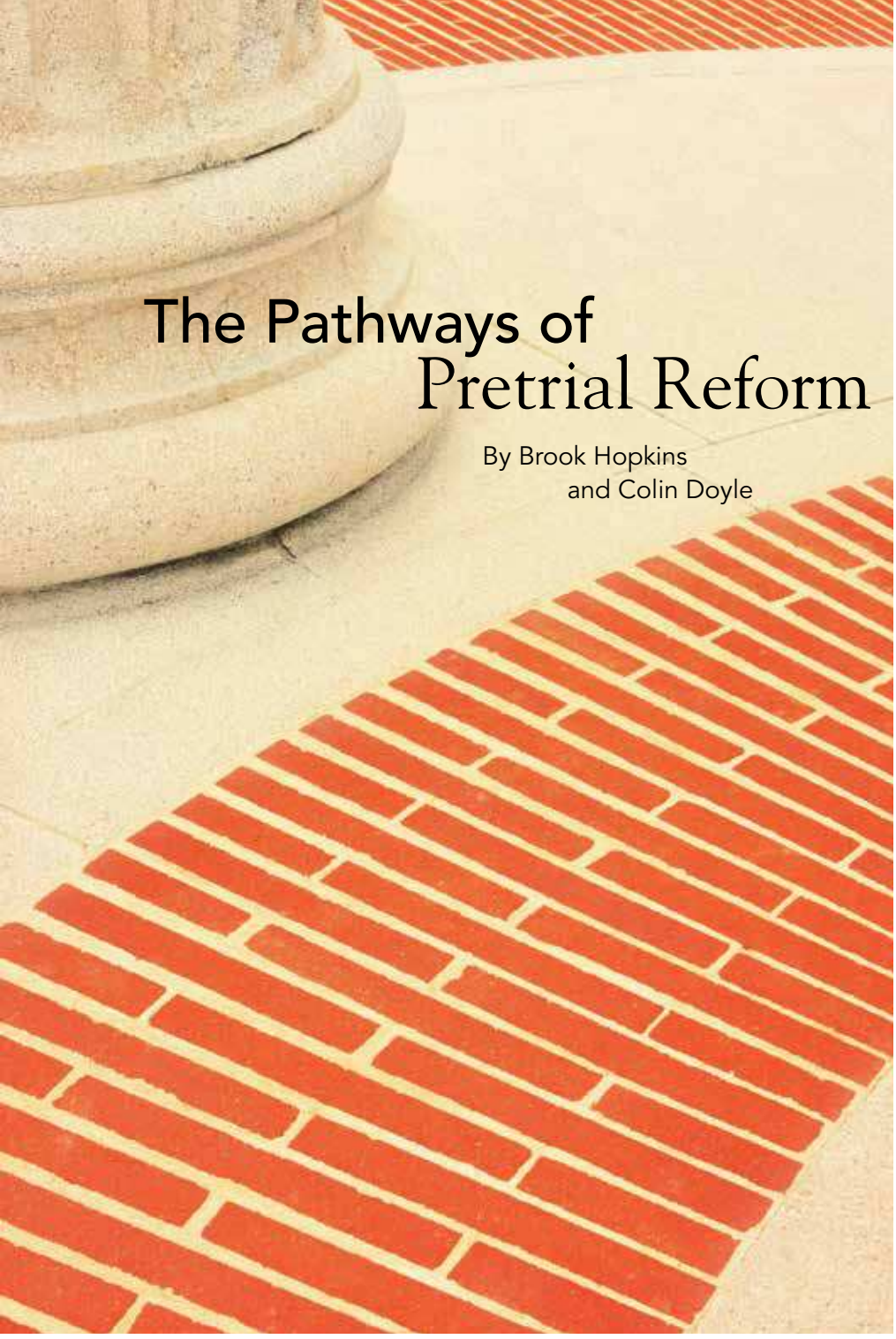

The Pathways of Pretrial Reform

By Brook Hopkins
and Colin Doyle

Money bail is a hallmark of pretrial criminal justice systems across the United States. Originally established as a method for releasing people accused of crimes and ensuring their return to court, money bail has become a method of *sub rosa* pretrial detention and a predatory financial system for indigent people who have been accused of crimes. Money bail imposes high costs on people who are detained, their families, their communities, and the larger public. On any given day, the United States incarcerates nearly half a million people who are awaiting trial and presumed innocent, many of whom are in jail only because they cannot afford to post bail.[1]

As the public, the media, and local and state government officials learn about the injustice of money bail, and the associated costs of pretrial detention, pretrial reform is taking hold. State legislatures are enacting reforms and state supreme courts are issuing rulings that reshape the pretrial landscape. At the local level, city councils, judges, district attorneys, and sheriffs are using the power of their offices to change how bail works in their jurisdictions. Civil rights litigators are filing lawsuits from coast to coast challenging the constitutionality of contemporary bail practices. Community groups have organized to pressure elected officials—and some of these groups now operate nonprofit organizations that post bail for people who cannot afford their bond amount.

For each jurisdiction, the path of reform depends on a number of factors, including local culture and demographics; state constitutional, statutory, and rule frameworks; the influence of the commercial bail bond industry; and pending litigation. But most jurisdictions that are reforming their pretrial justice systems have adopted some combination of the following:

- Stronger presumptions of release on recognizance or release on nonmonetary conditions.
- Timeliness requirements for release decisions.
- Procedural safeguards for preventive detention.
- Risk assessment tools.
- New pretrial services.

This article highlights some recent reform efforts for each of these examples and concludes by discussing the outcomes, to date, that suggest these reforms are working from a variety of different perspectives.

Stronger Presumptions of Release on Recognizance or Release on Nonmonetary Conditions

A central component of pretrial reform is a strong presumption in favor of release on recognizance. As the U.S. Supreme Court reminds us, "[i]n our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[2] Many jurisdictions have coupled this presumption of release with carefully circumscribed limits on money bail, restricting its purpose to ensure appearance in court and requiring bond amounts to be within a defendant's ability to pay.

For decades, Washington, D.C., has been a leader in responsible, equitable

pretrial practices, including a presumption of unconditional pretrial release.[3] In D.C., if a judge wishes to impose secured money bail or any other condition of release, the judge must impose the "least restrictive condition or combination of conditions" that will "reasonably assure the appearance . . . and the safety of any other person and the community."[4] The judge can impose money bail only to ensure the defendant's appearance in court and cannot use public safety as a justification for money bail.[5] As a result, D.C. judges release 88 percent of pretrial defendants on personal recognizance and impose money bail for only 4 percent of pretrial defendants.[6]

More recently, Cook County, Illinois, has implemented pretrial reform. In July 2017, against the backdrop of pending civil rights litigation over bail practices in Chicago courts and jails, Timothy C. Evans, Chief Judge of the Circuit Court of Cook County, issued an administrative order creating a presumption of nonmonetary conditions of release for all pretrial defendants.[7] The order requires that "no defendant is held in custody prior to trial solely because the defendant cannot afford to post bail."[8] Before the order, judges rarely made findings on the record about a defendant's ability to pay.[9] Now, judges must make two findings before setting a money bond. First, the judge must conclude that no conditions other than money bond can ensure the defendant's appearance in court. Second, the judge must find that the defendant is able to pay the amount ordered.[10] As a result of this order, money bail is no longer the default condition of release in Cook County.[11]

As another example, in New Mexico, a recent amendment to the state constitution prohibits courts from detaining defendants on a bail that they cannot afford.[12] The new procedures also dispense with bail schedules and allow money bail only as a condition to ensure that a defendant appears for a future court hearing.[13]

Some district attorney offices also have revised their policies to increase pretrial release rates. Prosecutors in Richmond, Virginia, no longer seek money bail as a condition of release.[14] Prosecutors in Philadelphia, New York City, and one county in Massachusetts have all adopted officewide policies instructing their line attorneys to not request money bail for people facing low-level charges.[15]

Social science research has found that even short-term stays in jail increase a person's propensity to commit crime and miss court dates.

Timeliness Requirements for Release Decisions

By requiring courts to make pretrial release decisions promptly, jurisdictions help to ensure that people who will be released before trial spend as little time in jail as possible. Quick pretrial release after an arrest can have an outsized positive impact on public safety. Social science research has found that even short-term stays in jail increase a person's propensity to commit crime and miss court dates.[16]

As part of sweeping pretrial reforms in New Jersey in 2017, courts now must make pretrial release decisions within 48 hours of a defendant's arrest. Embracing these reforms, courts have sought to make release decisions in even less time. Last year, New Jersey courts made 81.3 percent of release decisions within 24 hours of arrest and 99.5 percent of release decisions within 48 hours of arrest.[17] Other states have adopted similar policies. In Kentucky; Washington, D.C.; and Yamhill County, Oregon (near Portland), the pretrial services agencies must complete a risk assessment and make a release recommendation to the court within 24 hours of a defendant's arrest.[18]

Some jurisdictions have created procedures that allow and encourage police and pretrial services agencies to release pretrial defendants without a hearing before a judge. Many of these jurisdictions leverage their risk assessment tools by automatically identifying and allowing for the immediate release of certain defendants who are likely to attend court and unlikely to commit a crime on release. In addition to avoiding unnecessary jail time, these procedures help to preserve valuable court time for hearings in which conditions of release or preventive detention require serious consideration.

For example, New Jersey's revamped court administration software automatically runs a preliminary risk assessment when a police officer books a defendant. The risk assessment recommendations encourage police officers to issue summons to low-risk people rather than arrest them.[19] Similarly, Kentucky allows pretrial services agencies to release defendants charged with nonviolent, nonsexual misdemeanors without a judge's involvement if the state's risk assessment algorithm assigns a defendant a low- or medium-level risk score.[20]

Procedural Safeguards for Preventive Detention

As jurisdictions have restricted judges' ability to detain pretrial defendants on unaffordable bail, many also have revised the procedures that allow for judges to detain people without the possibility of release. To limit the overuse of pretrial detention, most of these emerging preventive detention schemes have robust due process protections and are limited in scope.[21] Typically, preventive detention can be used only to ensure public safety (and not to ensure appearance in court), is allowed only for certain offenses, and will be considered only upon motion of the prosecutor and after a pretrial detention hearing.[22] At the detention hearing, the defendant is represented by counsel who can challenge the government's evidence and

call witnesses. The government carries the burden to prove, by clear and convincing evidence, that detention is warranted and that no conditions of release could reasonably ensure the safety of the community.[23]

Risk Assessment Tools

In most jurisdictions, pretrial decisions are informed by a judge's personal assessment of risk—the risk of a defendant fleeing from justice and the risk of the defendant committing a crime pretrial. Many jurisdictions now use algorithmic risk assessment tools to help judges gauge these risks. These tools assess a particular defendant's level of risk based on the rate at which defendants with similar characteristics committed crimes on pretrial release or didn't appear for court dates in the past. Different tools use different defendant characteristics as inputs. All tools look at the defendant's criminal history, but some also consider characteristics such as length of employment, mental health history, or even zip code. Most risk assessment tools rank a defendant from low to high risk for two independent concerns: missing court dates or being rearrested while awaiting trial.[24]

The appeal of a risk assessment tool is clear: Data might help judges more accurately estimate pretrial risk and make better release decisions. Algorithms that have been trained on millions of data points may be quicker and better than judges at predicting the future behavior of people who have been accused of crimes.

Nonetheless, law professors, social scientists, and civil rights groups have raised concerns about algorithmic risk assessments. Some have argued that risk assessment tools that use demographic and socioeconomic variables are unconstitutional and inaccurate.[25] Others contend that even when tools use only criminal history data, these data are biased and will produce biased results because racial and wealth disparities in policing and prosecution distort criminal history inputs and can contribute to future disparities.[26] These concerns lead to a second concern that the tools could produce a feedback loop in which the tools not only replicate but also exacerbate racial disparity.[27]

The current crop of pretrial risk assessment tools are relatively new and their long-term effects are largely unknown. Many jurisdictions that have adopted risk assessment tools have seen lower pretrial detention rates, lower failure-to-appear rates, and lower pretrial offense rates—although this has not been the case everywhere.[28] Most jurisdictions have adopted risk assessment tools alongside other reforms, making it hard to distinguish which reforms or which combination of reforms is responsible for positive results.

New Pretrial Services

As jurisdictions strive to release more people pending trial, many localities are expanding the scope of pretrial service agencies. The most promising models provide evidence-based services while also guarding against the imposition of unnecessary and excessive conditions on those who are released.

Calling or texting people to alert them of upcoming court dates has been shown to be an effective, cost-saving tool for ensuring that people make all required court appearances. For example, Multnomah County, Oregon (which includes Portland), ran a pilot program that placed automatic calls to pretrial defendants to alert them of upcoming court dates. In only six months, the program raised court appearance rates by 37 percent and saved the county over a quarter of a million dollars.[29] Just this year, a study in New York City found that text message reminders alone improved appearance rates by 26 percent.[30]

New forms of pretrial monitoring are also on the horizon. Santa Clara County, California, is in the process of implementing a new program called "community release."[31] Under the program, defendants will be able to choose an organization, such as a church or community group, that will support the defendant on release. This organization can help the defendant in a variety of ways by providing services such as court date reminders, transportation to court, and referrals to social services. This model of conditional release can help to engage the broader community in pretrial justice and reduce the workload of pretrial services agencies.

Pretrial services agencies are also increasingly imposing conditions of release that include drug testing and treatment, mental health treatment, and electronic monitoring. These practices can be disruptive to people's employment and family lives. There is little to no research showing that many of these intrusive conditions improve pretrial outcomes.[32] In most cases, there are inexpensive and easily administrable alternatives that more effectively help people return to court and remain arrest-free.

A troubling trend in many jurisdictions is the practice of charging people fees for pretrial services, especially drug testing and electronic monitoring. These fees can distort sound policymaking and can introduce perverse incentives and conflicts of interest for judges. By requiring defendants to pay for the costs of pretrial monitoring, judges do not have to weigh the expense of those services against their public safety or court-efficiency benefits. And jurisdictions that partially fund their court system or other public institutions through pretrial services fees will have a perverse incentive to maximize the use of fee-based conditions.

Outcomes

Nearly every jurisdiction that has recently engaged in pretrial reform has improved its pretrial outcomes. This is a testament not only to the deficiencies of money bail but also to the thoughtfulness with which many jurisdictions have implemented reform.

Where release on recognizance becomes

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the norm, jail populations drop. In New Jersey, the jail population decreased by 20 percent in the first year of reform.[33] Money bail has been almost entirely eliminated: In the past year, money bail was imposed as a condition for release on only 44 defendants.[34] Similarly, after recent reforms, the jail population in Cook County, Illinois, fell to below 6,000 inmates, the lowest level in decades.[35]

In jurisdictions that have undergone reform, the overwhelming majority of people released pretrial make their court dates and remain arrest-free. Each year in Washington, D.C., 88 percent to 90 percent of defendants released are not arrested,[36] and between 98 percent and 99 percent are not arrested for violent crimes.[37] In Santa Clara County, defendants released on their own recognizance or on conditions appear in court 95 percent of the time and avoid rearrest 99 percent of the time.[38]

More reform is on the way. Nonprofits are funding efforts to eliminate money bail in at least 36 states.[39] Santa Clara County's community release model could pave the way for other jurisdictions to better involve the community in pretrial justice. Social scientists are conducting rigorous empirical studies of the efficacy of existing risk assessment tools, while other academics are exploring new models and ways of thinking through algorithmic assessments. Community groups and civil rights organizations continue to monitor reform and ensure that these new practices are helpful, lasting, and impactful. ■

Endnotes

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