

Challenges to Advancing Bail Reform

Lessons from Five States

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Every day, judges set bail for thousands of individuals charged with a crime. Bail represents a promise that they will return to court for their next court appearance. In many cases, courts require that this promise be secured by money beyond people's means. As a result, despite the presumption of innocence, thousands remain behind bars for months or even years until their cases are resolved.

Tying pretrial release to one's ability to pay means that all too often wealth — not public safety, nor the likelihood of returning to court — determines who goes free and who awaits case resolution in jail.¹ Those without the means to post bail in cash can turn to third-party guarantees known as bonds, typically arranged by private bail bond companies that front the cost for a nonrefundable fee that can run into the thousands of dollars — a debilitating sum for many people.² This option may not be available for smaller but still-unaffordable bail amounts.³

This system persists despite growing research on the harmful consequences of detention. Even a brief period in jail increases the risk that a person will lose employment and housing. Time in jail also increases the likelihood of future arrests.⁴ This pattern could be due to the economic effects of incarceration (such as wage loss) or to disruptions to interpersonal relationships and commu-

nity ties.⁵ The threat of jail may even induce false guilty pleas, as some people would rather face a criminal record than spend additional time in pretrial detention.⁶

The bail system contributes to the United States' high rate of incarceration. An estimated two-thirds of the 750,000 people in the nation's jails are awaiting resolution of their cases; as such, they are legally innocent. While some are detained because they have been deemed a threat to public safety or for another specific cause, most simply cannot afford to pay bail.⁷ The number of people held in pretrial detention has risen sharply over time, multiplying by more than a factor of seven from 1970 to 2021.⁸ The average amount of time spent in jail has also increased, from roughly two weeks in 1983 to nearly five weeks in 2021.⁹

Over the past two decades, jurisdictions around the country have revised their policies on pretrial release, bail, and detention, drawing on broad and often bipartisan concern about the role of money in determining who goes free and who awaits trial in jail.¹⁰ Despite progress, however, political backlash and implementation challenges have stymied reforms.

This report highlights recent examples of bail reform and the complicated dynamics that have prevented these policies from living up to their potential. Specifically, the report spotlights five jurisdictions that undertook major

From Reforms to Repeals

Historically, bail took the form of a third party assuming responsibility for a defendant's return to court (in legal terms, a *surety*). Release on bail was originally a right in many U.S. jurisdictions.¹¹ In those states, bail could be denied in only a limited set of cases.¹²

By the early 20th century, however, the United States had largely shifted to a bail system defined by a pledge of money, whether cash or bond — functionally, a high-interest loan.¹³ Under this system, people unable to afford bail or a bail bond agent's fees risk detention, and with it the loss of employment, which can in turn jeopardize housing and even parental rights.¹⁴ Similar threats loom for those who might be able to pay the fees for a bail bond, only to be left without any remaining income to support themselves.

Reducing these hardships has been a goal of the criminal justice reform movement for the better part of a century. From the 1920s through the 1960s, policymakers, legal professionals, academics, and concerned members of the public advocated for a shift away from money bail.¹⁵ In 1961, the Vera Institute of Justice launched the Manhattan Bail Project, an initiative aimed at demonstrating that people with strong community ties would return to court and follow the law even if released without bail. The model worked, showing that individuals released on the project's recommendation were twice as likely to appear in court as those released on bail.¹⁶ In 1966, the Federal Rules of Criminal Procedure were amended to “encourage commissioners

and judges to set the terms of bail so as to eliminate unnecessary detention.”¹⁷ Congress also passed the Bail Reform Act of 1966, creating a presumption of release for people charged federally with noncapital crimes, setting restrictions on money bail, and requiring judges to base pretrial bail decisions on factors such as community ties.¹⁸ Many states followed suit and enacted similar laws.¹⁹

Bail policy underwent another transformation in the 1970s and 1980s, when many jurisdictions limited the right to release on bail in response to mounting public concern over crime. The new laws instructed judges to base release decisions on public safety considerations in addition to a defendant's likelihood of returning to court.²⁰ Exemplifying that trend, in 1984, Congress passed the Bail Reform Act, which authorized courts to detain people based on perceived risk to the community rather than a concern that the person might fail to appear in court.²¹ By the mid-2000s, at least 44 states and the District of Columbia had statutes identifying community safety as an appropriate consideration in bail determinations.²² Theoretically, courts would have used this authority to detain only defendants perceived as “high risk.” But money bail has led to the detention of many lower-risk individuals due solely to their inability to pay.²³ All told, the evolution of bail from the use of sureties to cash and bonds has increased the likelihood that defendants' freedom depends on their access to money or credit.

changes to bail policies through a variety of mechanisms, including legislation, litigation, and amendments to court rules. Three jurisdictions ultimately rolled reforms back in whole or in part; in the other two, reforms led to unintended increases in pretrial detention.

What happened? Lawmakers often made bail reform a scapegoat for rising crime rates, particularly during the Covid-19 pandemic, which coincided with increases in violent crime. But rising crime is by no means limited to 2020, and bail reform has long been a wedge issue. Further, the difficulty of acquiring and studying criminal justice data has made it hard for policymakers to defend or explain the effects of bail reform policies. Finally, judges, prosecutors, and pretrial supervision agencies have sometimes failed to adapt to reforms, leading to confusion and surprising results, such as seemingly paradoxical increases in supervision and detention.

Only by understanding the shortcomings of past reform efforts can advocates begin to overcome the challenges inherent to building a more equitable and efficient pretrial justice system.

The Current Landscape

The last decade has seen a resurgence of often bipartisan bail reform efforts in Congress and in many states.²⁴ These initiatives have typically been motivated by the twin goals of limiting the role of money in determining pretrial release and reducing the incarceration of people accused of nonviolent, lower-level offenses. As table 1 illustrates, a wide array of jurisdictions have adopted policies along these lines. However, the table also shows that not all of these efforts have been sustained.

Some states, such as Maine and Illinois, have eliminated money bail either entirely or for whole categories of lower-level offenses such as misdemeanors.²⁵ Others, like Nebraska, have established a clear preference or an explicit presumption for releasing individuals on their own recognizance — that is, releasing them without any payment or other conditions.²⁶ Still others, including New Jersey and West Virginia, require judges to impose the “least restrictive” conditions necessary to secure a statutory objective, such as reducing the risk of flight or

TABLE 1

Pretrial Justice Reform Legislation, 2013–23

	ELIMINATED MONEY BAIL	ESTABLISHED PREFERENCE FOR RECOGNIZANCE RELEASE	REQUIRED LEAST RESTRICTIVE MEANS OF RELEASE	AUTHORIZED OR REQUIRED ABILITY-TO-PAY DETERMINATIONS	CREATED OR EXPANDED PRETRIAL SUPERVISION SERVICES
Alaska (2016)	√ Most misdemeanors and some felonies		√	√	√
California (2021)				√	
Colorado (2013, 2019)	√ Traffic, petty, and municipal offenses		√		
Connecticut (2017)	√ Some misdemeanors				
Georgia (2018)				√	
Houston, Texas (2017)	√ Misdemeanors			√	√
Illinois (2017, 2021)	√ All cases		√	√	
Maine (2021)	√ Some misdemeanors			√	
Maryland (2017)			√		
Missouri (2019)		√	√	√	
Montana (2017)					√
Nebraska (2017, 2020)	√ Some misdemeanors	√	√	√	
New Hampshire (2018)				√	

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TABLE 1

Pretrial Justice Reform Legislation, 2013–23 (continued)

	ELIMINATED MONEY BAIL	ESTABLISHED PREFERENCE FOR RECOGNIZANCE RELEASE	REQUIRED LEAST RESTRICTIVE MEANS OF RELEASE	AUTHORIZED OR REQUIRED ABILITY-TO-PAY DETERMINATIONS	CREATED OR EXPANDED PRETRIAL SUPERVISION SERVICES
New Jersey (2014)	✓ Most cases	✓	✓		
New Mexico (2016)				✓	
New York (2020)	✓ Most cases		✓	✓	✓
Oregon (2022)	✓ Most cases	✓			
Utah (2020)		✓	✓	✓	
Vermont (2018)	✓ Some misdemeanors				✓
West Virginia (2020)		✓	✓		

Note: All dates indicate when reforms became law rather than when they took effect. Highlighted cells indicate reforms that were later repealed, significantly modified, or superseded by subsequent reforms. Prosecutor-led reforms, such as commitments not to seek bail in specified cases, are excluded.

Source: Brennan Center analysis of recent legislation and Isabella Jorgensen and Sandra Susan Smith, “The Current State of Bail Reform in the United States: Results of a Landscape Analysis of Bail Reforms Across All 50 States” (working paper RWP21-033, Harvard Kennedy School Faculty Research Series, December 2021), <https://www.hks.harvard.edu/publications/current-state-bail-reform-united-states-results-landscape-analysis-bail-reforms-across>. For additional sources, see the appendix.

perceived threat to the community.²⁷ This latter category is not a prohibition on money bail, but rather an obligation on the court to impose bail or detention only as a last resort.

Apart from limitations on imposing money bail, many states require (or at least authorize) judges to consider a defendant’s ability to pay when setting the amount. Additionally, several jurisdictions have created or expanded pretrial services programs, which may be operated by public agencies, nonprofit organizations acting under contract, or other professional groups. These initiatives maintain contact with people released while awaiting trial, assist judges in determining how to safely release them, or both.²⁸

Bail Reform in Five States

This report focuses on five states whose experiences exemplify challenges in enacting and sustaining bail reform policies. New York, Alaska, and Utah overhauled their bail systems by legislation, Maryland by court order, and California as a result of litigation. Despite these different pathways to reform, commonalities emerge that help to explain why bail reform efforts fell short in each case: First, swift and forceful political resistance in the legislative reform states led to significant rollbacks within just a few months of bail reform legislation taking effect. In the remaining two states, political challenges also explain why court-led reform proved necessary. Second, reforms

failed to change prevailing practices among officials tasked with implementing new bail policies — whether due to misaligned incentives or a lack of resources to support implementation.

New York

In 2019, the New York State legislature passed a major revision of the state’s bail laws, which took effect in January 2020.²⁹ Policymakers then amended the law three times within a span of four years, based largely on concerns about public safety as violent crime rates spiked during the Covid-19 pandemic.³⁰ The result was a series of complex carve-outs to the original legislation, enacted by the same governing coalition that first passed it.

Bail reform in New York grew out of a concern that judges used their broad pre-2020 statutory discretion to set unnecessarily high money bail, which resulted in people being detained for lower-level offenses simply because they could not afford release. The issue came to a head in 2015, when Kalief Browder, a Black teenager who entered the city’s notorious Rikers Island jail complex when he was 16, died by suicide at age 22, three years after his release. Browder had spent three years in pretrial detention for allegedly stealing a backpack, with nearly two years of that time in solitary confinement.³¹ Browder was never tried for this alleged offense, much less convicted.

Informed by a commission convened by the New York City Council, the state legislature passed a major rewrite of New York’s bail law in 2019.³² Under the new law, bail and detention would no longer be an option in most cases involving misdemeanors and lower-level felonies. Judges would still retain the ability to set bail in most other cases, including almost all involving violent felonies.³³ The legislation retained a principle first adopted in New York in 1971: consistent with the historic purpose of bail, judges could set bail or order detention only to ensure a defendant’s return to court. They would remain unable to set bail or order detention based on their perception of an individual’s “dangerousness.”³⁴

Political backlash began immediately. Some lawmakers rushed to blame rising crime — a national trend — on bail reform.³⁵ Police leaders, for example, initially (and inaccurately) blamed a spike in shootings on bail reform and jail releases prompted by Covid-19 concerns.³⁶ New York City Mayor Eric Adams repeatedly criticized bail reform.³⁷ Candidates for state office in the 2022 midterm elections did the same. The issue also roiled the gubernatorial campaign, with some saying that it contributed to an unexpectedly tight margin of victory for the Democratic incumbent, Kathy Hochul.³⁸ Some bail reform critics urged legislators to explicitly allow judges to consider their view of a defendant’s “dangerousness” when setting release conditions.³⁹ This debate spilled far beyond New York.⁴⁰

Amid these controversies, legislators revisited bail reform in 2020, 2022, and 2023.⁴¹ Broadly speaking, each revision expanded the charges for and circumstances around which a judge could set bail or order detention and the factors they could consider when doing so. The first round focused on concerns about people committing new crimes while released. Legislators changed the law to allow judges to set bail in any case in which an individual was charged with a felony or a Class A misdemeanor involving “harm to an identifiable person or property,” was subsequently released, and went on to be arrested for a similar offense, regardless of whether that offense would otherwise have been bail-eligible.⁴²

In 2022, the legislature broadened this so-called “harm-to-harm” rule to make clear that it covers “theft or damage to property,” with limited exceptions.⁴³ That same year, the legislature also enumerated factors that judges should consider when setting conditions of release, including defendants’ criminal histories and the charges they were facing.⁴⁴ In May 2023, at Governor Hochul’s insistence, the legislature removed language requiring judges to set the “least restrictive” conditions of release — legal terminology that has also proved controversial in other states, such as Utah, where critics argued that it encouraged the release of dangerous people.⁴⁵ (The New York legislature rejected an earlier proposal by Hochul that would have permitted judges to set bail for any reason rather than solely to ensure a return to court.)⁴⁶

Although critics blamed the original bail reform legislation for compromising public safety, the evidence for these claims was never strong. In July 2020, the *New York Post* showed that data from the New York City Police Department contradicted its top officials’ claims that bail reform and Covid-19–related jail releases were behind the city’s rise in shootings.⁴⁷

But data around which policymakers could make informed judgments was not immediately available, posing a challenge for the law’s defenders. Although the 2019 legislation required courts to collect release data, the first batch was not published until July 2021.⁴⁸ That data showed relatively low rearrest rates among people released before trial, but it lacked a pre-reform basis for comparison, making it difficult to determine whether rearrest rates had changed because of the reforms.⁴⁹ No before-and-after comparison of rearrest rates was possible until late 2022, by which point new legislation had already weakened the 2019 reforms twice.⁵⁰

Furthermore, when data materialized, it told a complex tale. One of the first studies pointed to limited increases in rearrest rates in New York City and more substantial increases upstate.⁵¹ Another study suggested that, on average, rearrest rates fell in New York City in cases where judges could no longer set bail but increased for a small subset of cases: those involving a defendant who had another pending case or a recent violent felony

arrest.⁵² Taken together, these studies may explain renewed legislative interest in funding pretrial supervision programs, which are relatively rare upstate and overburdened downstate.⁵³ Subsequently enacted legislation sought to bridge that shortfall, including with a \$10 million infusion in 2022.⁵⁴

Alaska

Bail reform in Alaska grew out of a research-driven, cost-conscious effort to reduce the number of people detained in the state’s prisons. But nearly a decade later, owing partly to concerns about rising crime and drug addiction, critical reforms have been repealed and pretrial populations remain high.

Alaska began exploring changes to its criminal justice policies in the mid-2010s, motivated in part by a growing and increasingly costly prison system. (Alaska’s prisons also serve as pretrial detention facilities.)⁵⁵ The state worked in collaboration with the nonprofit Crime and Justice Institute and the Justice Reinvestment Initiative, a partnership between the U.S. Bureau of Justice Assistance and the Pew Charitable Trusts that advises states on reducing correctional expenditures and redirecting savings toward other public safety strategies.⁵⁶ With technical assistance from the two groups, a bipartisan commission recommended steps to reduce the pretrial detention of people accused of lower-level offenses who were likely to return to court if released.⁵⁷

As a result, in 2016, the legislature passed S.B. 91, a bill that, along with many other changes to the state’s criminal justice system, reworked the pretrial detention process from top to bottom.⁵⁸ Under the new system, bail and release decisions would be guided by a risk assessment tool — that is, a guide designed to evaluate the likelihood of specific behaviors based on known characteristics.⁵⁹ S.B. 91 made release mandatory in certain cases depending on the charges and the assessed risk of flight or rearrest.⁶⁰ The bill also allowed judges, for the first time, to consider ability to pay when reviewing previously imposed bail conditions.⁶¹

The measure took effect at a time when violent crime rates were rising.⁶² Alaska was also deeply affected by the opioid crisis, with Gov. Bill Walker declaring a state public health emergency in 2017.⁶³ Before long, S.B. 91 was scapegoated as the cause. Critics pointed to statistics showing that shoplifting had risen in Anchorage, and business owners blamed the reforms for the increase.⁶⁴ However, there was no direct evidence that Alaska’s crime issues were connected to the criminal justice reforms.⁶⁵ The R Street Institute and the Pew Charitable Trusts both noted that violent and property crime rates had been increasing prior to S.B. 91’s passage and that reforms had not been in place long enough to manifest significant changes one way or the other.⁶⁶

Nevertheless, by early 2018, lawmakers began to unwind S.B. 91’s bail reform provisions. The provision tying risk assessment scores to bail eligibility went into effect on January 1, 2018, only to be partially dismantled just six months later, when the passage of H.B. 312 made risk assessment outcomes advisory rather than binding.⁶⁷ These rollbacks accelerated under Gov. Mike Dunleavy, who promised during his 2018 campaign to repeal S.B. 91.⁶⁸ Once in office, he proposed H.B. 49, which the state legislature enacted in July 2019.⁶⁹ The new law limited the role of the risk assessment even further, demoting it to just one factor among many that judges could consider when making release decisions.⁷⁰

Consequently, once again, bail was essentially left to judges’ broad discretion. One aspect of S.B. 91 remained: judges could still consider a defendant’s inability to pay bail when reevaluating previously imposed money bail. But H.B. 49 added an additional hurdle, requiring people to demonstrate that they had made a good faith effort to post the required bail.⁷¹ (H.B. 49 also left undisturbed a statutory provision, passed in 2010, requiring judges to set only the “least restrictive condition or conditions” of release needed to ensure public safety and return to court.)⁷²

Many of the challenges that gave rise to S.B. 91 remain. As of early 2024, Alaskan prisons held more people in pretrial detention than people convicted of criminal offenses. Pretrial detention is also well above 2015 levels.⁷³

Utah

Bail policies have changed rapidly in Utah, going from reform to repeal to compromise within a few years. In 2014, driven in part by developments in other states, the Utah Judicial Council formed a committee to report on pretrial best practices. The committee’s final report concluded, among other things, that judges overused bail and often based their decisions on a fixed schedule that set bail amounts by the offense charged rather than an individualized assessment of factors like the defendant’s flight risk or ability to pay. The result, they concluded, was a system in which release largely depended on one’s ability to pay for it.⁷⁴ To address this inequity, the committee recommended that the state adopt a presumption in favor of release along with a risk assessment tool, a robust pretrial supervision system, and procedures for releasing some lower-risk defendants under the “least restrictive conditions” necessary to preserve public safety and ensure their return to court.⁷⁵

Lawmakers did not adopt these reforms immediately.⁷⁶ But in 2020, the legislature passed a comprehensive bail reform bill, H.B. 206, with large bipartisan majorities — winning final passage with a 25–1 senate vote.⁷⁷ The bill required courts to impose the “least restrictive reasonably

available conditions” of release and, when setting bail, to ensure a defendant’s ability to pay. Under H.B. 206, a judge could order detention only if no other option would mitigate the risk of flight or danger to the community. Additionally, the bill established a fund to support pretrial services for people released under the new provisions.⁷⁸ On March 28, 2020, just weeks after declaring the Covid-19 pandemic emergency, Gov. Gary Herbert signed the bill into law. It took effect on October 1, 2020.

Opposition to the new law mounted within a few months. Critics included the Utah Sheriffs’ Association, whose executive director called it an “unmitigated disaster” and a “humiliation to officers [and] . . . to jail personnel.”⁷⁹ Some concerns about the bill hinged on anecdotes or apparent misunderstandings. For example, several critics in the law enforcement community blamed bail reform for an expanded reliance on “penny warrants,” under which people could be released with a reminder to return to court after posting as little as a penny. However, a court administrator clarified that penny warrants had nothing to do with bail reform but were rather a precaution against the spread of Covid-19 as the pandemic entered its second year.⁸⁰ Detractors also pointed to a serious car crash caused by a suspected drunk driver who was then released on supervision, but that release occurred before H.B. 206 took effect.⁸¹ Other critics zeroed in on the law’s provision requiring the “least restrictive” conditions of release, arguing that it “encourag[ed] judges to release dangerous people.”⁸²

The bill’s defenders, including prominent prosecutors, accused those calling for H.B. 206’s repeal of “bad faith.”⁸³ The limited data available at the time tended to support this view. In Salt Lake County, releases in serious cases, such as those involving allegations of first-degree felonies or serious domestic violence, had declined.⁸⁴ But data for other parts of Utah was sparse, making it hard to evaluate the law’s effects more broadly.⁸⁵

Other objections concerned implementation challenges. Rural county officials argued that they had no money to implement pretrial services programs and that the grant program set up for that purpose lacked the necessary funds.⁸⁶ The bill had also “inadvertently deleted” a provision allowing bail commissioners — local officials charged with making certain pretrial release decisions — to set bail in misdemeanor cases. That deletion led to some people accused of misdemeanors being unintentionally held without bail. A “fix-it” bill designed to correct both issues failed to advance, and the Utah legislature largely repealed H.B. 206 on March 24, 2021, roughly one year after it was signed into law and just five months after it went into effect.⁸⁷

Critically, though, some of the law’s opponents saw repeal as the first step toward a compromise.⁸⁸ Rep. Mike Schultz, one of H.B. 206’s most prominent critics, described repeal as “just one step in an important process” and noted the need to find a substitute for the bill that

would address inequities within the system.⁸⁹ Legislators and other policymakers with responsibility for running the justice system began meeting immediately to develop a new bill. In November 2021, just over a year after H.B. 206 took effect, Utah enacted H.B. 2003, a compromise bill, in a special session.⁹⁰

The final legislation dropped H.B. 206’s “least restrictive” language. Instead, it required judges to “impose only conditions of release that are reasonably available and necessary” to ensure public safety and defendants’ return to court.⁹¹ But it retained the requirement that judges consider ability to pay when setting monetary conditions — a priority for H.B. 206’s supporters. H.B. 2003 also authorized judges to consider pretrial services programs only if “the county or municipality” had those services “currently available.”⁹²

How these changes will affect pretrial justice in Utah is not yet clear. Legislative work continues: the recent 2023 legislative session addressed technical issues and emphasized that bail cannot be based exclusively on the nature of the charges involved.⁹³

California

In California, revisions to bail policy emerged from litigation as momentum for legislative reform stalled. The effect of these changes remains unclear.

In her 2017 State of the Judiciary Address, five months after appointing a Pretrial Detention Reform Workgroup to recommend improvements, Chief Justice Tani Cantil-Sakauye argued for overhauling the state’s bail system.⁹⁴ The resulting study found that, although state law allowed judges to consider an array of factors when deciding whether to set bail and in what amount, judges still relied heavily on county bail schedules that prescribed a set amount based on the charged offense.⁹⁵ According to one study of bail practices in Los Angeles County and Orange County, judges paid little heed to a defendant’s ability to pay, attorneys rarely contested bail amounts that were consistent with the schedule, and “over 70% of defendants were ultimately held in pretrial detention.”⁹⁶

Courts and lawmakers responded by seeking to change California’s bail practices. Drawing on the workgroup’s recommendations, the legislature passed S.B. 10, a measure intended to fully eliminate money bail and replace it with a system that based release solely on a defendant’s assessed risk.⁹⁷ Signed into law in August 2018, S.B. 10 would have made California the first state to end money bail in full. However, a veto referendum was filed the next day, suspending the law and giving voters a chance to repeal it by ballot initiative.⁹⁸

Bail bond companies and criminal justice advocates both supported the repeal effort, albeit for different reasons.⁹⁹ Bail bond agents worried that the new law

would put them out of business, while advocates were concerned about last-minute revisions to the bill that would have expanded preventive detention and tied its use to a risk assessment tool.¹⁰⁰ In 2020, following a misleading campaign largely funded by the bail bond industry, Californians voted to repeal S.B. 10.¹⁰¹

Another challenge to the state's bail system was simultaneously proceeding through the state courts. In May 2017, Kenneth Humphrey was arrested for robbery. Based in part on his "lengthy history of contact" with the criminal justice system and the seriousness of the underlying crime, the court declined to order release; instead, it set bail at \$600,000, later conditionally reduced to \$350,000 — neither of which Humphrey could afford.¹⁰² The California Court of Appeals reversed and remanded the case, holding that the trial court's failure to inquire into Humphrey's ability to pay raised constitutional concerns. The trial court subsequently imposed nonfinancial conditions and released Humphrey.¹⁰³

The California Supreme Court later chose to take up the case to "address the constitutionality of money bail" in California and "the proper role of public and victim safety in making bail determinations." In its 2021 decision, the court held that detaining an individual awaiting trial solely because they cannot afford bail violates the due process and equal protection guarantees of the state and federal constitutions.¹⁰⁴

In re Humphrey was expected to catalyze major changes in state bail practices, but a recent analysis indicates that its effects were at most modest. Berkeley Law researchers found lower median bail amounts since *Humphrey* in just one of three counties they studied, and they found no evidence that *Humphrey* led to a decrease in the average length of pretrial detention.¹⁰⁵ More troublingly, research indicated that "no bail holds" — effectively, orders stating that an individual is ineligible for any type of release — had increased post-*Humphrey*.¹⁰⁶ The researchers also found that judges had not been considering less restrictive alternatives to detention, and that jail populations in California had not declined.¹⁰⁷

Contradictory interpretations of *Humphrey* and how to implement it may be partly to blame. Some courts have read *Humphrey* narrowly, limiting the use of ability-to-pay determinations.¹⁰⁸ Additionally, the Judicial Council of California issued guidance that appears to deviate from *Humphrey* by expanding judicial authority to detain people without bail. An April 2021 memo advised judges that they can hold individuals with no bail in the presence of anything higher than "some risk" of flight or rearrest.¹⁰⁹

Prosecutorial behavior may also explain why *Humphrey*'s effects have been limited. Prosecutors wield considerable discretion in deciding what charges to bring and what conditions of release to seek. The same Berkeley Law analysis argued that district attorneys still had not adopted policies regarding the new legal landscape of bail

or otherwise adapted to the decision a year after it was handed down. In a survey, nearly 90 percent of defense attorneys indicated that prosecutors objected to releases on recognizance as frequently as they had before *Humphrey* — between 75 and 100 percent of the time. And nearly half said that prosecutors sought "no bail holds" more often than before the decision.¹¹⁰

Maryland

Political pressures stood in the way of legislative bail reform in Maryland, giving the state court system an opportunity to lead by promulgating guidance for judges statewide. While some results have been encouraging, unintended consequences have emerged as well.

Several factors pushed Maryland toward bail reform in the mid-2010s. In 2014, a commission convened by Gov. Martin O'Malley recommended moving away from money bail.¹¹¹ The following year brought heightened public scrutiny of state bail rules when a court held a Baltimore teenager on \$500,000 bail after he allegedly broke a car window during the protests over Freddie Gray's death in police custody — an amount higher than that set for any of the six officers charged in Gray's death.¹¹²

As state lawmakers grappled with the bail system's shortcomings, the counsel to the Maryland General Assembly concluded in October 2016 that there was a "significant risk" that the state's bail system, if challenged in court, would be found to violate due process in permitting bail at levels that many people cannot afford.¹¹³ At the same time, Maryland Attorney General Brian Frosh issued a series of opinion letters raising constitutionality questions, urging the state court system to adopt rules clearly requiring ability-to-pay determinations and minimizing the use of money bail.¹¹⁴

Legislative efforts faltered due in part to bail bond industry lobbying.¹¹⁵ But in 2017, Maryland courts adopted Rule 4-216.1, which encourages judges to avoid imposing money bail and to set the "least onerous" conditions of release possible to meet the state's interests in public safety and to ensure the defendant's appearance in court. The rule also states that "preference should be given to additional conditions without financial terms."¹¹⁶

This policy shift reduced the use of money bail. According to court data reviewed by local journalists, the share of individuals held with bail decreased from 29.8 percent to 18.4 percent from January 2017 to July 2018.¹¹⁷ Other data showed that releases on recognizance increased, suggesting that judges were granting release when they previously would have set bail in at least some cases, and that defendants received 70 percent lower bail amounts on average.¹¹⁸ According to the state judiciary, failure-to-appear rates did not increase in the wake of guidance that anticipated the rules change.¹¹⁹

However, judges also appeared to be ordering detention in some cases where bail would previously have been set, especially in cases involving allegations of violence.¹²⁰ The same court data referenced above indicated that the share of individuals held without bail increased from 13.6 percent to 22.6 percent between January 2017 and July 2018.¹²¹ Essentially, reducing the availability of bail as a “middle ground” seems to have forced judges in marginal cases to decide between ordering detention or release, prompting an increase in both outcomes. A report focusing on Prince George’s County (which borders Washington, DC) echoed these findings, concluding that bail hearings in the county were perfunctory and that jail populations had not declined.¹²²

Lessons Learned

Table 2 synthesizes where and how bail reform has faltered in the jurisdictions studied in this report. Despite vast differences in states’ political and legal landscapes, common themes emerge.

Politicians insist on a higher evidentiary standard for reform than for repeal. In each of the case studies above, bail reforms followed years of research and analysis. Alaska and Utah revised their pretrial systems only after independent analyses by committees of experts. By contrast, legislators who reversed reforms in Alaska, New York, and Utah never had a clear, data-driven picture of whether bail reform had undermined public safety. At times, they appeared to mischaracterize bail reform simply to garner political support.¹²³

In each of those three states, bail reforms went into effect amid other serious challenges, such as the Covid-19 pandemic, associated rises in crime, and, in Alaska, the opioid crisis. But concurrence is not causation. Focus-

ing on bail policy took time and resources that could have been spent developing other strategies for reducing crime and addiction.

This dynamic — wherein lawmakers follow data in enacting reforms but not in repealing them — suggests the power of status quo bias in policymaking. Breaking from entrenched bail policies requires a powerful motivating force, which research and evidence can help provide. Meanwhile, the impulse to abandon reform at the first sign of trouble is all too potent. To combat this outcome, policymakers should have facts and data on hand to answer early criticisms (which, of course, is easier said than done).

Data is vital but takes time to develop. Gathering and analyzing data on the criminal justice system takes considerable time and resources. Policymakers understandably want to respond to public concerns about crime and bail policy in the moment, but few (if any) states publish crime or court data in anything approaching real time. Reliable research on the effects of newly enacted policies takes years to produce.

Future reform efforts should bear these challenges in mind and confront them by continuing to build public support for reforms after passage and well into the implementation phase. Policymakers should develop strong relationships with the officials and staff, including judges and pretrial supervision officers, who will be tasked with implementing bail reforms.¹²⁴ Legislative efforts should also include funding for research partners to evaluate outcomes, along with language requiring state agencies to collect and share court data. Lawmakers can also ensure that reforms come with a mandate for timely data collection and reporting.

The growing national body of research on bail reform can also inform policymakers and help ward off repeal campaigns. Leaders should welcome third-party studies (like those undertaken in Maryland and California) that

TABLE 2

Rollbacks and Other Challenges to Bail Reform Laws, 2013–23

	DETENTION ELIGIBILITY EXPANDED	JUDICIAL DISCRETION BROADENED	POLITICAL BACKLASH	IMPLEMENTATION PROBLEMS
Alaska	✓	✓	✓	
California			✓	✓
Maryland				✓
New York	✓	✓	✓	✓
Utah		✓	✓	✓

Source: Brennan Center analysis of recent legislation.

indicate where reforms may be leading to unintended consequences, such as seemingly paradoxical increases in detention. This data can be used to improve on reforms.

Implementation cannot be taken for granted; it requires training and funding to succeed. Barriers to bail reform go beyond politics. Successful implementation requires support and buy-in from judges, prosecutors, and pretrial supervision agencies (among other stakeholders) who may otherwise resist changes to bail procedures — a hurdle that played a major role in the limited reach and unexpected results of reforms in California and Maryland. Even with good intentions, these stakeholders can also make mistakes. Bail statutes are often complex and highly technical, and explaining bail decisions requires in-depth knowledge (not to mention extra paperwork). Adequate funding for training and support is essential to ensure that the people tasked with implementing new policies have the necessary tools and expertise to do so effectively.

Not all types of bail reform are politically fraught. Limiting the role of money in pretrial release — such as through ability-to-pay determinations — remains broadly popular. Utah is a case in point, and a similar interest animates Maryland’s and California’s judicial reforms. By contrast, provisions limiting how judges can make pretrial release decisions emerged as flash points in the states that embarked on legislative reforms (namely, Alaska, New York, and Utah). Even in states where courts have led the way, individual judges appear to resist changes limiting their discretion. That dynamic may explain the unexpected increases in detention in Maryland and California. Addressing the challenges of judicial discretion and promoting more effective bail reform also necessitates comprehensive judicial training to educate judges on how bail reform fosters more humane and better-informed pretrial release decisions.

Moreover, reforms may fail to achieve their intended goals if state judiciaries, public defenders, prosecutors’ offices, and other necessary agencies lack needed funding, training, or personnel. That proved to be the case in Utah and New York, where reforms aimed at expanding pretrial supervision programs ran into resource constraints outside of major cities. Legislatures should avoid passing bail reform as an unfunded (or thinly funded) mandate, expecting state agencies, cities, and courts to create supervision services out of their own pockets. Lawmakers must ensure that enough money is available to support the demand for supervision programs that reduced detention may create.

Legal reforms without culture change can lead to unintended consequences. California, Maryland, and

New York illustrate a phenomenon known as “net widening” — that is, when reforms aimed at reducing incarceration end up increasing the overall number of people under some form of correctional control.¹²⁵ The problem often occurs when jurisdictions adopt pretrial supervision as a midpoint between bail and detention on the one hand and release on the other; rather than ordering supervision for defendants who previously would have received bail, some judges may begin ordering unnecessary supervision for defendants whom they otherwise would have released without conditions.¹²⁶

Solving problems like those described in this report may turn more on questions of culture than law. Courts are not unitary actors that can be remade at the stroke of a pen. Engrained practices and personal policy preferences of judges and court employees can grind reforms to a halt.¹²⁷ Adequate funding for training and support programs is needed to overcome this dynamic and facilitate smooth rollouts of new policies. Court administrators and chief judges should be brought into the process to ensure that their guidance advances rather than undermines the goals of reform.

Conclusion

Bail policy remains one of the most complex and politically sensitive issues in the criminal justice field. It is also vitally important. Jail populations remain high and access to money remains a determining factor in who is released and who is detained awaiting trial. Even in jurisdictions where reforms remain on the books, racial disparities in bail decisions and detention persist.¹²⁸

Challenges to bail reform continue across the country. Wisconsin voters, reacting to a tragic act of mass violence in 2021, recently expanded judges’ authority to set money bail.¹²⁹ After New Jersey largely eliminated money bail in 2017, legislators in 2023 debated a measure that would have ended the presumption of release in many cases and enacted a narrower one targeting auto thefts.¹³⁰ And in Georgia — just five years after Republican Gov. Nathan Deal signed a bipartisan bail reform measure into law — lawmakers are poised to significantly limit judges’ authority to release defendants in some cases.¹³¹

Even amid these recent controversies, two principles remain widely accepted: that every person is innocent until proven guilty and that innocent people should not be detained simply because they lack the ability to purchase their freedom. Yet policymakers continue to struggle to honor those ideals. Understanding the dynamics that underlie these debates is fundamental to crafting policies that can withstand political pressure while ensuring a more just legal system.

Appendix: Notes to Table 1

Alaska. S.B. 91, 29th Leg., 2d. Sess. §§ 57, 59 (Alaska 2016), <https://www.akleg.gov/basis/Bill/Text/29?Hsid=SB0091Z> (providing, respectively, for ability-to-pay determinations in bail review hearings and for release without monetary bond for people charged with certain offenses and evaluated as low or moderate risk). For repeal, see H.B. 49, 31st Leg., 1st Spec. Sess. § 59 (Alaska 2019), <https://www.akleg.gov/basis/Bill/Text/31?Hsid=HB0049Z> (ending risk-based system and providing instead for release on least restrictive conditions with a presumption against monetary conditions of bail). Alaska established a preference for release and a requirement for release on the least restrictive conditions before the reforms discussed in this report. It retains both still. See H.B. 324, 26th Leg., 2d. Sess. § 5 (Alaska 2010), <https://www.akleg.gov/basis/Bill/Detail/26?Root=HB%20324>.

California. *In re Humphrey*, 482 P.3d 1008 (Calif. 2021). See also “*In re Humphrey*: California Supreme Court Holds Detention Solely Because of Inability to Pay Bail Unconstitutional,” *Harvard Law Review* 135, no. 3 (January 2022), 912, <https://harvardlawreview.org/print/vol-135/in-re-humphrey>. California’s S.B. 10, which would have ended cash bail entirely in the state, is not included here, as it was repealed by a ballot initiative (Proposition 25) before it could take effect. Taryn Merkl and Leily Arzy, “California’s Referendum to Eliminate Cash Bail, Explained,” Brennan Center for Justice, Oct. 2, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/californias-referendum-eliminate-cash-bail-explained>; and “California Election Results,” *New York Times*, January 12, 2021, <https://www.nytimes.com/interactive/2020/11/03/us/elections/results-california.html>.

Colorado. H.B. 13-1236, 69th Gen. Assemb., Reg. Sess. § 16-4-104(4)(a) (Colo. 2013), <https://cdpsdocs.state.co.us/ccjj/Resources/Leg/2013/HB13-1236.pdf>. Colorado’s 2019 reform legislation provided, with certain exceptions, that individuals charged with most low-level offenses (such as Class 3 misdemeanors or petty offenses) are no longer required to post a monetary bond for pretrial release. H.B. 19-1225, 72nd Gen. Assemb., Reg. Sess. (Colo. 2019), https://leg.colorado.gov/sites/default/files/2019a_1225_signed.pdf.

Connecticut. Public Act 17-145 prohibits cash bail for most misdemeanor offenses unless the court makes specific determinations. 2017 Conn. Acts 17-145, Sub. H.B. No. 7044, Reg. Sess. (Conn. 2017), <https://cga.ct.gov/2017/act/pa/pdf/2017pa-00145-r00hb-07044-pa.pdf>. This caveat, as in the case of Nebraska’s L.B. 881 (discussed below), means that Connecticut’s law effectively blurs the line between ending money bail and creating a strong preference against it. This

report classifies such marginal cases as efforts to end cash bail in select cases.

Georgia. S.B. 407 codifies the requirement that courts not impose excessive bail in misdemeanor cases and requires courts to release defendants on conditions reasonably necessary to ensure that such persons appear in court and to protect the safety of any person or the public. S.B. 407, Reg. Sess. (Ga. 2018), <https://www.legis.ga.gov/legislation/52666>; and Andrea Woods, “Two Steps Forward, One Step Back: A Cautionary Tale About Bail ‘Reform’ in Georgia,” American Civil Liberties Union (ACLU), September 24, 2020, <https://www.aclu.org/news/smart-justice/two-steps-forward-one-step-back-a-cautionary-tale-about-bail-reform-in-georgia>. An early draft of the bill would have required judges to impose the “least restrictive” conditions for release. Office of Governmental and Trial Court Liaison, *Summary — SB 407 (As Passed)*, Administrative Office of the Court, Judicial Council of Georgia, 2019, 2, <https://georgiacourts.gov/wp-content/uploads/2019/09/Legislative-Summary-2018.pdf>.

Houston, Texas. A court case filed in 2016 resulted in substantial modifications to the pretrial release process in misdemeanor cases in Harris County, Texas, which covers Houston and parts of the surrounding area. See *O’Donnell v. Harris County*, 251 F. Supp. 3d 1052, 1161 (S.D. Tex. 2017), *aff’d as modified*, 882 F.3d 528 (5th Cir. 2018), and *aff’d as modified sub nom.* *O’Donnell v. Harris County*, 892 F.3d 147 (5th Cir. 2018), <https://clearinghouse.net/case/15377>. Rules adopted by the county and a consent decree imposed by the court require release or unsecured bail for most misdemeanor offenses, as well as individualized ability-to-pay determinations. L.R. Harris Cnty. Crim. Ct. 9, Bail Policies, accessed February 23, 2024, <https://casetext.com/rule/texas-court-rules/local-rules-of-the-harris-cty-criminal-courts-at-law/rule-9-bail-policies>; and Consent Decree, *O’Donnell v. Harris County* No. 4:16-CV-01414 (S.D. Tex., November 21, 2019), https://jad.harriscountytexas.gov/Portals/70/documents/ODonnell_Consent_Decree_CJ-TX-0010-0025.pdf. See also Don Stemen and David Olson, *Is Bail Reform Causing an Increase in Crime?*, Harry Frank Guggenheim Foundation, January 2023, 7, <https://www.hfg.org/wp-content/uploads/2023/01/Bail-Reform-and-Crime.pdf>. On pretrial supervision expansion, see Hena Rafiq, Christi Economy, and Lindsay Graef, “Building a Responsive Pretrial Supervision System in Harris County, Texas,” Harvard Kennedy School Government Performance Lab, 2023, https://govlab.hks.harvard.edu/building-responsive-pretrial-supervision-system-harris-county-texas?admin_panel=1.

Illinois. Under an Illinois law passed in 2017, courts must impose “the least restrictive conditions or combination of conditions necessary to reasonably assure the appearance of the defendant for further court proceedings and protect the integrity of the judicial proceedings from a specific threat to a witness or participant.” S.B. 2034, 100th Gen. Assemb., Reg. Sess. (Ill. 2017) (codified at 725 Ill. Comp. Stat. § 5/110-5(c)), <https://law.justia.com/codes/illinois/2022/chapter-725/act-725-ilcs-5/title-iii>. That same year, the court system for Cook County, which includes Chicago, released a new rule requiring ability-to-pay determinations, specific procedures governing those evaluations, and release on the least restrictive means. Cook County Cir. Ct. Gen. Order 18.8A (July 17, 2017), <https://www.cookcountycourt.org/Manage/Division-Orders/View-Division-Order/ArticleId/2562/GENERAL-ORDER-NO-18-8A-Procedures-for-Bail-Hearings-and-Pretrial-Release>. In 2021, the state enacted the SAFE-T Act, which ended money bail in all cases in the state. This provision went into effect in late 2023. See *Rowe v. Raoul*, 2023 IL 129248, ¶¶ 27–29, 52, <https://caselaw.findlaw.com/court/il-supreme-court/114633504.html>; and Ames Grawert, Ram Subramanian, and Maris Mapolski, “The Fate of Bail Reform in Illinois,” *State Court Report*, updated July 18, 2023, <https://statecourtreport.org/our-work/analysis-opinion/fate-bail-reform-illinois>. It also functionally moots the state’s ability-to-pay reform.

Maine. L.D. 1703 abolished cash bail for most nonviolent Class E misdemeanors, which are the state’s least serious criminal offenses. (Examples include cases such as drinking in public and criminal trespass.) In addition, courts must consider a person’s employment and primary caregiving responsibilities, as well as specific health care needs, alongside “the ability of the defendant to afford a financial condition imposed by the judicial officer” when setting terms of release. L.D. 1703, H.P. 1266, 130th Leg., 1st Spec. Sess. (Maine 2021), <https://legislature.maine.gov/legis/bills/getPDF.asp?paper=HPI266&item=1&snum=130>; and ACLU of Maine, “Maine Enacts Significant Bail Reform Law,” news release, July 1, 2021, <https://www.aclumaine.org/en/press-releases/clone-maine-senate-fails-pass-critical-drug-reform-bill-despite-overwhelming-support>.

Maryland. A court rule enacted in 2017 obligates judges to consider a defendant’s financial status broadly but does not include language requiring courts to consider “ability to pay” when setting money bail. Md. Rule 4-216 (e), Pretrial Release — Authority of Judicial Officer; Procedure, accessed February 23, 2024, <https://www.mdcourts.gov/sites/default/files/import/district/bondsmen/rule4216.pdf>.

Missouri. Mo. Sup. Ct. R. 21, 22, 23, <https://www.courts.mo.gov/page.jsp?id=134633>.

Montana. As part of a nine-bill reform package in 2017, the state committed to an up-front investment of \$3 million in FY 2017 and FY 2018 to hire additional probation and parole officers and to establish a local government grant program that enables local governments to create pretrial service programs, establish diversion programs, create supportive housing programs, adopt assurance measures, and professionalize the parole board. For summaries of the individual bills, see Montana Budget and Policy Center, “Criminal Justice Reinvestment in Montana: Improving Outcomes for American Indians,” July 2018, 2, 10–12, <https://mbadmin.jaunt.cloud/wp-content/uploads/2018/11/Criminal-Justice-Reinvest-in-IC-FINAL-.pdf>.

Nebraska. L.B. 259, 105th Leg., Reg. Sess. (Neb. 2017), <https://nebraskalegislature.gov/FloorDocs/105/PDF/Slip/LB259.pdf> (providing for release on the “least onerous” conditions that will “reasonably assure the defendant’s appearance or that will eliminate or minimize the risk of harm to others or the public at large,” as well as consideration of ability to pay). The legislation also includes a strong presumption against detention. L.B. 259, at § 2 (“The court shall consider all methods of bond and conditions of release to avoid pretrial incarceration.”). Enacted in 2020, L.B. 881 effectively ended bail in many misdemeanor cases unless the person had recently failed to appear for court, posed a risk, and was arrested on a warrant. L.B. 881, 106th Leg., 2d. Sess. (Neb. 2020), <https://nebraskalegislature.gov/FloorDocs/106/PDF/Slip/LB881.pdf>.

New Hampshire. S.B. 556 mandates that judges take into account an individual’s financial situation when determining bail and prohibits pretrial detention solely based on a person’s inability to pay bail. The law also expands the authority of courts to detain individuals without bail if they pose a risk to themselves or the community. S.B. 556, Reg. Sess. (N.H. 2018), <https://legiscan.com/NH/text/SB556/2018>.

New Jersey. Bail reform in New Jersey took effect on January 1, 2017, following a 2014 amendment to the state constitution. P.L. 2014, c.31 (C.2A:162-15 et seq.) (2014), https://pub.njleg.state.nj.us/Bills/2014/PL14/31_.PDF. The new system virtually eliminates cash bail in favor of a risk assessment-based approach. All defendants receive scores indicating perceived threat to the community and risk of flight; judges then apply those scores to a decision-making framework that guides release decisions. There is a presumption of release for most people charged under the new system (although there is a presumption of detention for people charged with certain specific crimes). Prosecutors may rebut the presumption of release by way of “clear and convincing evidence.” Arnold Ventures, “New Jersey Bail Reform Fact Sheet,” March 1, 2023, 1, <https://craftmediabucket.s3>.

amazonaws.com/uploads/AV-New-Jersey-Bail-Reform-Fact-Sheet.pdf; and Chloe Anderson et al., *Evaluation of Pretrial Justice System Reforms That Use the Public Safety Assessment: Effects of New Jersey’s Criminal Justice Reform*, MDRC Center for Criminal Justice Research, November 2019, https://www.mdrc.org/sites/default/files/PSA_New_Jersey_Report_%231.pdf. Some exceptions to this framework have been added over the years.

New Mexico. N.M. Const. art. II, § 13 (“A person who is not detainable on grounds of dangerousness nor a flight risk in the absence of bond and is otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond.”). Lauren Gill, “Data vs. Anecdotes in a Fight over New Mexico’s Bail Reform,” Arnold Ventures, November 16, 2022, <https://www.arnoldventures.org/stories/data-vs-anecdotes-in-a-fight-over-new-mexicos-bail-reform>.

New York. For a summary of bail reform as passed in New York, see Michael Rempel and Krystal Rodriguez, “New York’s Bail Reform Law: Major Components and Implications,” Center for Justice Innovation, April 2019, <https://www.innovatingjustice.org/publications/bail-reform-NYS>. For a discussion of exceptions added since 2020, see Stephanie Wylie and Ames Grawert, “2023 Criminal Justice Reform in New York State,” Brennan Center for Justice, July 20, 2023, <https://www.brennancenter.org/our-work/analysis-opinion/2023-criminal-justice-reform-new-york-state>.

Oregon. Broadly speaking, Oregon’s law attempts to significantly restrict the cases in which judges can order money bail (or “security” bail). S.B. 48, 81st Leg., Gen. Sess. § 5 (Ore. 2022), <https://olis.oregonlegislature.gov/liz/2021RI/Downloads/MeasureDocument/SB0048/B-Engrossed> (“Only after determining that conditional release is unwarranted, or if otherwise required . . . may the magistrate proceed to consider security release.”). See also Barney Lerten, “Oregon to End Bail-Based Pretrial Release System Friday, Focus Instead on Arrestee’s Danger to Community,” KTVZ (Bend), June 29, 2022, <https://ktvz.com/news/crime-courts/2022/06/29/oregon-to-end-bail-based-pretrial-release-system-friday-focus-instead-on-arrestees-danger-to-community>. Within that wide framework, the legislature delegated the task of creating standardized release guidelines to the judiciary. S.B. 48 § 2, codified at Ore. Rev. Stat.

§ 135.233. Those guidelines in turn require release on recognizance or nonmonetary conditions for many offenses. C.J. Order No. 22-010, Order Establishing Release Guidelines Governing Presiding Judge Standing Pretrial Release Orders, June 7, 2022, https://www.courts.oregon.gov/rules/Documents/CJO_2022-010.pdf.

Utah. H.B. 206, 84th Gen. Assemb., Gen. Sess. § 7 (Utah 2020), <https://le.utah.gov/~2020/bills/static/HB0206.html> (providing for a presumption of release, release under least restrictive conditions, and ability-to-pay determinations) (largely repealed by H.B. 220, 85th Leg. Gen. Sess. (Utah, 2021), <https://le.utah.gov/~2021/bills/hbillint/HB0220.pdf>); and H.B. 2003, 85th Leg., 2d Spec. Sess. § 16 (Utah 2021), <https://le.utah.gov/~2021S2/bills/static/HB2003.html> (restoring the ability-to-pay determination requirement). See also Sonja Hutson, “Utah Legislature Passes Bail Reform Compromise Bill,” KUER (Salt Lake City), November 11, 2021, <https://www.kuer.org/politics-government/2021-11-11/utah-legislature-passes-bail-reform-compromise-bill>.

Vermont. H. 728 ended cash bail for misdemeanor offenses that are eligible for expungement (with a \$200 bail cap for individuals who may pose a higher risk of fleeing). The law also modified the criteria for determining bail to ensure that courts consider intent when penalizing people who miss court dates. H. 728, Gen. Assemb., Reg. Sess. (Vt. 2018), <https://legislature.vermont.gov/Documents/2018/Docs/ACTS/ACT164/ACT164%20As%20Enacted.pdf>. Last, the law called for the study and potential expansion of a supervised release program. H. 728 § 8; and 13 Vt. Stat. Ann. § 7554b (existing home detention program for people detained pretrial).

West Virginia. The presumption of release applies only to certain nonviolent misdemeanor offenses. However, the provision requiring release on the least restrictive conditions applies to all offenses. H.B. 2419, 84th Gen. Assemb., Reg. Sess. (W.Va. 2020), https://www.wvlegislature.gov/Bill_Text_HTML/2020_SESSIONS/RS/signed_bills/house/HB2419%20SUB%20ENR_signed.pdf; and ACLU of West Virginia, “HB 2419 Becomes Law Today. It’s More Important than Ever,” June 5, 2020, <https://www.acluww.org/en/news/hb-2419-becomes-law-today-its-more-important-ever>.

Endnotes

- 1 See Insha Rahman, “Undoing the Bail Myth: Pretrial Reforms to End Mass Incarceration,” *Fordham Urban Law Journal* 46, no. 4 (2019): 865, <https://ir.lawnet.fordham.edu/ulj/vol46/iss4/2> (“It seems obvious that a wealthy person accused of the same conduct as a poor one is no more or less likely to be a danger to society, simply because the wealthy can pay for their freedom while the poor cannot.”).
- 2 In one instance, an individual was charged a nonrefundable fee of \$3,275 by the bond agent, an amount that spiraled to at least \$5,450 with additional fines and fees. Jessica Silver-Greenberg and Shaila Dewan, “When Bail Feels Less Like Freedom, More Like Extortion,” *New York Times*, March 31, 2018, <https://www.nytimes.com/2018/03/31/us/bail-bonds-extortion.html>.
- 3 The United States and the Philippines are the only two countries where commercial bail bond companies dominate the pretrial release system. If an individual is unable to afford the entirety of the bail bond, that person — or someone else on their behalf — can pay a nonrefundable fee to a bail bond company or agent, who then posts bail with the court. The fee is usually 10 to 20 percent of the total bail amount. Once the person shows up in court, the agent is refunded the entire amount from the court, but the fee paid to the agent is nonrefundable. Adam Liptak, “Illegal Globally, Bail for Profit Remains in U.S.,” *New York Times*, January 29, 2008, <https://www.nytimes.com/2008/01/29/us/29bail.html>; and Nick Pinto, “The Bail Trap,” *New York Times*, August 13, 2015, <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html>.
- 4 Léon Digard and Elizabeth Swavola, “Justice Denied: The Harmful and Lasting Effects of Pretrial Detention,” Vera Institute of Justice, April 2019, <https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf>; and Megan T. Stevenson, “Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes,” *Journal of Law, Economics, and Organization* 34, no. 4 (November 2018): 516, 532, <https://academic.oup.com/jleo/article/34/4/511/5100740>.
- 5 Paul Heaton, Sandra Mayson, and Megan Stevenson, “The Downstream Consequences of Misdemeanor Pretrial Detention,” *Stanford Law Review* 69, no. 3 (March 2017): 760, <https://perma.cc/8BB38BPY>; and Will Dobbie, Jacob Goldin, and Crystal S. Yang, “The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges,” *American Economic Review* 108, no. 2 (February 2018): 235, <https://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.20161503>.
- 6 Digard and Swavola, “Justice Denied,” 4–6; and Ram Subramanian, Léon Digard, Melvin Washington II, and Stephanie Sorage, *In the Shadows: A Review of the Research on Plea Bargaining*, Vera Institute of Justice, September 2020, 11–15, <https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf>.
- 7 U.S. Commission on Civil Rights, *The Civil Rights Implications of Cash Bail*, January 2022, <https://www.usccr.gov/files/2022-01/USCCR-Bail-Reform-Report-01-20-22.pdf> (“more than 60 percent of inmates are detained prior to trial due to an inability to afford posting bail”).
- 8 Zhen Zeng, “Jail Inmates in 2021 — Statistical Tables,” Bureau of Justice Statistics, U.S. Department of Justice (DOJ), December 2022, 1, <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/ji21st.pdf> (listing 2021’s midyear pretrial population as 636,300); and Digard and Swavola, “Justice Denied,” 1 (listing 1970’s pretrial population as 82,922).
- 9 Ram Subramanian et al., *Incarceration’s Front Door: The Misuse of Jails in America*, Vera Institute of Justice, updated July 29, 2015, 10, https://www.vera.org/downloads/publications/incarcerations-front-door-report_02.pdf; and Zeng, “Jail Inmates in 2021,” 3. See also Jake Horowitz and Tracy Velázquez, “Why Hasn’t the Number of People in U.S. Jails Dropped?,” Pew Charitable Trusts, March 27, 2020, <https://pew.org/2JiyQ4H>.
- 10 See, e.g., Kamala D. Harris and Rand Paul, “To Shrink Jails, Let’s Reform Bail,” *New York Times*, July 20, 2017, <https://www.nytimes.com/2017/07/20/opinion/kamala-harris-and-rand-paul-lets-reform-bail.html>.
- 11 Timothy R. Schnacke, Michael R. Jones, and Claire M. B. Brooker, *The History of Bail and Pretrial Release*, Pretrial Justice Institute, updated September 24, 2010, http://archive.uscstoryspace.com/2018-2019/shirshod/Fall_Final/docs/pretrialrel.pdf; and Ariana K. Connelly and Nadin R. Linthorst, “The Constitutionality of Setting Bail Without Regard to Income: Securing Justice or Social Injustice?,” *Alabama Civil Rights and Civil Liberties Law Review* 10, no. 2 (2019): 117–21, https://www.law.ua.edu/acrl/files/2019/06/4.-Connelly-and-Linthorst_Published.pdf.
- 12 See, e.g., Utah Const. art. I, § 8 (providing that “all persons charged with a crime shall be bailable” unless otherwise specified), https://le.utah.gov/xcode/Article/Article_1,Section_8.html; and Connelly and Linthorst, “Constitutionality of Setting Bail,” 117–21.
- 13 See Schnacke et al., *History of Bail and Pretrial Release*, 6–7.
- 14 See ACLU of Michigan, “Stories from a Broken Bail System,” accessed February 23, 2024, <https://www.aclumich.org/en/stories-broken-bail-system>.
- 15 For a broader history of bail policy, see Alexa Van Brunt and Locke E. Bowman, “Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What’s Next,” *Journal of Criminal Law and Criminology* 108, no. 4 (2018): 701, <https://scholarlycommons.law.northwestern.edu/jclc/vol108/iss4/3>; and Caitlin Hill, “A Brief History of Cash Bail,” ACLU of Ohio, December 12, 2017, <https://www.acluohio.org/en/news/brief-history-cash-bail>.
- 16 Manhattan Bail Project staffers would evaluate people for release and make recommendations to prosecutors and defense attorneys, leading to more people being released based on community ties. Other jurisdictions began to study alternatives to bail, catalyzed in part by Vera’s example. Vera Institute of Justice, *A Short History of Vera’s Work on the Judicial Process*, June 2003, 2, https://www.vera.org/downloads/publications/hist_summ_judicial_process.pdf. Ultimately, the project was folded first into New York City’s Department of Probation and later into the independent New York City Criminal Justice Agency. See also Mary T. Phillips, *A Decade of Bail Research in New York City*, New York City Criminal Justice Agency, August 2012, 1–2, <https://www.prisonpolicy.org/scans/DecadeBailResearch12.pdf>.
- 17 A 1963 attorney general’s report further inspired this change and subsequent federal bail reform. See *Report of the Attorney General’s Committee on Poverty and the Administration of Federal Criminal Justice*, February 25, 1963, chapter 3, “Bail and Pre-trial Release,” <https://babel.hathitrust.org/cgi/pt?id=hvd.32044032191801&seq=7> (discussing proposals for bail reform, including increased release on recognizance).
- 18 Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (1966), <http://uscode.house.gov/statutes/pl/89/465.pdf>. This legislation also has its origins in state bail reform. See New York State Senate Research Service Task Force on Critical Problems, *Accused and Unconvicted: A Brief on Bail Practices*, January 1978, 34, <https://www.ojp.gov/pdffiles1/Digitization/46590NCJRS.pdf>.
- 19 This period also saw marked growth in pretrial services programs, some of which (like the Manhattan Bail Project) evaluated

a person's suitability for release. Others evolved to focus on supervising people who had been released to ensure their return to court and compliance with any conditions imposed. Marie VanNostrand and Gena Keebler, "Our Journey Toward Pretrial Justice," *Federal Probation Journal* 71, no. 2 (September 2007), https://www.uscourts.gov/sites/default/files/71_2_6_0.pdf.

20 The District of Columbia's Court Reform and Criminal Procedure Act of 1970 was the first legislative move Congress made in this direction. The act allowed judges to detain defendants pretrial without setting bail if they were deemed dangerous. Pub. L. No. 91-358, 84 Stat. 473 (1970).

21 Bail Reform Act of 1984, Pub. L. 98-473, 98 Stat. 1837, 1977 (1984), <https://www.govinfo.gov/content/pkg/STATUTE-98/pdf/STATUTE-98-Pg1837.pdf>, codified at 18 U.S.C. § 3142 (providing for pretrial release on recognizance unless release "will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community"). The Supreme Court turned away a legal challenge to the act three years later, holding that while "in our society, liberty is the norm," the law's "numerous procedural safeguards" adequately protected due process. *United States v. Salerno*, 481 U.S. 739, 755 (1987).

22 VanNostrand and Keebler, "Our Journey Toward Pretrial Justice," 2, citing Evie Lotze et al., *The Pretrial Services Reference Book* (Washington, DC: Pretrial Services Resource Center, 1999), 12.

23 Van Brunt and Bowman, "Toward a Just Model of Pretrial Release," 706n16 (citing Subramanian et al., *Incarceration's Front Door*, 32).

24 While Congress has not been able to pass federal bail reform legislation, several efforts have been made, including one in 2017 led by Senator Rand Paul and then-Senator Kamala Harris. Pretrial Integrity and Safety Act of 2017, S. 1593, 115th Congress (2017), <https://www.congress.gov/bill/115th-congress/senate-bill/1593/amendments?s=1&r=38>.

25 L.D. 1703, H.P. 1266, 130th Leg., 1st Spec. Sess. (Maine 2021), <https://legislature.maine.gov/bills/getPDF.asp?paper=HP1266&item=3&snum=130>; and H.B. 3653, 101st Gen. Assemb., Reg. Sess. (Ill. 2021), <https://legiscan.com/IL/text/HB3653/id/2255202>.

26 L.B. 881, 106th Leg., 2d Sess. (Neb. 2020), <https://nebraskalegislature.gov/FloorDocs/106/PDF/Intro/LB881.pdf>; and Shima Baradaran Baughman, *The Bail Book: A Comprehensive Look at Bail in America's Criminal Justice System* (New York: Cambridge University Press, 2017), 43 (discussing the process of release on recognizance).

27 N.J. Stat. Ann. § 2A:162-15 (2017), <https://www.njcourts.gov/sites/default/files/attorneys/calendars/appellate-court/bailreformstatute.pdf>; and H.B. 2419, 84th Gen. Assemb., Reg. Sess. (W.Va. 2020), https://www.wvlegislature.gov/Bill_Status/bills_text.cfm?billdoc=HB2419%20SUB.htm&yr=2020&sessstype=RS&i=2419.

28 Baughman, *Bail Book*, 54 (discussing pretrial services programs).

29 Taryn A. Merkl, "New York's Latest Bail Law Changes Explained," Brennan Center for Justice, April 16, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/new-yorks-latest-bail-law-changes-explained>. The law was phased in early in some courtrooms, but its implementation statewide took effect on January 1, 2020. Heather Yakin, "Memo: Judges Can Free Defendants Before Jan. 1 Start of Bail Reform," *Times Herald-Record* (Middletown, NY), November 7, 2019, <https://www.recordonline.com/story/news/2019/11/08/memo-judges-can-free-defendants/2343116007>.

30 See, e.g., Peter Sterne, "Hochul Cites Media Coverage in Decision to Roll Back Bail Reforms," *City and State NY*, April 28, 2023, <https://www.cityandstateny.com/politics/2023/04/hochul-cites-media-coverage-decision-roll-back-bail-reforms/385762>.

31 Browder's story "helped persuade Mayor Bill de Blasio to try to reform the city's court system and end the sort of excessive delays that kept [Browder] in jail for so long." Jennifer Gonnerman, "Kalief

Browder, 1993–2015," *New Yorker*, June 7, 2015, <https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015>.

32 In 2016, Melissa Mark-Viverito, then speaker of the New York City Council, convened a commission to be headed by the state's former chief judge, Jonathan Lippman. The Lippman Commission, as it came to be known, ultimately recommended closing the Rikers Island facility, a goal that would require changes to pretrial detention policies. See J. David Goodman, "Melissa Mark-Viverito, Council Speaker, Vows to Pursue New Criminal Justice Reforms," *New York Times*, February 11, 2016, <https://www.nytimes.com/2016/02/12/nyregion/melissa-mark-viverito-council-speaker-vows-to-pursue-new-criminal-justice-reforms.html>; and Nick Corasaniti, "Rikers Island Commission Unveils Plan to Shut Down Jail Complex," *New York Times*, April 2, 2017, <https://www.nytimes.com/2017/04/02/nyregion/rikers-island-jail-closure-plan.html>.

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York, where another bail overhaul became a major issue in the midterms and fueled key House losses for the party”).

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justice system, see Ames Grawert and Patricia Richman, *The First Step Act's Prison Reforms*, Brennan Center for Justice, September 23, 2022, 3, <https://www.brennancenter.org/our-work/research-reports/first-step-acts-prison-reforms>.

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61 S.B. 91 §§ 51, 57.

62 Alaska's violent crime rate had been rising for years by the time S.B. 91 was enacted — jumping roughly 15 percent between 2014 and 2015 alone — and would continue to rise until 2018, when it peaked roughly 50 percent above 2012 levels. FBI Crime Data Explorer, "Trend of Violent Crime from 2011 to 2021," accessed February 23, 2024, <https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/crime-trend>.

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§§ 12, 33 (Alaska 2018), <https://www.akleg.gov/basis/Bill/Text/30?Hsid=HB0312Z>.

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69 H.B. 49, 31st Leg., 1st Spec. Sess. § 59 (Alaska 2019), <https://www.akleg.gov/basis/Bill/Text/31?Hsid=HB0049Z>.

70 The law also altered the way presumptions work when making pretrial release decisions. On the one hand, it created a presumption in favor of detention for some serious offenses. On the other, it made rebutting the presumption in favor of release for some other offenses easier. H.B. 49 § 59, <https://www.akleg.gov/basis/Bill/Detail/31?Root=HB%20%2049>; and Siegel, "Alaska Passed Sweeping Criminal Justice Reforms."

71 H.B. 49 § 58.

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75 Utah State Courts, *Report to the Utah Judicial Council on Pretrial Release and Supervision Practices*, 3–4, 33, 37–43; and Paighen Harkins and Jessica Miller, "Utah Courts Quietly Rolled Out a New Way to Set a Suspect's Bail Based on One's Risk. Bail Bondsmen Are Not Pleased," *Salt Lake Tribune*, June 6, 2018, <https://www.sltrib.com/news/2018/06/06/utah-courts-quietly-rolled-out-a-new-way-to-set-a-suspects-bail-based-on-ones-risk-bail-bondsmen-are-not-pleased>.

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77 H.B. 206, 84th Gen. Assemb., Gen. Sess. (Utah 2020), <https://le.utah.gov/~2020/bills/static/HB0206.html>; and Zoi Walker, "Utah Lawmakers OK Bill to Reform Bail System," *Salt Lake Tribune*, March 10, 2020, <https://www.sltrib.com/news/politics/2020/03/10/bill-aims-quit-locking>.

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Decry Lack of Data,” KUTV (Salt Lake City), February 5, 2021, <https://kutv.com/news/utah-legislature-2021/bail-reform-repeal-passes-utah-house-but-critics-decry-lack-of-data>.

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82 Sonja Hutson, “Utah Legislature Passes Bail Reform Compromise Bill,” KUER (Salt Lake City), November 11, 2021, <https://www.kuer.org/politics-government/2021-11-11/utah-legislature-passes-bail-reform-compromise-bill>.

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