966 is the election of Richard Nixon in 1968, who ran his presidential campaign as a “law and order” candidate.<sup>114</sup> This law-and-order mentality focused more on preventing crime than ensuring the objectivity of the criminal justice system. Another possible reason for the failure is that, while its policy basis was sound, there was a lack of motivation in both the social and political realms to tailor actions to conform to the Act’s reform spirit.<sup>115</sup> For example, most judges deemed the potential political consequences of releasing a defendant pretrial who then committed a crime greater than the non-existent sanctions built into the Act.<sup>116</sup>

Perhaps the most consequential reason for failure is that the FBRA of 1966 provided judges ample discretion to make individual determinations, with no mechanism for sanctioning those who abused it. The Act authorized judges to look at defendants’ prior records when considering their potential flight risk, which then allowed some judges to consider other factors under the guise of trying to ensure the defendant’s “appearance at trial.”<sup>117</sup> Further, in the late 1970s and early 1980s, the social consciousness of the effects of poverty changed to a concern about crime.<sup>118</sup> Some commentators have argued that language giving judges discretion to hold defendants on fear of flight risk created the opportunity for increased pretrial detention,<sup>119</sup> a pattern which will be discussed in the next Part.

---

<sup>114</sup> See Hegreness, *supra* note 48, at 956 (arguing that Nixon ran a “law and order” campaign that was realized with the passage of the District of Columbia Crime Act of 1970, which was unique for its time in that it encouraged courts to consider a person’s dangerousness when making bail determinations); *see also* Smith, *supra* note 89, at 452 (“[W]ithin a decade, a ‘tough-on-crime’ counter movement had peeled back [the Bail Reform Act of 1966]’s advances.”).

<sup>115</sup> Simonson, *supra* note 16, at 623 (“[T]he failure of the reforms to bring forth a true shift in the money bail system was based not on unsound policies but rather on a missing piece of political or social will to incentivize institutional actors to act in the spirit of the reforms.”).

<sup>116</sup> *Id.*

<sup>117</sup> Baradaran & McIntyre, *supra* note 29, at 747–48.

<sup>118</sup> Smith, *supra* note 89, at 457 (“Caught up in public anxiety about crime, judges began ignoring the 1960s laws setting a presumption of release on recognizance.”).

<sup>119</sup> Yang, *supra* note 32, at 1413 (“[T]he 1966 Act required judges to release non-capital defendants unless the judge ‘determined . . . that such a release [would] not reasonably assure the appearance of the person as required’ which some scholars have argued inadvertently paved the path for increased pre-trial detention.”). *See generally* Baradaran, *supra* note 13, at 739–46 (arguing that the 1966 Act was responsible for facilitating the passage of the 1984 Act by allowing judges to take more factors into account, including the likelihood a defendant would commit further crimes and their connections to the community).

## B. *The Federal Bail Reform Act of 1984*

### 1. Social and Legislative Context

The 1970s and 1980s brought concerns of rising rates of pretrial crime. These concerns were the catalyst of the second wave of bail reform, the focus of which was identifying and mitigating the dangers of defendants who posed a risk of committing a pretrial crime.<sup>120</sup> Graphic stories of violent defendants reoffending while out on bail were widely circulated, which only fueled the public's fears.<sup>121</sup> In addition to a fear of crime, the socio-political climate created by the War on Drugs weighed heavily on the Senate Judiciary Committee. For example, in 1983, the Committee explicitly mentioned concerns that a defendant released pretrial would engage in drug activity,<sup>122</sup> so the Committee included a "public safety risk" provision that could be interpreted to mean committing any crime, regardless of violence or dangerousness.<sup>123</sup>

The FBRA of 1984 was part of the Comprehensive Crime Control Act,<sup>124</sup> serving as a response to the "alarming problem of crimes committed by persons on release."<sup>125</sup> Congress borrowed procedural provisions from the District of Columbia Crime Act of 1970, especially those addressing judges' assessments of defendants' risks to their communities.<sup>126</sup> The FBRA of 1984 was passed to reflect the reality

---

<sup>120</sup> Heaton et al., *supra* note 85, at 719–20; *see also* Yang, *supra* note 32, at 1413; Gouldin, *supra* note 13, at 848. *But see* Goldkamp, *supra* note 9, at 52 (arguing that studies done at the time estimated that anywhere from 10% to 20% of defendants were rearrested during the pretrial phase for suspicion of committing a crime, with less than half actually convicted for those crimes).

<sup>121</sup> Luna, *supra* note 17, at 1078.

<sup>122</sup> *See* Gouldin, *supra* note 13, at 851.

<sup>123</sup> 18 U.S.C. § 3142(e)(3)(A) (1984) (stating that a large class of drug offenses are subject to pretrial detention and the judge only requires probable cause that the person committed that crime); *see also* E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2016, at 1 (2018) (revised Aug. 7, 2018) (arguing that the fixation with curbing drug offenders is still reflected today, where almost half of all federal arrests in 2016 were for drug offenses).

<sup>124</sup> Miller, *supra* note 20, at 1244.

<sup>125</sup> S. REP. NO. 98-225, at 3 (1983); *see also* Baradaran & McIntyre, *supra* note 29, at 523 (reporting expert reports to the House which note that it is nearly impossible to predict who will offend on pretrial release with any kind of accuracy). *But see* U.S. GOV'T ACCOUNTABILITY OFF., GGD-82-51, STATISTICAL RESULTS OF BAIL PRACTICES IN SELECTED FEDERAL COURTS 7 (1982) (noting that in the ten federal districts which had pretrial service agencies in the late 1970s and early 1980s, the overall rate of bailed defendants who had committed a crime on release had decreased thirty-three percent between 1976–1980).

<sup>126</sup> Yang, *supra* note 32, at 1413–14.

that judges were already considering defendants' dangerousness and to make bail more "honest and protect the integrity of the process" by ensuring the transparency of judicial opinions.<sup>127</sup> During debates of the Comprehensive Crime Control Act, lawmakers were critical of the use of dangerousness as a consideration, citing experts who noted that it was nearly impossible to predict who would commit pretrial crimes.<sup>128</sup>

## 2. Language of the FBRA of 1984

The FBRA of 1984 was passed as a replacement to the FBRA of 1966.<sup>129</sup> The FBRA of 1984 signaled a significant shift to a focus on public safety, a departure from the focus on appearance at trial found in the FBRA of 1966.<sup>130</sup> For example, the FBRA of 1984 added the stipulation that "unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required *or will endanger the safety of any other person or the community*," then a judge can impose conditions on a defendant's release.<sup>131</sup> This dangerousness standard was significant because it marked the first time that judges were given statutory authority to consider the dangerousness of defendants in United States federal courts.<sup>132</sup> The additional consideration of a defendant's dangerousness effectively nulled the presumption of release that characterized the rationale in the FBRA of 1966.<sup>133</sup> Additionally, nine new conditions were added to the FBRA of 1984, all of which related to defendants' potential safety risks.<sup>134</sup> While appearance was still important,

---

<sup>127</sup> Gouldin, *supra* note 13, at 848–49. In particular, those calling for bail reform wanted judges to specify when they were holding defendants for a concern of dangerousness rather than flight risk. *Id.*

<sup>128</sup> Baradaran & McIntyre, *supra* note 29, at 523.

<sup>129</sup> Johnson, *supra* note 14, at 177.

<sup>130</sup> Goldkamp, *supra* note 9, at 6; *see also* Einesman, *supra* note 97, at 3.

<sup>131</sup> 18 U.S.C. § 3142(b) (1984) (emphasis added).

<sup>132</sup> Einesman, *supra* note 97, at 1 ("For the first time in the history of federal bail legislation, courts are authorized, in noncapital cases, to consider both the defendant's risk of flight, as well as his possible danger to the community, when deciding whether and what amount of bail should be set . . .") (emphasis added).

<sup>133</sup> Kenneth Frederick Berg, *The Bail Reform Act of 1984*, 34 EMORY L.J. 685, 686 (1985). Congress noted this change as well, specifically highlighting that the addition of a consideration of dangerousness was a significant departure from the goals of the 1966 Act. *See* S. REP. NO. 98–225, at 3 (1983).

<sup>134</sup> *See* 18 U.S.C. § 3142(b), (g)(1)–(4). These provisions are all either completely new or have features which were not a part of the 1966 Act; *see also* Einesman, *supra* note 97, at 12 (arguing that these provisions in conjunction with 18 U.S.C. § 3142(f)(1)–(2) have led to greater rates of pretrial incarceration).

the FBRA of 1984 emphasized evaluating the dangerousness of defendants by explicitly instructing the judge to consider the “nature and seriousness of the danger to any person or the community that would be posed by the [defendant’s] release.”<sup>135</sup>

As part of an evaluation of dangerousness, judges are given a list of factors to consider, including defendants’ “characteristics.”<sup>136</sup> This language effectively creates a statutorily-authorized consideration of defendants’ race, ethnicity, and other indicators, including neighborhood of residence. Critics of the FBRA of 1984 have vilified its dangerousness provision, arguing that, “prior to this revision, denial of bail was only permitted for the most heinous crimes, such as capital offenses. Since the 1984 Act, courts have been able to deny bail as a preventative measure.”<sup>137</sup>

Financial considerations were not completely lost in the FBRA of 1984, with one section stating that “[t]he judicial officer may not impose a financial condition that results in the pretrial detention of the person.”<sup>138</sup> In theory, if defendants were a low flight risk and not considered dangerous, the judge would be prohibited from setting bail above what defendants could afford. However, as will be detailed in the next Part, this is not what actually what occurred.

### 3. Intended vs. Actual Impact and Reasons for Failed Reform

Despite knowledge that judges are imperfect evaluators of defendants’ risks,<sup>139</sup> many states adopted the federal government’s practice.<sup>140</sup> By the end of 1984, thirty-four states had preventative detention laws, almost all of which were influenced by the FBRA of 1984.<sup>141</sup> Additionally, almost all states amended laws to allow judges to consider defendants’ dangerousness.<sup>142</sup> A government report in 1987 showed that rates of detention had increased: There was a 51% increase in defendants

---

<sup>135</sup> 18 U.S.C. § 3142(g)(4).

<sup>136</sup> *Id.* § 3142(g).

<sup>137</sup> Allen, *supra* note 25, at 649.

<sup>138</sup> 18 U.S.C. § 3142(c)(2).

<sup>139</sup> See Gouldin, *supra* note 15, at 703.

<sup>140</sup> *Id.* at 858. Most states included the provision that the denial of pretrial release would only be granted in cases where the judge could find no conditions of release which would mitigate the risks of flight or dangerousness. It is worth noting that since the passage of this Act, only about one out of every ten cases of pretrial detention are cited as a judge’s inability to mitigate risks. *Id.*

<sup>141</sup> Smith, *supra* note 89, at 457.

<sup>142</sup> Yang, *supra* note 32, at 1415.

incarcerated pretrial due to their inability to pay bail, and there was only a 0.3% drop (from 2.1% to 1.8%) in people who were released pretrial who failed to return to subsequent hearings in federal court.<sup>143</sup> In addition, from 1984 to 1985, 74% of defendants were released pretrial; in 1986, that number fell to only 69%.<sup>144</sup> In sum, the FBRA of 1984 led to greater rates of incarceration because of financial constraints, decreased rates of pretrial release, and it did not improve defendants' appearance at hearings.

Perhaps the most significant win for supporters of the FBRA of 1984 came in the controversial case of *United States v. Salerno*.<sup>145</sup> Anthony Salerno was indicted on twenty-nine counts, including RICO offenses, wire fraud, and attempted murder.<sup>146</sup> At his arraignment, Mr. Salerno requested pretrial release on the grounds that he was not a flight risk, citing a "serious medical condition."<sup>147</sup> But the District Court denied his request, holding that under § 3142(e) of the FBRA of 1984, there was no set of conditions which would assure the safety of others or his community, so he was ineligible for release.<sup>148</sup> The Second Circuit reversed, holding that § 3142(e) was facially unconstitutional because it deprived defendants of substantive due process under the Fourteenth Amendment—namely, the government cannot deprive a person who has not been accused of a crime of their liberty simply because they are believed to be a danger to their community.<sup>149</sup> The Supreme Court ruled that pretrial detention was regulatory, not punishment, which is supported by Congress' legislative history.<sup>150</sup> Also, the Court argued, the government has a legitimate interest in preventing further crime and this interest outweighs a defendant's right to liberty

---

<sup>143</sup> U.S. GOV'T ACCOUNTABILITY OFF., GGD-88-6, CRIMINAL BAIL: HOW BAIL REFORM IS WORKING IN SELECTED DISTRICT COURTS 17, 36 (1987).

<sup>144</sup> See *id.*; see also *Pretrial Services—Judicial Business 2017*, U.S. COURTS, <https://www.uscourts.gov/statistics-reports/pretrial-services-judicial-business-2017> (last visited Jan. 26, 2019) (noting that the rate of pretrial release in 2017 was 40%, demonstrating the long-term impact of the FBRA of 1984).

<sup>145</sup> *United States v. Salerno*, 481 U.S. 739 (1987).

<sup>146</sup> *Id.* at 743.

<sup>147</sup> *Id.*

<sup>148</sup> *United States v. Salerno*, 631 F. Supp. 1364, 1375 (S.D.N.Y. 1986), *overruled by* 481 U.S. 739 (1987).

<sup>149</sup> *United States v. Salerno*, 794 F.2d 64, 66 (2d Cir. 1986), *overruled by* 481 U.S. 739 (1987).

<sup>150</sup> *Salerno*, 481 U.S. at 746–47. *But see* Manns, *supra* note 17, at 1959 (questioning whether the distinction between "regulatory" and "punitive" purposes really matters when pretrial detainees are being held in the same conditions and facilities as people who have been convicted, a practice which is prohibited under the FBRA of 1984).

in cases where a court determines that the defendant presents a risk to commit further crimes.<sup>151</sup>

Critics of *Salerno* argue this decision “soundly rejected” a defendant’s right to bail.<sup>152</sup> In addition, *Salerno* further limited defendants’ rights by ruling that only in cases where bail is granted can a claim for excessive bail be entertained.<sup>153</sup> In fact, the Court explicitly refused to answer the question of when the duration of pretrial detention is too long.<sup>154</sup> This case directs lower court judges to interpret § 3142(e) strictly, meaning that in any case, judges can label defendants as a “serious flight risk” and hold them pretrial.<sup>155</sup> In addition, the Court’s idyllic image of the Act’s implementation<sup>156</sup> received criticism, beginning with the dissenting justices.<sup>157</sup>

There are a number of theories as to why the FBRA of 1984 failed to bring about real reform and, in fact, actually worsened the problem of over-detention in the pretrial period. One such explanation is that the FBRA of 1984 was not clear in its purpose or means of achieving its purpose, which led various jurisdictions to interpret the Act differently resulting in uneven implementation.<sup>158</sup> For example, some jurisdictions wanted to decrease the number of defendants detained pretrial, while others allocated resources to observing released defendants.<sup>159</sup> Because these

---

<sup>151</sup> *Salerno*, 481 U.S. at 749.

<sup>152</sup> Simonson, *supra* note 16, at 627.

<sup>153</sup> Colin Starger & Michael Bullock, *Legitimacy, Authority, and the Right to Affordable Bail*, 26 WM. & MARY BILL RTS. J. 589, 613 (2018).

<sup>154</sup> Allen, *supra* note 25, at 652; *see also id.* at 1–2 (arguing that the Court’s reliance on the Speedy Trial Act in defining what constitutes excessive pretrial detention has limited the FBRA of 1984’s effectiveness and had led to the long detention periods we see today); *id.* at 26 (arguing that the Court’s refusal to address the duration of pretrial detention has led lower courts to have different views on what constitutes “excessive detention” as well as how much to weigh certain factors over others, which has led to wide variations in pretrial detention lengths among jurisdictions). *See generally* Einesman, *supra* note 97, at 25–34 (discussing cases challenging whether the FBRA of 1984 protects defendants’ due process rights).

<sup>155</sup> Gouldin, *supra* note 13, at 878.

<sup>156</sup> *See generally Salerno*, 481 U.S. at 750 (arguing that the Act’s denial of bail only affects the most dangerous criminals, only in the narrowest criminal circumstances, and that the government holds a significant burden when moving for a denial of bail).

<sup>157</sup> *See generally id.* at 760 (Marshall, J., dissenting) (arguing that simply redefining something as “regulation” does not change the way it is being implemented or the underlying purpose of its implementation).

<sup>158</sup> *See Rohrer*, *supra* note 26, at 524.

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



approaches address distinct concerns, they cannot be measured equally in an analysis of effectiveness.

*Salerno* was a devastating blow to many bail reform activists who had hoped it would reverse the trend of overincarceration, though most were not surprised by the failure, especially given the long history of the Supreme Court's unwillingness to champion the cause of bail reform activists.<sup>160</sup> Due to the Court's refusal to interpret the Eighth Amendment's prohibition against cruel and unusual punishment as applying to bail, the key to lasting bail reform is in the language of legislation. In addition, the analysis in *Salerno* clearly highlighted the importance of the facial meaning of legislation. In Part III, this Note will discuss the language of the California Money Bail Reform Act of 2017, analyze the meaning of its text, and predict its future effectiveness.

### III. THE CALIFORNIA MONEY BAIL REFORM ACT OF 2017

As noted in previous Parts, past bail reform efforts have failed to achieve their intended impact on the United States' bail system. Commentators have identified that “[a]n elusive issue, unsolved by past generations of bail reformers, threatens the new reform efforts’ success: ambiguity regarding the risks that judges who set money bail or order pretrial detention are trying to mitigate or avoid.”<sup>161</sup> In other words, the failure of past bail reform efforts can be attributed, in part, to the lack of judicial transparency surrounding their rationale for pretrial incarceration. The current generation of bail reform efforts, also known as the third wave of bail reform, is “[d]riven by a mix of moral outrage and economic reality.”<sup>162</sup> These two imperatives are reflected in the text of the California Money Bail Reform Act of 2017 (“CMBRA”). The following Parts will introduce the California state prison system; discuss the legal status of bail prior to the CMBRA, the legislative history of the

---

<sup>160</sup> See *Stack v. Boyle*, 342 U.S. 1, 3 (1951), *superseded by statute*, Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1985 (1984) (codified as 18 U.S.C. § 3142 (2016) (holding that bail is only excessive when it is higher than necessary to secure the appearance of a defendant at trial); *Carlson v. Landon*, 342 U.S. 524, 540–41 (1952) (holding that bail determinations could only be overturned if it is clearly shown that discretion was misused); *Bandy v. United States*, 81 S. Ct. 197, 197 (1960) (refusing to rule on whether the Eighth Amendment requires bail to be affordable, instead discussing the issue only in dicta); cf. *Starger & Bullock*, *supra* note 153, at 617–18. *But see* *Schall v. Martin*, 467 U.S. 253, 277 (1984) (demonstrating the Court's greater willingness to rule on issues of pretrial release in the case of a juvenile defendant).

<sup>161</sup> Gouldin, *supra* note 15, at 682.

<sup>162</sup> Gouldin, *supra* note 13, at 839.

CMBRA, the text of the law; and finally predict the effect the law will have on the rates of incarceration in the state.

*A. Overview: California Prison System*

California's prison system is similar in size to the federal corrections system, making the two systems a natural comparison.<sup>163</sup> In California, it costs over \$81,000 per year to incarcerate one inmate.<sup>164</sup> This cost is significant because it is estimated that, at any given time, over 63% of people held in California jails are there merely due to their inability to pay bail.<sup>165</sup> The rate of pretrial incarceration in California may be so high because the median bail amount is \$50,000, which is five times the national average.<sup>166</sup> This figure is shocking on its own, but it is even more shocking given that about 80% of people arrested in California live below the federal poverty line.<sup>167</sup> In addition, people who are low-income were penalized more severely in California, where counties that had a higher proportion of their population under the poverty line also had a higher percentage of unsentenced people in jail.<sup>168</sup> California was one of only fifteen states to see their prison population increase between 2015 and 2016,<sup>169</sup> and, from 2011 to 2015, about one-third of all people arrested and incarcerated for felonies in California were never found guilty of a crime.<sup>170</sup> These

---

<sup>163</sup> In 2017, California had a total prison population of 129,920, whereas the federal prison system had a prison population of 166,203. *State-by-State Data*, SENTENCING PROJECT, <https://www.sentencingproject.org/the-facts/#map?dataset-option=SIR> (last visited Jan. 26, 2019).

<sup>164</sup> *How Much Does It Cost to Incarcerate an Inmate?*, LEGISLATIVE ANALYST'S OFFICE, [https://lao.ca.gov/policyareas/cj/6\\_cj\\_inmatecost](https://lao.ca.gov/policyareas/cj/6_cj_inmatecost) (last updated Jan. 2019).

<sup>165</sup> HUMAN RIGHTS WATCH, *supra* note 17.

<sup>166</sup> Mel Gonzalez, Note, *Consumer Protection for Criminal Defendants: Regulating Commercial Bail in California*, 106 CALIF. L. REV. 1381, 1389 (2018).

<sup>167</sup> *Id.* at 1394. The necessity of a higher average bail amount may be due to the fact that there were 451 violent crimes per 100,000 residents in 2017, a rate which is higher than the national average of about 394 violent crimes per 100,000 people. See Magnus Lofstrom & Brandon Martin, *Crime Trends in California*, PUB. POLICY INST. OF CAL. (Oct. 2018), <https://www.ppic.org/publication/crime-trends-in-california/>. However, due to California's increasing violent crime rate despite the excessive bail amounts assigned by judges, it is unlikely this bail process is having a positive effect on the deterrence of violent crime.

<sup>168</sup> HUMAN RIGHTS WATCH, *supra* note 17.

<sup>169</sup> CARSON, *supra* note 123, at 4.

<sup>170</sup> HUMAN RIGHTS WATCH, *supra* note 17.

statistics reflect a system that is desperately in need of reform.<sup>171</sup> The next Part will evaluate the history of bail prior to the promulgation of the CMBRA.

### B. California Bail System Prior to the CMBRA

California is one of the only states to include a provision for fair bail in its state constitution.<sup>172</sup> After the Supreme Court's ruling in *Salerno*, the California legislature passed laws affirming public safety as the most important consideration in bail proceedings.<sup>173</sup> However, there was no guidance to court officials on how such determinations were supposed to be instituted in practice, causing confusion.<sup>174</sup> So, in 1994, the state constitution was amended to include exceptions to the right to bail, including for felony sexual offenses and any crime where there is "substantial likelihood" that a defendant's release would result in "great bodily harm" to another person.<sup>175</sup> The 1994 amendment also provided a list of factors to consider when determining bail, including the offense charged, previous criminal record, and probability of appearance in court.<sup>176</sup> Some judges may also consider community factors, such as a defendant's employment status, enrollment in education, and community connections.<sup>177</sup>

In the past, there was no evidentiary hearing for bail, and defense attorneys rarely requested to present additional evidence to argue for lower or no bail.<sup>178</sup> This is especially true for public defenders, who, as a general matter, lack the support or time to delve deeply into a defendant's case.<sup>179</sup> In order to make bail determinations, judges in jurisdictions with bail schedules often rely on them instead of considering

---

<sup>171</sup> People of color in California are the most affected by unfair bail practices. *Id.* For example, across the state African Americans were six and a half times more likely to be incarcerated than whites. *Id.*

<sup>172</sup> CAL. CONST. of 1879, art. I, § 6 ("All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great.").

<sup>173</sup> Curtis E.A. Karnow, *Setting Bail for Public Safety*, 13 BERKELEY J. CRIM. L. 1, 8 (2008).

<sup>174</sup> *See id.* at 1–2.

<sup>175</sup> CAL. CONST. art. I, § 12. *But see* *Hunt v. Roth*, 648 F.2d 1148, 1165 (8th Cir. 1981), *vacated as moot sub nom. Murphy v. Hunt*, 455 U.S. 478 (1982) (ruling that a Nebraska law denying bail without consideration to all defendants accused of sex crimes was unconstitutional for violating the Due Process clause).

<sup>176</sup> Harrison, *supra* note 48, at 540.

<sup>177</sup> HUMAN RIGHTS WATCH, *supra* note 17.

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

<sup>179</sup> *See id.*

an individual defendant's circumstances.<sup>180</sup> Bail schedules in California typically provided maximum bail determinations prior to CMBRA, but the new law now defers to the judge in determining a defendant's bail amount.<sup>181</sup> When judges deviate from a bail schedule, they are required to provide a written statement explaining their reason for deviation.<sup>182</sup> Regardless of whether a jurisdiction has a bail schedule, judges maintain choice in deciding bail amounts,<sup>183</sup> with the goal of ensuring that the bail is an amount that is "reasonable and sufficient" for the defendant to appear in court.<sup>184</sup>

In general, prior to the CMBRA, the California state prison system was fairly inconsistent regarding the use of bail schedules, who assigns bail, and the degree to which pretrial release was used. The system's inconsistencies and sheer size warranted reform.

### C. *Legislative History and Text of the Law*

One of the authors of the CMBRA, California State Senator Hertzberg, introduced it hoping to shift focus towards defendants' risks to society and away from the importance of imposing bail on low-income defendants.<sup>185</sup> Specifically, the

---

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

<sup>181</sup> Allen, *supra* note 25, at 658. *See generally* HUMAN RIGHTS WATCH, *supra* note 17 (explaining that each county has its own bail schedule, and every year judges in that county meet to evaluate the bail schedule and make any revisions deemed necessary).

<sup>182</sup> Karnow, *supra* note 173, at 13–14.

<sup>183</sup> Some counties differ on who sets bail, with some jurisdictions using judges and others using the lead police officer at the jail where the defendant is being held. CAL. PENAL CODE § 1269b(a) (Deering 2018). An analysis on the county level is important given that 87% of all jails are run at the county level. Ortiz, *supra* note 39, at 1. In California the practices by county vary dramatically. For example, in Santa Clara County, the magistrate assigned to the case begins with the presumption of the defendant's release on their own recognizance. HUMAN RIGHTS WATCH, *supra* note 17. In Los Angeles County, prisoners have to call the probation department to request release, and the probation department provides information on the case to the on-duty judge. *Id.* The judge is not required to hear from an attorney or other representative and there is only one judge on duty at a time, often leading to a back-up of cases and judges who are overworked due to the high case load. *Id.* There are large variations between counties in how they handle pretrial release as well. *Id.* For example, in Alameda County, about 40% of people were kept in custody until their case was ultimately dismissed. *Id.* In contrast, in San Bernardino County, about one third of people were released to prevent overcrowding. *Id.*

<sup>184</sup> Harrison, *supra* note 48, at 540–41. If a defendant's risk of flight and dangerousness are low, a judge can release the defendant on her own recognizance, a pretrial release program, or with some other contingency like enrollment in a drug treatment program. Karnow, *supra* note 173, at 3.

<sup>185</sup> Harrison, *supra* note 48, at 537.

CMBRA notes the disparate impact of the money bail system on minorities and low-income communities and the intention of the California legislature to help alleviate these effects.<sup>186</sup> The authors credit Essie Justice Group, a grassroots movement of women with relatives in prison, with being a driving force behind the promulgation of the CMBRA.<sup>187</sup>

The CMBRA, which may go into effect in 2020,<sup>188</sup> makes many notable changes to the past system of bail in California. Perhaps the most notable change is the law would require each county to establish a Pretrial Assessment Service (“PAS”), which would assess defendants’ levels of risk and make recommendations to the court regarding the appropriate conditions of release or detention.<sup>189</sup> The PAS’s investigation must collect information relevant to the risk assessment tool, including the charges against the defendant, history of failure to appear in court within the last three years, and any other “supplemental information . . . that directly addresses the arrested person’s risk to public safety or risk of failure to appear.”<sup>190</sup> The CMBRA gives each PAS authority to review cases, create its own standards for reviewing the cases, and add offenses upon which to deny an individual bail.<sup>191</sup> Every year the superior court for that area will evaluate the PAS’s practices, specifically related to constitutional and pragmatic safeguards like due process and maintenance

---

<sup>186</sup> *Id.* at 545. See also Matt Redle, *Adult Cash Bail Resolution*, 2017 A.B.A. CRIM. JUST. SEC. 1 (advocating against pretrial incarceration and bail schedules, noting the egregious effect these policies have particularly on indigent and minority defendants).

<sup>187</sup> Smith, *supra* note 89, at 461–62. The group trains women who have been previously incarcerated or who have incarcerated family members on how to effectively lobby to their representatives and to speak to the media. *Id.* at 462. For more information about the Essie Justice Group, see Jazmine Ulloa, *This Group Is Putting Women at the Center of the Battle to Fix California’s Bail System*, L.A. TIMES (Sept. 4, 2017), <http://www.latimes.com/politics/la-pol-ca-essie-sisters-california-bail-legislation-20170904-htmlstory.html>.

<sup>188</sup> Jazmine Ulloa, *California’s Historic Overhaul of Cash Bail Is Now on Hold Pending a 2020 Referendum*, L.A. TIMES (Jan. 16, 2019), <https://www.latimes.com/politics/la-pol-ca-bail-overhaul-referendum-20190116-story.html> (noting that representatives of the bail bond industry submitted enough signatures to block the implementation of the CMBRA until a referendum is held in 2020).

<sup>189</sup> CAL. PENAL CODE § 1320.26 (Deering 2018). The law makes a distinction between those charged with misdemeanors and felonies; in the cases of those charged with misdemeanors, there is a presumption of release within twelve hours of custody, if taken into custody at all. See *id.* § 1320.8 (those charged with most misdemeanors “*may be* booked and released without being taken into custody” (emphasis added) but “*shall be*” released from custody within 12 hours).

<sup>190</sup> *Id.* § 1320.9(a)(1)–(3).

<sup>191</sup> *Id.* § 1320.11(a).

of public safety.<sup>192</sup> The court is required to consider the PAS's report when making release determinations,<sup>193</sup> but there is a notable lack of specificity regarding the degree to which the information must be considered. The law provides a number of factors, in conjunction with the PAS's report, to determine the appropriateness of pretrial detention, which include: nature of the crime, weight of evidence, defendant's criminal history, family and community ties, as well as the impact of detention on a defendant's family, education, and employment.<sup>194</sup>

A determination of high, medium, or low risk is made using a validated risk assessment tool,<sup>195</sup> which compiles information on a defendant's demographics, criminal history, and crime charged to try to predict her risk of dangerousness or nonappearance.<sup>196</sup> The court then reviews the PAS's recommendation and can choose to accept or reject the agency's determination, giving the judge discretion to decide a defendant's release status.<sup>197</sup> If a defendant is found to have a low risk of both dangerousness and flight, the PAS must release the defendant on her own recognizance without a review by the court.<sup>198</sup> A medium risk classification was added to this law, and any person designated as such may be released or detained pretrial, with the judge held to the familiar standard of imposing the "least restrictive condition or combination of conditions that will reasonably assure public safety and the person's return to court."<sup>199</sup> A high-risk defendant is not permitted to be released, even with conditions imposed.<sup>200</sup> The CMBRA also creates a Judicial Council, which establishes guidelines for appropriate use of pretrial assessment information in

---

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

<sup>193</sup> *Id.* § 1320.18(c).

<sup>194</sup> *Id.* § 1320.20(f)(1)–(8). Local jurisdictions have the authority to add or subtract factors they deem relevant.

<sup>195</sup> *See id.* § 1320.9(c). The PAS may also provide other options for restricted release depending on the available adoptions in the county. *See also id.* § 1320.18(a) (noting that regardless of a determination of risk, the prosecution can move to have the defendant detained pending trial in several circumstances, most notably if there is "substantial reason to believe that no nonmonetary condition or combination of conditions of pretrial supervision will reasonably assure protection of the public or victim, or the appearance of the defendant in court as required").

<sup>196</sup> *See id.* § 1320.25(a) (prescribing that experts and judicial officers are responsible for creating a scale which will designate the cut off scores separating low, medium, and high risk).

<sup>197</sup> Harrison, *supra* note 48, at 543.

<sup>198</sup> CAL. PENAL CODE § 1320.10(b).

<sup>199</sup> *Id.* § 1320.10(c).

<sup>200</sup> *Id.* § 1320.10(e)(1).

making release or detention determinations, evaluates and mitigates implicit bias in the risk assessment tools, provides standards for review, release, and detention, and sets parameters for local rules.<sup>201</sup> In addition, the Judicial Council will provide each county a list of approved, validated assessment tools.<sup>202</sup> The CMBRA, in sum, establishes a comprehensive framework for ensuring fairness in the bail system of California.

#### D. Predicted Impact

The use of pretrial assessment tools is not perfect, however, and has received significant criticism. For example, some risk assessment tools contain “subjective” information, such as a defendant’s demeanor and statements from arresting officers.<sup>203</sup> The use of such information increases the chance of injecting bias into a supposedly objective evaluation.<sup>204</sup> Even though using a risk assessment tool may help mitigate an individual judge’s bias, there is more criticism that these tools have racist undertones because they often create a “profile” of what characteristics a dangerous or risky defendant possesses.<sup>205</sup> In fact, some jurisdictions have noted that heavy reliance on a risk assessment tool as a method of reform has rendered few tangible improvements to their criminal justice system.<sup>206</sup>

Some have argued that any positive effects of pretrial service agency or judicial choice to utilize less onerous bail methods are literally useless if judges choose not to utilize them.<sup>207</sup> However, others have noted that the law provides judges specific directions for how to use the assessment tool’s recommendation as well as

---

<sup>201</sup> *Id.* § 1320.24(a)(1)–(5).

<sup>202</sup> *Id.* § 1320.24(e)(1).

<sup>203</sup> Rohrer, *supra* note 26, at 531.

<sup>204</sup> See HUMAN RIGHTS WATCH, *supra* note 17 (arguing that risk assessment tools do not make an individual determination, and thus it would likely be inappropriate to completely do away with a judge’s discretion, even if judges would submit to such a system).

<sup>205</sup> See HUMAN RIGHTS WATCH, *supra* note 17 (arguing that the information used to create risk assessment tools are based on, among others, arrest record information, which has been demonstrated to be racist in that people of color are more likely to be arrested).

<sup>206</sup> See Smith, *supra* note 89, at 469 (examining the case of Harris County, Ohio, which saw increased pretrial incarceration and more guilty pleas when they replaced money bail with an assessment tool. In addition, Maryland saw more defendants released pretrial, but there was an increase in crimes committed by those defendants and less defendants appeared for court dates.).

<sup>207</sup> Andrea Clisura, Note and Comment, *None of Their Business: The Need for Another Alternative to New York’s Bail Bond Business*, 19 J.L. & POL’Y 307, 321 (2010).

suggestions for the consideration of other information, which will help mitigate the risks of inconsistent judicial use of such factors.<sup>208</sup> Still, others have countered by arguing that factors and PAS are positive steps in the right direction,<sup>209</sup> but these are only effective if the PAS makes a complete report to the judge and the judge actually considers the information.<sup>210</sup>

There is, understandably, some apprehension regarding how much change the CMBRA is expected to bring. While the CMBRA has brought important attention to the problems caused by money bail, it is unclear how comprehensive the changes will be in practice because the law has not yet been implemented, which is ultimately what matters when evaluating its impact.<sup>211</sup> However, given the importance the Supreme Court placed on a facial evaluation of a law's language,<sup>212</sup> the language of the CMBRA may be compared to the FBRAs of 1966 and 1984 to predict how effective the CMBRA may be in improving the bail system in California.

#### IV. PREDICTING THE EFFECTIVENESS OF THE CALIFORNIA MONEY BAIL REFORM ACT OF 2017

While California has attempted to initiate substantial reform efforts, there remains the lingering question of whether the CMBRA will have any appreciable effect on the bail system. What is lacking in the CMBRA, much like its predecessors, is a mechanism for holding judges accountable for nonadherence to the reform-oriented spirit of the law. While the mandated release of low-risk offenders is positive, the fact that these defendants have to be a low risk in both flight and dangerousness categories restricts this provision's impact as a reform measure. In addition, those labeled as a medium risk were likely of greater concern because a determination of their risk necessitates more judicial discretion. The following Parts will compare the language and contexts of the CMBRA and the FBRAs of 1966 and 1984 for the purpose of using the FBRAs as a way to predict the outcome of the CMBRA. This Note will then investigate the possible implications of these predictions on the economy and prison population of California.

---

<sup>208</sup> *Id.* at 319.

<sup>209</sup> *See Ortiz, supra* note 39, at 13 (noting that counties without pretrial service agencies had more people held pretrial than those with pretrial service agencies).

<sup>210</sup> Standen, *supra* note 17, at 790.

<sup>211</sup> *Cf. Smith, supra* note 89, at 469–73.

<sup>212</sup> *See supra* text accompanying notes 142–57.



A. *Bail Reform Then and Now: CMBRA of 2017 and FBRA of 1966*

The FBRA of 1966 was a product of its era. The genesis of the FBRA of 1966 came from New York's Manhattan Bail Project, whose founders and supporters lobbied for bail reform in the federal system.<sup>213</sup> There was significant pressure on legislatures to ensure that reform efforts alleviated some of the disparate impacts inflicted on low-income communities.<sup>214</sup> Its factor-based analysis is reminiscent of that reform spirit.<sup>215</sup> The Act seeks to aid judges in their decision-making by providing a list of suggested factors in determining whether to release defendants, but also provides judges ample authority to make their own determination.<sup>216</sup> Each judge is required to use the least restrictive means of ensuring defendants' appearance at trial, though, again, it is the judge's prerogative to determine what the "least restrictive means" are in a given case.<sup>217</sup>

In California, reform efforts similarly reflect a commitment to ensuring fairness; by utilizing an evidence-based tool, legislators sought to bring objectivity into a system that was historically based solely on individual judges' evaluations.<sup>218</sup> The reform efforts in California were similarly initiated and led by impactful community groups seeking large-scale reform.<sup>219</sup> The CMBRA also provides a list of factors for judges to consider and provides judges with the authority to make their own determinations, but further limits judicial choice based on the PASA's determinations.<sup>220</sup> The CMBRA focuses on protecting the community rather than ensuring defendants' appearance at trial, but similarly leaves the determination of "least restrictive means" to the judge.<sup>221</sup>

Overall, the CMBRA shares the FBRA of 1966's desire to repair a broken bail system and to improve conditions of low-income communities. Both laws provide

---

<sup>213</sup> Smith, *supra* note 89, at 455.

<sup>214</sup> *See id.*

<sup>215</sup> Goldkamp, *supra* note 9, at 9.

<sup>216</sup> *See* 18 U.S.C. § 3146(a) (1966).

<sup>217</sup> Billings, *supra* note 21, at 1344.

<sup>218</sup> *See* Harrison, *supra* note 48, at 545.

<sup>219</sup> Smith, *supra* note 89, at 461; *see also supra* sources cited in note 183.

<sup>220</sup> *See* CAL. PENAL CODE § 1320.20(f) (West 2019).

<sup>221</sup> *See id.* § 1320.10(b).

judicial officers guidance and strongly-worded notes for practice, however both also lack teeth with which to hold judges accountable. This is particularly salient for California because its use of PAS and pretrial assessment tools provide the appearance of more substantial reform, yet its effects, like the FBRA of 1966, will likely be unimpactful due to its lack of effective regulation of judicial action. The effects in California may be better if there is continued governmental support for its use, but only time will tell. Similar to the FBRA of 1966, the FBRA of 1984 shares some language and contextual similarities with the CMBRA, which seems to further presage that the CMBRA will be ineffective.

*B. CMBRA vs. FBRA of 1984*

The FBRA of 1984 was passed in the midst of serious concern about crime committed by defendants out on recognizance.<sup>222</sup> The focus of the FBRA of 1984 clearly reflects the movement toward placing a higher value on holding potentially dangerous defendants rather than ensuring defendants appear at trial, as was the focus in the FBRA of 1966.<sup>223</sup> The FBRA of 1984 provides judges the discretion to hold defendants pretrial if they determine that pretrial release could endanger the community.<sup>224</sup> When judges make their bail determination, the Act requires they provide some reasoning for their decision<sup>225</sup> but that same requirement lacks any standards or threshold judicial officers must meet for reasoning and supporting their decision.<sup>226</sup>

The CMBRA is a clear example of how much more influence the FBRA of 1984 had on the creation of subsequent laws than did the FBRA of 1966. The CMBRA was passed in the context of increasing rates of violent crime, which are crimes that would likely earn a defendant a “high risk” designation, thus almost ensuring their pretrial detention.<sup>227</sup> The virtual certainty of this is assured due to the pressure put on judges during judicial election cycles to not release potentially violent offenders when all other indicators point to releasing them.<sup>228</sup> The CMBRA

---

<sup>222</sup> Heaton et al., *supra* note 85, at 719–20; Yang, *supra* note 32, at 1413; Gouldin, *supra* note 13, at 848.

<sup>223</sup> Goldkamp, *supra* note 9, at 6; *see also* Einesman, *supra* note 97, at 3.

<sup>224</sup> 18 U.S.C. § 3142(g) (2018).

<sup>225</sup> *Id.* § 3142(i)(1).

<sup>226</sup> Gouldin, *supra* note 13, at 703, 712.

<sup>227</sup> *See supra* sources cited in note 163.

<sup>228</sup> *See generally* KATE BERRY, BRENNAN CTR. FOR JUSTICE, HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES 8 (2015).

also requires judicial rationale to explain their deviation from the PAS's recommendation.<sup>229</sup> It, however, lacks any guidance on what type of reasoning judges must provide.<sup>230</sup>

The similarities in statutory language of the CMBRA and the FBRA of 1984 allow judges too much power to alter or completely disregard the suggestions provided in the statute. The vague language found in both laws gives the judge significant authority and, given that both California and the FBRA of 1984 were passed with a public concerned about reducing crime, this language does not dissuade a judge from being overly restrictive with a defendant. In fact, a judge is permitted to overcome the presumption of least restrictive means in the name of preserving public safety, which provides CMBRA judges the same legislatively-prescribed authorization that was provided to judges in 1984. Concerns of safety also provide a nearly irrefutable rationale for holding a defendant pretrial, meaning that it is nearly insulated from conflicting arguments.<sup>231</sup> Therefore, it would not be unexpected for a similar result to be seen in California as was seen in the federal system in the aftermath of the FBRA of 1984.

### C. *Predicted Outcomes*

The notion that most judges will disregard the recommendations of the PAS is not rooted in pessimistic beliefs about the criminal justice system. Some counties in California maintained PAS before the CMBRA and reported that judges disregarded the recommendation of the PAS 75% of the time.<sup>232</sup> This provides further context for how the CMBRA will likely be received by judges and allows for a prediction that judges across the state will be similarly receptive. California may be taking the easy way out. Some of their counties have already begun using PAS, so the state can simply adopt these counties' systems instead of overhauling the system state-wide. This has led some commentators to draw parallels between the CMBRA and previous reforms, including some who say: "Like the earlier movement, [the current bail reform movement] is in some cases opting for politically expedient reforms . . . . History has indicated such half-measures are unlikely to succeed in the long run

---

<sup>229</sup> Karnow, *supra* note 173, at 13–14.

<sup>230</sup> *See generally supra* sources cited in note 179.

<sup>231</sup> *But see* Gouldin, *supra* note 13, at 688–89 (arguing that judges should carefully consider their decision before labeling someone a risk because that label will impact their potential for future release if they have subsequent arrests).

<sup>232</sup> HUMAN RIGHTS WATCH, *supra* note 17.

and can even re-entrench existing class and racial disparities in the bail system.”<sup>233</sup> Based on this prediction, there are specific consequences for the economy and prison population that may likely result.

### 1. Economic Consequences

There are some economic benefits to maintaining a PAS. For example, when Santa Clara County instituted a PAS prior to the CMBRA, it saved \$53 million a year over its previous expenditures holding defendants pretrial.<sup>234</sup> Over time, it is estimated that it may be eight times more expensive to detain defendants pretrial than it is to maintain a pretrial service agency,<sup>235</sup> which should provide incentives for counties to utilize this service, if, for no other reason, as a cost-saving measure. In addition, the greater number of defendants released pretrial also means that more defendants will be able to maintain employment stability in their lives than they would if they were detained.<sup>236</sup>

While the economic benefits of using the PAS are substantial and proven in other locations, it is unlikely this will have a significant impact on a judge’s decision of whether to detain a defendant. Judges are insulated from public concerns of budgetary constraints, and even if they were subject to such criticism, most people would defer to judges’ determinations of dangerousness over a concern of budget expenditures. As a result, the social context of preventing crime will likely weigh heavily on judges’ case considerations and will undoubtedly survive any criticism from economists.

### 2. Prison Population

CMBRA has sufficiently similar language and context to the FBRA of 1984, meaning California is likely to see a similar increase in their prison population as was observed in the federal system after the FBRA of 1984’s enactment. Bail reform activists have noted that judges who do not want to be blamed if defendants reoffend while on pretrial release will often place blame on risk assessment tools, while also disregarding PAS’s recommendation when it is for release.<sup>237</sup> This perspective seems

---

<sup>233</sup> Smith, *supra* note 89, at 453.

<sup>234</sup> Harrison, *supra* note 48, at 542.

<sup>235</sup> Rohrer, *supra* note 26, at 536.

<sup>236</sup> See generally Yang, *supra* note 32, at 1424 (“[D]etained defendants are substantially less likely to be employed in the formal labor market and are significantly less likely to have any household income up to four years after their bail hearing.”).

<sup>237</sup> Smith, *supra* note 89, at 471.

to indicate that there may be no decline in the prison population because judges are able to disregard the suggestion in favor of their initial determination. They can also use it as a defense against those who may criticize the judge for not following the tool's suggestion by pointing to instances of seemingly innocent defendants reoffending.

Adding to the potential for an increase in the prison population is that there is less concern about prison overcrowding. Between 2007 and 2016, California allocated \$2.47 billion towards new jail construction, adding over 12,000 jail beds.<sup>238</sup> This makes arguments about prison overcrowding moot and, with it, puts less pressure on judges to reduce the prison population. Due to the lack of judicial motivation or pressure to reduce the prison population, as well as the emphasis placed on preventing crime by released defendants, it is likely that the CMBRA will, at the very least, have no impact on the prison population, with the possibility of an actual increase in the population as a result of the social context.

### CONCLUSION

While there is good reason to be optimistic about the passing of the CMBRA, an analysis of the history and context relative to past reform efforts indicates that giving judges discretion means that without any statutory regulation of their behavior, judges will often proceed as though they were not bound by bail reform legislation. The judicial election cycle further compounds this problem because judges may be less willing to appear “soft” on crime, especially in a state like California, which is experiencing an increase in violent crime. Any legal challenge brought to the Supreme Court will likely continue the trend of failing to create legal precedent as to what “reasonable bail” means,<sup>239</sup> leaving statutory interpretation largely the only recourse for bail reform activists.

With the rise in technology and statistical models, there are many other options to restrict defendants without detaining them before trial and therefore bail as a form of preventative detention should only be used in extreme cases.<sup>240</sup> Because of the near impossibility of obtaining justice by appealing one's bail,<sup>241</sup> the solutions to excessive pretrial detention must be brought about through the legislature to prevent

---

<sup>238</sup> HUMAN RIGHTS WATCH, *supra* note 17.

<sup>239</sup> Allen, *supra* note 25, at 673–74.

<sup>240</sup> Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment's Right to Bail*, 32 N. KY. L. REV. 1, 40 (2005).

<sup>241</sup> *See id.* at 13 (“Bail is not an issue that is thoroughly appealed because relief in this type of case must be speedy if it is to be effective.”) (internal quotation marks omitted).

and constrain judicial power in bail determinations. Until the day where there is a perfect statistical model for predicting human behavior (a day not likely anytime soon), the question for policy makers remains the same as it did in the first wave of bail reform: How far as a society are we willing to go to protect and defend our most vulnerable from the systematic inequalities that are inherent in our system? People like Mr. Wheeler hope our commitment to such a mission is stronger than it was in the past.