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Criminal Justice Committee

Report on the Louisiana Bail System

A report on the current state
of pretrial practices in bail
setting, both nationally
and in Louisiana, and
recommendations
for reform.

Published by the Louisiana State Bar Association
Criminal Justice Committee in August 2018.

*This report is intended to be used for informational purposes only.
The recommendations herein have not been adopted by the Louisiana State Bar Association.*

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Executive Summary

The Louisiana State Bar Association's Criminal Justice Committee [hereinafter Committee] is a standing committee comprised of defense attorneys, prosecutors, judges, and judicial personnel. The members of this Committee have long been focused on pretrial practices, specifically bail setting procedures that raise due process concerns, impact the jail population rate, and place a financial burden on localities across the state. Most significantly, the Committee is concerned with the number of low-income Louisianans being held in jail not for their risk of flight or risk of harm to the public, but simply because they cannot afford to post bail.

In the beginning of 2018, members of the Committee analyzed Louisiana law as it pertains to bail as well as bail practices of jurisdictions around the state. From these efforts, the Committee developed this report on the current state of the Louisiana bail system and recommendations. This executive summary provides an overview of the analysis and key findings of the report.

Though the decision to detain or release a person after arrest is legally straightforward – to maximize public safety, maximize court appearance, and maximize pretrial liberty – the practices currently used in bail setting do not accomplish this goal. For instance, this report finds that:

- bond schedules are used by a majority of jurisdictions, meaning bail amounts are not set based on a person's risk of flight, risk of harm to the public, or ability to pay. Instead, bail is set based on the offense for which a person has been arrested;
- most jurisdictions do not use an evidence-based risk assessment tool to determine if a person detained will appear for court or be rearrested if released; and
- the conditions that apply to every bail determination can lead to numerous defendants returning to custody for minor violations of bail conditions.

Louisiana is a right to bail state, which means that individuals have a right to be admitted to bail when charged with a criminal offense and the vast majority of defendants are guaranteed access to bail with sufficient surety. Yet, Louisiana's pretrial jail detention rates are the highest in the nation and are actually twice the national average at 455 per 100,000 residents between the ages of 15 and 64, according to a 2015 study by the Vera Institute of Justice. A closer look at Orleans Parish showed that in 2017 only thirty-five (35) percent of people eligible for unsecured release were released without having to pay money bail, and seventy-five (75) percent of all persons booked and assessed by the pretrial services agency were required to post a secured money bail to obtain release.

The cost to detain a person in jail is high for localities and taxpayers in particular. The marginal rate of a day in jail in New Orleans in 2015 was \$31.38, with the average daily cost at \$119. In certain localities it can cost more than \$6 million per year to jail individuals who cannot afford to post bail. Because the current system relies heavily on bond schedules rather than an assessment of a person's risk of flight and harm to the public, bail amounts are set at arbitrary amounts and at levels most of the jailed population is unable to pay.

The collateral consequences of a person remaining in jail simply because they cannot afford to post bail are great. These consequences include loss of employment, housing, and property. This not only creates irreversible negative effects for the individuals and their families, but also places a great burden on the economic welfare of the state as a whole.

A survey disseminated by the Committee for the purpose of gathering information for this report revealed both commonalities and variations in bail setting practices across the state. Commonalities in practices include:

- the use of bond schedules that rarely recommend unsecured release for any offense, including minor infractions, misdemeanors, and non-violent and non-sex felony charges;
- bail setting occurring informally without the presence of a defense attorney or prosecutor;
- commercial surety bond as the most common type of bond used; and
- the lack of formal risk assessment tools that utilize established evidence-based factors used to determine what level of risk a person poses.

Variations in practices include:

- the percentage of people and the type of offense for which a person would be released on recognizance;
- the amount of time that passes while a person is detained before bail is set; and
- the offenses for which a bond schedule is used.

The constitutionality of wealth-based detention is being challenged in courts across the United States and there are several ongoing lawsuits challenging bail practices in Louisiana. Lawsuits are being filed with regulatory bodies challenging the predatory nature of the for-profit bail bond industry and for-profit pretrial supervision industry, alleging that the industry routinely violates state and federal law in efforts to extort money from indigent defendants. These lawsuits highlight how these industries often unlawfully inject concerns about profits into the decision-making process in ways that undermine public safety and justice.

Meanwhile, state legislatures, courts, and some localities have recently enacted constitutional amendments, legislation, and court rules to restrict or eliminate the use of monetary bail in several different ways. Some have enacted legislation banning the use of monetary bail for certain types of charges and laying out non-monetary alternatives.

To combat the inconsistencies in practice and to institute bail setting procedures that are fair and in accordance with the law, the Committee first recommends implementation of a validated pretrial risk assessment tool.

Many jurisdictions, including Orleans, are implementing predictively accurate risk assessment tools such as the PSA to determine whether to release an arrestee. Research performed over the past twenty years has identified nine factors that can predict the risk of a defendant failing to appear for required court proceedings and the risk that the defendant will commit new criminal offenses while released on bond. Additionally, research has shown that incarcerating low-risk defendants who are unable to afford bail is associated with higher rates of recidivism, both pretrial and post-disposition.

Second, a pretrial risk assessment tool can also remove variations in practices. By using a tool such as the PSA that approaches bail setting with a presumption toward release, similar to the approach taken in the federal system, jail incarceration rates can be substantially reduced, cutting costs for localities and, ultimately, taxpayers. Additionally, using accurate risk assessment tools rather than access to money to determine release can increase public safety. Studies have found evidence that pretrial detention increases the likelihood that a person will commit future crimes.¹

Lastly, bringing bail setting practices in line with the law will prevent the intrusion on a person's individual liberty, including rights under the Equal Protection and Due Process Clauses of the U.S. Constitution. This report provides a close review of recent litigation in the nation, and in Louisiana specifically, that highlights the need for practices that protect a person's constitutional right to pretrial liberty.

These recommendations are the product of this in-depth study. Part I & II of the report examine historic and current bail practices at both the federal and state level. In Part III, the report analyzes the bail practices of Orleans Parish as a case study. Part IV provides an overview of the use of validated evidence-based pretrial risk assessment tools. Part V discusses Louisiana pretrial detention rates and outcomes compared to the southern region as well as to the rest of the nation. Part VI provides a review of the changing landscape of bail, including recent litigation and legislation enacted to curb the negative effects of money bail on individual liberty rights. Part VII analyzes the collateral consequences of people remaining in jail because they cannot afford to post bail. Finally, Part VIII sets out aspirations to bring Louisiana bail practices in line with the law. The Appendices of this report provide a summary of Louisiana bail statutes, other pending litigation and legislation, a summary of the survey results, and recommended steps to realize the aspirations included in this report.

1 Sandra Mason & Megan Stevenson, *Bail Reform: New Directions for Pretrial Detention and Release*, U. PA. L. SCHOOL FACULTY SCHOLARSHIP p.2 (2017), available at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2747&context=faculty_scholarship

LSBA Criminal Justice Committee Report on Bail

Table of Contents

Executive Summary	4
I. Bail in the United States: A Brief History	9
II. Louisiana Law and Practices	11
Factors in Setting Bail	11
Restrictions on Right to Bail	11
Incentives to Use Commercial Surety Bonds.....	12
Widespread Use of Conditions	13
Variations Across Louisiana	13
Where the Law is Silent	15
The Right to Counsel	15
III. New Orleans' Bail Practices – A Case Study	17
The Use of Bail	17
Recent Reform Efforts.....	17
IV. Risk Assessment Overview	19
V. Louisiana Detention Outcomes Compared to the Nation and Region	20
Louisiana in a National Perspective	20
Louisiana in a Regional Perspective	20
Variation among Louisiana Parishes	20
Orleans Parish	21
VI. Changing Landscape of Bail.....	22
Map of Recent Bail Litigation by State.....	23
Recent Bail Litigation & Recent Legislation by State	23
VII. Human Impact of Bail	30
VIII. Aspirations for Louisiana	32
Adopt a Presumption for Release	32
Prevent Money Bail as Being a Sole Reason a Person is Detained Pretrial.....	33
Ensure Consistent Representation at Bail Settings	34
Eliminate Restrictions on Unsecured Bail	34
IX. Conclusion.....	35
X. Acknowledgments.....	36
XI. Resources	37
Appendices	
Appendix A: Summary of Louisiana Bail Statutes	38
Appendix B: Survey Results	46
Appendix C: Other Litigation and Legislation.....	47
Appendix D: State Assessment Tools.....	58
Appendix E: Steps to Realize Aspirations.....	59

I. Bail in the United States: A Brief History

The right of the accused to be admitted to bail—to be released pretrial—was carried over from centuries of English law and codified in the federal constitution through the Eighth Amendment. Bail refers to the conditions attached to pretrial release.² The Eighth Amendment prohibits excessive bail. The conditions of release on bail may be financial or otherwise. Before the late nineteenth century it was rare for a court to impose secured money bail, the requirement that a person pay before being admitted to bail. When money was used as a condition of bail it was in the form of a promise to pay if the accused failed to appear for trial.

The meaning of, and right to, bail was most clearly addressed by the Supreme Court in *Stack v. Boyle*. In *Stack*, the Court defined the right to bail as the “traditional right to freedom,” and held that “unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”³ Yet, *Stack* made clear that “the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.”⁴ The Court presumed that money bail would not lead to detention but would serve this sole purpose of bail, to ensure the defendant’s release and subsequent appearance at trial. “[T]he modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is ‘excessive’ under the Eighth Amendment.”⁵

[T]he modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is ‘excessive’ under the Eighth Amendment.

- Stack v. Boyle

The Court in *Stack* made clear that the right to release on bail required an individualized determination of the defendant’s likelihood to appear for trial. “The fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant... . Each defendant stands before the bar of justice as an individual.”⁶

Subsequent to *Stack*, the Court, in *United States v. Salerno*, held that the constitution allows the presumption of release on bail to be rebutted and the accused to be preventively detained.⁷ However, the Court held that such preventive detention was not the norm, ruling that, “[i]n our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”⁸ The Court also held that, in order to justify pretrial detention, a trial court must find that no condition or set of conditions of release would be sufficient to overcome an identified imminent risk.⁹ The Court in *Salerno* recognized that bail could be denied not only on the basis of an uncontrollable risk of flight, but also when necessary to protect the safety of an individual or the public.¹⁰

2 Bail can refer to “the process by which a person is released from custody either on the undertaking of a surety or on his or her own recognition.” Bail can also be used as a verb meaning “to obtain the release of oneself or another by providing security for a future appearance. BLACK’S LAW DICTIONARY 126 (9th ed. 2009).

3 *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

4 *Id.* at 4.

5 *Id.*

6 *Id.*

7 *United States v. Salerno*, 481 U.S. 739, 751-52 (1987) (holding that 18 U.S.C.S. § 3142(e) of the Bail Reform Act of 1984 was constitutional and a federal court may detain an arrestee pending trial if the government demonstrated by clear and convincing evidence that no release conditions would reasonably assure the safety of any other person and the community).

8 *Id.* at 755.

9 *Id.* at 742.

10 *Id.* at 750.

“

[I]n the case of an indigent, whose appearance at trial could reasonably be assured by one of the alternate forms of release, pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint.

- Pugh v. Rainwater

”

The transformation from the nineteenth century norm of unsecured bail to the present reality in most states of requiring secured bail—payment up front—has been widely challenged under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Although not fully resolved, it appears the federal constitution encompasses a conditional right to pretrial liberty that may not be conditioned on one’s ability to pay for one’s release.

The Fifth Circuit has applied a broad reading of Equal Protection to money bail. In *Pugh v. Rainwater*, it held that “...in the case of an indigent, whose appearance at trial could reasonably be assured by one of the alternate forms of release, pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint.”¹¹ Most recently, in *O’Donnell v. Harris County*, the Fifth Circuit affirmed the district court’s finding of procedural Due Process and Equal Protection violations where secured money bail is set regardless of the defendant’s ability to pay.¹² The court upheld the use of heightened scrutiny for review of money-based detention under the Equal Protection Clause.¹³

The U.S. Constitution provides a right to pretrial release that may be denied only in exceptional circumstances and that may be conditioned only based on an individualized determination of risk of flight or danger to an individual or the public, where that risk cannot be mitigated by conditions of release. Furthermore, the conditional right to release on bail may not be withheld because of an inability to pay for one’s release.

11 *Pugh v. Rainwater*, 572 F.2d 1053 (1978).

12 *O’Donnell v. Harris Cty.*, 892 F.3d 147 (5th Cir. 2018).

13 *Id.* at 161.

II. Louisiana Law and Practices

Louisiana is a right to bail state. Both La. Const. art. I, § 18, as well as Louisiana Code of Criminal Procedure art. 312, provide a right to be admitted to bail for individuals charged with a criminal offense. While the Constitution does not extend the right to bail to persons charged with a capital offense and some others, the vast majority of defendants are guaranteed access to bail with sufficient surety.¹⁴

Even where Louisiana law allows for restrictions on bail, there are still burdens that must be met to deny access to bail. The standard for denial of bail in capital cases, for example, is if proof is evident and presumption of guilt is great.¹⁵ And in these cases, judges retain a certain degree of discretion in interpreting the standard, i.e., bail is not prohibited across the board for these cases.

Taken together, these provisions mandate that the vast majority of defendants be released on bail pretrial with only a minority that may be detained through trial, mostly those facing very serious charges who pose an established, significant risk that cannot be managed if the defendant were released.

A. *Factors in Setting Bail*

In addition to establishing a right to bail, La. Const. art. 1 § 18 specifically prohibits excessive bail. But, while the Louisiana Constitution establishes the extent of and access to bail, it is Louisiana statutes that set forth the procedural requirements and factors involved in setting bail.

La. Code of Crim. Proc. art. 316 sets forth the requirement that bail be set in the amount that will secure appearance in court and protect public safety. The factors set forth in the statute suggest that the bail should be the lowest amount needed to achieve those goals.¹⁶

Moreover, La. Code of Crim. Proc. art. 321 authorizes multiple types of bail (secured or unsecured, cash or commercial surety), providing flexibility to best meet individual circumstances. Taken together, these provisions indicate that only individuals who are found to present a significant flight or public safety risk should be detained pretrial.

B. *Restrictions on Right to Bail*

Louisiana statutes contain numerous restrictions on the type of bail available in certain cases that can limit judges' discretion and lead to continued pretrial detention. For example, under art. 321, wide restrictions limit the courts' ability to release defendants on their own recognizance (ROR) or on the signature of a third party (PSBU).¹⁷

These restrictions do not directly prevent people from securing their release pretrial. Rather they require payment up front through a secured financial bond. These statutory limitations are also entirely arrest charge-based,¹⁸ meaning law enforcements' choice of the statute under which to charge an accused will limit judicial discretion regarding how, when, or even if an individual will remain incarcerated prior to trial. Of course, often a variety of possible options exist.

¹⁴ In addition to the death penalty, exceptions to the absolute right to bail exist in crime of violence charges and drug distribution, manufacturing, and possession with intent to distribute charges. LA. CODE CRIM. PROC. art. 312 (2016).

¹⁵ LA. CODE OF CRIM. PROC. art. 313 D.(1).

¹⁶ LA. CODE OF CRIM. PROC. art. 316 (2018) includes ten factors to consider, such factors as: the seriousness of the offense charged, including but not limited to whether the offense is a crime of violence or involves a controlled dangerous substance; and the ability of the defendant to give bail; the nature and seriousness of the danger to any other person or the community that would be posed by the defendant's release.

¹⁷ Release on recognizance ("ROR"), as is commonly understood across the country, does not exist per se under Louisiana law. Rather, Louisiana law considers a form of bail without surety as a ROR which still has a dollar amount attached to it but that doesn't require an up-front payment. In other states, this would be referred to as an unsecured personal surety bond.

¹⁸ LA. CODE OF CRIM. PROC. art. 321 (C.) includes a number of offenses for which the defendant arrested shall not be released on his personal undertaking or with an unsecured personal surety.

This system can delay release or lead to the pretrial detention of defendants because they are unable to come up with the money. And that is important, as even a few days in jail can detrimentally impact recidivism, especially for low-risk defendants.¹⁹ Moreover, research has shown that the arrest charge is weakly predictive of risk and is only one of multiple predictors of failure to appear or being arrested for a new offense while on pretrial release that should be considered.²⁰ The American Bar Association in its standards for pretrial release warns judges to “exercise care not to give inordinate weight to the nature of the present charge.”²¹

Additional statutory restrictions include: the possibility to outright deny bail for five days in domestic violence cases pending a hearing under Louisiana’s *Gwen’s Law* statute;²² a broad prohibition on secondary release for persons who were previously admitted to bail for a violent or drug crime and failed to appear;²³ and a requirement to specify one bail amount per arrest charge.^{24 25}

It is also important to note that under Louisiana’s *Speedy Trial* provision,²⁶ defendants can be detained pretrial (whether through preventive detention or because of an inability to pay money bail), for very long periods of time—45 days for misdemeanors and 60 days for most felonies—before the prosecutor decides whether to prosecute and files a bill of information.

C. Incentives to Use Commercial Surety Bonds

Louisiana statutes contain multiple incentives for government agencies to use more severe charges and set high bonds virtually guaranteeing the use of commercial surety bonds over other ways of securing release on bail. In fact, La. Rev. Stat. §22:822 provides a two (2) percent fee imposed only on commercial surety bonds (2.5 percent in Jefferson Parish and 3 percent in New Orleans) to four government entities: the Court, the District Attorney’s Office, the Sheriff’s Office, and the Public Defender’s Office.²⁷

Unsecured financial bonds are prohibited in a large number of cases. In all but two parishes,²⁸ defendants also do not have the option of depositing a portion of the financial bail with the court, which means a commercial bond is often the only affordable option.²⁹

Bail companies are also exposed to limited liability with stringent requirements to forfeit bonds when defendants do not comply with the requirements of the bail undertaking. Most notably, a bail agent’s obligation ceases if the clerk of court fails to send notice of an arrest warrant following a failure to appear within a certain time period, making the bond impossible to forfeit.³⁰

19 See CHRISTOPHER LOWENKAMP, ET. AL., LAURA AND JOHN ARNOLD FOUNDATION, *THE HIDDEN COSTS OF PRETRIAL DETENTION*, (2013), available at http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf.

20 CYNTHIA MAMALIAN, BUREAU OF JUST. ASSISTANCE U.S. DEP’T OF JUST., *PRETRIAL JUSTICE INSTITUTE, STATE OF THE SCIENCE OF PRETRIAL RISK ASSESSMENT 7-11* (2011), https://www.bja.gov/publications/pji_pretrialriskassessment.pdf

21 AMERICAN BAR ASSOCIATION, *ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE*, 50 (3rd ed. 2007) available at https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf (citing General Principle 10-1.7 Consideration of the nature of the charge in determining release options).

22 LA. CODE OF CRIM. PROC. art. 313 (2018).

23 LA. CODE OF CRIM. PROC. art. 312(B) (2018).

24 LA. CODE OF CRIM. PROC. art. 328 (2018).

25 Most of these restrictions are part of a more recent history of legislative changes, since the 1990s, to restrict the right to bail and to drive the use of secured money bail as the principle form of bail. For example, the constitutional amendment that authorizes preventive detention in crimes of violence or sale or possession with intent to sell drugs when there is a high flight or public safety risk was enacted in 1998. The restrictions on unsecured money bail are even more recent, from the 2000s and 2010s.

26 LA. CODE OF CRIM. PROC. art. 701 (2018).

27 LA. REV. STAT. ANN. § 22:822 (2018).

28 LA. CODE OF CRIM. PROC. art. 326 A.(2) (2018) (stating, “the court in the parishes of St. John the Baptist and St. Charles, by written rule, may alter the percentage amount of bail to be deposited with the officer authorized to accept the bail undertaking and authorize the officer to charge an administrative fee, not to exceed fifteen dollars, for processing the bail undertaking).

29 See LA. CODE OF CRIM. PROC. art. 321 (2018) for requirements to post bail in full.

30 LA. CODE OF CRIM. PROC. art. 334 (2018).

D. Widespread Use of Conditions

Standard conditions apply to every bond, namely that defendants appear in court, that they submit to orders of the court, and that they do not leave the jurisdiction without permission.³¹ In addition, the statute contains extensive provisions that allow or mandate additional conditions to be imposed on defendants released pretrial, as long as they reasonably relate to the defendant's appearance or public safety.

Some of these conditions are not discretionary, but apply automatically for certain charges. For example, a drug test is mandated for anyone arrested for crimes of violence or violation of drug laws,³² or an ignition interlock device is required when facing a second or subsequent violation of operating a motor vehicle while under the influence of drugs or alcohol. Such blanket bail conditions have been challenged in court in other states and have been found to raise constitutional concerns.³³

Unfortunately, under Louisiana law, there is little discretion left to the judge as how to respond to violations of pretrial release conditions. In fact, such violations usually result in revocation of bail and a bench warrant or remand.³⁴ The law mandates revocation and allows for an increase in financial bail or additional non-financial conditions of release and leads to numerous defendants returning to custody for minor violations of bail conditions.

E. Variations Across Louisiana

Despite these statewide statutes, bail practices are not uniform across the state. A survey of Louisiana Judicial Districts reveals a varied patchwork of bail setting processes. While the Louisiana Criminal Code provides a basic legal framework for time limits on determining probable cause,³⁵ setting bonds, and appointing counsel,³⁶ it does not provide much guidance on how to accomplish these legal requirements. The court officers who set the bonds in each jurisdiction have authority to design their own process. Approaches vary from parish to parish according to unwritten local custom.³⁷

Even within districts there is variation amongst the different courts and, within those courts, the process can vary by court officer. Some courts have open hearings which the public, including family members of arrestees, is able to attend. In some jurisdictions, court officers set bail via closed caption TV or Skype. In other parishes, judges do all the work by phone and there is no face-to-face process. Certain courts only set bail two to three days a week while others have bail hearings seven days a week and multiple times each day.

The court officers charged with setting bail vary by jurisdiction. For example, in Orleans Parish initial bonds are set by either an elected magistrate or one of four appointed commissioners. In Jefferson Parish a Justice of the Peace, who may not even be an attorney, may be responsible for making these determinations. In many parishes, elected judges rotate bond setting duties. In certain districts, judges only have one or two days a month allotted to hearing criminal court motions. This means that motions to reduce bail, often based on information from an initial attorney-client meeting, may not be calendared for a month or more after arrest. By this time, the consequences of pretrial detention are often irrevocable.³⁸

31 LA. CODE OF CRIM. PROC. art. 320 (2018).

32 LA. CODE OF CRIM. PROC. art. 320 (D) (2018).

33 MARIE VANNOSTRAND, ET. AL., PRETRIAL JUSTICE INSTITUTE, STATE OF THE SCIENCE OF PRETRIAL RELEASE RECOMMENDATIONS AND SUPERVISION 3-6 (2011).

34 LA. CODE OF CRIM. PROC. art. 320 (K) (2018).

35 LA. CODE OF CRIM. PROC. art. 230.2 (2018).

36 LA. CODE OF CRIM. PROC. art. 2301.1 (2018).

37 For example, in some jurisdictions, the hearings are referred to as "first appearances," while in others they are called "72s" in recognition of the time limit in LA. CODE OF CRIM. PROC. art. 230.1 (2018) for appointment of counsel.

38 See *infra* § VI. p. 26.

For most arrestees, the date and place of arrest affects the bond amount more than the factors listed in La. Code of Crim. Proc. art. 334. In determining the bail amounts, court officers universally consider an arrestee's prior record, as well as the arrest affidavits or warrant applications. In many parishes, judges set bonds when law enforcement approaches them with arrest warrant implications. In theory, officers may elect to approach judges they believe will set higher or lower bond amounts. Few courts seem to explicitly consider the defendant's ability to give bail.

Most judicial districts that responded to the survey use bond schedules that provide guidance for bond amounts based on the charges for which the arrestee is booked.³⁹ Several use preset bonds, usually for misdemeanors, that allow defendants to post bond immediately after being booked without having to wait for a judicial review.

Evidence-based risk assessments designed for the purpose of making pretrial risk decisions about bail are not commonly used in Louisiana, though stakeholders in many jurisdictions express interest in implementing risk assessment protocols to guide bond decisions. At least two jurisdictions, Orleans and St. Tammany, are using or are scheduled to begin using such systems.

In most parishes, the State is not represented by assistant district attorneys during bail hearings. Bail is set based on arrests, rather than charges for which the State has filed a bill of information. Likewise, in most of Louisiana, arrestees are not afforded counsel at their initial bail hearing. In many parishes where public defenders are present, they are not provided an opportunity to conduct meaningful client interviews prior to the setting of bail. Such interviews are essential to providing the court with information relevant to an arrestee's ability to give bail or the likelihood that he will return to court. The vast majority of jurisdictions do not consider the presence of defense counsel essential to a fair proceeding and do not recognize the right to counsel at initial appearance.

Most districts rely almost entirely on the use of commercial surety bonds. Forty districts allow defendants to pay a refundable cash bond as long as they are able to deposit the entire amount of the bond. Alternatively, St. Charles and St. John Parishes allow defendants to pay only a ten (10) percent deposit on the bond amount and sign for the rest as an unsecured bond. This practice is not permitted in the rest of the state, where any cash deposit must be 100 percent. Across the state, property bonds are often allowed but are rare since most arrestees do not possess the kind of assets needed for a property bond and because the process is difficult to complete without the assistance of an attorney.

Unsecured personal surety bonds or allowing an arrestee to be released on his own recognizance (ROR) are, overall, rare. There is almost always a financial requirement for release from custody. Some parishes are beginning to increase their use of ROR bonds for those arrested on certain misdemeanors, specifically simple possession of marijuana.⁴⁰ Indeed, some variations that exist are written into the Code of Criminal Procedure as provisions only applicable to certain parishes, creating statutory disparities across the state.⁴¹

39 Based on the respondents of the survey, the following information on bond schedules was received:

Bond Schedule Used for Some Misdemeanors	Bond Schedule Used for All Misdemeanors	Bond Schedule Used for Some Felonies
2nd, 14th, 18th, 20th, 24th, 26th, 32nd, 34th, 36th, 42nd	1st, 3rd, 6th, 8th, 9th, 12th, 25th, 40th	2nd, 6th, 9th, 12th, 25th, 26th, 34th, 36th

40 See Appendix B: Summary of Survey Results *infra* p. 42-43.

41 For example, and as previously mentioned, the statutes impose a higher fee on commercial surety bonds in New Orleans (3% instead of 2% in the rest of the state except Jefferson Parish). In Jefferson Parish, an additional 0.5% fee is imposed on top of the 2% fee. Also, the distribution of the commercial bond fees varies significantly. In New Orleans, the criminal district court receives 1.8%; in the rest of the state the district court receives 0.5%.

F. *Where the Law is Silent*

In addition to the extensive restrictions on the federal constitutional right to bail in Louisiana, there are a number of aspects of bail not covered in Louisiana statutes that have the potential to lead to unnecessary incarceration.

While it can be inferred from the statute, art. 316 does not clearly state that release conditions imposed on pretrial defendants *must* be the least restrictive to ensure appearance in court and public safety, a nationally recognized standard grounded in the due process right to be free of unwarranted deprivations of liberty.⁴²

Louisiana statutes are also silent on how pretrial services agencies should operate, with the exception of a recent provision set forth in art. 317 that requires pretrial services agencies to verify background information. This means that pretrial service agencies currently operate in Louisiana without a legal framework that would set minimum standards for operations. Nor are there statutory protections against improper use of information obtained from and about a defendant in the course of assessing or providing services to pretrial defendants.

Of additional note, Louisiana's bail statutes do not require a first appearance hearing in open court to set bail. This means that practices can vary across the state, and in some jurisdictions—despite Constitutional and legal guarantees—bail can be set without a meaningful opportunity for counsel to be present (or opportunity to appoint counsel if the defendant is indigent).

G. *The Right to Counsel*

The right to counsel is guaranteed by the Sixth Amendment of the U.S. Constitution, the Louisiana Constitution, and the Louisiana Code of Criminal Procedure.⁴³ According to best practices written by the National Legal Aid and Defenders Association⁴⁴ and later adopted by the Administrative Office of the United States Courts,⁴⁵ a defense attorney must obtain certain key information from the defendant at first appearance for a bail hearing to be meaningful. In order to offer the magistrate or commissioner a proposal concerning conditions of release, a defense attorney must gather information that includes, but is not limited to: community ties; health; education; armed service record; criminal record; medical needs; ability to meet financial conditions of release; verification contacts; facts pertaining to the charges against the defendant; improper police or prosecutorial conduct; any evidence that must be preserved; evidence of the defendant's competence to stand trial; and any possible witnesses who should be located.⁴⁶ At the first appearance, the defense attorney should also inform the defendant of his or her rights and provide key information relating to future court proceedings.⁴⁷

Addressing the Sixth Amendment, the U.S. Supreme Court has held that the right to counsel attaches at the defendant's initial appearance before a judicial officer, where the judge determines the conditions for

42 ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE, 10-5.2 at 106.

43 U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."); LA. CONST. art. I, § 13 (1974) ("At each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment."); LA. CODE CRIM. PROC. art. 230 (2011) ("The person arrested has, from the moment of his arrest, the right to procure and confer with counsel."); LA. CODE CRIM. PROC. art. 511 (2016) ("The accused in every instance has the right . . . to have the assistance of counsel.").

44 NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (BLACK LETTER), <http://www.nlada.org/defender-standards/performance-guidelines/black-letter> (last visited July 15, 2018).

45 *Federal Adaptation of National Legal Aid and Defender Association (NLADA) Performance Guidelines for Criminal Defense Representations Adopted by the Defender Services Advisory Group*, DEFENDER SERVICES ADVISORY GROUP (Oct. 2015), https://www.fd.org/sites/default/files/cja_resources/federal-adaptation-of-nlada-performance-guidelines-for-criminal-defense-representatives_0.pdf.

46 *Id.* at 3.

47 *Id.* at 4.

pretrial release.⁴⁸ Moreover, legal counsel must be present at any critical stage once the right to counsel attaches.⁴⁹ A critical stage has been defined as a proceeding between an individual and agents of the state that amounts to trial-like confrontations at which counsel would help the accused “in coping with legal problems or meeting his adversary.”⁵⁰

In Louisiana, the constitutional right to counsel at first appearance is secured by both the Louisiana Constitution and Louisiana Code of Criminal Procedure. Article I § 13 of the Louisiana Constitution provides that every person is entitled to counsel at “each stage of the proceedings” against him.⁵¹ La. Code of Criminal Proc. art. 511 dictates that “the accused in every instance has the right to defend himself and to have the assistance of counsel”⁵²

These safeguards exist for fundamental reasons, as noted by experts in criminal and constitutional law:

Many unrepresented detainees speak without knowing the appropriate words to say to improve their chances for pretrial release. Others remain silent after hearing a judge warn that their words may be used against them at trial. Hearings move quickly and may conclude in a moment or two, despite the severe collateral consequences to detainees of remaining in jail and risking “lost wages, worsening physical and mental health, possible loss of custody of children, a job, or a place to live.”⁵³

Despite this law, first appearances—where pretrial release is usually determined—often occur only hours after arrest, before the defendant or the family members can retain counsel. As such, courts across Louisiana often conduct these hearings without counsel. The Louisiana Constitution provides that a public defender is required “if [the defendant] is indigent;” thus, indigence is a sufficient condition for court-appointed representation rather than a necessary condition for that representation.⁵⁴

The presence of an attorney, in and of itself, does not ensure that an accused’s constitutional rights are being protected. Effective right to counsel means that a defense attorney can subject the prosecution’s case to “meaningful adversarial testing.”⁵⁵

48 Brewer v. Williams, 430 U.S. 387, 399 (1977). (The constitutional right to counsel attaches at or before the first appearance, and the first appearance is a proceeding at which the presence of counsel is constitutionally required. The United States Supreme Court has held that the Sixth Amendment right to counsel attaches at “the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.”); United States v. Gouveia, 467 U.S. 180, 188 (1984) (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)).

49 Rothgery v. Gillespie County, 554 U.S. 191, 212 (2008).

50 United States v. Ash, 413 U. S. 300, 312-13 (1973); see also Massiah v. United States, 377 U. S. 201 (1964).

51 LA. CONST. art. I § 13. As with the federal constitutional right to counsel, the Louisiana Supreme Court has held that “a person’s right to the assistance of counsel guaranteed by Article I, § 13 attaches no later than the defendant’s initial appearance or first judicial hearing.” State v. Hattaway, 621 So.2d 796, 800, 801 (La. 1993) (overruled on separate grounds by State v. Carter, 94-2859 (La. 11/27/95), 664 So.2d 367 (La. 1995); see also State v. Jackson, 27855-KA (La. App. 2 Cir. 4/3/96), 672 So.2d 215, 221 (La. Ct. App. 1996) (“A person’s right to the assistance of counsel attaches as early as his custodial interrogation and no later than the defendant’s initial court appearance or first judicial hearing at the 72-hour mandated time.”) (emphasis in original).

52 LA. CODE CRIM. PROC. ANN. art. 511 (2016).

53 JOSEPH R. BIDEN, JR. ET. AL., SOLUTIONS: AMERICAN LEADERS SPEAK OUT ON CRIMINAL JUSTICE, BRENNAN CTR. FOR JUS., 23 (2015), https://www.brennancenter.org/sites/default/files/analysis/Solutions_American_Leaders_Speak_Out_On_Criminal_Justice.pdf.

54 Similarly, an indigent defendant at an arraignment must be provided with an attorney before he or she pleads, but the statute again phrases indigence as a sufficient condition. LA. CODE CRIM. PROC. ANN. art. 513 (2016) (“When a defendant states under oath that he desires counsel but is indigent, and the court finds the statement of indigency to be true, before the defendant pleads to the indictment, the court shall provide counsel to the defendant . . .”).

55 McMann v. Richardson, 397 U.S. 759 (1970); see also Reece v. Georgia, 350 U. S. 85, 350 U. S. 90 (1955); Glasser v. United States, 315 U. S. 60, 69-70 (1942); Avery v. Alabama, 308 U. S. 444, 446 (1940); Powell v. Alabama, 287 U. S. 45, 57 (1932).

III. New Orleans' Bail Practices – A Case Study

New Orleans provides a useful case study because it has been engaged for many years in seeking to reduce the use of pretrial incarceration. It has been doing so through a number of approaches. Since 2011, it has operated a pretrial services program that evaluates all people arrested for a felony for risk of flight or rearrest before the first appearance in court. This program now uses a risk assessment tool and decision-making framework that does not use money as a determinant of whether a person is released or detained. On the municipal side, the city has mandated by ordinance that no person arrested for a municipal offense be detained on money bail. Additionally, there is federal constitutional litigation addressing bail practices in the Criminal District Court.

Information about the outcomes and impacts of this risk-based system is reported through monthly data reporting and analysis. The data provided below was taken from the Orleans criminal court and the Orleans Parish Sheriff's Office data folders. The data includes individuals being held in jail pretrial, excluding people for whom bail was set above \$100,000 or had a detainer. The methodology for collecting this data is explained in the Vera Institute of Justice's report, *Past Due: Examining the Costs and Consequences of Charging for Justice*.

A. The Use of Bail

In New Orleans, eighty-seven (87) percent of defendants facing felony charges and sixty-three (63) percent of defendants facing misdemeanor charges were required to pay money to secure their release from jail pretrial in 2015.⁵⁶

Commercial surety bonds are the most common form of release when facing secured money bail. In 2015, ninety-seven (97) percent of people who posted bond in Criminal District Court (handling felonies and state misdemeanors) did so through a bail bondsman. The remaining three (3) percent paid in cash. In Municipal Court (handling municipal and state misdemeanors), sixty-nine (69) percent of defendants who posted bail paid by purchasing a commercial surety bond.⁵⁷

The average bail that people were able to pay in New Orleans was \$10,000 for felony cases and \$2,500 for misdemeanor cases.⁵⁸

Bail practices disproportionately impact black families and communities. In 2015, eighty-four (84) percent of bond premiums and bond fees were paid by black residents, or \$5.4 million.

Financial bonds represent a heavy financial burden for New Orleans families, which spent \$6.4 million in 2015 to cover the cost of bail premiums and fees. Government agencies collected \$1.7 million of that sum and the rest went to commercial bond agents.

B. Recent Reform Efforts

Over the past ten years, New Orleans has engaged in a series of efforts to shift the focus from secured money bail to risk-based release/detention practices.

In 2011, the New Orleans City Council passed an ordinance to cap the size of the new jail (rebuilt after Katrina) to 1,438 beds, a fraction of the size of the pre-storm jail (over 7,000 beds). The decision was informed by the recommendations of a working group revealed that New Orleans's incarceration rate to be over five times the national average.

56 MATHILDE LAISNE ET. AL., VERA INST. OF JUST., PAST DUE: EXAMINING THE COSTS AND CONSEQUENCES OF CHARGING FOR JUSTICE IN NEW ORLEANS 6 (2017), https://storage.googleapis.com/vera-web-assets/downloads/Publications/past-due-costs-consequences-charging-for-justice-new-orleans/legacy_downloads/past-due-costs-consequences-charging-for-justice-new-orleans.pdf.

57 *Id.*

58 *Id.*

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*Louisiana has the highest pretrial detention rate of any state in the nation. Louisiana's pretrial incarceration rate is 455 per 100,000 residents between the ages of 15 and 64. The national average rate of pretrial incarceration is 205 per 100,000 residents between the ages of 15 and 64. Thus, Louisiana uses pretrial detention **more than twice as frequently as** the national norm.*

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Since 2012, New Orleans has operated a pretrial services program that assesses people charged with felonies for risk upon arrest through the use of a research-based risk assessment instrument. The risk information is made available to the magistrate judge and commissioners to inform release/detention decisions at first appearance.⁵⁹

In 2016, the City of New Orleans received a grant from the MacArthur Foundation to reduce its jail population as part of a national effort called the Safety and Justice Challenge. The goal is to reduce the jail population by twenty-seven (27) percent by the spring of 2019, down to 1,277 people. Initiatives that have been implemented under the Challenge include the following:

- Increase the use of release on recognizance (ROR) in Magistrate Court through the use of protocols that recommend the judge/commissioner issue RORs for low-risk defendants who are statutorily eligible. For defendants who are statutorily restricted from receiving an ROR but are otherwise low-risk, the protocols recommend the setting of a nominal bail amount.
- Improve pretrial release advocacy by creating two public defender positions and one client advocate position dedicated to advocacy at bail setting and bond review stages.
- Institutionalize bond reviews for low-risk defendants who are assessed a secured bail of \$10,000 or less but remain detained seven days after first appearance.
- Implement a new risk assessment instrument—the PSA—with support from the Laura and John Arnold Foundation, and develop a locally tailored pretrial decision-making framework to guide judges' release decisions based on risk.

⁵⁹ Originally created and operated by the Vera Institute of Justice, the program was turned over to the Criminal District Court in 2017 with oversight from the Louisiana Supreme Court. It is funded by the City of New Orleans.

IV. Risk Assessment Overview

This section provides an overview of the long-standing and increasingly widespread use of pretrial risk assessment methodologies. These methods are designed to make the detention/release decision grounded in research-based predictively accurate assessment of risk rather than merely the charge and criminal history.

This change in methodology seeks to apply protections guaranteed by the U.S. Constitution. For the person arrested, the procedural presumption of innocence is buttressed by the Eighth Amendment to the U.S. Constitution which prohibits “excessive bail.” Moreover, the Fourteenth Amendment requires that no person be denied “liberty” without due process of law and that equal protection of the laws be ensured to all persons. Setting bail on the charge itself is a violation of an accused’s presumption of innocence, as established by the United States Supreme Court as far back as *Coffin v. United States*.⁶⁰

A lawful decision to detain a person, i.e., to rebut the constitutional right to pretrial liberty, must be grounded in a finding that the person poses significant risk, either of flight or of danger to an individual or the community and that no conditions of release exist to mitigate that risk if the defendant were released. Research-based, predictively accurate risk assessment tools provide the basis for a court to make that decision appropriately. Using risk assessment provides the ability to identify persons who do not pose significant risk, and thus must be released. Getting this decision right is critical to ensure both that the rights of defendants are respected and that the safety of the community is prioritized.

There are many such tools in use around the country.⁶¹ They share a common approach in that they aggregate large quantities of data to enable a determination of the objective factors that present pretrial risk at relative levels. There has been considerable research over the past twenty (20) years that shows relatively few factors are accurately predictive and the factors that are predictive, are not necessarily used by the courts to make the release/detention decisions. A recent massive data effort led by the Arnold Foundation found that there are roughly nine objective factors that are predictive of risk of flight, risk of rearrest, or both. These include various aspects of the defendant’s prior criminal history, prior failures to appear, prior sentence to incarceration, whether there is a pending charge at the time of the current arrest, and the defendant’s age.⁶² The Public Safety Assessment (PSA) tool provides distinct risk scores for risk of failure to appear and risk of rearrest. It also produces a flag suggesting a risk of future violent criminal activity.

Such tools are available to courts in Louisiana. At least three judicial districts use some form of research-based risk assessment.⁶³ Since 2012, New Orleans has used an assessment tool that was built from factors and weights validated as predictive in other jurisdictions. As previously mentioned, New Orleans’s program recently shifted to the use of the Arnold Foundation-developed PSA and its decision-making framework. The decision-making framework is a guide for judicial officers on how to use the scores generated by the risk assessment.⁶⁴

60 *Coffin v. United States*, 156 U.S. 432 (1895).

61 PRETRIAL JUST. INST., *A National Model for Pretrial Risk Assessment*, (November 15, 2013), <https://www.pretrial.org/national-model-pretrial-risk-assessment/>.

62 There is a valid criticism of pretrial risk assessment instruments in that they can re-produce race- and class-based disparities that exist throughout the criminal justice system, particularly in that they rely on factors tied to various aspects of the defendant’s prior criminal history. It must be understood that these instruments do not purport to eliminate these re-produced disparities. Judges and other system actors should bear in mind that people of certain race- and class-based groups, or who live in certain over-policed neighborhoods, may score higher because of their status and not because they present higher risk than others for whom systemic disparities do not exist.

63 The 15th JDC, 22nd JDC, and Orleans.

64 The Supreme Court is intending the use of the PSA in New Orleans to be a pilot. If successful, it can be used in other districts in the state. At least three have already requested use of the PSA.

V. Louisiana Detention Outcomes Compared to the Region and the Nation

Inmate population is periodically reported to the Bureau of Justice Statistics (BJS) of the U.S. Department of Justice. Through the BJS Annual Survey of Jails and Census of Jails, a snapshot of who is incarcerated on June 30th of each year is provided. Researchers at the Vera Institute of Justice have compiled a historical look at jail population numbers in every county or parish in the United States over the past forty years.

Based on the jail administrator's responses to standard BJS questions, the researchers disaggregate pretrial jail detainees from persons held in jail post-adjudication.⁶⁵ Generally, persons who are being held pretrial in another jurisdiction in the state and otherwise cannot be distinguished in this data. Additionally, the accuracy of the data heavily relies on the accuracy jail administrators' responses to the standard BJS questions. The following analyses are drawn from analysis of June 30, 2015 BJS data.

A. *Louisiana in a National Perspective*

Louisiana has the highest pretrial detention rate of any state in the nation. Louisiana's pretrial incarceration rate is 455 per 100,000 residents between the ages of 15 and 64. The national average rate of pretrial incarceration is 205 per 100,000 residents between the ages of 15 and 64. Thus, Louisiana uses pretrial detention more than twice as frequently as the national norm.

B. *Louisiana in a Regional Perspective*

Louisiana's extraordinary use of pretrial incarceration is evident even when compared to the generally detention-heavy Southern United States. The nine southern states – Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee – have a collective incarceration rate of 296 per 100,000 residents between the ages of 15 and 64, with the lowest rate in North Carolina (229/100,000). In comparison to its Gulf state neighbors of Alabama and Mississippi, Louisiana's rate of pretrial incarceration remains striking: 455/100,000 compared to 261 (Alabama) and 350 (Mississippi).

C. *Variation among Louisiana Parishes*

Comparing rates of pretrial incarceration among parish jails is challenging because of local practices, such as housing detainees from other parishes. In general, Louisiana parishes detain people at rates between 200 and 900 per 100,000 residents between the ages of 15 and 64.⁶⁶

⁶⁵ Persons identified as pretrial include those who are detained both for a new criminal charge and for an alleged probation or parole violation.
⁶⁶ However, there are signs of clear reporting errors from certain parishes, such as reverse reporting of pretrial and post adjudication inmates.

D. Orleans Parish

Although state law governs pretrial decision-making, judges retain broad discretion in individual cases. The way in which that discretion is used determines pretrial outcomes, such as release or detention, and impacts pretrial success for those who are released, appearance in court as required and being arrest free during the pretrial period. The following are some data regarding pretrial outcomes in the Criminal District Court of Orleans Parish in 2017:

- 1,927 of the 5,472 people who were eligible for unsecured release (ROR) under Article 321 were released without having to pay money bail⁶⁷
- 75% of all persons booked and assessed by pretrial services were required to post a secured money bail to obtain release⁶⁸
- 14.4 days was the average length of stay for all persons booked in the third quarter of 2017⁶⁹
- 88% of people released pretrial who were assessed in the lowest two of four risk categories made all court appearances as required and all were not rearrested⁷⁰
- 83% of people in the highest risk category appeared in court and 83% were not rearrested⁷¹

The consequences of a system relying on secured money bail for people who are arrested and their families are significant. In 2015, they paid \$6.4 million in non-refundable premiums and fees.⁷² Black residents and their families paid 84 percent of that.⁷³ Over 500 people, 30 percent of the entire jail population, were being held solely because they could not afford to pay.⁷⁴ This does not include people detained for any other reason or those whose money bail was set at an amount intended to preventively detain them (above \$100,000, requiring payment of more than \$12,000).

There is also significant cost to the city of New Orleans from the excess incarceration that results from conditioning pretrial release on the ability to pay money. The Vera Institute calculated the 2015 marginal rate of a day in jail as \$31.38 (the average daily cost was \$119). That means it cost the city more than \$6 million that year to underwrite the money bail system.⁷⁵

It is likely these human costs and costs to localities are similar or worse in other cities and parishes throughout Louisiana. State law and judicial practices relying on money bail present a stark unfunded mandate to parishes and cities who must pay for the resulting unnecessary jail incarceration. And sheriffs are made to make due with inadequate resources.

67 VERA INST. OF JUST., NEW ORLEANS: WHO'S IN JAIL AND WHY?, *Fourth Quarter Data for 2017* (unpublished on file with the author). This is an ROR rate of 35%. Some, however, were not released until days or weeks after being held on secured money bail.

68 *Id.* Measure taken from fourth quarter of 2017. Almost one-third (1/3) were detained throughout the quarter because they were not able to post a secured money bail.

69 ROSE WILSON ET AL., VERA INST. OF JUST., NEW ORLEANS: WHO'S IN JAIL AND WHY? (2018), <https://www.vera.org/publications/new-orleans-jail-population-quarterly-report/new-orleans-whos-in-jail-and-why-third-quarterly-report-2017/new-orleans-whos-in-jail-and-why-third-quarterly-report-2017-about-this-report>.

70 *Id.* (measured in the third quarter of 2017).

71 VERA INST. OF JUST., NEW ORLEANS: WHO'S IN JAIL AND WHY?, *Fourth Quarter Data for 2017* (unpublished on file with the author).

72 LAISNE, *supra* note 56 at 13.

73 *Id.* at 19.

74 *Id.* at 10.

75 *Id.* at 23-24.

VI. Changing Landscape of Bail

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*Bail reform is moving fast. As of June 2018, there are **fourteen states** weighing significant pretrial legislation, including California, Massachusetts, New Hampshire, New York, Ohio, and Virginia. According to the National Conference of State Legislatures' bill tracking database, there are **168 bail and pretrial bills** currently pending across the country. Meanwhile, local changes at the county and municipal levels are the most rapidly expanding area of change.*

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The constitutionality of wealth-based detention is being challenged in courts across the United States and there are several ongoing lawsuits challenging bail practices in Louisiana. These lawsuits generally implicate two substantive rights: (1) the right to be free from wealth-based detention, based on the Equal Protection and Due Process Clauses; and (2) the fundamental right to pretrial liberty, based on substantive due process. Both of these substantive rights permit detention only if the State makes a substantive finding that detention is necessary to serve a compelling interest and provides robust procedural protections to ensure the accuracy of that finding. Litigation efforts have largely been successful. Many impacted jurisdictions have ended their practice of requiring secured money bail, entered consent decrees, or have overhauled their bail processes. Some were also required to pay damages to plaintiffs. Legal challenges have been made in urban jurisdictions, such as Houston and San Francisco, as well as smaller, rural communities in Alabama, Mississippi and Louisiana. Many of these cases have settled because the parties have agreed to implement substantial reforms.

Civil rights lawyers have also filed lawsuits and complaints with regulatory bodies challenging the predatory nature of the for-profit bail bond industry and for-profit pretrial supervision industry, alleging that the industry routinely violates state and federal law in efforts to extort money from indigent defendants. These lawsuits and complaints highlight how these industries often unlawfully inject concerns about profits into the decision-making process in ways that undermine public safety and justice.

Meanwhile, state legislatures, courts, and some localities have recently enacted constitutional amendments, legislation, and court rules to restrict or eliminate the use of monetary bail in several different ways. Some have enacted legislation banning the use of monetary bail for certain types of charges and laying out non-monetary alternatives. Many jurisdictions are implementing PSA risk-calculation tools to determine whether to release an arrestee.⁷⁶ Others have mandated the creation of pretrial services or passed legislation to regulate the commercial bail bond industry. Still others have amended existing statutes related to pretrial release eligibility and conditions in general, and to bail in particular.

Bail reform is moving fast. As of June 2018, there are fourteen states weighing significant pretrial legislation, including California, Massachusetts, New Hampshire, New York, Ohio, and Virginia. According to the National Conference of State Legislatures' bill tracking database, there are 168 bail and pretrial bills currently pending across the country.⁷⁷ Meanwhile, local changes at the county and municipal levels are the most rapidly expanding area of change.⁷⁸

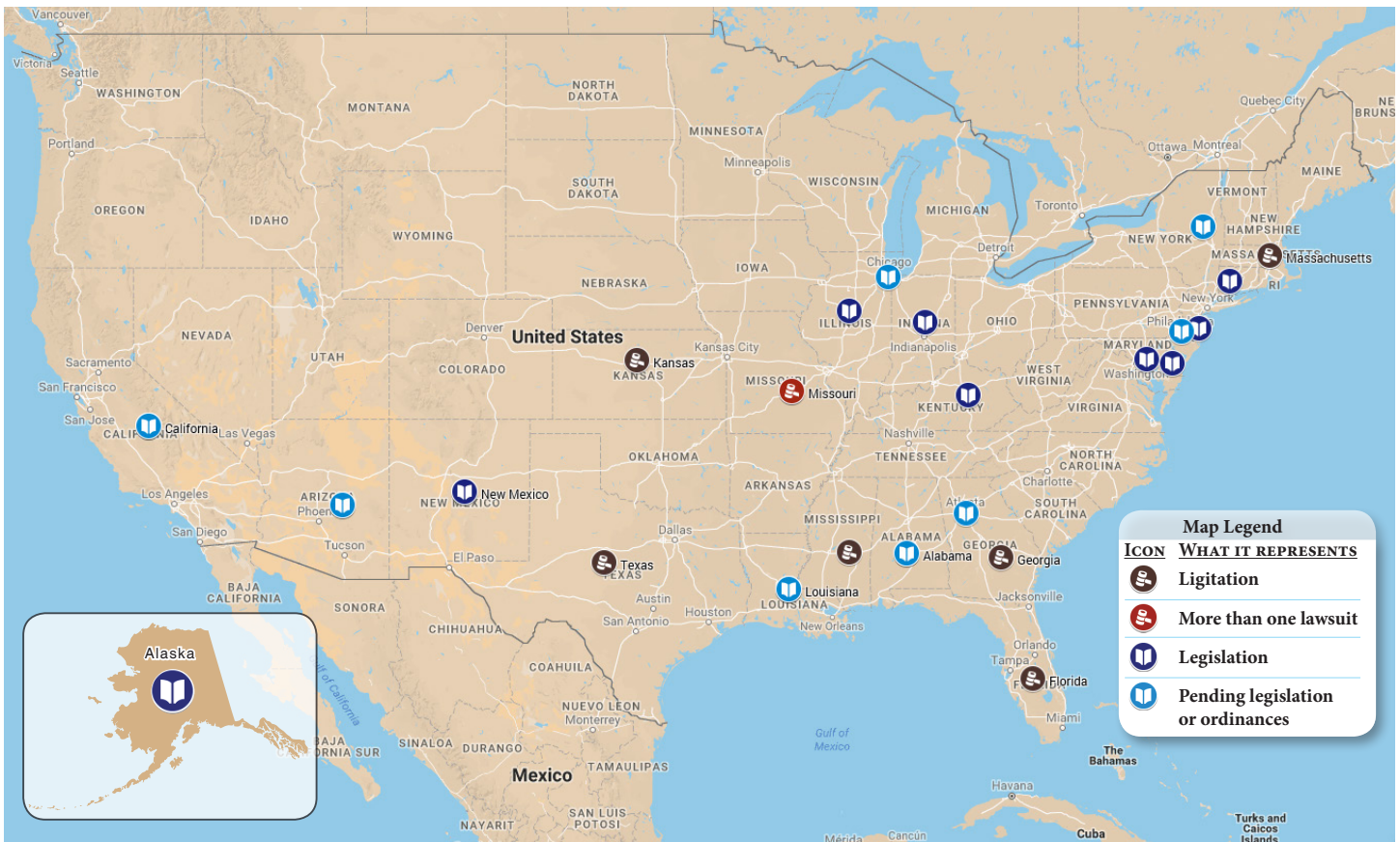
The following section highlights recent litigation occurring in Louisiana and around the country. A listing of other litigation and legislation can be found in Appendix C of this report.

⁷⁶ Note, *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing* 131 HARV. L. REV. 1125, 1125 (2018). Some of the methods used, however, have been subject to criticism for incorporating racial bias.

⁷⁷ *State Pretrial Policy: Bill Tracking Database*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/civil-and-criminal-justice/state-pretrial-policy-bills-tracking-database.aspx> (last visited Jul. 24, 2018).

⁷⁸ *Essential PJI Reports*, PRETRIAL JUST. INST., <http://www.pretrial.org/essential-reports/> (last visited Jul. 24, 2018).

Bail Litigation by State



This map highlights the states in which litigation or legislation is taking place that would challenge or change current practices in bail setting. Information on additional current and pending legislation and litigation can be found in Appendix C.

A. Recent Bail Litigation in the United States

Louisiana

Little v. Frederick, No. 6:17-CV-00724, 2018 WL 1221119 (W.D. La. Mar. 8, 2017).

Little is a case out of Lafayette Parish involving a plaintiff alleging that the Sheriff, Commissioner, and Chief Judge for the Fifteenth Judicial District violated Due Process and Equal Protection rights under the Fourteenth Amendment by setting bail amounts without appropriate inquiry into ability to pay. The plaintiff was arrested and detained at Lafayette Parish Correctional Center after being charged with felony theft and was unable to post the \$375 bond premium. He sought an injunction, declaratory relief, and compensation for attorney's fees and costs.

In July 2017, the case was stayed as the parties engaged in settlement talks. The stay was eventually vacated because the defendants claimed there was nothing to settle and the plaintiff claimed he was experiencing ongoing, irreparable harm.

In December 2017, the magistrate recommended that the motion be granted with respect to the plaintiff's Equal Protection and Due Process claims against

“ [T]his Court agrees . . . that the Louisiana Constitution generally creates a right to bail on ‘sufficient surety.’ Louisiana [law] further provides that ‘[t]he amount of bail shall be fixed in an amount that will ensure the presence of the defendant, as required, and the safety of any other person and the community, having regard to,’ among other factors, ‘[t]he ability of the defendant to give bail.’ ”

- *Little v. Frederick*

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As a result [of defendant's lack of individualized assessment], the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart.

- O'Donnell v. Harris County

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the Judge. The magistrate also recommended that the motion be denied to the extent that it requested dismissal of Due Process claims against the Commissioner.

In January 2018, the plaintiff moved for oral arguments and was granted a hearing. In March 2018, the Court adopted the magistrate judge's Report and Recommendation in part, denying the defendant's 12(b)(6) motions to dismiss and thereby allowing the plaintiff to proceed in federal court on both his due process and equal protection claims.

This case is ongoing.

Texas

O'Donnell v. Harris County, 892 F.3d 147 (5th Cir. 2018).

O'Donnell is an ongoing case disputing the constitutionality of the fixed bail system in Harris County – the most populous county in Texas and the third most populous county in the U.S. Two central issues are involved in this case. First, can a jurisdiction impose fixed cash bail on misdemeanor arrestees who are unable to pay, but would otherwise be released, thereby effectively requiring pretrial detention? Second, what Due Process and Equal Protection requirements exist for such actions to be lawful?

While detained for misdemeanor offenses in Harris County's jail, which is the third-largest jail in the nation, three indigent plaintiffs sued the County, its Sheriff, and its Criminal Court Judges under 42 U.S.C. § 1983. The plaintiffs claim that the County's fixed pretrial bail system and detention in misdemeanor cases violate both the Equal Protection and Due Process

Clauses of the Fourteenth Amendment.⁷⁹ Specifically, they allege that the County's policies have deprived them of such constitutional protections by detaining them solely due to their inability to pay a set bail amount, and without a meaningful inquiry into whether they can pay. Such a system violates Equal Protection principles because it enables “defendants with otherwise similar histories and risks but with access to money” to essentially “purchase” their pretrial release. Additionally, the plaintiffs put forth empirical evidence that in misdemeanor cases, release on money bail does no more to mitigate nonappearance or new criminal activity than does release on nonmonetary conditions. The plaintiffs sought declaratory and monetary relief, as well as an injunction preventing the defendants from maintaining a “wealth-based post-arrest detention scheme;” i.e., from requiring money bail without inquiring into the arrestee's ability to pay.

In response, the defendants argue that a) there is no constitutional right to “affordable bail;” b) Harris County's policies are subject to rational basis review; and c) under any level of judicial scrutiny, the County's policies are constitutional.

On April 28, 2017, the United States District Court for the Southern District of Texas issued a landmark ruling in the case, holding that the County's policies and practices violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. This decision emphasized the unconstitutionality of wealth-based detention and granted the plaintiffs' motion for preliminary injunctive relief.

⁷⁹ Although the plaintiffs did not raise an Eighth Amendment challenge, they argued that, in the alternative, the County's bail system for misdemeanor arrestees also violated the Eighth Amendment.

In its decision, the court made the following findings: Harris County has a consistent and systematic policy and practice of imposing secured money bail as de facto orders of pretrial detention in misdemeanor cases; these de facto detention orders effectively operate only against the indigent, who would be released if they could pay at least a bondsman's premium, but cannot; those who can pay are released, even if they present similar risks of nonappearance or of new arrests; these de facto detention orders are not accompanied by the protections that federal due process requires for pretrial detention orders; Harris County has an inadequate basis to conclude that releasing misdemeanor defendants on secured financial conditions is more effective to assure a defendant's appearance or law abiding behavior before trial than release on unsecured or nonfinancial conditions, or that secured financial conditions of release are reasonably necessary to assure a defendant's appearance or to deter new criminal activity before trial; and that Harris County's policy and practice violates the Equal Protection and Due Process Clauses of the United States Constitution.

The court then ordered the following: Harris County and its policymakers are enjoined from detaining misdemeanor defendants who are otherwise eligible for release but cannot pay a secured financial condition of release; Harris County Pretrial Services must verify a misdemeanor arrestee's ability to pay bail on a secured basis by affidavit; and that the Harris County Sheriff must release on unsecured bail those misdemeanor defendants whose inability to pay is shown by affidavit, who would be released on secured bail if they could pay, and who have not been released after a probable cause hearing held within twenty-four hours after arrest.

Judge Rosenthal's 193-page opinion has received national attention for being a historic ruling in the movement towards bail reform. "For what appears to be the first time, . . . a federal judge has ruled that imposing too-high bail amounts on poor, low-level defendants — without considering whether they can pay it — amounts to a detention order for those people, which is illegal. As Rosenthal notes, since the thirteenth century, bail has only been legal because it is supposed to be a mechanism for people's release — not an excuse to continue detaining them."⁸⁰

The district court denied a stay pending appeal without prejudice that same day. Harris County appealed to the U.S. Court of Appeals for the Fifth Circuit on June 12; that appeal was accepted.

In February 2018, the Fifth Circuit issued an opinion affirming the district court's ruling. However the injunction was found to be too broad of a remedy because it required assuming "a fundamental substantive due process right to be free from any form of wealth-based detention . . . [and] no such right is in view." The case was remanded to district court for a new injunction.

On June 1, 2018, on a petition for rehearing, the Fifth Circuit issued a new opinion in substitution of the February 2018 one. The new opinion holds that abstention under the *Younger* doctrine was not warranted, and that Harris County's bail-setting procedures a) were inadequate to protect detainees' Due Process rights; and b) violated indigent arrestees' rights to Equal Protection.

This case is ongoing.

“For what appears to be the first time, . . . a federal judge has ruled that imposing too-high bail amounts on poor, low-level defendants — without considering whether they can pay it — amounts to a detention order for those people, which is illegal. As Rosenthal notes, since the 13th century, bail has only been legal because it is supposed to be a mechanism for people's release — not an excuse to continue detaining them.”

80 Meagan Flynn, *The Scathing Federal Ruling Against Harris County's Bail System Is One for the Ages*, HOUS. PRESS, May 1, 2017, available at <http://www.houstonpress.com/news/judge-rips-harris-county-bail-system-in-historic-ruling-9399890>.

“ [T]he problem this case presents does not result from the sudden application of a new and unexpected judicial duty; it stems instead from the enduring unwillingness of our society, including the courts . . . to correct a deformity in our criminal justice system that close observers have long considered a blight on the system. . . . The problem, as [the California Supreme Court] Chief Justice has shown, requires the judiciary, not just the Legislature, to change the way we think about bail and the significance we attach to the bail process.

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- *In re Humphrey*

California

In re Humphrey, 19 Cal. App. 5th 1006 (2018).
Humphrey (Kenneth) on H.C., 417 P.3d 769 (Cal. 2018).

In re Humphrey is an ongoing case that was recently granted review by the Supreme Court of California. The case involves a 63-year-old indigent defendant who was detained pretrial due to his inability to post a \$600,000 bail amount set by California’s fixed bail schedule. He had been arrested for burglary and theft charges after breaking into and stealing five dollars and a bottle of cologne from a neighbor’s unit in his senior living home. Pretrial services conducted a PSA report on him, concluding with a recommendation against his release due to his prior convictions. The court then set bail at \$600,000 without inquiring into either his financial resources or potential alternative, nonmonetary release conditions, such as recognizance.

A hearing judge reduced the bail amount to \$350,000, citing the defendant’s strong ties to the community and willingness to participate in a treatment program for his substance abuse issues. Although it was established that the defendant was indigent and there was no evidence that any risk he posed could not be managed, including through the supportive treatment program that was willing to accept him, the trial judge insisted that he posed a public safety and flight risk concern sufficient to warrant a bail figure so high that he could not possibly pay it.

Humphrey subsequently filed a petition for habeas corpus, claiming that he was denied due process of law and deprived of his personal liberty by being subject to pretrial detention solely due to his poverty. He argued that the Fourteenth Amendment’s Due Process and Equal Protection Clauses required the trial court to assess the availability of nonmonetary release conditions as an alternative to money bail. Because the trial court failed to make such an assessment, he argued, his substantive due process rights were contravened. His petition requested the Court of Appeal to either order his immediate release or remand the matter for a new bail hearing.

The Attorney General initially opposed Humphrey’s petition for habeas corpus and asked the court to deny it, arguing that the magistrate had no obligation to inquire into his ability to pay bail. Later, however, the Attorney General agreed with the defendant/petitioner that a writ for habeas corpus should be issued to provide the defendant with a new bail hearing including a consideration of his financial status.

The Court of Appeal held that the lower court erred in failing to inquire into and take into account the defendant’s financial ability to pay bail and less restrictive, nonmonetary alternatives to bail. Its opinion noted that the bail amount reduction from \$600,000 to \$350,000 was “ineffectual” and “incongruous” because the court had made no findings that the defendant could possibly pay the lesser amount and he was effectively precluded from release.⁸¹

The Court applied the *Mathews* test and found that a defendant’s liberty interest is of greater importance than the government’s interest in ensuring the defendant’s presence at future court proceedings and protecting the safety of victims and the community. Therefore, the defendant’s liberty interest may only be abridged to the extent necessary to serve a compelling governmental interest.

The Court held that an order setting a secured money bail that results in detention cannot stand unless it is treated as a preventive detention order and passes the highest standards of Due Process:

[A]lthough the prosecutor presented no evidence that non-monetary conditions of release could not sufficiently protect victim or public safety, and the trial court found petitioner suitable for release on bail, the court’s order, by setting bail in an amount it was impossible for petitioner to pay, effectively constituted a sub rosa detention order lacking the due process protections constitutionally required to attend such an order. Petitioner is entitled to a new bail hearing at which the court inquires into and determines his ability to pay, considers nonmonetary alternatives to money bail, and, if it determines petitioner is unable to afford the amount of bail the court finds necessary, follows the procedures and makes the findings necessary for a valid order of detention.⁸²

The Court established that the standard of proof required for a detention decision is clear and convincing evidence, regardless of what causes the detention—secured money bail that is unreachable, or an explicit order of detention.

The Court’s opinion noted the “significant disconnect between the stringent protections state and federal appellate courts have required for proceedings that may result in a deprivation of liberty and what actually happens in bail proceedings in our criminal courts.”⁸³ It also laid blame on the courts for the current misuse of money bail:

[T]he problem this case presents does not result from the sudden application of a new and unexpected judicial duty; it stems instead from the enduring unwillingness of our society, including the courts . . . to correct a deformity in our criminal justice system that close observers have long considered a blight on the system . . . The problem, as our Chief Justice has shown, requires the judiciary, not just the Legislature, to change the way we think about bail and the significance we attach to the bail process.⁸⁴

On May 23, 2018, the Supreme Court of California granted review on three issues. First, whether the Court of Appeal erred in holding that, in setting or reviewing a monetary bail amount, due process and equal protection principles require considering a defendant’s ability to pay. Second, whether a trial court may (and whether it must) consider public and victim safety when setting the bail amount. Third, under what circumstances the California Constitution permits bail to be denied in noncapital cases. The Court also denied a requested order for de-publication of the Court of Appeal’s opinion.

This case is ongoing.

B. *Recent Legislation*

This section highlights the major laws enacted by states regarding pretrial practices and the money bail system. A listing of other litigation and legislation can be found in Appendix C of this report.

82 *Id.* at 1014 (internal citations omitted).

83 *Id.*

84 *Id.* at 1049.

“

*All people shall,
before conviction,
be eligible for
pretrial release.*

”

New Jersey

In recent years, New Jersey has adopted a system that only permits money bail as a last resort, requiring judges to consider non-financial conditions of release first. This action has essentially eliminated cash bail for most defendants. In the first year, the state saw a significant drop in its pretrial jail population.

In August of 2014, the New Jersey legislature enacted a law authorizing bail reform and a constitutional amendment approved by voters in November 2014.⁸⁵

The amendment establishes pretrial detention for people determined to be high risk in criminal cases by replacing the phrase “bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great” with the following:

All people shall, before conviction, be eligible for pretrial release. Pretrial release may be denied to a person if the court finds that no amount of monetary bail, non-monetary conditions of pretrial release, or combination of bail and non-monetary conditions would reasonably assure the person’s appearance in court when required, or protect the safety of any other person or the community, or prevent the person from obstructing or attempting to obstruct the criminal justice process. It shall be lawful for the Legislature to establish law procedures, terms, and conditions applicable to pretrial release and the denial thereof authorized under this provision.⁸⁶

The statutory changes require that a pretrial release decision be made within forty-eight hours of being admitted to jail and allow prosecutors to file motions for pretrial detention when no condition or combination of conditions is found to reasonably ensure appearance in court and protection of public safety. The statutes do not explicitly outlaw the use of money bail but make it the third option only after ROR and the “least restrictive” non-monetary conditions have been deemed ineffective. They also require courts to consider Pretrial Services’ risk assessment and recommendations on conditions of release. When the constitutional amendment and legislative changes went into effect in 2017, they were accompanied by a set of new court rules. One rule, for example, tracks the constitutional and statutory changes in outlining eligibility for pretrial release and authority to set release conditions.⁸⁷

Together, the constitutional amendment, legislative changes, and court rules have moved bail setting practices away from monetary bail to a risk-based system. These changes – along with accompanying ones like the issuance of more summons in lieu of arrests – reduced the pretrial jail population statewide by twenty (20) percent in 2017, and thirty-five (35) percent compared to January 1, 2015. According to the New Jersey Administrative Office of Courts’ annual report on bail reform for 2017, of all defendants issued complaint warrants (more serious charges) and complaint summonses (less serious charges), ninety-four (94) percent were released, and six (6) percent were detained. The state required eligible defendants to post money bail only forty-four times.⁸⁸ The reforms have also reduced detention timelines, as courts made release decisions for eligible defendants for whom prosecutors did not file detention motions within twenty-four hours eighty-one (81) percent of the time, and ninety-nine (99) percent within forty-eight hours.⁸⁹ In addition to pretrial release rates and detention times, it will be important to see what the rates of failure to appear (FTA) and new criminal arrests will be in New Jersey as these are two other main measures used to evaluate the success of these bail reforms.

85 S. Con. Res. 128, 216th Leg. (N.J. 2014), available at http://www.njleg.state.nj.us/2014/Bills/SCR/128_11.HTM;

S. B. 946 (N.J. 2014); Leg. Act 2014-31 (N.J. 2014), available at http://www.njleg.state.nj.us/2014/Bills/PL/14/31_.HTM.

86 N.J. CONST. art.1 §11, available at <http://www.njleg.state.nj.us/lawsconstitution/constitution.asp>.

87 See N.J. Ct. R. 3:26-1, available at <https://www.judiciary.state.nj.us/attorneys/assets/rules/r3-26.pdf>.

88 The second way to calculate the pretrial release rate is to compare just the eligible defendants issued complaint warrants, 81.3 percent of whom were released and 18.1 percent were detained. In 2017, out of 44,319 defendants issued complaint warrants, prosecutors filed 19,366 motions for pretrial detention, and courts ordered 8,043 of those people detained. *Report to the Governor and the Legislature: Jan. 1 – Dec. 31, 2017*, N.J. ADMIN. OFF. OF CTS., (2017), <https://www.judiciary.state.nj.us/courts/assets/criminal/2017cjranual.pdf>.

89 *Id.*

New Mexico

New Mexico allows monetary bail only when it is deemed necessary to assure a defendant will appear in court.

In November 2016, New Mexico enacted a constitutional amendment largely in response to its Supreme Court's decision in *Brown*.⁹⁰ The amendment simultaneously limits the right to bail and eliminates money-based detention. It allows preventative detention in felony cases in which there is "clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community." And it establishes that "a person who is not detainable on grounds of dangerousness nor a flight risk in the absence of a bond and is otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond."⁹¹ Essentially, it ensures that defendants who are not considered to be dangerous, and pose no flight risk, shall not be subject to pretrial detention solely because they cannot afford to purchase a money bond. The amendment also authorizes judges to deny release to defendants charged with felonies whom can pay bail but are proven dangerous and a threat to public safety. Therefore, the amendment seeks to serve a dual purpose: to promote equal protection of the law and to promote public safety. The amendment was highly popular, achieving the approval of ninety-one (91) percent of the legislature and eighty-seven (87) percent of New Mexico voters.⁹²

To effectuate its ruling in *Brown* and the new constitution, the New Mexico Supreme Court promulgated rules effective July 1, 2017, requiring "clear and convincing evidence" that a person would be a flight risk or danger to others as the standard for preventative detention and ensuring prompt consideration of defendants' motions for relief from unreachable money bail. These court rules on pretrial decision-making eliminate jail house bond schedules, limit the use of financial bonds, specify timeframes for hearings, include the use risk assessment tools, and set standards for conditions of pretrial release. For example, one rule specifies a "least restrictive" standard for nonmonetary release conditions.⁹³

This major change was led by the state Supreme Court to build a statutory and regulatory framework that was aligned with the law as stated in the *Brown* decision. The Supreme Court established an ad hoc committee to propose rules for preventive detention and limiting detention on the basis of financial inability to pay money bail. In implementing the new court rules, the committee emphasized that fixed bail schedules result in equal protection denials to indigent arrestees who are neither dangerous nor pose a threat of flight. Further, it pointed out that traditional cash bail systems result in continual "catch-and-releases" of high-risk defendants, effectively undermining public safety. The new system aims to eliminate the old pattern of "fixed money bond schedules that allowed high-risk defendants to buy their way out of jail before even seeing a judge and kept low-risk defendants in jail at taxpayer expense simply for lack of money to buy a money bond."⁹⁴

Bernalillo County, where Albuquerque is located, has implemented the Arnold Foundation PSA and decision-making framework, which does not include recommendation of any financial bail and, together with the new rules, has dramatically reduced the number of people in the local jail who were detained on financial bail. According to the Bernalillo County Monthly Report from December 2017, the pretrial detention of people for their inability to pay bond decreased dramatically, from over 400 on January 31, 2017, to 59 on December 31, 2017.⁹⁵

90 See Appendix C at p. 48.

91 N.M. CONST. art. II, §13, available at <http://www.sos.state.nm.us/nmconst2017.pdf>.

92 ADMIN. OFF. OF THE CTS. OF N.M., KEY FACTS AND LAW REGARDING PRETRIAL RELEASE AND DETENTION (2018), [https://nmcourts.gov/uploads/files/Pretrial%20Release%20and%20Detention%20Key%20Facts%20%20\(1-31-2018%20UPDATE\)%20\(1\)%20\(1\).pdf](https://nmcourts.gov/uploads/files/Pretrial%20Release%20and%20Detention%20Key%20Facts%20%20(1-31-2018%20UPDATE)%20(1)%20(1).pdf).

93 N.M. DIST. CRT. R. 5-401, http://www.nmcompcomm.us/nmrules/NMRules/5-401_6-5-2017.pdf.

94 ADMIN. OFF. OF THE CTS. OF N.M. *supra* n. 84.

95 BERNALILLO COUNTY METROPOLITAN DETENTION CTR., *Criminal Justice Reforms and the Jail Population: In Custody Bond Amounts: December Monthly Report* 5 (Jan. 2018).

VII. The Human Impact of Bail

Louisianans who are arrested and unable to afford the bail amount required to secure their release remain in jail. The consequences that follow affect not only the lives of the individuals detained and their families, but also affect employers and ultimately taxpayers. These serious consequences begin before the arrestee is ever convicted of a crime and, in many cases, before the State of Louisiana has even reviewed their case to determine if there is sufficient evidence to prosecute.

Below are some of the many collateral consequences that result from being detained pretrial simply because a person is unable to afford release.

Loss of Employment. People who remain in jail are unable to go to work. A person's inability to work causes the loss of income and potentially the loss of employment and property. They lose income needed to support themselves and their families. According to a study published by Pew Charitable Trusts on Incarceration's effect on economic mobility, pretrial detainees who lose employment often encounter reduced wages if and when they find new employment.⁹⁶

Loss of Property. Families can become homeless due to eviction when the household loses a breadwinner, or even a second income. Property loss occurs in twenty-three (23) percent of cases.⁹⁷ Homelessness can also follow when the detained person is the leaseholder for a subsidized apartment, as certain programs can terminate a lease due to the leaseholder's absence. When property is lost, extra funds must be expended on subsequent housing search, which exacerbates a cycle of poverty for low-income families, potentially resulting in homelessness.

“ There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.

- Justice Hugo Black in *Griffin v. Illinois* (1956)

”

Human Impact of Bail:

Andrew was arrested in another state for a warrant issued in Louisiana for drug distribution from five years previously. Andrew maintained his innocence and had no allegations of criminal activity before the allegation, or in the subsequent five years. The trial court set bond well beyond what Andrew could afford. Andrew spent the next five months of his life in the prison while his defense counsel sought additional discovery and subpoenaed employment records. It was eventually determined that Andrew had been falsely accused, and was released with no job, no home, his possessions gone after his eviction, and no way to get home.

Hector was arrested in 2017. The court set bail at \$5,000 on his case. The case was set for trial. Hector's family went to a bondsman to try to pay the bond. Because Hector was originally from Honduras, all of the bondsmen refused to bond Hector out unless his family paid the entire \$5,000 as opposed to the normal percentage charged. Hector remained in jail. Over a month later, the case came before the court for trial. On that date, the State indicated that it was not ready to proceed. The court agreed to reduce Hector's bond at that time. Two weeks later, Hector's family was finally able to bond him out. Hector spent nearly six weeks in jail pretrial. Two weeks later, the State dismissed the charge.

*The stories are true, and illustrate some of the human impacts of bail.
The names and some details in the stories have been modified to protect the privacy of the individuals' stories mentioned.*

⁹⁶ PEW CHARITABLE TRS., COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY, 11 (2010), <https://perma.cc/9Q9Y-CWYT> (finding that serving time reduces hourly wages for men by approximately 11%, annual employment by nine weeks, and annual earnings by 40%).

⁹⁷ Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. REV. 1, 4 (2017) (citing Mark Pogrebin et al., *The Collateral Costs of Short-Term Jail Incarceration: The Long-Term Social and Economic Disruptions*, CORR. MGMT. Q., Fall 2001, at 64, 64-65).

Family Unification. Children whose parents are held because they cannot afford secured money bail suffer in many ways. First of all, for a very young child or a nursing baby, the absence of a parent can be traumatic, causing long term developmental and emotional issues. Often times, children end up staying with caretakers who are less than able to provide for their needs. In worst case scenarios, children can be removed from their parent's legal custody, even if that parent has never been accused of abuse or neglect, and placed in the care of the Department of Children and Family Services where long term outcomes for children are bleak.

Education. Young people who are detained often go without education during their detention. They may be denied access to special education services. Students can be held back an entire year, thereby increasing the likelihood of dropout. Those enrolled in college may have their progress interrupted or may forfeit tuition or scholarships. Adults who are pursuing high school equivalency or trade programs also experience serious setbacks.

Health & Medical Services. People with mental and physical health needs that cannot be met by the facility in which they are housed are unable to access needed medical treatment. Some can even lose long sought-after medical appointments or their place in line for special treatments or transplants as a result of inability to pay bond. Mental health problems may go untreated or can become exacerbated by jail conditions. Young people and detainees who have suffered traumatic experiences in the past are particularly vulnerable to emotional breakdown while incarcerated. The worst-case scenarios result in suicide.

Case and Sentencing Outcomes. The case and sentencing outcomes of people detained pursuant to unaffordable money bail also suffer. Compared to people released at some point pending trial, people who remain incarcerated for the entire pretrial period are more likely to be sentenced to jail or prison time.⁹⁸ And those sentences are, on average, nearly three times longer.⁹⁹

These are just some examples of the ripple effects that pretrial incarceration can have on an individual's life and liberty. Due to the high cost of housing a person in jail pretrial, municipalities and, ultimately, taxpayers foot the bill for detaining someone in jail simply because he or she cannot afford release.

Human Impact of Bail:

Casey was arrested after being accused of stealing. Casey had never before been convicted of a crime. Because the amount at which bail was set, Casey's family could not afford her release. Her attorney filed a motion asking the court to reduce her bond and alerted the court that Casey was the primary caregiver of her very ill father. During her detention, Casey's father was hospitalized. This information was shared with the court noting that Casey urgently needed to be at her father's bedside. The motion to reduce bail was scheduled one week later. After hearing the motion, the court agreed to convert Casey's bond to a release on recognizance, sixteen days into Casey's pretrial incarceration. Casey's father died while she was detained.

Ricardo was arrested for driving while intoxicated. He came before the judge to have bond set. On the evening that bond was set, there were several other people arrested for driving while intoxicated. The court issued recognizance bonds for all of the arrestees, except Ricardo. The court set bond without making any inquiries regarding Ricardo's address, job, or criminal record when determining the bond amount.

*The stories are true, and illustrate some of the human impacts of bail.
The names and some details in the stories have been modified to protect the privacy of the individuals' stories mentioned.*

⁹⁸ According to a study conducted by the Arnold Foundation, "[l]ow risk defendants who are detained for the entire pretrial period are 5.41 times more likely to be sentenced to jail and 3.76 times more likely to be sentenced to prison when compared to low-risk defendants who are released at some point before trial or case disposition. Moderate and high-risk defendants who are detained for the entire pretrial period are approximately 3 times more likely to be incarcerated than similar defendants who are released at some point." Christopher Lowenkamp, Ph.D., et al., *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, ARNOLD FOUND., 4 (November 2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_state-sentencing_FNL.pdf.

⁹⁹ *Id.* at 19 (showing prison sentences in months were 2.84 times longer for people than their released counterparts).

VIII. Aspirations for Louisiana

Louisiana must work to conform with changing state and federal perceptions and procedures regarding bail, and to ensure that “liberty is the norm and detention prior to trial or without trial is the carefully limited exception.” These goals will make good on the true purpose of bail—to enable pretrial release for all but the carefully limited few who must be detained, not to raise revenue and prevent the right to release from being attained by the indigent.

Further, Louisiana must aim to rid its bail system of its characterization as one that commodifies liberty and criminalizes poverty. These goals aim to reduce the racial and socioeconomic disparities that pervade pretrial detention.

The Committee has created a set of principles that can help ensure a more transparent, just, functional, and constitutional system of bail throughout the state. The following should be seen as a jumping off point for potential changes to the system that will improve on the problems identified in this report.

A. Adopt a Presumption for Release

Louisiana has the highest pretrial detention rate of any state in the nation, more than double the national average,¹⁰⁰ even though the vast majority of arrestees return for required court appearances and do not commit new offenses while released. In the third quarter of 2017 in Orleans Parish Criminal District Court, out of all arrestees assessed in the highest of four risk categories, 83% made all court appearances, and 83% were not rearrested.¹⁰¹ While pretrial detention is often unnecessary, it can also impair public safety. Research has shown that incarcerating low-risk defendants¹⁰² who are unable to afford their bail is associated with higher rates of recidivism, both pretrial and post-disposition.¹⁰³ “The longer low-risk defendants are detained, the more likely they are to be rearrested for new criminal activity pending trial.”¹⁰⁴ The increased rearrest rates may be due to the destabilization of the defendant’s community (e.g., employment, finances, residence, and family) while the defendant is incarcerated.¹⁰⁵ In the third quarter of 2017, persons booked in the New Orleans jail stayed an average of 14.4 days.¹⁰⁶ In two weeks’ time, an employed defendant could lose their job and place financial and child care hardship on his or her community. The interruption in a defendant’s life from pretrial detention could therefore impact not only the individual defendant’s life but also public safety at large.

Shifting the paradigm away from a reliance on money bail and toward a presumption of release allows the system to refocus on risk, the very basis of bail in the United States. Louisiana should adopt a tri-partite model for bail decision-making: judges should use 1) release on recognizance for those who pose little risk, 2) non-financial release with a range of supports or supervision for those who pose some degree of risk, and 3) non-financial preventive detention for defendants for whom the court finds, “by clear and convincing evidence, that no conditions of release can reasonably assure the safety of the community or

100 Vera Institute of Justice, <http://trends.vera.org/incarceration-rates?data=pretrial>.

101 *Id.*

102 Low-risk defendants are persons who are assessed as likely to appear for required court proceedings and unlikely to commit new criminal offenses while released on bond.

103 See CHRISTOPHER LOWENKAMP, ET. AL., LAURA AND JOHN ARNOLD FOUNDATION, THE HIDDEN COSTS OF PRETRIAL DETENTION, (2013), available at http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf.

104 *Id.* at 4.

105 See *id.*

106 Vera Institute of Justice: *Who’s in Jail and Why?*, Mar. 2018. <https://www.vera.org/publications/new-orleans-jail-population-quarterly-report/new-orleans-whos-in-jail-and-why-third-quarterly-report-2017/new-orleans-whos-in-jail-and-why-third-quarterly-report-2017-about-this-report>.

any person.”¹⁰⁷ This model is supported by the American Bar Association Standards for Criminal Justice¹⁰⁸ and resembles the federal system.¹⁰⁹ As of July 1, 2018, this tri-partite model has been implemented in New Orleans by using the PSA, a pretrial risk assessment tool that can assist judges as they decide whether to release or detain a defendant before trial.¹¹⁰ The PSA, based on research performed over twenty years, uses neutral, reliable data to identify nine factors which can predict the risk of a defendant failing to appear for required court proceedings and the risk that the defendant will be rearrested for new criminal offenses while released on bail.¹¹¹ The PSA has also been implemented in over a dozen states and counties across the country.¹¹² While the PSA may not be a practical solution for all Louisiana judicial districts, it may serve as an aspiration to keep in mind while using a presumption for release.

Non-financial preventive detention is the “carefully limited exception” in *Salerno*.¹¹³ For a court to resort to preventive detention, it should make the following two findings: 1) there is objective accurate identified risk of flight or danger to an individual or the community, and 2) there are no conditions that can be imposed to mitigate the identified risk. When an individual is preventively detained, their case should be flagged to the court to revisit the grounds for detention at least every 30 days.

B. Prevent Money Bail from Being the Sole Reason a Person is Detained Pretrial

“[M]oney becomes a proxy for risk. Those who can afford to make bail buy their way out of jail, while those who can’t remain locked up.”¹¹⁴ Under the federal system, a “judicial officer may not impose a financial condition that results in the pretrial detention of the person.”¹¹⁵ In New Orleans in 2015, \$6.4 million was spent on non-refundable bail premiums and fees, and of that amount government agencies profited \$1.7 million.¹¹⁶ Whether a defendant can afford a money bail should not be the determinant of whether they are detained or released pretrial. At the very least, secured money bail should only be used when it is clear that the defendant has the immediate ability to pay without undue hardship. The amount of money bail should be the lowest deemed necessary to “ensure the presence of the defendant, as required, and the safety of any other person and the community.”¹¹⁷ Also, government agencies should not benefit financially from the posting of secured money bail as it incentivizes the setting of such bail, thus presenting a conflict of interest with the judicial officer’s obligation to secure defendants’ presumptive constitutional right to pretrial liberty.

107 *Salerno*, 481 U.S. at 750.

108 *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* (2007) – Standard 10-5.1. “It should be presumed that defendants are entitled to release on personal recognizance on condition that they attend all required court proceedings and they do not commit any criminal offense.”

109 Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* at 53 (US Dept. of Justice, National Institution of Corrections, 2014). The federal system “allow[s] judges to use whatever least restrictive conditions provide reasonable assurance of court appearance and public safety so long as they are lawful and effective.”

110 “Public Safety Assessment: A risk tool that promotes safety, equity, and justice” <http://www.arnoldfoundation.org/public-safety-assessment-risk-tool-promotes-safety-equity-justice/> (Last visited Jul. 19, 2018).

111 *Id.* A Laura and John Arnold Foundation pretrial research team analyzed 750,000 cases from over 300 jurisdictions to identify the nine risk factors.

112 PSA Research FAQs, www.arnoldfoundation.org.

113 *Salerno*, 481 U.S. at 755.

114 *Id.*

115 18 U.S. Code § 3142(c)(2).

116 MATHILDE LAISNE ET. AL., *VERA INST. OF JUST., PAST DUE: EXAMINING THE COSTS AND CONSEQUENCES OF CHARGING FOR JUSTICE IN NEW ORLEANS* 6 (2017), https://storage.googleapis.com/vera-web-assets/downloads/Publications/past-due-costs-consequences-charging-for-justice-new-orleans/legacy_downloads/past-due-costs-consequences-charging-for-justice-new-orleans.pdf.

117 La. C.Cr.P. art. 316.

C. Ensure Consistent Representation at Bail Settings

The determination of an arrestee's pretrial release or detention is a "critical stage" of criminal proceedings that triggers the right to counsel.¹¹⁸ The Louisiana Constitution and Code of Criminal Procedure require the assistance of counsel when the accused, if convicted, faces imprisonment.¹¹⁹ A survey of the forty-two (42) Louisiana judicial districts, to which thirty-six (36) districts responded,¹²⁰ reveals that wide variations exist in bail setting practices across the state and even within the same jurisdiction. Attorney presence at bail settings is sparse: state prosecutors are present during bail settings in ten (10) districts, while defense attorneys are present during bail settings in twelve (12) districts. Of those districts, several reported that attendance by defense attorneys and state prosecutors was somewhat inconsistent and that often offices are represented only by administrative staff who record information, but do not speak on the record. Some districts noted that attorneys were only present when bail settings were set in person as opposed to being conducted over closed-circuit television, Skype, or the telephone. In districts in which defense counsel are present for bail settings, many respondents indicated that they are not provided police reports or criminal record information in advance of the hearing and many are not permitted to make representations regarding probable cause, the arrestee's ties to the community or their ability to make bond.

Ideally, public bail settings where the prosecutor, defense attorney, and arrestee are all present in person should be held as quickly as possible, and no more than 48 hours, following arrest to best uphold constitutional requirements. However, arrestees should not bear the burden of waiting in jail for such public hearings to occur. The interest in efficiently setting bail must not subvert defendants' constitutional rights to an individualized determination of bail and to counsel. Since bails are set within a matter of minutes, it is crucial that the court and attorneys have as much information about the arrest as possible. Law enforcement should timely provide its records to the court, and both attorneys should have this information prior to the bail setting. Defense counsel must be afforded the opportunity to gather as much information as possible during pre-bail setting client interviews, which are essential for providing the court with information relevant to the likelihood that the arrestee will return to court and the arrestee's ability to give bail. All attorneys should be notified in advance of bail settings, whether they are scheduled to be in person or remote. Public defenders should be appointed in cases where private counsel is unavailable for the bail setting, even for arrestees who are not indigent. Balancing the pragmatism of efficient bail settings with arrestees' individual rights will help to bring Louisiana practices closer to constitutional ideals.

D. Eliminate Restrictions on Unsecured Bail

The statutes forbid non-fully secured financial release for a wide range of arrest charges. This interferes with the judicial officer's ability to make an individualized determination of whether the defendant must be detained, otherwise undermines judicial discretion, and discriminates against people with limited financial means. These statutes are unique to Louisiana and are of questionable constitutional status.¹²¹

118 *Brewer v. Williams*, 430 U.S. 387, 399 (1977) (The Sixth Amendment right to counsel attaches at "the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."); *United States v. Gouveia*, 467 U.S. 180, 188 (1984) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008). *United States v. Ash*, 413 U.S. 300, 312-13 (1973); *see also Massiah v. United States*, 377 U.S. 201 (1964).

119 *See* La. Const. art. I § 13; LA. CODE OF CRIM. PROC. art. 511.

120 *See* Appendix B: Survey Results Summary for more information *infra* at 42.

121 For a list of recommended steps to achieve these aspirations, see Appendix E: Steps to Realize Aspirations at the end of this report. The steps are simply suggestions made based on the findings of this report.

IX. Conclusion

Louisiana's existing bail system creates an array of burdens on the state. First and foremost, a system that defaults to scheduled commercially secured bail bonds creates an insurmountable burden on the individuals charged with crimes who are all too often incarcerated because they lack the financial resources to secure their release—all without any attempt to determine the likelihood that an individual would fail to appear for court or their actual threat to the community.

Moreover, Louisiana's bail system creates a debilitating financial burden on the municipalities that end up shouldering the cost of housing the accused. Many of the individuals detained pre-trial offer little to no flight risk or danger to the community and could safely be released without the need for local municipalities to pay for their incarceration.

Finally, Louisiana's bail system creates a financial burden to the state at large, which ultimately bears the collateral financial burden of unemployment, homelessness, and increased rates of recidivism that are caused by unnecessary pre-trial detention.

While the bail system has proved a financial boon for the for-profit bail/bond industry, and has offered certain monetary incentives for the courts, the prosecution, and other agencies of the criminal justice system, those benefits are far outweighed by the personal and economic costs to Louisiana and its citizens.

These problems are exacerbated by a balkanized system of enforcement and application that has resulted in bail policies and procedures that vary from parish to parish, jurisdiction to jurisdiction, and sometimes from courtroom to courtroom. Such wildly divergent bail systems offer little to no guidance to judges, increase dependency upon bail schedules, and renders state level oversight difficult.

The conclusion of this committee is that the state must work to create a uniform system of bail that adopts four basic tenets:

- Establish a state-wide presumption of release for individuals charged with a crime;
- When the state seeks to challenge the presumption of release, create clear policies and procedures for bail settings that ensure both access to bail as soon as possible as well as meaningful legal representation;
- When bail is deemed necessary by the court, significantly reduce the reliance on money bail to ensure pre-trial release by expanding access to unsecured bail;
- Create a state-wide data collection system that can be accessed by every judicial district to provide both uniformity of application and guidance to judges.

Through these common-sense approaches, basic constitutional tenets such as the presumption of innocence can be restored, state and local finances can be significantly unburdened, and communities can steadily become safer as recidivism rates drop.

X. Acknowledgements

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XI. Resources

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National Conference on State Legislatures, Pretrial Enacted Legislation Database: <http://www.ncsl.org/research/civil-and-criminal-justice/state-pretrial-release-legislation.aspx>

National Conference on State Legislatures Pretrial Pending Bills Database: <http://www.ncsl.org/research/civil-and-criminal-justice/state-pretrial-policy-bills-tracking-database.aspx>

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APPENDIX A: SUMMARY OF LOUISIANA BAIL STATUTES

LA Bail Law	Highlights
LA CONST 1 18 http://www.legis.la.gov/legis/Law.aspx?p=y&d=206283	Excessive bail shall not be required. <i>Before and during trial:</i> mandates that people be bailable by sufficient surety except capital offenses when proof is evident and presumption of guilt is great. <i>After conviction and before sentencing:</i> mandates a person be bailable if maximum sentence is 5 years or less. Beyond five years at judge's discretion. <i>After sentencing and until final judgment:</i> mandates bail if imposed sentence is 5 years or less, beyond five years at the judge's discretion. <i>Exception for Crimes of Violence (COV) and Production/PWIT charges:</i> prohibits bail if proof is evident and presumption of guilt great and if, after a contradictory hearing, judge finds by clear and convincing evidence there is a flight risk or danger to another person or community.
CCRP 311, Definitions https://legis.la.gov/legis/Law.aspx?d=112429	<i>Bail:</i> security given to assure appearance in court. <i>Appearance:</i> appearance in the court where charges are pending. <i>Surrender:</i> detention of the defendant at request of surety. <i>Constructive surrender:</i> detention of defendant in another parish or foreign jurisdiction. <i>Personal surety:</i> a natural person domiciled in Louisiana who owns property in this state of sufficient value to satisfy bail amount. Precludes personal sureties from charging a fee or receiving compensation. Bail undertaking of personal surety may be secured or unsecured.
CCRP 312, Right to bail before and after conviction https://legis.la.gov/legis/Law.aspx?d=112430	Person charged with an offense is entitled to bail (except for 313). Prevents bail for people previously released on bail for COV with min. mandatory sentence or PWIT who failed to appear and had a warrant issued or their bond forfeited. Exceptions if person came to court voluntarily. Person who has been surrendered can still bail out.
CCRP 313, Gwen's Law; bail hearings; detention without bail https://legis.la.gov/legis/Law.aspx?d=112431	Authorizes a contradictory bail hearing prior to setting bail for DV-related charges to be held within 5 days from date of probable cause (exclusive of week-ends and holidays) during which the person can be ordered detained. Authorizes judges to deny bail in these cases upon proof by clear and convincing evidence that defendant might flee or that defendant poses an imminent danger to any other person or the community. Judge shall consider electronic monitoring conditions.
CCRP 313.1 Detention of noncitizen defendant pending bail hearing https://legis.la.gov/legis/Law.aspx?d=1015265	Mandates a contradictory bail hearing prior to setting bail for non-citizens or non-permanent residents charged with an offense involving a fatality.
CCRP 314 Authority to fix bail; bail order https://legis.la.gov/legis/Law.aspx?d=112432	Gives authority to fix bail to district courts and their commissioners, city or parish courts and municipal and traffic courts of New Orleans, Mayor's courts and traffic courts, juvenile, and family courts, and justices of the peace within their respective jurisdictions. Mandates that bail order be in writing, set the type and single amount of bail for each charge.

LA Bail Law	Highlights
CCRP 315 Schedules of bail https://legis.la.gov/legis/Law.aspx?d=112433	Requires a specific amount of bail be set in each case in the absence of a bail schedule. Authorizes courts to set bail schedules in non-capital cases.
CCRP 316 Factors in fixing amount of bail https://legis.la.gov/legis/Law.aspx?d=112434	Mandates that the amount of bail be fixed in an amount that will ensure appearance in court and public safety and lists factors to consider, including the seriousness of the charge, weight of the evidence, previous record, ability to pay bail, nature of danger to others, etc.
CCRP 317 Organization performing or providing pretrial services https://legis.la.gov/legis/Law.aspx?d=112435	Mandates that organizations providing pretrial services verify background information provided by defendant or otherwise obtained by the organization.
CCRP 318 Juvenile records in fixing bail https://legis.la.gov/legis/Law.aspx?d=112436	Court may request abstract from juvenile record for purpose of setting bail.
CCRP 319 Modifications of bail https://legis.la.gov/legis/Law.aspx?d=112437	Authorizes the court with trial jurisdiction to increase or reduce the amount of bail or require new or additional security on motion of either party or on its own motion and for good cause. Such modification terminates liability of the defendant and sureties on any existing bail. Authorizes defendant or a surety to substitute one form of security for another with approval of the court.

LA Bail Law	Highlights
<p>CCRP 320 Conditions of bail undertaking https://legis.la.gov/legis/Law.aspx?d=112439</p>	<p>Mandates that the conditions of bail be to appear at all stages, to submit orders of the court, and to not leave the state without written permission of the court. Provides the court with discretion to impose other conditions of release that are reasonably related to appearance and public safety.</p> <p>Mandates an ignition interlock device as a condition on all DUI 2nd and subsequent.</p> <p>Mandates drug testing for anyone arrested for a Crime of Violence (COV) or a violation of the Uniform Controlled Dangerous Substances Law. Authorizes the court to order drug testing in other felony and misdemeanor cases.</p> <p>Authorizes courts to operate drug testing programs with mandatory participation of all persons arrested for violation of state law contingent on funding.</p> <p>In domestic violence, stalking, and rape cases, mandates that the court consider prior criminal history of the defendants and whether the defendant poses a threat of danger to the victim. In such a case, the court shall issue a protective order. If a protective order is issued, the court shall prohibit defendant from possessing a firearm. Authorizes the court to order global positioning monitoring as a condition of release in these cases on the condition that the defendant agrees to pay the associated fees or to perform community service to cover the cost.</p> <p>Mandates that the court order a stay away order in crime of violence cases unless the victim consents.</p> <p>Violations of any condition amount to contempt of court and shall result in revocation of bail and a bench warrant or remand. Authorizes the court to modify the bail by increasing the amount of adding conditions.</p>

LA Bail Law	Highlights
<p>CCRP 321 Types of bail; restrictions https://legis.la.gov/legis/Law.aspx?d=112440</p>	<p>Provides for 5 types of bail: commercial surety, secured personal surety, unsecured personal surety, bail without surety, and cash deposit. Mandates that the bail be posted in the full amount. Specifies that a secured bail undertaking may be satisfied by a commercial surety, cash deposit, or with the court's approval, a secured personal surety or property (or combination thereof).</p> <p>Prohibits release on personal undertaking (ROR) or unsecured personal surety (PSBU) for the following charges:</p> <ul style="list-style-type: none"> • Crimes of violence • Felony offense involving discharge of a firearm • A sex offense when the victim is under 13 • Vehicular homicide • DV battery and domestic abuse aggravated assault • Cyberstalking 3rd conviction • Aggravated kidnapping of a child • False imprisonment with or without a dangerous weapon • Killing a child during delivery • Human experimentation • Cruelty to person with infirmities 2nd offense • DUI 2nd offense • Aggravated cruelty to animals • Injuring or killing of a police animal • Jumping bail • Out-of-state bail jumping • Violation of protective orders • Production, manufacturing, or possession with intent to distribute Controlled Dangerous Substances • Creates a rebuttable presumption that defendants who are out on bail and who are arrested for a new felony offense or who failed to appear on an underlying felony offense shall not be released on ROR or PSBU.
<p>CCRP 322 Commercial surety https://legis.la.gov/legis/Law.aspx?d=112441</p>	<p>Authorizes surety companies to become surety for the release of a person on bail.</p>
<p>CCRP 323 Secured personal surety https://legis.la.gov/legis/Law.aspx?d=112442</p>	<p>Defines secured personal surety as personal surety that mortgages immovable property in favor of the state of Louisiana. Mortgages must include the person's name, description of the immovable, certificate of ownership, and a copy of the bail order. Such mortgages can be cancelled upon order of the court. In the absence of a court order, mortgages are good for 10 years.</p>
<p>CCRP 324 Unsecured personal surety https://legis.la.gov/legis/Law.aspx?d=112443</p>	<p>Authorizes the court to release a person on an unsecured personal surety bail undertaking, defined as a personal surety without mortgaging or giving security interest in any property as security. Requires an affidavit that the defendants possesses the sufficiency and qualifications of a personal surety, is qualified to become a surety under 327, and listing the number and amount of undischarged bail undertakings, if any.</p>

LA Bail Law	Highlights
<p>CCRP 325 Bail without surety https://legis.la.gov/legis/Law.aspx?d=112444</p>	<p>Authorizes the court to release a person from custody on his personal bail undertaking without surety.</p>
<p>CCRP 326 Cash deposits https://legis.la.gov/legis/Law.aspx?d=112446</p>	<p>Authorizes defendants to deposit bail with an officer in lieu of a surety in cash, cashier's checks, bonds of U.S. government, bonds of state of Louisiana, or money orders. Authorizes the courts in St. John the Baptist and St. Charles to alter the percentage amount of bail to be deposited with the officer and sets the maximum processing fee at \$15.</p> <p>If funds remain unclaimed for one year after final disposition, the officer who accepted the bail shall use half to fund the office of the clerk and the other half to the local governing authority after publication in the official parish journal notifying the public of their intent to so use the funds, including the name and last known address of the defendant. Such notice shall be made once within 30 days of final disposition. The clerk shall also mail notice to defendant's last known address. Such funds may not be subject to garnishment, attachment or seizure under any legal process.</p> <p>Authorizes the court to deposit such funds in an interest-bearing account and to use the interest to fund the operation and maintenance of the office of the clerk of court.</p>
<p>CCRP 327 Those who may not be sureties https://legis.la.gov/legis/Law.aspx?p=y&d=112447</p>	<p>Attorneys at law, judges, and ministerial officers of a court may not become sureties. However this may not be a defense to an action to forfeit the bail.</p>
<p>CCRP 328 Bail undertaking https://legis.la.gov/legis/Law.aspx?d=112449</p>	<p>Requires that the bail undertaking be in writing, state the court and a single amount of bail for each charge, and be made before an officer authorized to take bail. Mandates that officers accept the bail if all conditions in this title are met. Irregularities do not amount to a discharge from bail obligations.</p>
<p>CCRP 329 Declaration of residence; waiver of notice https://legis.la.gov/legis/Law.aspx?d=112450</p>	<p>Requires an address for the surety and defendants on bail undertaking. Allows defendant to appoint counsel as agent for his notice. Invalid information under this article will not preclude forfeiture of the bond.</p>
<p>CCRP 330 Notice of defendant's required appearance https://legis.la.gov/legis/Law.aspx?d=112452</p>	<p>If notice of next appearance date is given on bail undertaking, person appears, and is given notice of next date, no additional notice is necessary. If the bail undertaking does not fix appearance date, written notice to defendant and surety is required. If defendant does not appear or no new date is set, notice of next appearance date is required. Notice shall be made to the provided address, and may be delivered by officer designated by the court at least 2 days prior to appearance date or mailed or delivered by electronic means at least 5 days prior to court appearance. Failure to give notice relieves surety from liability for non-appearance on these dates.</p>

LA Bail Law	Highlights
CCRP 331 Discharge of bail obligation https://legis.la.gov/legis/Law.aspx?d=112454	Bail undertaking and surety's obligations cease upon conviction. Gives the court discretion in requiring a new bail undertaking or releasing defendant without surety if necessary to assure appearance. Court may continue existing bail undertaking post-conviction upon approval of the surety. When the DA modifies charges for the same facts, court shall reinstate bail undertaking if surety consents in writing. Authorizes surety to surrender defendant, incl. through arrest, at any time. A \$25 fee applies to the surety for the officer accepting the surrender through a certificate of surrender. Surety is relieved of obligations upon surrender of defendant within 180 days of issuance of notice of arrest warrant. Authorizes the surety to file a request with clerk of court that defendant be remanded if he appears in court within 45 days of a failure to appear while there is an active arrest warrant. Mandates that defendant be remanded if appears in court within 180 days of notice of warrant if bondsman filed such request.
CCRP 332 Court order for arrest of defendant https://legis.la.gov/legis/Law.aspx?d=112455	Authorizes the court to issue an arrest warrant in case of breach of the bail undertaking, surety seems insufficient or absent, or court deems bail should be increased or additional security required.
CCRP 333 Failure to appear; issuance of arrest warrant https://legis.la.gov/legis/Law.aspx?d=112456	Mandates an arrest warrant be issued if defendant failed to appear after being properly notified of court date.
CCRP 334 Notice of warrant of arrest https://legis.la.gov/legis/Law.aspx?d=112457	Mandates clerk of court send notice of arrest warrant to DA, defendant, and surety within 60 days of issuance. Failure to do so within 60 days releases surety of his obligations
CCRP 335 Rule to show cause; bond forfeiture https://legis.la.gov/legis/Law.aspx?d=112458	If defendant failed to appear and was not surrendered within 180 days of notice, the DA may file rule to show cause requesting bond forfeiture judgment which shall be set for a contradictory hearing.
CCRP 336 Proof necessary at bond forfeiture hearing https://legis.la.gov/legis/Law.aspx?d=112460	A judgment of bail forfeiture requires 1. The bail undertaking, 2. The power of attorney, if any, 3. Notice to defendant and surety, and 4. Proof that more than 180 days have elapsed since notice of arrest warrant. Mandates issuing of judgment of bond forfeiture for full amount of bail. A bail agent who represents the surety shall not be solidarily liable for the judgment against the defendant and his sureties.

LA Bail Law	Highlights
CCRP 337 Interruption of the period for obtaining a bond forfeiture judgment https://legis.la.gov/legis/Law.aspx?d=112461	Appearance by defendant interrupts period for obtaining bond forfeiture judgment and does not relieve defendant of its bail undertaking obligations
CCRP 338 Cases of nonforfeiture https://legis.la.gov/legis/Law.aspx?d=112462	Precludes judgment of bond forfeiture if defendant was serving in US armed forces, was a member of the Louisiana national guard, or defendant was prevented from appearing due to state of emergency declared by governor.
CCRP 339 Notice of judgment https://legis.la.gov/legis/Law.aspx?p=y&d=112463	Requires clerk of court send notice to all parties of bond forfeiture judgment.
CCRP 340 Recordation of judgment https://legis.la.gov/legis/Law.aspx?d=112464	Authorizes DA to cause judgment to be recorded in every relevant parish at no cost, making judgment operate as a judicial mortgage. DA is responsible for verifying information on judgment prior to recordation. Judgment is ineffective as judicial mortgage if contains inaccurate information.
CCRP 341 Appeals https://legis.la.gov/legis/Law.aspx?d=112465	Right to appeal a bail forfeiture judgment is regulated by civil procedure.
CCRP 342 Enforcement of judgment https://legis.la.gov/legis/Law.aspx?d=112466	Judgment is enforceable through DA filing a rule to show cause or collect judgment in same manner as civil judgment.
CCRP 701 Right to a speedy trial http://www.legis.la.gov/Legis/Law.aspx?d=112708	States that the defendant and state have a right to speedy trial and set the following timelines: <ul style="list-style-type: none"> • For detained defendants: 45 days in misdemeanor cases. 60 days in felony cases, and 120 days in death penalty or life in prison cases to file a bill of information or indictment. • For released defendants: 90 days in misdemeanor cases and 150 days in felony cases to file a bill or indictment Mandates release of defendant if prosecutor fails to file within delay without just cause. <ul style="list-style-type: none"> • 30 days for DA to set case for arraignment upon acceptance unless just cause for longer delay. Upon defense motion for speedy trial: <ul style="list-style-type: none"> • Felony cases: trial commences within 120 days if detained and 180 days if released. • Misdemeanor cases: trial commences within 30 days if detained and 60 days if released.

LA Bail Law	Highlights
RS 22:1443 Premium on criminal bail bond http://www.legis.la.gov/Legis/Law.aspx?d=508385	The premium rate for commercial surety underwriters across Louisiana is set by the legislature and is not subject to rates set by insurance commissioner. Fixes the premium rate at 12 percent of the face amount of the bond or \$125, whichever is greater. Additional fees under R.S. 13:718(I)(2) shall not be included in premium rate and are exclusive of limits in this section.
RS 22:822 Criminal bail bond annual license fee http://www.legis.la.gov/Legis/Law.aspx?d=507600	Sets the exclusive fee on premiums for commercial surety underwriters at 2 percent payable to the Sheriff when submitting appearance bond. Payment of fee is required to secure release of a defendant through commercial surety. Exception in Orleans Parish: fee is set at 3 percent of premium. Mandates Sheriff remits collected fees within 60 days in the following way: 25% to judicial court fund, 25% to Sheriff's general fund, 25% to DA's operating fund, 25% to Indigent Defenders program. Exception in 22 nd Judicial District: 22% each to Court, Sheriff, DA, and Public Defender and remaining 12 percent to St. Tammany Children's Advocacy Center. Exception in Orleans Parish: 2/3 of the revenue is distributed equally between Court, Sheriff, DA, and Public Defender. The remaining 1/3 shall be allocated to Criminal District Court.
RS 13:1381.5 Orleans Parish administration of criminal justice fund http://www.legis.la.gov/Legis/Law.aspx?d=76807	Creates a Criminal Justice Fund in Orleans Parish to collect and distribute proceeds from annual license fee (R.S. 22:822). Mandates revenue in the fund be distributed per quarter and within 30 days of receipt as follows: Criminal District Court's Judicial Expense Fund (40%), Sheriff's operating fund (20 percent), DA's operating fund (20 percent), and indigent defender's program (20 percent). Creates a committee with representatives of the 4 agencies mentioned above and empowers them by unanimous consent to modify distribution of funds for emergencies or in the interest of the administration of criminal justice for the Parish of Orleans. Prevents the committee from paying any funds to any entity not authorized by this section.
RS 15:85.1 Posting of criminal bond; fee assessed http://www.legis.la.gov/Legis/Law.aspx?d=79394	Sets a \$15 fee on every criminal bond to be collected by the sheriff from person seeking release to benefit the DA's office or city/municipal prosecutor (\$7), public defender's office (\$2), criminalistics laboratory that provides the majority of the crime lab services in the parish (\$2), clerk of court (\$2), Sheriff's office (\$2). Fee is reimbursable through a court petition if person is found non-guilty or whose charges are dismissed.
RS 13:5599 Fees of criminal sheriff http://www.legis.la.gov/Legis/Law.aspx?d=763334	Sets fees for criminal sheriff of Orleans Parish, including \$7 for each notice of arraignment or trial on accused and surety and \$15 for taking appearance bond or recognizance bond, unless suspended by the judges of Criminal District Court of the Parish of Orleans.
R.S. 13:718(I)(2) http://www.legis.la.gov/Legis/Law.aspx?d=78048	Sets an additional fee on premium for all commercial surety underwriters in Jefferson Parish of \$50 for each \$10,000 of liability underwritten (i.e., and additional 0.5 percent).

APPENDIX B: Survey Results

In July 2018, the LSBA Criminal Justice Committee conducted a telephonic and online survey for the purposes of gathering and analyzing information regarding pretrial practices for setting bail in Judicial Districts around the State of Louisiana. A summary of the responses received are below. Respondents represented thirty-six (36) districts and included Chief Judges, District Judges, Prosecutors, and Public Defenders. The thirty-six (36) Judicial Districts included: 1st, 2nd, 3rd, 4th, 6th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 36th, 37th, 39th, 40th, 41st, and 42nd.

In some cases, multiple respondents from the same Judicial District answered the survey and gave conflicting responses to the questions asked. Conflicting responses are not included in the summary below; however, those responses do show inconsistencies in practices within Judicial Districts in addition to variations across the state.

Jurisdiction	Pretrial Procedure
1st, 2nd, 3rd, 4th, 6th, 8th, 9th, 10th, 12th, 14th, 15th, 16th, 17th, 18th, 20th, 21st, 22nd, 25th, 26th, 28th, 30th, 31st, 32nd, 33rd, 34th, 36th, 37th, 39th, 40th, 41st, 42nd	A Judge or Magistrate sets bond
15th, 22nd, 23rd, 24th, 29th, 41st ¹	A Commissioner or Justice of the Peace sets bond
2nd, 14th, 18th, 20th, 24th, 26th, 32nd, 34th, 36th, 42nd	A bond schedule for some misdemeanors is used to set bond
1st, 3rd, 6th, 8th, 9th, 12th, 25th and 40th	A bond schedule for all misdemeanors is used to set bond
2nd, 6th, 9th, 12th, 25th, 26th, 34th, 36th	A bond schedule for felonies is used to set bond
22nd, 41st	Use of Formal Pretrial Risk Assessment Tool ²
2nd ³ , 16th, 18th ⁴ , 22nd, 24th ⁵ , 25th, 32nd, 33rd, 37th, 41st ⁶	An attorney for the state is present when bond is set
2nd ⁷ , 10th ⁸ , 12th ⁹ , 16th, 18th ¹⁰ , 22nd, 24th ¹¹ , 25th, 32nd, 33rd, 37th, 41st	A public defender or attorney for defense is present when bond is set
6th, 8th, 9th, 12th, 14th ¹² , 15th, 18th ¹³ , 24th, 25th, 26th, 30th, 33rd, 34th, 41st, 42nd	Bail amount set within 48 hours of arrest
2nd, 6th, 12th, 15th, 30th, 33rd, 34th, 36th, 41st, 42nd	Public is free to attend when bail is set in court

Additionally, twenty-four out of the twenty-six judicial districts that responded chose commercial surety bonds as the most common bond type used.

1 The 41st JDC has both a Magistrate Judge and Commissioners to set bond.

2 A number of Districts screen defendants for risk of flight and rearrest; however, the only two districts known to use a validated pretrial risk assessment tool to determine bond amounts are listed above.

3 According to a respondent: "If bail is set in open court, the prosecutor and defense attorney, public or private, is present. The 2 JDC has statutory authority to conduct 72 hour hearings by telephone. If the 72 hour hearing is done by telephone the only people involved in the telephone conference are the charged person, the jailer and the judge. Because of this authority to conduct 72 hour hearings telephonically, the judges are able to set the bail obligation quickly. Also, in cases in which the arrest is pursuant to an arrest warrant, the bail obligation is set on the warrant itself."

4 Presence of prosecuting attorneys at bond hearings is inconsistent.

5 Only during the week and not on weekends.

6 The state is represented at first appearance hearings before the magistrate but not before the commissioners in magistrate court; the state is represented in all bond settings for state misdemeanors in municipal court.

7 Unless the bail is set telephonically.

8 According to a respondent: "Defense attorney present except when hearing times are changed and the defense attorney is not notified."

9 Respondents indicated that defense attorneys are sometimes present.

10 Respondents indicated that defense attorneys are sometimes present.

11 Only during the week and not on weekends.

12 Respondents selected 25-48 hours for misdemeanors and 49-72 hours for felonies.

13 Respondents selected 1-24 hours for misdemeanors and 49-72 hours for felonies.

APPENDIX C: Other Litigation and Legislation

FEDERAL LAW PARAMETERS OF BAIL

The Excessive Bail Clause of the Eighth Amendment to the U.S. Constitution guarantees a right against excessive bail. In 1966, Congress enacted the Bail Reform Act, under which arrestees' pretrial detention was only permitted if necessary to assure appearance at trial (i.e. to reduce the likelihood of an arrestee fleeing and skipping trial). Only in capital cases was an arrestee's danger to the community as a factor for a release decision.

Congress's passage of the Bail Reform Act of 1984 changed that provision, enabling an arrestee's danger to the community (or, in other words, public safety) to be a basis for pretrial detention. The U.S. Supreme Court upheld this provision as constitutional in 1987 with *U.S. v. Salerno*.¹²² Under *Salerno*, in order to detain an arrestee prior to trial, "the government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person."¹²³ There is otherwise a presumption of release pending trial. That is the current stance of federal law on bail.

CHANGING LANDSCAPE OF BAIL

A) Recent Bail Litigation in the United States

Alabama

Jones v. City of Clanton, No. 15-cv-34, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015).

- The plaintiff was arrested for an alleged misdemeanor offense, and detained because she could not afford the \$500 money bail. The plaintiff alleged that the city's use of a fixed bail schedule to determine the amount was unconstitutional.
- The US Department of Justice filed a Statement of Interest, that "it is the position of the United States that, as courts have long recognized, any bail or bond scheme that mandates payment of pre-fixed amounts for different offenses in order to gain pretrial release, without any regard for indigence, not only violates the Fourteenth Amendment's Equal Protection Clause, but also constitutes bad public policy."
- In June 2015, the case was settled with an entry of declaratory judgment. The conditions of the settlement ordered that all municipal offenses, with the exception of Driving under the Influence, shall have bail set at \$500; bail will be set at \$1,000 for Driving under the Influence. If the defendant has no existing warrants, bail shall be unsecured.

California

Welchen v. Cty. of Sacramento, No. 16 CV 0185, 2016 WL 5930563 (E.D. Cal. Oct. 11, 2016).

- Defendants: County of Sacramento, Kamala Harris, in her Official Capacity as the California Attorney General.
- The plaintiff was arrested for an alleged felony offense and was detained because he was unable to pay a \$10,000 secured bond. The plaintiff alleged that the use of bail schedules is discriminatory because it does not contemplate an arrestee's financial standing and it results in the over-detention of low-risk, poor defendants.
- In October 2016, the defendants' motion to dismiss pursuant to Eleventh Amendment immunity and the *Younger* doctrine was denied. The defendants' Motion for a More Definite Statement pursuant to Federal Rule of Civil Procedure 12(e) was granted as to plaintiff's due process claim, and defendants' Motion to Dismiss Plaintiff's equal protection claim was granted.
- This case is ongoing.

122 *U.S. v. Salerno*, 481 U.S. 739 (1987).

123 *Salerno*, 481 U.S. at 750.

Buffin v. City & Cty. of S.F., No. 15 CV 4959, 2016 WL 6025486 (N.D. Cal. Oct. 14, 2016).

- The plaintiffs, arrested for alleged felony offenses, were detained because of their inability to pay a money bail. The plaintiffs allege that their detention was based solely on an arbitrary, fixed bail schedule that violates their constitutional rights.
- Defendants: City and County of San Francisco, the San Francisco Sheriff and the California Attorney General (Kamala Harris)
- In November 2016, Sheriff Vicky Hennessey stated that she would not defend money bail in court because “This two-tiered system of pretrial justice does not serve the interests of the government or the public, and unfairly discriminates against the poor.”
- In October 2017, California’s Chief Justice released a report on bail reform, which called for a massive reform to the money bail system.
- In February 2018, discovery in the case was extended until June 30, 2018.
- This case is ongoing.

Florida

Knight v. Sheriff of Leon Cty., No. 4:17cv464, 2018 WL 2138532 (N.D. Fla. May 9, 2018).

- Defendants: State of Florida and Sheriff for Leon County, Florida.
- On October 13, 2017, the ACLU, on behalf of the plaintiff, filed a Petition for Writ of Habeas Corpus to remedy her and other similarly situated individuals being held in pretrial detention.
- The plaintiff was arrested in June 2016 and her initial monetary bail was set at \$500,000. In August of 2016, it was reduced to \$250,000. Because she could not afford this amount, she remained in custody. The writ argues that the plaintiff’s constitutional rights under the 8th and 14th amendments were violated, and that the court was preventatively detaining her by setting an unaffordable money bail.
- The petition requests the court to join other similarly situated individuals by certifying the case as class; declare that unaffordable money bail constitutes preventive detention, and that preventive detention may only be used when less restrictive means would not achieve the government’s interests; conduct an evidentiary hearing to release Knight and other class members if it is found that the money bail amount exceeds the reasonable amount necessary to achieve the government’s interests.
- On May 9, 2018, the Court partially granted the sheriff’s motion to limit his 30(b)(6) deposition, ruling that the plaintiff may not inquire into his personal opinions about the bail system. The Court also granted the judges’ motion for a protective order limiting the duration and scope of their depositions, ruling that the plaintiff must not inquire into a judge’s mental impressions. Lastly, the Court amended the case name to list only the sheriff as a respondent.
- This case is ongoing.

Georgia

Walker v. City of Calhoun

Walker v. City of Calhoun, Ga., Civil No. 15-170, 2016 WL 361612 (N.D. Ga. Jan. 28, 2016).

Walker v. City of Calhoun, 682 F. App’x 721 (11th Cir. 2017).

- The plaintiff was arrested for an alleged municipal offense and alleged that the City’s use of a fixed bail schedule violated his constitutional rights. Per the City’s policies, arrestees who cannot afford to pay money bail must wait for a court hearing, which are typically only held once a week.

- The plaintiff argued that his rights under the Fourteenth Amendment were violated, and asked the court for injunctive relief and a declaration that the city's conduct was unlawful.
- The Court ordered the City to implement constitutional post-arrest procedures and to release any other misdemeanor arrestees in its custody, or who come into its custody, on their own recognizance or on an unsecured bond in a manner otherwise consistent with state and federal law and with standard booking procedures if they were detained solely because of their inability to pay a money bail. The Court's injunction requires an indigency assessment within 24 hours of arrest in order to minimize any period of wealth-based detention.
- The case was appealed and sent to the Eleventh Circuit. The Eleventh Circuit then vacated the preliminary injunction and remanded the case back to district court for further proceedings.
- In District Court, the court ordered that the defendant would be prohibited from detaining arrestees who are otherwise eligible for release but cannot post bail because of their poverty. The court also established procedures for indigent plaintiffs to demonstrate financial hardship.
- The defendant again appealed to the Eleventh Circuit and motioned to stay proceedings with the district court. The District Court granted the motion to stay proceedings and found that the defendant would have been irreparably harmed absent stayed proceedings.
- On August 18, 2016, the American Bar Association submitted an amicus brief encouraging the Eleventh Circuit to rule that the practices are unconstitutional.
- This case is ongoing.

Kansas

Martinez v. City of Dodge City, No. 2:15-cv-09344, 2016 WL 9051913 (D. Kan. Apr. 26, 2016).

- The plaintiff was arrested for alleged municipal offense. The plaintiff alleged that Dodge City's policy and practice of using a fixed "bail schedule" to determine the amount of money necessary to secure post-arrest release, and its practice of requiring cash up-front to avoid post-arrest detention, violate the Fourteenth Amendment's Due Process and Equal Protection Clauses.
- In Dodge City, if defendants could afford to pay the predetermined amount listed on the bail schedule, they could be released immediately. Defendants who could not afford this amount were forced to be detained for at least 48 hours.
- The plaintiff sought to certify a class on behalf of himself and all other arrestees unable to pay for their release pursuant to Dodge City's fixed bail schedule who were, are, or who will become in the custody of Dodge City.
- In November 2015, the court granted motions to stay all proceedings to allow the parties to explore a non-litigation resolution.
- The court issued a declaratory judgment, stating that persons cannot, consistently with the Equal Protection Clause, be held in custody after a non-warrant arrest because they are too poor to post a monetary bond. It also entered an injunction, ordering the release of individuals arrested for non-warrant arrests in Dodge City for violation of municipal ordinances on recognizance bonds without further conditions of release and without requiring posting any monetary bond. The court retains jurisdiction to enforce the injunction.

Massachusetts

Brangan v. Commonwealth, 80 N.E.3d 949 (Mass. 2017).

- The defendant, arrested for an alleged felony offense, had been detained for over three and a half years because he had been unable to post bail in the amounts ordered by a superior court judge following his arrest. He petitioned for relief and a single justice denied his petition. He then appealed, arguing that his due process rights were violated because the judge failed to consider his financial standing. The Supreme Court then reversed, holding that the judge did not consider the defendant's financial resources in setting the bail.

- The Massachusetts Supreme Judicial Court ordered judges to consider a defendant's ability to pay when determining bail and explain, either in writing or orally, their reasons for setting a cash bail that is more than the person can afford.
- “[W]here a judge sets bail in an amount so far beyond a defendant’s ability to pay that it is likely to result in long-term pretrial detention, it is the functional equivalent of an order for pretrial detention, and the judge’s decision must be evaluated in light of the same due process requirements applicable to such a deprivation of liberty.”

Mississippi

Thompson v. Moss Point, Civil No. 15–182, 2015 WL 10322003 (S.D. Miss. Nov. 6, 2015).

- The plaintiff was unable to pay the bail amount required for her release under the city’s “secured bail” schedule after being arrested for an alleged misdemeanor offense. Plaintiff argued that the bail schedule violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment.
- The plaintiff asked for the following: class certification; a declaration that the City had violated the constitutional rights of arrestees who were unable to pay the City’s secured bail; preliminary and permanent injunctive relief requiring the City to stop jailing arrestees for their inability to pay a secured bail; compensation to the named plaintiff for her time spent in detention; and legal costs and attorneys’ fees.
- In October 2015, the parties reached a settlement. The settlement agreement required the City to stop using a secured bail requirement for persons seeking release from jail after a warrantless arrest or after an initial warranted arrest, and to release defendants if they agreed to provide an unsecured bond or a recognizance bond. The City also agreed to improve procedures for notifying defendants of their court dates.

Missouri

Pierce v. City of Velda, Civil No. 15–570, 2015 WL 10013006 (E.D. Mo. June 3, 2015).

- The plaintiff was arrested for an alleged misdemeanor offense, after which the plaintiff alleged that the city’s policy and practice of detaining defendants for at least three days unless they pay a fixed bond amount violates the equal protection and due process clauses of the Fourteenth Amendment.
- On June 2015, the parties entered into a settlement agreement, under which the City agreed to end the use of the fixed bond system. The parties asked the District Court to issue an injunction for the agreement which would affirm that detaining a defendant because he/she is too poor to post a monetary bond violates the equal protection clause of the Fourteenth Amendment.

U.S. v. City of Ferguson, 4:16-cv-00180-CDP, ECF No. 40 (2016).

- A Department of Justice investigation of the city’s municipal court practices found that defendants’ rights under the First, Fourth, and Fourteenth Amendments were being violated. The DOJ determined that the Ferguson Police Department and Municipal Court’s approach to law enforcement was unduly focused on generating revenue and that its practices generated racial bias. The parties filed a proposed consent decree in federal court to address the conduct that DOJ’s investigation discovered.
- On April 19, 2016, the U.S. District Court for the Eastern District of Missouri approved and entered the parties’ jointly-filed consent decree that required the city to ensure that no person is held in custody after arrest because they cannot afford to post a monetary bail. The city was also required to develop and implement a plan to eliminate the use of a fixed monetary bail schedule. This plan requires that all individuals arrested for an initial violation of law or an outstanding municipal warrant will, except as otherwise provided by state law, receive a court date and be released on their own recognizance as soon as practicable after booking, and in any case within 12 hours of booking, with some limited exceptions allowed.

New Mexico

State v. Brown, 338 P.3d 1276, 1286 (N.M. 2014).

- Defendant Walter Brown was arrested for an alleged felony offense in 2011 and was required to pay a \$250,000 cash or surety bond at his arraignment. After being detained for more than two years, he requested that the district court review his conditions of release and release him under the supervision of the Second Judicial District Court's pretrial services program.
- The defendant's motion for release on nonmonetary conditions was denied on the grounds that his charge of first-degree felony murder carried a possible life sentence. However, the court found that the pretrial services program could fashion appropriate conditions of release. The defendant filed a second motion several months later requesting supervision under the pretrial services program with appropriate non-monetary release conditions. At a hearing on the second motion, defense counsel reiterated the information presented at the first hearing five months earlier. After the district court denied the defendant's second motion to amend the conditions of release, the defendant appealed.
- The Supreme Court of New Mexico found that the defendant presented the district court with substantial evidence that non-monetary conditions of pretrial release were sufficient to assure that the defendant was not likely to pose a flight or risk to public safety.
- In a sweeping ruling covering the history of bail from the Magna Carta to recent court rulings, the Court stated that neither the US nor the New Mexico constitution allows a judge to base pretrial conditions solely on the severity of the charged offense. The court also stated a money bail based on the severity would ultimately lead to detention based solely on inability to pay. The court concluded that the district court's requirement of \$250,000 bond was overly restrictive, and that pretrial release would be sufficient. The Court reversed the district court's pretrial release order and instructed the district court to release the defendant on non-monetary conditions pending trial.

Louisiana

Ascension Parish

Snow v. Lambert, Civil No. 15-567, 2015 WL 5071981 (M.D. La. Aug. 27, 2015).

- The plaintiff was unable to pay an automatic bail amount and was detained solely on that basis. In some cases, such as this one, the court does not allow the defendant to obtain an individualized bail.
- In August 2015, the plaintiff filed for class certification; however, the motion was not acted on before the case settled.
- In September 2015, both parties filed a joint motion for a settlement agreement and dismissal. The defendant agreed to create a new bail policy and agreed to not hold misdemeanor arrestees in jail because they could not afford a money bail. This settlement was approved by the Court.

Baton Rouge

Ayo v. Dunn, Civil No. 17-526-SDD-EWD, 2018 WL 2708752 (M.D. La. June 5, 2018).

- The plaintiffs were charged a \$525 initial fee and monthly and other fees by a private corporation in addition to bail and jailed until the initial fee was paid. Defendants are the corporation and Sheriff of East Baton Rouge Parish.
- Plaintiffs allege that the defendants violated the Fourteenth Amendment Due Process and Equal Protection Clauses, Fourth Amendment, RICO statutes, Louisiana Racketeering Influence and Corrupt Organization Act, and Louisiana Unfair Trade Practices Act, and state causes of action for conversion and unjust enrichment.
- On June 5, 2018, the Court granted the sheriff's 12(b)(6) motion to dismiss the Section 1983 claims against him.

Caliste v. Cantrell, No. 17-CV-6197, 2017 WL 6344152 (E.D. La. Dec. 12, 2017).

- The plaintiffs allege that the Magistrate Judge has consistently violated the constitutional rights of impoverished pretrial arrestees by setting high bail amounts without any consideration of a person's ability to pay or other non-monetary conditions of release.
- It is alleged that the Magistrate Judge regularly sets a \$2,500 minimum secured money bond without regard to the circumstances surrounding the arrestee appearing before him and arguments for lower financial conditions of release are not heard. The lawsuit also raises concern with the Magistrate Judge's use of commercial surety instead of cash bail.
- In August 2018, the court granted the Plaintiff's motion for summary judgement finding that a judicial officer may not set a secured money bail unless a) the judicial officer first determines that the person can pay it, or b) the judicial officer determines that there is clear and convincing evidence of a necessity of detention consistent with due process standards set out in *Salerno*.

Egana v. Blair's Bail Bonds Inc., No. 2:17-cv-5899, 2018 WL 2463210 (June 1, 2018).

- In its complaint, the plaintiff alleges that the defendant violated numerous laws, including the federal Truth in Lending Act and federal and state racketeering laws, as well as liability for the torts of kidnapping, extortion, and false imprisonment.
- Ronald Egana, the named plaintiff, along with his family, were required to pay a variety of hidden fees to their bail agent in addition to their bond premium and statutory fees.
- The plaintiff alleges that a bounty hunter grabbed him on his way to court and dragged him across the street to the defendant's office, handcuffed him and held him against his will for several hours while demanding a payment. He ultimately was surrendered to the jail.
- The plaintiff is seeking damages and an injunction to stop these practices, as well as class certification.
- On June 1, 2018, the Court partially granted defendants' motions to dismiss. For the claims against the Blair defendants, the Court dismissed plaintiffs' RICO claims but allowed all other claims against them to remain. For the Bankers defendants, the Court dismissed plaintiffs' RICO, TILA, false imprisonment, conversion, and consumer credit law violation claims but allowed the state contract law violation claim to stand. For the A2i defendants, the Court dismissed the RICO and conversion claims but allowed the state law false imprisonment claim to remain.
- The Court has allowed the plaintiffs 20 days to amend their Complaint to remedy the deficiencies identified.
- This case is ongoing.

B) Recent Litigation

MAJOR STATEWIDE LAW CHANGES ENACTED

Maryland

Maryland Court of Appeals Rule 4-216.1 (2017) mandates release on recognizance (ROR) or unsecured bail unless no permissible non-financial condition of bail exists that could reasonably ensure appearance and public safety, and that when conditions are attached they are the least onerous necessary to reasonably ensure appearance and public safety. The Rule also prohibits judicial officers from imposing a financial condition of bail that results in detention.¹²⁴

124 See MD. CRT. OF APP. R. 4-216.1, available at <https://www.courts.state.md.us/sites/default/files/import/rules/rodocs/ro192.pdf>.

LESSER STATEWIDE LAW CHANGES ENACTED

Alaska

Alaska Senate Bill 91 (Chapter 36 SLA 16) took effect January 1, 2018. It establishes a pretrial release decision-making framework for courts that limits the use of secured money bail. The law requires corrections departments to create pretrial service programs and implement risk assessments, including failure to appear and new criminal arrest scales. The law establishes a presumption of release unless there is “clear and convincing” evidence that least restrictive conditions cannot reasonably ensure appearance in court and the safety of the victim and others. It directs pretrial services to recommend nonfinancial release for a range of charges, including misdemeanor and class C felony charges, other than domestic violence. It also requires automatic review if a person is not released within 48 hours.¹²⁵

There is not yet available data on the impact this legislative change has had on pretrial release and detention rates, or on rates of failure to appear or new criminal arrests. While the law authorizes pretrial service officers to supervise people during the pretrial period in the “least restrictive” manner, it also allows them to contract with private providers for pretrial supervision and electronic monitoring. As in other places that move from systems of release based on ability to pay to nonmonetary release conditions, one potential negative impact is that public agencies and private companies will charge defendants for supervision, such as electronic monitoring, and other “nonmonetary” conditions of release, such as drug testing, which may lead to additional detention.

Arizona

In 2016, the Arizona Supreme Court directed judges to minimize the use of money bail in favor of risk-based decisions. A Task Force Report recommended eliminating money for freedom, a constitutional change similar to New Mexico’s, and training for judicial officers. Rule No. R-16-0041 implements some of the Task Force’s recommendations by directing judges to minimize the use of monetary bail and to implement risk assessments by amending the code of criminal procedure and substituting new forms. In addition to release on recognizance, the definitions for unsecured appearance bonds, cash bonds, and deposit bonds were changed to explicitly exclude professional bail bondsman. Non-monetary conditions include placing a person under supervision; restricting travel, associations, or residence; prohibiting the possession of dangerous weapons; prohibiting the consumption of alcohol or drugs; and being returned to custody during specified hours.

Rule 7.3(b)(2) limits the use of monetary bail by requiring the court to “make an individualized determination of a person’s risk of nonappearance, risk to the community, and financial circumstances,” rather than use a set bond schedule. It specifies that “the court must not impose a monetary condition that results in unnecessary pretrial incarceration solely because the person is unable to pay the bond,” and requires that courts impose “the least onerous” types of bonds or the “lowest amount necessary to protect other persons or the community from risk posed by the person or to secure the person’s appearance.”¹²⁶

Connecticut

In 2017, Connecticut enacted HB 7044 (Act No. 17-145), which limits use of financial bond in misdemeanor cases. The law prevents courts from assessing monetary bail in misdemeanor cases, except family violence or in cases where a person is determined likely to harm themselves or others. It also requires a bail hearing within 14 days and sets non-monetary release conditions such as release on recognizance and bail without surety.¹²⁷

125 S. 91, 2016 Sess., 28, 29, 71-75 (Alaska 2016), <http://www.akleg.gov/basis/Bill/Detail/29?Root=SB%20%2091>.

126 See *Justice for All Report: Court-Ordered Fines, Penalties, Fees, and Pretrial Release Policies*, TASK FORCE ON FAIR JUST. FOR ALL, 31-38 (2016), available at <http://www.azcourts.gov/LinkClick.aspx?fileticket=bmEC0PU-FD8%3D&portalid=74>, pp.31-38; Order Amending Rules 3, 6, and 7, and Abrogating Forms 6 and 7, Rule 41, Rules of Criminal Procedure, and Substituting New Forms 6 and 7 In Their Place, (Ariz. 2016), available at http://www.azcourts.gov/Portals/20/2016%20December%20Rules%20Agenda/R_16_0041.pdf.

127 H. 7044, Gen. Assemb., Jan. Sess. (Conn. 2017), available at <https://www.cga.ct.gov/2017/FC/2017HB-07044-R000695-FC.htm>.

Delaware

In January, 2018, the Delaware governor signed HB 204 (Delaware Code Ch.21, Title 11) which takes effect January 1, 2019, and empowers courts to make individualized pretrial decisions and to use reasonable non-monetary conditions for everyone who is eligible for release. The law requires a review of conditions of release within 10 days if a defendant is still in jail 72 hours after their initial appearance.¹²⁸

Illinois

In 2017, Illinois SB 2034 (Act No. 1) established that “the decision-making behind pretrial release shall not focus on a person’s wealth and ability to afford monetary bail but shall instead focus on a person’s threat to public safety or risk of failure to appear before a court of appropriate jurisdiction.” The law requires appointment of counsel at initial appearance in court and adds a presumption for non-monetary release with the “least restrictive” standard for any conditions set. It also requires, within seven days, a review of the amount of money bail set for low and mid-level felony charges if a person is unable to pay it.¹²⁹ The Illinois Supreme Court issued court rules for pretrial release hearings which support the presumption in favor of “least restrictive” non-monetary release conditions.

Indiana

In April 2017, Indiana HB 1137 (Act No.187-2017) was enacted requesting the supreme court to adopt rules establishing pretrial risk assessment to assist courts in assessing the likelihood of a person’s arrest for a new criminal charge or failure to appear in court when released before trial. It also requires courts to consider the pretrial risk assessment and guidelines for non-monetary conditions of release, with exceptions for certain charges.¹³⁰

Indiana Supreme Court Rule 26 (2016) requires courts to release without money bail anyone who does not present a substantial flight risk or danger to themselves or others. Exceptions are made for murder, those who are arrested while out on pretrial release, and those on probation, parole, or community supervision. The rule also mandates the use of a risk assessment tool approved by the Indiana Office of Court Services. The court rule does not set clear standards or guidelines and, if the court determines that someone is to be held on money bail, authorizes courts to set the amount of money to be paid, either by surety or cash deposit.¹³¹

Kentucky

Kentucky Supreme Court Order 2016-10 (2017) amends the authorization of the non-financial administrative release program to make it statewide and mandatory for all courts. Those people charged with misdemeanors who are determined to be of low or moderately low-risk of failing to appear or committing new criminal activity will be automatically released on their own recognizance. It requires that anyone arrested for a non-violent non-sexual misdemeanor who is assessed as low or moderate risk be released on their own recognizance before seeing a judicial officer.¹³²

Mississippi

Mississippi’s first uniform rules of criminal procedure took effect on June 30, 2017.¹³³ The rules standardize bail practices across the state in the wake of an onslaught of suits from the MacArthur Justice Center, Southern Poverty Law Center, and Equal Justice Under Law/Civil Rights Corps.¹³⁴

128 H. 204, 149th Gen. Assemb., Reg. Sess. (Del. 2019), available at <https://legis.delaware.gov/BillDetail?LegislationId=25863>.

129 S. 2034, 100th Gen. Assemb., Reg. Sess. (Ill. 2017), available at <http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=100-0001>.

130 H. 1137, 120th Gen. Assembly, Reg. Sess. (Ind. 2017), available at https://custom.statenet.com/public/resources.cgi?id=ID:bill:IN-2017000H1137&ciq=abwidgery&client_md=957dcd3bac9e525837b137a6f732ea92&mode=current_text.

131 Order Adopting Criminal Rule 26, (Ind. 2016), available at <https://www.in.gov/judiciary/files/order-rules-2016-0907-criminal.pdf>.

132 See Amended Order In Re: Authorization for the Non-Financial Uniform Schedule of Bail Administrative Release Program, 2016-10, (Ky. 2015), available at https://courts.ky.gov/courts/supreme/Rules_Procedures/201524.pdf.

133 See Miss. R. Crim. Proc., available at <https://courts.ms.gov/Newsite2/research/rules/msrulesofcourt/Rules%20of%20Criminal%20Procedure%20Post-070117.pdf> (the new rules).

134 See <http://www.civilrightscorps.org/ending-modern-debtors-prisons/>; <http://www.wtva.com/content/news/Another-Mississippi-city-agrees-to-jail-and-bail-changes-480949691.html>.

The Mississippi Supreme Court created a committee in 2004 to draft the state's first uniform Rules of Criminal Procedure. Thirteen years later, in July 2017, it released a list of changes that have the potential to end cash bail in most misdemeanor and many low-level felony cases. The new rules established the right to see a judge within 48 hours after arrest, relieving pressure to turn to a bail agent to buy freedom more quickly. Cash bail is no longer the default option, and bail schedules have been banned. If a person is not a flight risk or danger to the community, the judge must release them on a written promise to appear or to pay money to the court if they fail to show up. Cash bail will continue for those wanting out of jail immediately, or those charged with most felonies.¹³⁵

New York

Enacted on April 12, 2018, New York Assembly Majority bill (A9505-C) works within the existing legislative framework to preserve the presumption of innocence. As with S3579, the Assembly Majority bill restricts pretrial detention to only a small set of circumstances.¹³⁶

MAJOR STATEWIDE LAW CHANGES PENDING

New York

In January 2017, the “bail elimination act of 2018” (S 3579-A) was introduced as part of a bail and discovery reform package.¹³⁷ The bill would mandate release on recognizance for all defendants unless ROR will not reasonably ensure appearance (NY law does not allow consideration of public safety risk in determining bail). It would allow non-monetary conditions of release but only the least restrictive necessary to ensure appearance. It also would allow prosecutors to move for detention for defendants charged with serious violent offenses or witness intimidation or when the defendant has “willfully and persistently” failed to appear in the instant case. The standard to be applied after a detention hearing is “clear and convincing that the defendant poses a high risk of intentional flight for the purpose of evading criminal prosecution and that no conditions or combination of conditions in the community will reasonably assure the defendant’s return to court.” The bill also would mandate pretrial service agencies in each county and text, email, or other form of reminder for every court appearance. The bill was amended on February 12, 2018.¹³⁸

A somewhat more modest bill (A 8820/S 7582)¹³⁹ was introduced in December 2017. It would create a presumption of release on recognizance for persons arrested for all but the most serious enumerated violent, sex, and weapons crimes. And it would extend right to counsel to recognizance hearings.¹⁴⁰ In his January 2018 State of the State Address, Governor Cuomo proposed that the state legislature eliminate money bail for people facing misdemeanor and non-violent felony charges.¹⁴¹

California

The “California Money Bail Reform Act of 2017” (SB 10) repeals and amends those sections of the statutes relating to bail and proposes that monetary bail be replaced with pretrial release procedures that use a risk assessment tool. It would apply to most people facing misdemeanor and non-violent felony charges and take effect in 2020. The bill passed the 2nd Committee on September 6, 2017, and will next move onto the 2nd Chamber. The next step is to pass the House Appropriations Committee.

135 Joseph Neff, MARSHALL PROJECT, *Petty Charges, Princely Profits* (July 13, 2018), <https://www.themarshallproject.org/2018/07/13/petty-charges-princely-profits>.

136 H. 9505-C, Reg. Sess. (N. Y. 2018), available at <http://nyassembly.gov/2018budget/assembly/A9505C.pdf>.

137 S. 3579, Reg. Sess. (N.Y. 2017), available at https://custom.statenet.com/public/resources.cgi?id=ID:bill:NY2017000S3579&ciq=ncsl&client_md=563d29988df3424f8faaf7fc84453c50&mode=current_text.

138 No amendments have been made since Feb., 12, 2018.

139 Last revision to the bill took place on Dec. 6, 2017.

140 S. 8820, Reg. Sess. (N.Y. 2017), available at https://custom.statenet.com/public/resources.cgi?id=ID:bill:NY2017000A8820&ciq=ncsl&client_md=1d146dc99de7c00223d267b23b5bb6bd&mode=current_text.

141 Governor Cuomo Unveils 22nd Proposal of 2018 State of State: restoring Fairness in New York’s Criminal Justice System, NEWYORKSTATE.GOV, Jan. 3, 2018, available at <https://www.governor.ny.gov/news/governor-cuomo-unveils-22nd-proposal-2018-state-state-restoring-fairness-new-yorks-criminal>. About 60% of people incarcerated across the state are being detained pretrial. See also, *Jail Population in the State of New York State*, N. Y. ST. DIV. OF CRIM. JUST. SERVICES, http://www.criminaljustice.ny.gov/crimnet/ojsa/jail_pop_y.pdf

FEDERAL LAW CHANGES PENDING

In July, 2017, Senators Kamala Harris and Rand Paul co-authored a bill, called the “Pretrial Integrity and Safety Act” (S 1593), that proposes \$15,000,000 in federal grants to states and Indian tribes to replace money bail as a condition of pretrial release, and holds up best practices in New Jersey and Kentucky as models to follow.¹⁴²

Introduced in 2016, Representative Ted Lieu brought the federal “No Money Bail Act” (HR 1437) to the House Judiciary Committee in March 2017. The law would amend the Omnibus Crime Control and Safe Streets Act to deny funding to states with a bail system that requires payment of money as a condition of pretrial release and would take effect in 2020.¹⁴³

LOCAL LAW CHANGES ENACTED AND PENDING

New Orleans

In January 2017, the City Council enacted, and subsequently amended, Municipal Code Section 54-23, which eliminates money-based pretrial detention. The ordinance mandates that the Municipal Court’s bail schedule eliminate money amounts and instead specify that persons charged with all but five more serious municipal offenses be released on their own recognizance at booking. Persons arrested for one of the five offenses are to be detained until an appearance before a judicial officer within 24 hours. At that appearance, the judicial officer must determine whether there is a substantial risk that the defendant may flee or pose a danger. If such a finding is made the judicial officer may set appropriate non-financial conditions of release. If not, the judicial officer must release the defendant on his or her own recognizance.

Atlanta

In February 2018, the City Council of Atlanta, Georgia, unanimously passed, and the Mayor signed, an ordinance (18-O-1045) to eliminate the requirement of paying money bail to be released from the city jail for certain non-violent charges.¹⁴⁴ The ordinance followed a letter to the Mayor and City Attorney, from Civil Rights Corps and Southern Center for Human Rights claiming the then-current money-based bail laws were unconstitutional and pointing to the success of recent municipal bail reform ordinances in New Orleans, Nashville, and Birmingham.¹⁴⁵ The ordinance does not prohibit secured money bail in all cases, but judges must set money bail in an amount no greater than what the defendant can afford, if and when they do use money bail.

Philadelphia

On February 1, 2018, the Philadelphia City Council adopted a resolution encouraging the District Attorney’s Office and First Judicial District Court of Pennsylvania to institute policies that reduce reliance on money bail.¹⁴⁶ It also calls on the state legislature and state Supreme Court to revise state laws and codes to allow for the elimination of money bail statewide. District Attorney Larry Krasner issued a directive stating that the DA’s office would not seek cash bail for certain charges. The DA’s office estimated that this policy shift would affect as many as 4,000 cases per year, or 10 percent of the office’s cases.¹⁴⁷

142 Pretrial Integrity and Safety Act of 2017, S. 1593, 115th Cong. (2017), available at <https://www.congress.gov/bill/115th-congress/senate-bill/1593>. No new action reported since initial referral to Senate Judiciary in June of 2017, not reported out or referred to subcommittee.

143 No Money Bail Act of 2017, H. 1437, 115th Cong. (2017), available at <https://www.congress.gov/bill/115th-congress/house-bill/1437>. No new action since March of 2017, but it was sent to Subcommittee on Crime, Terrorism, Homeland Security, and Investigation then, and sponsors have signed on as recently as June of 2018.

144 See ATLANTA, GA. ORDINANCE 18-0-1045, (Feb. 6, 2018), available at https://library.municode.com/ga/atlanta/ordinances/code_of_ordinances?nodeId=878366

145 See LETTER TO MAYOR KEISHA BOTTOMS RE: ENDING WEALTH-BASED DETENTION IN THE ATLANTA MUNICIPAL COURT, CIV. RIGHTS CORPS AND SOUTHERN CTR. ON HUMAN RIGHTS, (Jan. 4, 2018) available at <https://static1.squarespace.com/static/57fd58f937c581b957965f8e/t/5a7a0bf10d9297e49c4ad2e4/1517947890048/2018.01.04+SCHR+CRCTo+Mayor+Bottoms.pdf>.

146 R. No. 180032, City Council of Phila., (Jan. 25, 2018), available at <https://phila.legistar.com/LegislationDetail.aspx?ID=3320331&GUID=26509E32-9EA2-426D-A521-5CEE7484C3EF&Options=ID%7CText%7C&Search>.

147 Chris Palmer, *Philly DA Larry Krasner won't seek cash bail in certain crimes*, THE INQUIRER, Feb. 21 2018, <http://www.philly.com/philly/news/crime/philadelphia-larry-krasner-cash-bail-reform-20180221.html>.

Municipalities in Alabama

Courts in 78 municipalities across Alabama have issued standing orders requiring people to be released on unsecured bond, and many are implementing risk assessments. Large cities like Birmingham have reduced their municipal court pretrial jail population by between 30 and 70 percent.¹⁴⁸

Cook County, Illinois

The Circuit Court of Cook County, Illinois, issued General Order No.18.8A, effective September 2017 in felony cases and January 1, 2018 in all other types of cases. The order is intended to ensure no defendant is held in custody prior to trial due to their inability to afford money bail. It includes directives regarding ability to pay determinations, use of a risk assessment tool, pretrial services, and presumption in favor of non-monetary release conditions.¹⁴⁹

148 *SPLC prompts Alabama cities to reform discriminatory bail practices*, SOUTHERN POVERTY LAW CTR., Dec. 6, 2016, <https://www.splcenter.org/news/2016/12/06/splc-prompts-alabama-cities-reform-discriminatory-bail-practices>.

149 *See* Gen. Order No.18.8A, CIR. CRT. OF COOK CTY., ILL., (2018), available at <http://www.cookcountycourt.org/Manage/DivisionOrders/ViewDivisionOrder/tabid/298/ArticleId/2562/GENERAL-ORDER-NO-18-8A-Procedures-for-Bail-Hearings-and-Pretrial-Release.aspx>.

APPENDIX D: State Assessment Tools

The survey results identified three formal risk assessment tools currently being used by various Louisiana Judicial Districts at the pretrial phase. However, the only tool used specifically to assess risk for the purposes of setting bail is the Arnold Foundation's PSA.

Risk Assessment Tool	Judicial District Court
Arnold Foundation's Public Safety Assessment (PSA)	22nd and Orleans
LAFRNS ¹⁶⁴	15th and 36th
ODARA ¹⁶⁵	42nd

¹⁶⁴ Lafayette administers LAFRNS in the Lafayette Parish Correctional Center to individuals who are incarcerated and don't bond out before the 72-hour hearing. For those who are free on bond, the 15th JDC's Adult Drug Court Staff administer similar screenings using the Risk And Needs Triage (RANT) instrument.

¹⁶⁵ The Ontario Domestic Assault Risk Assessment (ODARA) is a procedure to identify the risk of future assaults against intimate partners, developed by the Ontario Provincial Police and the Ontario Ministry of Health and Long Term Care.

APPENDIX E: Steps to Realize Aspirations

The authors of this report have developed a list of recommended steps that can assist in carrying out the aspirations stated in Part VII of the report. Please note that these steps are merely suggestions by the authors and have not been endorsed by the LSBA or its Criminal Justice Committee.

Law Enforcement: Issue Summonses when Authorized

For misdemeanors and minor felonies, law enforcement should use a summons instead of custodial arrest when authorized by statute.

Hold Initial Bail Hearings as Early as Possible

When a custodial arrest is used, an initial hearing should be held no later than 48 hours after custody begins.

Conduct Indigency Screenings as Early as Possible

Early indigency screenings ensure that poor defendants receive consistent representation from case start to finish. This would require that additional state resources be directed to the Louisiana Public Defender Board (LPDB) in order to increase staffing of public defenders. Costs saved from decreases in pretrial detention should be shifted to the LPDB or local defender offices directly.

Notify All Attorneys of Bail Hearings in Advance

All attorneys should receive advanced notice of bail hearings. Regardless of indigency determination, every arrestee should be appointed counsel if retained counsel is not present.

Provide Defense Counsel with Information for Bail Hearings

Defense counsel should be provided police affidavits, arrest warrants, and any other information relevant to the arrestee's individual likelihood of returning to court and of rearrest. Counsel should have adequate opportunity to fully confer with the arrestee before the hearing begins.

Stop Money Bail from Leading to Pretrial Detention

The judicial officer should not order financial conditions of release unless the individual has the immediately ability to pay the money bail. Government fees related to the posting of secured money bail should be abolished.

Adopt a Tri-Partite Model for Bail Decision-Making

Louisiana should adopt a tri-partite model for bail decision-making which creates a rebuttable presumption for release on recognizance. To request additional conditions upon a defendant's release, including money bail, or preventive detention, the district attorney should prove by clear and convincing evidence that there exists a specific substantial risk of flight or danger to an individual or the community if the defendant were released and that less restrictive conditions could not adequately mitigate the risk or danger.

Regularly Review Cases of Preventive Detention

When an individual is preventively detained, their case should be flagged to the court to revisit the grounds for detention at least every 30 days.

Shorten Article 701 Release Periods

Code of Criminal Procedure Article 701 provides prosecutors a very long time to detain arrestees before they make charging decisions, resulting in several-month periods of pre-charge detention for many defendants. The allowable time period during which an arrestee may be detained prior to the institution of prosecution should be considerably shortened.

Educate the Legal Community on Bail Practices

There should be judicial education about the problem of over supervision of low- and medium-risk defendants, exploring critical areas such as criminogenic effects, pretrial liberty infringement, and expense. There should also be judicial education about the criminogenic effects and other harms of long pretrial detention periods and money bail. LSBA could host a symposium on bond reform, bringing in leaders from other states, such as the New Jersey governor, judiciary, public defenders, and attorney general or district attorney, to spread awareness about other effective practices to Louisiana’s prosecutors and the judiciary.

Embrace Technology & Data Collection

Technology may be useful in addressing day-to-day bail issues. For instance, court reminder text notifications have been shown to be an effective, low-cost and least-restrictive condition in ensuring pretrial defendants’ presence in court.¹⁵⁰ Statewide uniform methods of tracking bail data should be implemented to determine the number of individuals incarcerated because they are unable to pay secured money bail, to identify individuals currently in each jail across the state and the length of their stay, and to track rates of failure to appear and new criminal activity while released. Baseline and periodic data are crucial to predicting future trends and informing policy discussions.

¹⁵⁰ Cooke, B., Diop, B.Z., and Fishbane, A., et al., *Using Behavioral Science to Improve Criminal Justice Outcomes: Preventing Failures to Appear in Court* (Jan. 2018).



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