

Comments

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Why Has the Bail Reform Act Not Been Adopted by the State Systems?

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INTRODUCTION

Kalief Browder was returning home from a party in the Bronx, ten days before his seventeenth birthday, when he and his friends were stopped by police responding to a call of robbery.¹ Though a search of their pockets yielded nothing, police arrested Kalief and his friends.² Kalief was charged with robbery, grand larceny, and assault; his bail was set at three thousand dollars.³ Unable to meet bail, Kalief was sent on a bus to Rikers Island, a four-hundred-acre jail complex that houses eleven thousand inmates on any given day.⁴ The conditions at Rikers are “notoriously grim,” and it has a “deep-seated culture of violence” including reports of broken bones, fractures, and lacerations in all forms.⁵ Upon arrival, Kalief was instantly met with the threat of violence by other inmates and prison guards alike, which persisted while he awaited trial.⁶ Although fellow inmates and the prosecution urged him to take a plea deal, Kalief refused, despite the potential fifteen-year sentence.⁷ Only 165 felony cases proceeded to trial in the Bronx in 2011, in stark contrast to the 3391 cases in which the defendants pled guilty,⁸ exemplifying just how rare Kalief’s story is. Kalief’s time at Rikers Island was brutal and taxing on him. While in Rikers, Kalief was held in solitary confinement, was prohibited

¹ Jennifer Gonnerman, *Before the Law*, THE NEW YORKER (Oct. 6, 2014), <http://www.newyorker.com/magazine/2014/10/06/before-the-law>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

from speaking to his mother, was given an inadequate amount of food for a person his age, suffered beatings by corrections officers, and even tried to hang himself while awaiting trial.⁹ Kalief spent more than a thousand days in Rikers before his case was dismissed due to the prosecutor's inability to meet the burden of proof.¹⁰

Although Kalief was eventually released, he never fully recovered from his time at Rikers Island.¹¹ Kalief would recreate the conditions of solitary confinement in his own bedroom in the Bronx, now uncomfortable being around people.¹² Two years after his release, Kalief committed suicide at his parents' house.¹³

This type of situation, in which those presumed innocent are nonetheless subjected to pretrial detention due to an inability to post bail, is a systemic problem in our state judicial and corrections systems. Although the United States federal system has taken steps to improve its pretrial detention program by largely eliminating surety bonds, many states have failed to do so. Under surety bond and cash bail systems, the accused must provide a certain amount of cash to assure the defendant will return to court for his or her trial. With so few merits to the surety bond, compared to other means of guaranteeing pretrial compliance, how can this be? What system best balances the interest of guaranteeing a detainee's appearance at trial and his or her humanitarian rights? Is pretrial preventive detention ever morally acceptable? If so, under what circumstances? If not, why not?

Part I of this Comment provides an overview of pretrial detention and its relationship to the presumption of innocence and wrongful convictions. Part II discusses international and domestic law governing pretrial detention and compares the federal and state systems of pretrial detention in the United States. The Part begins by discussing how the International Covenant on Civil and Political Rights (ICCPR) created standards by which countries across the globe are required to handle those arrested and awaiting trial. Citing language in the ICCPR, Part II discusses the federal system in the

⁹ *Id.*

¹⁰ *Id.*

¹¹ Michael Schwirtz & Michael Winerip, *Kalief Browder, Held at Rikers Island for 3 Years Without Trial, Commits Suicide*, N.Y. TIMES (June 8, 2015), http://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html?_r=0.

¹² *Id.*

¹³ *Id.*

United States for pretrial detainees through the Bail Reform Act of 1984 and the Act's effect on pretrial detention.

Part III then turns to current state pretrial programs, highlighting their continued reliance primarily on surety cash-bail bonds. Part III attempts to answer why the states are not implementing reforms similar to those adopted in the Bail Reform Act. In doing so, the Part examines who benefits and who suffers under surety bonds and examines how the political climate can facilitate a system that primarily uses conditions other than cash bail to secure appearance. The Comment concludes with Part IV, which evaluates possible solutions to the epidemic of pretrial detention triggered solely by a detainee's inability to post cash bail and suggests reforms that both our state and federal governments might enact to improve our current system of pretrial detention in the United States.

I

BACKGROUND OF PRETRIAL DETENTION

The number of pretrial detainees is staggering not only in the United States' federal and state systems, but also worldwide. This Part discusses who these pretrial detainees are and how the United States addresses pretrial detainees.

A. Number of Offenders in Pretrial Detention Internationally

Globally, the number of suspects detained in pretrial detention is remarkably high, especially considering the guidelines set forth in the ICCPR, which dictates a preference for alternatives to pretrial detention. At any given moment, 3.3 million people are being held in pretrial detention worldwide.¹⁴ Those 3.3 million people will spend a collective 660 million days in pretrial detention.¹⁵ In 2012, one third of the world's ten million incarcerated persons were in pretrial detention.¹⁶ Asia holds the highest proportion of pretrial detainees at 40.6% of their prison population, followed by Africa at 34.7%, the Americas at 27.9%, and Europe at 18.8%.¹⁷ Developing countries have the highest number of pretrial detainees.¹⁸

¹⁴ OPEN SOCIETY JUSTICE INITIATIVE, PRESUMPTION OF GUILT: THE GLOBAL OVERUSE OF PRETRIAL DETENTION 11 (2014), <https://www.opensocietyfoundations.org/sites/default/files/presumption-guilt-09032014.pdf>.

¹⁵ *Id.*

¹⁶ *Id.* at 16.

¹⁷ *Id.* at 17.

¹⁸ *Id.* at 18.

Across the globe, 10.3 million prisoners occupy 8.7 million allotted spaces.¹⁹ Overcrowding in jails and prisons is often worse in developing countries due to rapid population growth and lack of resources for prison construction.²⁰ The poor are disproportionately subjected to this overcrowding.²¹ Blame can be placed in part on money bail, which requires a monetary deposit that often the poor cannot conjure in time to be released before their trial.²² In one example, a woman accused of drug possession was held in pretrial detention with her baby for a year because she was unable to pay the 15,000 rupees (U.S. \$134) to secure her release.²³

Overcrowding creates humanitarian problems for the pretrial detainees, who are typically subjected to harsher conditions in overpopulated local jails than convicted offenders held in long-term prison facilities.²⁴ These harsh conditions can include a lack of separation between violent and nonviolent pretrial detainees, and in other cases, a lack of separation between convicted prisoners and pretrial detainees.²⁵ The conditions stemming from overcrowding can infringe on an individual's human rights by denying resources such as adequate beds, food, and medicine.²⁶ Unfortunately, governments often seek to excuse these harsh conditions for pretrial detainees by pointing to the difficulty of predicting the number of pretrial detainees and the length of their stay.²⁷

B. How Pretrial Detention Contributes to Wrongful Conviction

Of the numerous factors to blame for wrongful convictions,²⁸ the pretrial criminal process is a significant one.²⁹ Pretrial detention

¹⁹ *Id.* at 30.

²⁰ *Id.* at 31.

²¹ *Id.* at 33.

²² *Id.* at 35.

²³ *Id.* at 36.

²⁴ *Id.* at 57.

²⁵ *Id.* at 60.

²⁶ *Id.* at 59.

²⁷ *Id.* at 60.

²⁸ Examples include faulty eyewitnesses, witness perjury, ineffective counsel, forensic errors, failure to properly investigate a case, relying on questionable evidence, juries putting too much faith in scientific evidence, and overestimating witnesses' ability to perceive and remember. *See generally* H. Patrick Furman, *Wrongful Convictions and the Accuracy of the Criminal Justice System*, 32 *COLO. LAW.* 11 (2003).

²⁹ Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 *AM. CRIM. L. REV.* 1123, 1124 (2005).

hampers the ability of defendants and their lawyers to consult about strategy and coordinate investigation.³⁰ During Kalief's detention, his attorney could seldom take the ferry from Brooklyn to Rikers Island.³¹ A defendant's inability to assist with his defense, identify alibis, and help his attorney secure hard-to-find-evidence, can contribute to wrongful convictions.³² Furthermore, Kalief's resistance to plead guilty under the pressure of pretrial detention is an anomaly; many defendants plead no contest for reasons unrelated to the strength of the prosecution's evidence.³³ The precise relationship between pretrial detention prevalence and rates of wrongful convictions is difficult to quantify given the myriad factors that play into wrongful convictions.³⁴ Although not completely conclusive, studies have shown that defendants detained pending trial are generally more likely to be convicted than their counterparts on pretrial release.³⁵

C. Is the Presumption of Innocence Still Alive in the Federal System?

The goal of pretrial detention is twofold: to assure the accused appears in court and for public safety. The role of the judge in this matter, practically speaking, is to predict whether the accused will make his court appearance without being detained before his trial or will commit a crime during his trial. This duty of the judge, however, seems to strike against a core goal of justice here in the United States, which is the accused are presumed innocent until proven guilty.³⁶ Despite this presumption, the percentage of federal defendants detained pretrial increased from fifty-nine percent to seventy-six percent between 1995 and 2010.³⁷ This growth in pretrial detention has been attributed mainly to pretrial detention of immigration defendants, who saw an increase in their rates of pretrial detention

³⁰ *Id.* at 1130.

³¹ Gonnerman, *supra* note 1, at 10.

³² Leipold, *supra* note 29, at 1130.

³³ *Id.* at 1154–56.

³⁴ *Id.* at 1131.

³⁵ *Id.* at 1131 n.27; *see also* BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES 24 (2000) (“Seventy-seven percent of the defendants who were detained until case disposition were actually convicted of some offense, compared to 55% of those released pending disposition.”).

³⁶ Coffin v. United States, 156 U.S. 432, 453 (1895).

³⁷ THOMAS H. COHEN, PRETRIAL DETENTION AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 1995–2010 1 (2013), <https://www.bjs.gov/content/pub/pdf/pdmf9510.pdf>.

from eighty-six percent in 1995 to ninety-eight percent in 2008.³⁸ However, defendants charged with drug and weapons offenses also saw significant increases in pretrial detention rates.³⁹

Overall, the rates of pretrial detention correlate with the severity of defendants' criminal arrest histories.⁴⁰ Specifically, in 2010, sixty-four percent of defendants with no prior arrests were detained pretrial.⁴¹ The rate of pretrial detention increased to seventy-nine percent when defendants had two to four prior arrests and to eighty-five percent when defendants had five or more arrests.⁴² Obviously, the defendant's arrest record is a significant factor in whether or not he will be released before trial, and rightly so. Recidivism is predictive of future actions, including future crimes, be it another crime in the community or the failure to appear in court. The court usually leans in favor of detaining those accused with serious prior criminal histories, rather than allowing them back into the public to await trial either via recognizance or under supervision. If a defendant was released back into the public and, while on release, committed another serious crime, there would likely be public outcry against the judge who issued the release order. However, as the numbers above show, this policy of presumptive detention may be too broad.

Despite these statistics, or perhaps because of them, the percentage of released defendants who fail to make court appearances between 1995 through 2010 ranged from a mere one percent to three percent, suggesting that the current system of pretrial detention is likely overinclusive.⁴³ The problem is one of false negatives. Of course, a defendant's failure to appear or committal of another crime while out on pretrial release generates immediate feedback that that he or she should have been detained. Conversely, however, there is no way to detect if an individual detained pending trial would have made court appearances had he been released. How can a judge accurately predict whether a defendant will appear for his next court appearance? Though the federal system may not have mechanisms in place to detect overdetection, it largely eschews cash bail so defendants' freedom is rarely determined by their socioeconomic status.

³⁸ *Id.* at 3.

³⁹ *Id.* at 4.

⁴⁰ *Id.* at 6.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 8.

D. Development of Federal Pretrial Services in the United States

In 1961, the Manhattan Bail Project established the first pretrial services program in the country, emphasizing the use of pretrial release on conditions independent of financial surety bonds.⁴⁴ The Manhattan Bail Project served as the impetus for the federal bail reform movement, which pressured legislators around the country to rewrite statutes to reflect a preference for releasing arrestees on their own recognizance or on non-financial conditions of release before trial.⁴⁵ Still, reform has not been uniform.⁴⁶ Varying jurisdictional goals have led to divergent release criteria, including recognizance, supervision, and financial conditions.⁴⁷ While some jurisdictions aimed to reduce jail populations, others wanted to provide supervision to arrestees pending trial.⁴⁸ Some jurisdictions targeted certain groups of defendants for release on supervision, while still others interviewed all arrestees.⁴⁹

To combat these inconsistencies, the Department of Justice created two programs: the National Association of Pretrial Services Agencies and the Pretrial Service Resource Center, to develop national professional standards for pretrial programs and to compare these programs nationwide.⁵⁰ Those programs are still in place today and currently survey issues involving the administrative locus, program scope and size, program funding and staffing, and specific program practices.⁵¹ These programs are more thoroughly discussed in Part II, but here, it is important to emphasize the federal system's long history of bail reform and its movement away from cash-bail.

⁴⁴ JOHN CLARK & D. ALAN HENRY, PRETRIAL SERVICES PROGRAMMING AT THE START OF THE 21ST CENTURY: A SURVEY OF PRETRIAL SERVICES PROGRAMS 1 (2003), <https://www.ncjrs.gov/pdffiles1/bja/199773.pdf>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* For further information on the National Association of Pretrial Services Agencies, see their website at <http://napsa.org/eweb/startpage.aspx>, and for more information on the Pretrial Service Resource Center, visit their website at <http://www.pretrial.org>.

⁵¹ *Id.*

E. The States' Overuse of Surety Bonds in Contrast to the Federal System

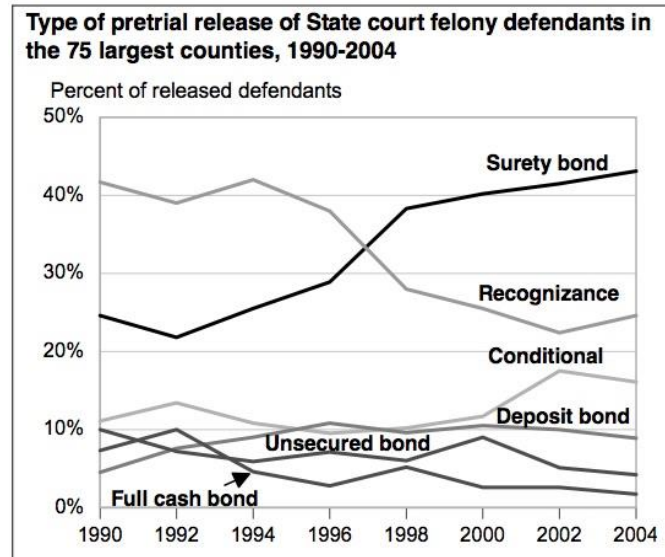


Figure 1: Rise in Surety Bonds in State Courts⁵²

Unlike the federal system, state courts employ the use of the cash-bail systems as their primary regulation of pretrial release and detention. Between 1990 to 1998, the release of defendants based on financial conditions rose from twenty-four percent to thirty-six percent, while releases secured by other means dropped from forty percent to twenty-eight percent, as seen in Figure 1.⁵³ The percentage of defendants required to post bond to secure release rose from fifty-three percent in 1990 to sixty-eight in 2004, of which less than half were actually able to post this financial bail.⁵⁴ This is the crux of the problem: Why are states relying on a defendant's ability to post bail as an indicator for whether he will show up for his court appearance or abide by the law while out on release? Why do states insist on the use of financial release instead of other forms of pretrial release? Why have state courts not enacted any type of reforms, as the federal system has? Answering these questions requires a step back to examine how these laws are formed.

⁵² THOMAS H. COHEN & BRIAN A. REAVES, STATE COURT PROCESSING STATISTICS, 1990-2004: PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 2 (2007), <https://www.bjs.gov/content/pub/pdf/prfdsc.pdf>.

⁵³ *Id.*

⁵⁴ *Id.* at 3.

II BACKGROUND LAW

A. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) establishes international guidelines regarding pretrial detainees.⁵⁵ Its section on the treatment of pretrial detainees reads:

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.⁵⁶

To apply these guidelines, the United Nations created a handbook providing more specific instructions.⁵⁷ The handbook interprets the ICCPR as dictating that pretrial detention should only be used to ensure a suspect's appearance at trial, prevent the interference with evidence, and prevent further offences.⁵⁸ While the federal system has, at least to some extent, adopted these goals, state systems generally have not.

Cash bail and surety bonds bear a weak relationship to these goals and unfairly benefit the wealthy and penalize the poor. A wealthy person may not be deterred from nonappearance or future crimes by even a relatively high fixed bail amount, while a poor person who poses little to no risk of nonappearance or future crimes may end up detained unnecessarily by even a relatively low cash-bail amount.

The handbook also provides that judges, when deciding whether pretrial detention is necessary, should always impose the least confining measures compatible with the interests of justice and society.⁵⁹ Specifically, custody pending trial should be ordered only if "there is reasonable suspicion that the accused has committed the alleged offence and that he is likely to abscond, interfere with the

⁵⁵ International Covenant on Civil and Political Rights, art. 9, Dec. 19, 1966, 999 U.N. 14668.

⁵⁶ *Id.*

⁵⁷ U.N. CTR. FOR HUMAN RIGHTS & CRIME PREVENTION AND CRIMINAL JUSTICE BRANCH, PROFESSIONAL TRAINING SERIES NO. 3: HUMAN RIGHTS AND PRETRIAL DETENTION, U.N. Sales No. E.94.XIV.6 (1994).

⁵⁸ *Id.* at 8.

⁵⁹ *Id.* at 13.

course of justice, or commit a serious offence.”⁶⁰ If one is ordered detained pending trial, the maximum period of pretrial detention should be proportionate to the maximum potential sentence.⁶¹ If an offender is released before trial, the court should impose the minimum controls necessary to ensure the offender’s return to trial and the safety of witnesses and the community.⁶² When evaluating whether someone will return on his own accord to trial, the handbook suggests courts look to family ties, employment status, and criminal history as risk factors.⁶³ American courts have perhaps relied on this last factor too heavily, as indicated in Part I.⁶⁴ When comparing the standards proposed by the United Nations to what is currently happening in the United States, it becomes apparent that the courts have not come close to meeting these international guidelines, drawing criticism from humanitarian organizations and academic commentators,⁶⁵ including this author.

B. 1984 Bail Reform Act

The United States has not adopted the principles set forth in the United Nations handbook. With many Americans holding a “hard on crime” attitude, legislatures are likely unwilling to draft laws that allow more of those arrested back into the public. The Supreme Court has held that ICCPR is not judicially enforceable in the United States, stating, “although the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.”⁶⁶

⁶⁰ *Id.* at 1.

⁶¹ *Id.* at 18.

⁶² *Id.* at 15.

⁶³ *Id.*

⁶⁴ Gonnerman, *supra* note 1.

⁶⁵ See, e.g., Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. REV. 1 (2017) (stating the financial costs of pretrial detention alone call for reform to pretrial detention); Carrie Leonetti, *When the Emperor Has No Clothes II: A Proposal for a More Serious Look at “The Weight of the Evidence,”* 7 N.Y.U. J. L. & LIBERTY 84 (2013) (stating that courts typically do not allow pretrial release even when the weight of the evidence is weak); Danushka S. Medawatte, *Justice in Dire Straits: Unlawful Pretrial Detainees, Family Members and Legal Remedies*, 22 BUFF. HUM. RTS. L. REV. 189 (2016) (exploring how overuse of pretrial harms the families of those detained); Tiffany Woelfel, *Go Directly to Jail, Do Not Pass Go, Do Not Collect \$200: Improving Wisconsin’s Pretrial Statute*, 2016 WIS. L. REV. 207 (2016) (proposing Wisconsin implement pretrial risk assessments into state statute).

⁶⁶ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004).

Instead, the United States has developed its own constitutional standards for regulating pretrial detention. These limitations are based on the Eighth Amendment's requirement that "[e]xcessive bail shall not be required,"⁶⁷ and the Fourteenth Amendment's Due Process Clause of the Fifth and Fourteenth Amendments,⁶⁸ which require that laws imposing pretrial detention be narrowly tailored to serve a "sufficiently compelling governmental interest."⁶⁹ In federal criminal proceedings, release and detention decisions are governed by the Bail Reform Act of 1984.⁷⁰

Under the 1984 Act, a judicial officer has three options to choose from during a detention hearing. The first default position is that a person's release on his personal recognizance or unsecured appearance bond is appropriate unless such release will not reasonably assure the appearance of the person as required or will endanger the safety of any person or the community.⁷¹

The second option is release of a person on "the least restrictive further condition, or combination of conditions . . . that will reasonably assure the appearance of the person as required and the safety of any other person and the community."⁷² Possible release conditions include: remaining in the custody or supervision of a designated person; maintaining or seeking employment or education; house arrest; restriction from contact with victim or witnesses; reporting to a pretrial services or designated law enforcement agency for supervision; curfews; refraining from possessing or using drugs, alcohol, and firearms; and undergoing medical or psychiatric treatment.⁷³

The third option is pretrial detention, which is appropriate only if "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community."⁷⁴ The Act lists crimes that carry a rebuttable presumption of danger to the community, triggering pretrial detention, including serious drug trafficking cases, firearm cases involving crimes of violence or drug offenses, international

⁶⁷ U.S. CONST. amend. VIII.

⁶⁸ U.S. CONST. amend. XIV, § 1.

⁶⁹ *United States v. Salerno*, 481 U.S. 739, 748 (1987).

⁷⁰ Bail Reform Act, 18 U.S.C. §§ 3141–3156 (2015).

⁷¹ *Id.* § 3142.

⁷² *Id.* § 3142(c)(1)(B).

⁷³ *Id.*

⁷⁴ *Id.* § 3142(e)(1).

murder and kidnapping conspiracies, serious acts of terrorism, human trafficking, and crimes of violence and sex offenses involving minors.⁷⁵ The government may seek pretrial detention for any defendant where it can prove, by clear and convincing evidence, that a serious risk exists “that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.”⁷⁶ The government may also seek pretrial detention for any defendant it can prove, by a preponderance of the evidence, poses a substantial risk of flight or risk of obstruction of justice.⁷⁷

In determining whether to grant the Government’s request for pretrial detention of a defendant, the court considers a list of factors: the nature and circumstances of the offense, the weight of the evidence against the person, the nature and seriousness of the danger to any person or the community that would be posed by the person’s release, and the “history and characteristics of the person.”⁷⁸ Under the statute, the relevant history and characteristics of the accused include:

[A] person’s character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law.⁷⁹

This list is far more extensive than the three factors listed in the United Nations handbook.

Significant for the purposes of this Comment, the Act outlaws the use of “a financial condition that results in the pretrial detention of the person.”⁸⁰ This provision prevents a federal judge from setting an impossible financial condition for a defendant, which would have the effect of triggering *de facto* pretrial detention based solely on the defendant’s insufficient financial resources. Instead, the Act focuses on the characteristics of individual defendants to determine whether

⁷⁵ *Id.* § 3142(e)(2).

⁷⁶ *Id.* § 3142(f)(2)(B).

⁷⁷ *Id.* § 3142(f)(2)(A); *United States v. Portes*, 786 F.2d 758 (7th Cir. 1986).

⁷⁸ 18 U.S.C. § 3142(g) (2015).

⁷⁹ *Id.* § 3142(g)(3)(A).

⁸⁰ *Id.* § 3142(c)(2).

pretrial release or detention is appropriate for the defendant and what conditions to impose on any release that is granted. However, it is this author's view that both federal and state judges grant pretrial release too infrequently.

C. Current Pretrial Release Programs

As mentioned in Part I, the current iterations of many pretrial service programs were instituted in the 1960s.⁸¹ The American Bar Association (ABA) recommends the creation and use of pretrial agencies.⁸²

Pretrial service agencies perform two primary functions: pre-release investigation and recommendation and post-release supervision. When an accused is arrested, formal adjudicatory procedures are held and the prosecution seeks a pretrial status other than the issuance of a summons for appearance.⁸³ At that point, a pretrial services agency begins an investigation to provide the judicial officer in charge of making the pretrial detention/release decision with information to determine whether releasing the defendant is safe.⁸⁴ The information is gathered via a voluntary interview with the defendant, typically in the presence of defense counsel, and a check of criminal history and court records.⁸⁵ The use of objective criteria in risk assessment is strongly urged by both the ABA and the National Association of Pretrial Services Agencies (NAPSA).⁸⁶ NAPSA explains that objective criteria should be used in order to "remove the individual bias [of the pretrial interviewer] [and] . . . remove arbitrariness and approach equal treatment for all defendants."⁸⁷ These objective criteria typically include the factors listed in the Bail Reform Act: the defendant's residence and employment status, length of time in the area, and ties to the community; criminal record; record of appearance in court; current probation, parole, or pretrial status; mental health status; and the presence of substance abuse or addiction.⁸⁸ However, objective criteria are not widely used, with only one in four pretrial programs exclusively using objective

⁸¹ CLARK & HENRY, *supra* note 44, at 1.

⁸² *Id.* at 13.

⁸³ *Id.* at 14.

⁸⁴ *Id.* at 13.

⁸⁵ *Id.*

⁸⁶ *Id.* at 15.

⁸⁷ *Id.*

⁸⁸ *Id.* at 13.

criteria.⁸⁹ In fact, thirty-five percent of pretrial service programs exclusively use *subjective* criteria.⁹⁰ Subjective criteria include court demeanor and attitude, and comments from arresting police officers.⁹¹

After an interview, the pretrial services agency verifies the information provided by the defendant.⁹² From this verified information, the pretrial services agency conducts a risk assessment based on objective criteria to determine flight risk, potential danger to the community posed by the defendant's release, and on what conditions, if any, the defendant can be safely released.⁹³ Once the investigation and risk assessment have been completed, the pretrial services agency presents the information and a recommendation to the judicial officer presiding over the defendant's detention hearing and typically provides a copy of the material to both the prosecution and defense.⁹⁴

If the judge orders the defendant released pending trial, the pretrial services agency has the responsibility to supervise the defendant during the release period.⁹⁵ This supervision could include having the defendant report to pretrial services by telephone, referrals to substance abuse and mental-health treatment, drug and alcohol testing, employment and residence reporting and verification, and electronic monitoring.⁹⁶ Pretrial service agencies are responsible for verifying the compliance of supervised defendants with release conditions and reporting noncompliance to the court.⁹⁷ Even if a defendant is detained pretrial, pretrial service programs are tasked with monitoring the detained defendants for changes in circumstances that could make them eligible for release in the future.⁹⁸

⁸⁹ *Id.* at 15.

⁹⁰ *Id.*

⁹¹ JENNIFER HEDLUND ET. AL., VALIDATION OF CONNECTICUT'S RISK ASSESSMENT FOR PRETRIAL DECISION MAKING 3 (2003).

⁹² *Id.* at 14.

⁹³ *Id.* at 15.

⁹⁴ *Id.* at 15–16.

⁹⁵ *Id.* at 16–17.

⁹⁶ *Id.* at 17. The last condition, electronic monitoring, will be discussed in more detail in Part IV.

⁹⁷ CLARK & HENRY, *supra* note 44, at 1.

⁹⁸ HEDLUND ET AL., *supra* note 91, at 18.

D. America's State Systems

1. New Jersey: A Prime Example of the Abuse of the Cash-Bail System

New Jersey is in dire need of pretrial detention reform. Just over seventy-three percent of its jail population comprises pretrial detainees.⁹⁹ Of these pretrial detainees, 38.5% had an option to post bail, but were held based solely on the inability to raise the money.¹⁰⁰ Twelve percent of the jail population in New Jersey is held in custody solely due to the inability to pay \$2500 or less to secure pretrial release.¹⁰¹ These figures do not accord with the humanitarian guidelines set forth in ICCPR or the bail reform principles that gave rise to the Bail Reform Act of 1984.

2. A Closer Look: Oregon's Pretrial Release System

Oregon law provides four options for defendants pending trial: release on personal recognizance, conditional release, security release (otherwise known as cash bail), and preventative detention.¹⁰² The first, second, and fourth options largely mirror the federal pretrial detention options. It is the third option that diverges: If a defendant does not qualify for release on personal recognizance or conditional release, the Oregon bail statute requires that the judicial officer set a security amount that will “reasonably assure the defendant’s appearance,”¹⁰³ and allows for the release of the defendant upon the deposit of a bond equal to ten percent of that amount.¹⁰⁴ The fourth option, pretrial detention without the possibility of secured release, occurs in two circumstances: (1) when a defendant is charged with murder, aggravated murder, or treason and the weight of the evidence is strong; or (2) when the defendant has been charged with a violent felony, there is probable cause that the defendant committed the

⁹⁹ MARIE VANNOSTRAND, NEW JERSEY JAIL POPULATION ANALYSIS: IDENTIFYING OPPORTUNITIES TO SAFELY AND RESPONSIBLY REDUCE THE JAIL POPULATION 11 (2013).

¹⁰⁰ *Id.* at 13.

¹⁰¹ *Id.*

¹⁰² OR. REV. STAT. §§ 135.255–135.265 (2015).

¹⁰³ *Id.* § 135.265.

¹⁰⁴ *Id.* § 135.240 (describing how defendants charged with offenses enumerated in Ballot Measure 11 of 1994 [establishing mandatory minimum sentences for certain crimes] are either ineligible for pretrial release or must post a bond of no less than \$50,000 to secure release); *see* OR. REV. STAT. § 135.242 (2015) (describing Oregon’s separate statute for security release for certain methamphetamine offenses, which sets the security release amount at no less than \$500,000).

crime, and there is clear and convincing evidence that release would pose a danger of physical injury to the victim or members of the public.¹⁰⁵

Oregon is one of four states in which commercial and surety bonds are prohibited,¹⁰⁶ so defendants are required to post their own bail with cash, stocks, bonds, or with real property.¹⁰⁷ The statute is silent on how judges should set the bail amount. Accordingly, certain counties have adopted security release schedules that link cash-bail amounts to the crimes being charged. These schedules vary from county to county. For example, a Class A misdemeanor that does not involve domestic violence or escape in Umatilla County requires \$2500 bail for release.¹⁰⁸ Meanwhile, in Lane County, this same Class A misdemeanor has a minimum bail set at \$5000 but may be increased up to \$15,000.¹⁰⁹ Thus, bail requirement levels in Oregon seem to be capricious and self-defeating. While bail schedules are supposed to provide predictability and consistency, they provide quite the opposite in Oregon. The amount can vary greatly depending on which county one is arrested in.

Multnomah County, Oregon, has embraced the ICCPR and the United States Constitution's preference for release before adjudication and without cash bail. Of the 413 felony defendants released pretrial in that county in 2008, 290 were released on their own recognizance, 57 released on supervision, and 58 were released on cash-bail.¹¹⁰ Multnomah County also appears to recognize the importance of keeping defendants out of jail pretrial. On average, the Multnomah County jail holds ninety-eight defendants awaiting trial for more than 150 days, of which half those are awaiting trial on murder charges.¹¹¹ These numbers suggest the County holds defendants in pretrial detention only when they commit dangerous

¹⁰⁵ OR. REV. STAT. § 135.240 (2015).

¹⁰⁶ Brian R. Johnson & Ruth S. Stevens, *The Regulation and Control of Bail Recovery Agents: An Exploratory Study*, 38(2) CRIM. JUST. REV. 190, 197 (2013).

¹⁰⁷ OR. REV. STAT. § 135.265 (2015).

¹⁰⁸ Order in the Matter of Adopting a Uniform Pre-trial Security Release Schedule for Umatilla and Morrow County Circuit Court Defendants, No. 11-001 (Or. Cir. Ct. 2011).

¹⁰⁹ Order in the Matter of the Adoption of the Uniform Security Release Schedule, No. 619500007 (Or. Cir. Ct. 1998).

¹¹⁰ ELIZABETH DAVIES & MATT O'KEEFE, PRETRIAL RELEASE AND MISCONDUCT OF FELONY DEFENDANTS IN MULTNOMAH COUNTY 3 (2010), <https://multco.us/file/30549/download>.

¹¹¹ MULTNOMAH COUNTY SHERIFF'S OFFICE, MONTHLY JAIL REPORT, JANUARY 2016 17-18 (2016).

crimes, which is just what pretrial detention should be used for—not for holding non-dangerous criminals who cannot afford cash bail.

III

WHY DO STATES CONTINUE TO USE BAIL?

A. Private Bail Bond Recovery

One reason that states have not adopted the bail reforms detailed in the Federal Bail Reform Act is the power of the bail bondsmen lobby. Bail recovery agents, also known as bounty hunters, are private actors who detain and arrest defendants who have violated the condition of their pretrial release bonds.¹¹² These agents are typically employed by private bail bondspersons, who post a surety bond on behalf of the accused, to be recovered only if the accused voluntarily appears for trial and complies with release conditions or if the bondsperson “recovers” an accused who has failed to appear or violated other conditions of release.¹¹³ States in which financial bail is the primary mechanism for ensuring compliance with release conditions provide a lucrative market for bail recovery agents.¹¹⁴ Because bail recovery agents are privately contracted, they are not bound by constitutional limitations on searches, seizures, interrogations, or the use of force that bind government actors in the United States.¹¹⁵ As a result, there have been instances in which bail recovery agents have injured, kidnapped, and killed innocent parties, subsequently enjoying immunity from subsequent civil suits under 42 U.S.C. § 1983.¹¹⁶

While the bail recovery agent’s power to arrest and detain criminal defendants began in the English common law, states vary widely on how they govern bail recovery agents today.¹¹⁷ Four states have banned commercial bail bondsmen, twenty-eight states permit recovery by a licensed bail agent licensed under a state regulatory scheme, and eighteen states have no statutory or administrative provisions regulating bail recovery agents.¹¹⁸ In states falling under this last category, in theory, anyone could become a bail recovery agent regardless of education, training, certification, or criminal

¹¹² Johnson & Stevens, *supra* note 106, at 190.

¹¹³ *Id.* at 191–92.

¹¹⁴ *Id.* at 190–91.

¹¹⁵ *Id.* at 192.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 193–94.

¹¹⁸ *Id.* at 195.

history.¹¹⁹ This type of lawlessness is a side effect of the promulgation of the surety bond system that states use to assure a defendant's appearance at court and should be replaced with more sensible pretrial detention programs.

Because bail bondsmen represent such a large business interest in this country, they have secured a lobby to maintain their interests.¹²⁰ Pretrial service agencies directly conflict with the business interests of bondsmen: the more people released on non-financial conditions to the supervision of pretrial services agencies, the smaller the for-profit financial surety market.¹²¹

Broward County, Florida, recently saw the power of the bail bondsmen lobby. Broward County's pretrial services saved the county money, lowered jail crowding, and raised the rate of court appearances for defendants on pretrial release.¹²² County commissioners called the pretrial program a success, but two years after the commissioners voted to double the program's funding, the very same commissioners passed an ordinance that strictly limited who can qualify for pretrial release.¹²³ This was likely a result of the bondsmen hiring a lobbyist, who in turn gave almost \$23,000 in campaign contributions to council members prior to the passage of the ordinance.¹²⁴

This type of pressure is widespread. Judge Ben C. Clyburn of Maryland has spoken out against the power of his state's bail bondsmen's lobby to stymie attempts to eliminate cash bail there.¹²⁵ To have a system in which we emphasize the use of pretrial services instead of financial incentives, the power of the bail bond industry must be counteracted.

¹¹⁹ *Id.* at 199–200.

¹²⁰ *Id.* at 213.

¹²¹ The same is true of states and counties which profit directly from the seizure of forfeited bail and the collection of non-refundable surety fees charged to defendants who are released on bail/bond posted directly with the state.

¹²² Laura Sullivan, *Bondsman Lobby Targets Pretrial Release Programs*, NAT'L PUB. RADIO (Jan. 22, 2010), <http://www.npr.org/templates/story/story.php?storyId=122725849>.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Ian Duncan, *Top District Court Judge Points to Power of Bail Bonds Lobby in Debate Over Reform*, BALT. SUN (Jan. 23, 2014), <http://www.baltimoresun.com/news/maryland/crime/bal-top-district-court-judge-calls-out-bail-bonds-lobby-in-debate-over-reform-20140123-story.html>.

B. Supervision Is Expensive

The cost of implementing a pretrial services program is substantial, which may be why some counties and states are hesitant to implement, or continue to fund, pretrial services. Pretrial services are funded mainly by the local government.¹²⁶ On their face, these programs can often appear to be quite the financial burden. For example, instituting a pretrial service program that conducts interviews and supervision with a staff size of eight people could cost between \$200,000 to \$500,000 per year.¹²⁷ On paper, many municipalities and local governments would prefer to maintain the status quo. However, research has shown that incarcerating a defendant is eight times more costly than placing that defendant in the supervision of pretrial services.¹²⁸ Hence, governments should consider implementing pretrial supervision programs in recognition of long-term financial cost savings in their jurisdictions. Part IV discusses just how much money can be saved through the implementation of electronic monitoring in contrast to pretrial detainment.

C. Legislative Slowness and Complacency

Legislatures are slow to develop laws regarding bail reform, and when a brave lawmaker does create a bill, it is often hard to curry support from fellow lawmakers. When the Honorable Jonathan Lippman, Chief Judge of the New York Court of Appeals, proposed a bail-reform bill to the New York legislature, it failed to gain traction.¹²⁹ One reason was and is the legislative complacency on criminal-justice system reforms. Specifically, lower crime statistics have taken the wind out of any momentum for reform.¹³⁰ GOP candidates in the 2016 Presidential race employed “tough on crime”

¹²⁶ PRETRIAL JUSTICE INST., PRETRIAL SERVICES PROGRAM IMPLEMENTATION: A STARTER KIT 17 (2010).

¹²⁷ *Id.* at 18.

¹²⁸ U.S. COURTS, *Supervision Costs Significantly Less Than Incarceration in Federal System*, <http://www.uscourts.gov/news/2013/07/18/supervision-costs-significantly-less-in-carceration-federal-system> (last visited on Mar. 12, 2017).

¹²⁹ James C. McKinley Jr., *State's Chief Judge, Citing 'Injustice,' Lays Out Plans to Alter Bail System*, N.Y. TIMES (Oct. 1, 2015), <http://www.nytimes.com/2015/10/02/ny-region/jonathan-lippman-bail-incarceration-new-york-state-chief-judge.html>.

¹³⁰ Pat Garofalo, *Soft on Crime, Part Two: The GOP's Criminal Justice Scare Tactics Put Reform at Risk*, U.S. NEWS (Sept. 18, 2015), <http://www.usnews.com/news/the-report/articles/2015/09/18/has-2016-tough-on-crime-talk-already-doomed-criminal-justice-reform>.

rhetoric to support stricter criminal justice policies and court voters away from “soft-on-crime liberals.”¹³¹ This strategy was persuasive, as former GOP Candidate and current President of the United States Donald Trump emphasized he was the “law-and-order candidate” in comparison to his Democratic Party rival Hillary Clinton.¹³² The combination of political rhetoric and lower crime rates has made bail-reform legislation both unpopular to propose and difficult to pass.

IV PROPOSALS FOR REFORM

A. Eliminate the Bail Schedule

In *Stack v. Boyle*, the U.S. Supreme Court held that setting blanket bail for all codefendants was improper because the Federal Rules of Criminal Procedure call for bail to be set based on individualized criteria.¹³³ The Supreme Court emphasized this focus on the individual in *Salerno*, when it decided that judges must identify a specific future danger stemming from a defendant’s release pending trial as a prerequisite to ordering preventative detention.¹³⁴ Despite this emphasis on the individual, many jurisdictions throughout the country rely on uniform bail schedules based solely on the offense(s) charged to provide guidance to judicial officials in determining a bail amount and to free up the court dockets more expeditiously.¹³⁵ However well intended these bail schedules were, they have serious negative consequences for arrestees. A study conducted in New York City revealed that, in 2008, of those arrested on non-felony charges who were given a bail of \$1000 or less, only thirteen percent were able to post bail by the time of their arraignment.¹³⁶

Bail schedules effectively impose an arrest tax on those charged with low-risk offenses and result in *de facto* detention of those who cannot afford the amount set in the bail schedule.¹³⁷ Though this does

¹³¹ *Id.*

¹³² Jon Schuppe, *With Trump in White House, Criminal Justice Reformers Will Look Elsewhere*, NBC News (Nov. 10, 2016), <http://www.nbcnews.com/storyline/2016-election-day/trump-white-house-criminal-justice-reformers-will-look-elsewhere-n681536>.

¹³³ *Stack v. Boyle*, 342 U.S. 1, 9 (1951).

¹³⁴ *United States v. Salerno*, 481 U.S. 739, 754 (1987).

¹³⁵ Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion?*, 26 CRIM. JUST. 12, 13–14 (2011).

¹³⁶ *Id.* at 14.

¹³⁷ *Id.*

foster the detention of indigents, it also permits the release of potentially dangerous, wealthy defendants or career criminals who set aside money gained from their criminal activity to pay bail.¹³⁸ The replacement of bail schedules with the exercise of judicial discretion and an emphasis on pretrial services would better ensure future court appearance and safety upon release.

B. Switch to a Well-Resourced System of Pretrial Release and Supervision

One impediment to a defendant's fair shake during his or her detention hearing is the defendant's lack of time and ability to provide information to prove he or she is a suitable candidate for release. The investigations conducted by pretrial service agencies can be costly and time consuming, and sometimes do not occur until after bail has been set.¹³⁹ More resources should be directed toward these risk assessments so that judicial officers have more complete information to use in deciding whether to release defendants during detention hearings.

C. Implementation of Technology to Reduce the Costs of Supervision

The use of electronic monitoring of defendants would allow more defendants the freedom to maintain their employment, housing, and family ties and to assist their attorneys in crafting their defense, while still under supervision to ensure that they do not flee or pose a danger to the community.¹⁴⁰ Although electronic monitoring technology has been available to law enforcement agencies since the 1980s, it has yet to supplant pretrial detention¹⁴¹ or the money bail system. Unfortunately, there are few studies on the effectiveness of pretrial electronic monitoring. Some European studies have reported that defendants released before trial with electronic monitoring appeared

¹³⁸ *Id.* at 17.

¹³⁹ LAURA & JOHN ARNOLD FOUND., DEVELOPING A NATIONAL MODEL FOR PRETRIAL RISK ASSESSMENT 2 (2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary_PSA-Court_4_1.pdf.

¹⁴⁰ See Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1364 (2014) (stating that electronic monitoring will present a superior alternative to money bail for addressing flight risk).

¹⁴¹ *Id.*

more often and reoffended less often than those without electronic monitoring.¹⁴²

While no form of electronic monitoring will be as effective in preventing flight as pretrial detention, due process dictates that the need to prevent flight should be balanced against the constraint of liberty imposed on the accused.¹⁴³ In the context of defendants who are facing less serious charges, with the least incentive to flee if released, the balance tips in favor of release with monitoring.¹⁴⁴ Additionally, as technology becomes more effective, available, and inexpensive, the cost of detaining a defendant before trial will far outweigh the cost of placing on him a GPS monitor. Miami-Dade County, Florida, has already cut costs from \$20,000 per pretrial defendant to \$432 for each released, monitored defendant per annum.¹⁴⁵ That cost savings should provide an incentive to local jurisdictions to move toward monitored pretrial release, particularly for defendants in pretrial detention solely because they could not post bail.

A primary argument against electronic monitoring is the invasion of privacy.¹⁴⁶ This is rightfully a concern, one to be weighed against the more severe privacy invasion of the primary alternative to electronic monitoring: pretrial detention in jail amongst fellow prisoners, guards, and security cameras.¹⁴⁷ Granting credit for time-served for the pretrial monitoring period could acknowledge the privacy invasion suffered by the monitored defendant and deter courts from using monitoring in place of less restrictive forms of release.¹⁴⁸ Overall, the use of GPS monitoring is preferable for those who lack the financial resources to post bail and should be implemented far more often to reduce pretrial detention.

¹⁴² *Id.* at 1369–70 (discussing how between 1998 and 1999, 118 individuals had conditional release with GPS and had a failure to appear rate lower than national and local figures. Additionally, a small pilot program in 2002 in Portugal that imposed electronic monitoring showed no relevant noncompliances nor revoked orders for the thirty-nine total participants.).

¹⁴³ *United States v. Salerno*, 481 U.S. 739, 750 (1987).

¹⁴⁴ *Id.* at 1371.

¹⁴⁵ *Id.* at 1372.

¹⁴⁶ Eric Maes & Benjamin Mine, *Some Reflections on the Possible Introduction of Electronic Monitoring as an Alternative to Pre-trial Detention in Belgium*, 52 *HOW. J. CRIM. JUST.* 144, 150–57 (2013).

¹⁴⁷ Wiseman, *supra* note 140, at 1375.

¹⁴⁸ *Id.* at 1379.

D. Recalibrating Risk Assessment

Of course, predicting the future is not an easy task, especially when lives are at risk. But with more and more research published on the subject of recidivism, pretrial services agencies and judges can more accurately predict whether a defendant truly poses a danger. One study has shown that factors like whether the victim suffered an injury, whether the crime involved a weapon, whether the defendant consumes alcohol, and the defendant's residential history have little to no correlation with whether the defendant will fail to appear in court or commit a crime while awaiting trial.¹⁴⁹ However, this study was unable to arrive at reliable factors that can predict whether a defendant will appear at trial or not.¹⁵⁰ More research is needed to validate scientifically the relationship between the factors listed in the Bail Reform Act and those used by pretrial service agencies in predicting the risk that defendants pose by a given release.

CONCLUSION

The move away from cash-bail to the more humanitarian view advanced by the Bail Reform Act and the ICCPR is a difficult change to implement. If a judicial officer releases a defendant before trial, and the defendant does not show up for trial, or worse, commits an additional crime while out on pretrial release, society is likely to blame the judge. It takes courage to accept the inherent inaccuracies of risk assessment and advance good faith attempts to individualize pretrial release decisions.

When will our jails be so overcrowded that they incite action and change how we treat those awaiting trial? At what point will we allow those like the late seventeen-year-old Kalief the opportunity to await his trial on his own recognizance, rather than in the harsh environment found within our jails?

As a society, we need to do more to protect those like Kalief from the treacheries of unnecessary pretrial detention. We need to challenge bail bondsmen lobbyists who oppose the creation of full funding of pretrial service agencies, eliminate bail schedules linking pretrial release to the crime charged and the financial resources of the accused, and resist the political fear mongering rhetoric that holds

¹⁴⁹ KRISTIN BECHTEL ET AL., IDENTIFYING THE PREDICTORS OF PRETRIAL FAILURE: A META-ANALYSIS 13 (2011).

¹⁵⁰ *Id.*

back bail reform. Pretrial services have been proven to be effective. Now we just need the laws to implement them universally.

