

# “GIVE US FREE”: ADDRESSING RACIAL DISPARITIES IN BAIL DETERMINATIONS

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*This article considers racial disparities that occur nationally in the bail determination process, due in large part to the lack of uniformity, resources, and information provided to officials in bail proceedings. It argues that the almost unbridled decision making power afforded to bail officials is often influenced by improper considerations such as the defendant’s financial resources or the race of the defendant. As a result of these failures, the bail determination process has resulted not only in racial inequalities in bail and pretrial detention decisions, but also in the over-incarceration of pretrial defendants and the overcrowding of jails nationwide. The article looks to the example of the ongoing work of criminal justice officials in Saint Louis County, Minnesota to address racial disparities in bail determinations in their county. In Saint Louis County, representatives from law enforcement, the court, and the community have taken a holistic approach to addressing the problems of the bail process including training, education, and continuing data collection. The experience of Saint Louis County provides a model for policy reform to reduce racial disparities not only in bail determinations, but the criminal adjudication process more generally.*

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#### INTRODUCTION

In the movie *Amistad*,<sup>1</sup> an enslaved African led a group of fellow slaves in a revolt against their Spanish captors. The actions of the slaves eventually landed them on the eastern shores of the United States in a federal district court.<sup>2</sup> During the protracted litigation over their fate, the Africans were held in jail and brought to court each day, bound in hand and leg irons, and chained together as a group. After months in detention, the leader of the group, with his limited command of the English language, suddenly stood in the crowded courtroom and demanded: “GIVE US FREE! GIVE US FREE!” More than 150 years since the end of slavery in America, the iconic image depicted in *Amistad* of a group of black men being led to court in chains can still be seen every day in the United States. In many metropolitan courthouses across the country, large groups of predominately African American arrestees are shackled and chained together and herded into

1. *AMISTAD* (Dreamworks Pictures 1997).

2. The movie was based on an actual case. See *Gendey v. L’Amistad*, 10 F. Cas. 141 (D. Conn. 1840); *United States v. Amistad*, 40 U.S. 518 (1841).

crowded arraignment courtrooms for "freedom hearings,"<sup>3</sup> where they will learn whether they will be released from their shackles and given bail, or forced to remain in chains and sent to a detention facility until the criminal charges are resolved.

In our criminal justice system, the legitimate focus of the bail determination is whether the defendant, if released, will commit a criminal act that poses a danger to the community, or whether the defendant will flee the jurisdiction and fail to return to court for trial.<sup>4</sup> As discussed more fully below, there are constitutional restrictions and state laws that prohibit the use of pretrial detention as punishment prior to an adjudication of guilt. There are also state laws that recognize the right of pretrial defendants in non-capital cases to be granted pretrial release if there is no basis for finding the defendant poses a flight or safety risk. In practice, however, whether a defendant is granted pretrial release or subjected to pretrial detention is, at best, arbitrary. Bail commissioners, magistrate judges and other court officers wield considerable power and exercise virtually unbridled discretion in making bail determinations, which are too frequently corrupted by the random amount of the money bond imposed, the defendant's lack of financial resources, the implicit bias of the bail official, and the race of the defendant. These factors combine to create an extreme dysfunction in the bail determination process, which produce severe over-crowding of jails with pretrial defendants, and unwarranted racial disparities in bail outcomes between white and African American pretrial defendants.

This article discusses the widespread and well-documented racial disparities in the bail determination process and presents policy reforms to reduce racial and ethnic disparities in pretrial detention. Part I discusses the limited constitutional restrictions on bail; the federal and state laws governing bail determinations; and the divergent and dysfunctional bail determination practices in state courts across the country. Part II discusses the extensive body of research that confirms that African American defendants are routinely subjected to harsher treatment in the bail process than white defendants charged with similar crimes, with similar backgrounds, and similar criminal histories. Part III highlights the work of the criminal justice officials in Saint Louis

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3. Douglas Colbert, Professor, Univ. of Md., Remarks at the Symposium, Gideon at Fifty: Fulfilling the Promise of Right to Counsel for Indigent Defendants (Mar. 22, 2013).

4. See LINDSEY DEVERS, BAIL DECISIONMAKING: RESEARCH SUMMARY 1-2 (2011), available at <https://www.bja.gov/Publications/BailDecisionmakingResearch-Summary.pdf>.

County (Duluth), Minnesota to address racial disparities in bail determinations in their local courts. Their approach to racial justice policy reform provides a useful roadmap for other jurisdictions. Finally, Part IV builds upon the work of the criminal justice officials in Duluth and proposes additional policy reforms that can be instituted to eliminate the arbitrariness and the lack of accountability for bail decisions that produce racial disparities.

## I.

### BAIL DETERMINATIONS: FEDERAL AND STATE LAWS AND PRACTICES

When a person is arrested, the next major decision in the criminal adjudication process is whether the defendant will be held in jail until the criminal charges are resolved, or afforded an opportunity to be placed on pretrial release. If the defendant is to be released, the bail official<sup>5</sup> must also determine what conditions of release, if any, will be imposed. Although many jurisdictions employ non-financial or “supervised” conditions of release,<sup>6</sup> in seventy percent of all criminal cases pretrial release is subject to payment of a money bond.<sup>7</sup> In de-

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5. The generic term “bail official” is used throughout this Article to refer to the person who makes the initial bail determination in a criminal case. As discussed *infra* Part I.B, in some jurisdictions this task is vested with a judge or magistrate, while elsewhere the bail determination is made by a bail commissioner or other non-judicial officer.

6. For example, the following is stated on the website of the Pretrial Services Agency for the District of Columbia:

The Pretrial Services Agency for the District of Columbia (PSA) provides a wide range of supervision programs to support the D.C. Superior Court and the U.S. District Court. Some defendants are released without conditions, but the majority of defendants are supervised by PSA. These defendants have a wide variety of risk profiles, from those posing limited risk and requiring condition monitoring, to those posing considerable risk and needing extensive release conditions such as frequent drug testing, stay away orders, drug treatment or mental health treatment and/or frequent contact requirements with Pretrial Services Officers. PSA also has a number of programs that provide increasing levels of restrictive and specialized supervision.

*Defendant Supervision*, PRETRIAL SERVICES AGENCY FOR THE DISTRICT OF COLUMBIA, [http://www.psa.gov/?q=programs/defendent\\_supervision](http://www.psa.gov/?q=programs/defendent_supervision) (last visited Oct. 10, 2013). Common non-financial release conditions range from personal recognizance (release from custody based solely on the defendant’s personal promise to re-appear) to various forms of supervised release conditions that the defendant must abide by (i.e., maintain a curfew, wear an electronic monitoring device).

7. See *infra* notes 142–143 (discussing Minnesota bail laws). “Money bail” or a “bond” is a set sum of money that will be held by the court as collateral to reasonably assure the defendant’s appearance for subsequent court hearings. See TIMOTHY R. SCHNACKE ET AL., PRETRIAL JUSTICE INSTITUTE, GLOSSARY OF TERMS AND PHRASES RELATING TO BAIL AND THE PRETRIAL RELEASE FOR DETENTION DECISION 2–5

cluding whether to impose a bond, the type of bond, and the amount of the bond, the bail official is tasked with evaluating each defendant to determine if he or she will pose a flight or community safety risk if released.<sup>8</sup> To make the flight and safety determination, bail officials are generally required to consider a range of factors, including the nature and severity of the charged offense, the strength of the government's evidence, the defendant's criminal history (i.e., prior convictions, other pending charges, current criminal justice supervision status, prior failures to appear in court), community ties (i.e., length of residency in the jurisdiction, education level, employment status), and personal information (i.e., financial resources for bail, health issues, illegal drug use, mental health history).<sup>9</sup>

As discussed below, despite the potential long-term impact of the bail decision in the criminal case, bail officials have relatively few legal constraints and a vast amount of discretion, particularly in state courts where the initial bail determination is often treated as little more than a minor administrative processing task.

#### A. *The Laws Governing Bail Determinations*

Bail determinations are governed by state and federal constitutional provisions, as well as state and federal statutes. The United States Constitution provides the starting point for the analysis of the laws governing bail determinations. The Bail Clause of the Eighth Amendment to the United States Constitution states that "Excessive bail shall not be required."<sup>10</sup> At one time, it was commonly understood that the Bail Clause vested pretrial defendants with the right to be released on a reasonable amount of bail before being convicted of a crime.<sup>11</sup> Over the last sixty years, however, the United States Supreme

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(2011), available at [http://www.colorado.gov/ccjdir/Resources/Committees/BailSub/Handouts/Glossary\\_Bail-PretrialRelease\\_DetentionDecision-PJI\\_2011.pdf](http://www.colorado.gov/ccjdir/Resources/Committees/BailSub/Handouts/Glossary_Bail-PretrialRelease_DetentionDecision-PJI_2011.pdf). There are several types of bonds accepted in different jurisdictions, including a cash bond (full payment of the entire bond amount before the defendant is released), unsecured bond (no payment required prior to release), property bond (property is used as collateral for the bond amount in lieu of a cash payment), surety bonds (a percentage of the bond is paid by a commercial bonding company to the court). *Id.*

8. See WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* 677–78 (5th ed. 1992); THOMAS H. COHEN & BRIAN A. REAVES, *BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: STATE COURT PROCESSING STATISTICS, 1990-2004, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 1–2* (2007), available at <http://www.prisonspolicy.org/scans/bjs/prfdsc.pdf>.

9. See COHEN & REAVES, *supra* note 8, at 6 (listing factors considered by courts in state courts in the 75 largest counties in the nation).

10. U.S. CONST. amend. VIII.

11. See *Carlson v. Landon*, 342 U.S. 524, 569 (1952) (Burton, J., dissenting) ("[T]he Eighth Amendment . . . clearly prohibits federal bail that is excessive in

Court has narrowed its interpretation of the Eighth Amendment to find that the Constitution does not give defendants a right to bail. Five key Supreme Court cases chart the diminished constitutional protections afforded defendants facing pretrial detention.

In one of the early Supreme Court cases addressing the right to bail, *Stack v. Boyle*, the appellant challenged the blanket imposition of \$50,000 bail for all twelve defendants as arbitrary and excessive, claiming that the amount was set without an individual assessment of each defendants' risk of flight.<sup>12</sup> The Court articulated a broad view of the Eighth Amendment that appeared to encompass a constitutional right to bail. The Court acknowledged that the function of bail is to assure the defendant's appearance at trial, and held that the Eighth Amendment prohibition against excessive bail is violated if bail is "set at a figure higher than an amount reasonably calculated to fulfill this purpose."<sup>13</sup> The Court also stated that, "the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant."<sup>14</sup> The Court remanded the case with instructions to the lower court to set bail in an amount that takes into account "the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant."<sup>15</sup>

In his oft-quoted concurrence in *Stack*, Justice Jackson wrote that bail "is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty."<sup>16</sup> Justice Jackson stressed that "[t]he question when application for bail is made relates to each one's trustworthiness to appear for trial and what security will supply reasonable assurance of this appearance."<sup>17</sup> Although the Court never expressly stated that a

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amount when seen in the light of all traditionally relevant circumstances. Likewise, it must prohibit unreasonable denial of bail. The Amendment cannot well mean that, on the one hand, it prohibits the requirement of bail so excessive in amount as to be unattainable, yet, on the other hand, under like circumstances, it does not prohibit the denial of bail, which comes to the same thing."); see also *LAFAVE ET AL.*, *supra* note 8, at 691 ("[T]o read the Amendment as barring judicial setting of excessive bail but not legislative denial of bail would make it virtually meaningless. After all, the interests at stake are identical whether a legislature or a court has made the basic decision resulting in the defendant's pretrial imprisonment.").

12. 342 U.S. 1, 1 (1952).

13. *Id.* at 5.

14. *Id.*

15. *Id.* at 5 n.3 (noting the required considerations of the Federal Rules of Criminal Procedure in setting the amount of bail for a defendant).

16. *Id.* at 7-8 (Jackson, J., concurring).

17. *Id.* at 9.

pretrial defendant has a right to bail, the language used by the court in the majority and concurrence strongly suggested a presumption of reasonable bail for all defendants in non-capital cases.<sup>18</sup>

Four months after *Stack*, however, the Court firmly declared that the Eighth Amendment creates no right to bail in its decision in *Carlson v. Landon*.<sup>19</sup> The Court stated the following:

The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable.<sup>20</sup>

The Court's holding in *Carlson* was the first step toward eliminating the constitutional protection of pretrial defendants facing pretrial detention. In fact, the Court's restrictive interpretation of the Eighth Amendment prompted Justice Black to state that "as construed and applied here . . . the Eighth Amendment's ban on excessive bail means just about nothing . . . The Amendment is thus reduced below the level of a pious admonition."<sup>21</sup>

Post-*Carlson*, the Court has held steadfast to its narrow interpretation of the Eighth Amendment Bail Clause. In *Bell v. Wolfish*, the Court addressed constitutional challenges to conditions of confinement by a class of pretrial detainees in a federal detention facility in New York.<sup>22</sup> The pretrial detainees argued that the mistreatment and restrictions to which they were subjected were contrary to their presumption of innocence, and in violation of their Eighth Amendment and Due Process rights.<sup>23</sup> Justice Rehnquist, delivering the opinion for the Court, summarily dispensed with the notion that the presumption of innocence in any way governed the treatment of pretrial detainees. Rather, the Court held that the presumption of innocence is a doctrine that allocates the burden of proof in criminal trials, but has no applica-

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18. See LAFAYE ET AL., *supra* note 8, at 691–92.

19. 342 U.S. 524 (1952).

20. *Id.* at 545–46 (footnotes and internal citations omitted).

21. *Id.* at 556 (Black, J., dissenting).

22. 441 U.S. 520 (1979).

23. *Id.* at 527–28.

tion to a determination of the rights of a defendant in pretrial detention.<sup>24</sup>

In response to the petitioners' second argument that the restrictions and conditions were so severe that their pretrial confinement was tantamount to the imposition of pretrial punishment in violation of the Due Process Clause, the Court stated the following:

In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee. For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.<sup>25</sup>

The Court rejected the lower court's determination that the due process rights of pretrial detainees are violated unless the conditions of confinement are justified by "compelling necessities of jail administration."<sup>26</sup> The Court held the following:

[I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees . . . .<sup>27</sup>

Although the opinion in *Bell* states that the essential objective of pretrial detention is to ensure the detainee's presence at trial, the Court did not address whether pretrial detention could be justified for any other reason, like community safety or a defendant's propensity to commit future crimes. The Court first addressed this issue in *Schall v. Martin*, where it examined a New York statute that authorized pretrial detention for juveniles in delinquency proceedings if there was a "serious risk" that the child would commit a crime while on pretrial release.<sup>28</sup> The lower court struck down the statute, finding that the law amounted to unconstitutional pretrial punishment. The Supreme Court granted certiorari to decide whether pretrial detention based on the likelihood of "future dangerousness" violated the Due Process Clause.<sup>29</sup> The Court held that New York's juvenile pretrial detention

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24. *Id.* at 533.

25. *Id.* at 535 (footnotes omitted).

26. *Id.* at 531 (internal quotation marks omitted); *see also id.* at 532.

27. *Id.* at 539 (footnotes omitted).

28. 467 U.S. 253 (1984).

29. 467 U.S. at 263.

statute did not unconstitutionally impose punishment prior to adjudication because preventative detention for juveniles advanced the state's legitimate objective in protecting the juvenile and society from the possibility that the juvenile would commit a crime while on pretrial release.<sup>30</sup> The Court also held that the New York statute had sufficient procedural protections to prevent the erroneous deprivation of rights, including the right to counsel, notice of the charges, a finding of probable cause prior to detention, and the requirement that the judge state on the record the facts and reasons for the detention."<sup>31</sup>

Although the Court's holding in *Schall* upheld pretrial detention for juveniles in delinquency proceedings where the government has a special patriarchal role to play, it remained unclear whether adults who posed no flight risk could be subjected to preventive pretrial detention based solely on a finding of future dangerousness. Congress answered this question in the affirmative with passage of the Bail Reform Act of 1984.<sup>32</sup> In the wake of "the alarming problem of crimes committed by persons on release,"<sup>33</sup> Congress amended the original 1966 Bail Reform Act<sup>34</sup> to expressly authorize preventive detention for federal defendants if the court finds the defendant poses a flight risk or if the court finds the defendant poses a risk of danger to the community.<sup>35</sup> The 1984 bail statute retains the presumption of release embodied in the predecessor federal bail law, authorizes supervised release under the least restrictive conditions,<sup>36</sup> and provides a non-exhaustive list of non-financial conditions of release that a court could impose upon a defendant.<sup>37</sup> The revised federal law also prohibits the imposition of a financial condition that results in pretrial detention.<sup>38</sup>

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30. *Id.* at 274.

31. *Id.* at 276.

32. Bail Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 1, 98 Stat. 1837 (codified at 18 U.S.C. §§ 3141–3156 (2006)).

33. *United States v. Salerno*, 481 U.S. 739, 742 (1987) (citations omitted) (citing S. REP. NO. 98-225, at 3 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3185).

34. Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214. In response to the national increase in pretrial detention, Congress passed the first federal Bail Reform Act in 1966, which created "a presumption of release in non-capital cases . . . restricted on the use of money bail bonds . . . a deposit money bail bond option, allowing defendants to post 10% of the bond amount . . ." Thereafter, thirty six states enacted bail statutes that authorized release on personal promise to re-appear for future court dates (also known as release on recognizance (ROR)) and/or supervised community release. *See also* SCHNACKE, *supra* note 7.

35. *See* 18 U.S.C. § 3142(e).

36. *Id.* § 3142(c)(1)(B).

37. *Id.*

38. *Id.* § 3142(c)(2).

Under the 1984 federal bail statute, if the court finds there is probable cause to believe the defendant has committed a “crime of violence” or other serious felony, and the court finds there is “no condition or combination of conditions” that will protect the safety of the community or assure the defendant’s appearance, the defendant can be placed in preventive detention.<sup>39</sup> The statute also contains a number of procedural protections. Prior to imposing preventive detention, the defendant is entitled to a prompt detention hearing, has the right to be represented by counsel, the right to present evidence,<sup>40</sup> and the government has the burden of showing by “clear and convincing evidence” that the defendant must be detained to prevent flight or to protect community safety.<sup>41</sup> The Act lists the factors that the court “shall” consider in making the detention determination,<sup>42</sup> and requires the judicial officer to provide a written justification for detention.<sup>43</sup>

The first challenge to the 1984 Bail Reform Act was addressed by the Court in *United States v. Salerno*.<sup>44</sup> In *Salerno*, two defendants were placed in pretrial detention under the authority of the 1984 bail statute based on a finding of future dangerousness. The defendants argued that the statutory grant of authority to impose pretrial detention based solely on a likelihood of future dangerousness rendered the statute unconstitutional on its face. While the Second Circuit Court of Appeals acknowledged that pretrial detention could be justified if the defendant presented a flight risk, the court found “repugnant” the statute’s authorization of pretrial detention in order to prevent “future crimes.”<sup>45</sup> The federal appeals court reasoned that, “our criminal law system holds persons accountable for past actions, not anticipated future actions.”<sup>46</sup> Thus, the court held that the liberty interests of arrestees, protected by the Due Process Clause of the Fifth Amendment, were infringed by the statutory authorization to impose punishment in the form of pretrial detention.

The Supreme Court reversed the Second Circuit and upheld the constitutionality of the 1984 bail statute. The Court reasoned that there is no due process violation if the restriction on liberty is regulatory and not punitive.<sup>47</sup> Applying the standards articulated in *Bell*, the Court

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39. *Id.* § 3142 (e) – § 3142 (f)(1)(a).

40. *Id.* § 3142(f).

41. *Id.* § 3142(f)(2)(B).

42. *Id.* § 3142(g).

43. *Id.* § 3142(i)(1).

44. 481 U.S. 739 (1987).

45. *Id.* at 744.

46. *Id.* at 745.

47. *Id.* at 747.

found the 1984 bail statute to be regulatory in nature because it was designed to advance the “legitimate regulatory goal” of preventing danger to the community.<sup>48</sup> In addressing the contention that the 1984 Bail Reform Act violated the Eighth Amendment, the Court reaffirmed the fact that the Eighth Amendment does not create an absolute right to bail. The Court stated:

While we agree that a primary function of bail is to safeguard the courts’ role in adjudicating the guilt or innocence of defendants, we reject the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release.<sup>49</sup>

Moreover, the Court limited the scope of the Bail Clause to bail determinations based solely on flight risk:

[W]hen the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more. We believe that when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail.<sup>50</sup>

The Court also found that the procedural safeguards in the 1984 bail statute were adequate to ensure accuracy and prevent erroneous detention.<sup>51</sup>

### *B. State Bail Law and Bail Determinations in Practice*

While federal criminal cases are uniformly governed by the 1984 Bail Reform Act, there is no uniformity in state bail laws.<sup>52</sup> Contrary to the Supreme Court’s restrictive interpretation of the Eighth Amendment, forty states have state constitutional provisions that expressly grant pretrial defendants a right to bail.<sup>53</sup> Typically, these constitutional provisions provide, in relevant part: “all persons shall be bailable by sufficient sureties, except for a person charged with a capital offense.”<sup>54</sup> Also, following the lead of the federal bail statute, forty-four states and the District of Columbia have bail statutes that allow

48. *Id.*

49. *Id.* at 753.

50. *Id.* at 754–55 (citations omitted).

51. *Id.* at 751–52.

52. See LAFAYE ET AL., *supra* note 8, at 677.

53. *Pretrial Release Eligibility*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/justice/pretrial-release-eligibility.aspx> (last visited June 6, 2013) (50 State Chart).

54. OHIO CONST. art. I, § 9.

consideration of future dangerousness in setting bail.<sup>55</sup> State bail laws generally authorize some combination of financial and non-financial release conditions, but in more than twenty states and the District of Columbia the bail laws create a presumption of non-financial release.<sup>56</sup> The use of money bonds as well as the use of commercial bail—via a bail bondsman—is still the widespread practice, except in Kentucky, Illinois, Oregon and Wisconsin where commercial bail has been abolished and replaced with comprehensive programs to provide supervised community release.<sup>57</sup> Although state bail laws provide broad outer boundaries to govern bail determinations, state bail officials have considerable discretion to decide: (1) who is a danger to the community; (2) who poses a risk of flight; and (3) the amount of bond to be imposed. The process employed to make these discretionary determinations is at best flawed, and at worse produces racial disparities in pretrial detention.

In 1952 Justice Jackson observed that, “[f]ixing bail is a serious exercise of judicial discretion that is often done in haste—the defendant may be taken by surprise, his counsel has just been engaged, or for other reasons, the bail is fixed without that full inquiry and consideration which the matter deserves.”<sup>58</sup> More than sixty years later, this description of the bail determination process remains shockingly accurate with regard to state court bail determinations. Bail determinations in state courts across the country have become untethered from the legitimate governmental interests in protecting the community safety and reasonably assuring the defendant’s appearance in court. The procedural safeguards that the Court found adequate in *Schall* and *Salerno* to protect defendants from arbitrary and erroneous deprivations of their rights in preventive detention proceedings are not required in many state bail determination proceedings. State bail laws generally do not mandate that the defendant be afforded a prompt bail review

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55. SCHNACKE, *supra* note 7, at 18; *see also* Richard Williams, *Bail or Jail: Lawmakers in More than two Dozen States are Changing the Rules on Bail*, STATE LEGISLATURES, May 2012, at 30, available at <http://www.ncsl.org/issues-research/justice/bail-or-jail.aspx> (discussing developments in bail policy in the United States since 2010).

56. *See Pretrial Release Conditions*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/justice/pretrial-release-conditions.aspx> (last visited June 4, 2013) (detailing non-financial conditions by state that can be imposed on pretrial release).

57. Williams, *supra* note 55, at 30.

58. *Stack v. Boyle*, 342 U.S. 1, 11 (1952) (Jackson, J., concurring); *see also* LAFAYE ET AL., *supra* note 8, at 678 (noting that overworked judges with crowded dockets make rushed decisions without full consideration of all relevant information).

hearing, where the defendant is represented by counsel,<sup>59</sup> has a right to present evidence, and where the government must offer “clear and convincing evidence”<sup>60</sup> that the initial bail determination is justified by flight or safety risk. Also, unlike the bail laws upheld in *Schall* and *Salerno*, state bail laws generally do not require bail officials to make oral or written fact-findings to explain or justify the bail imposed.<sup>61</sup>

In many jurisdictions, including the District of Columbia, a critical component of the bail determination process is the preparation of a bail report by a pretrial services agency.<sup>62</sup> Prior to the initial appearance/bail determination in the Superior Court for the District of Columbia, the D.C. Pretrial Services Agency prepares a bail report for the court that contains critical information on the defendant’s employment, residency, community ties, and criminal history.<sup>63</sup> After gathering this data based on interviews with the arrestee, verification of data by phone and the completion of a criminal background check using local and national databases, the Agency completes a risk assessment that allows the court to properly evaluate the risk that the defendant will flee or commit a crime while on pretrial release, and determine whether there are supervised release conditions that will address or

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59. See Douglas Colbert, *Coming Soon to a Court Near You—Convicting the Unrepresented at the Bail Stage: An Autopsy of a High Court’s Sua Sponte Rejection of Indigent Defendants’ Right to Counsel*, 36 SETON HALL L. REV. 653, 659 (2006); Douglas Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 337 (2011); Douglas Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail*, 23 CARDOZO L. REV. 1721, 1723 (2002).

60. See generally discussion *infra* Part III.C (Minnesota bail laws).

61. *Id.*

62. The District of Columbia Pretrial Services Agency performs a range of services to assist the court in making bail determinations, including gathering background information on arrestees prior to the bail hearing, performing a risk assessment, drug testing, community supervision, mental health treatment, and drug treatment. See PRETRIAL SERVICES AGENCY FOR THE DISTRICT OF COLUMBIA, <http://www.psa.gov/?q=about> (last visited October 21, 2013); see also D.C. MISDEMEANOR ARREST & PRETRIAL RELEASE PROJECT, CLARIFYING THE POST-ARREST PROCESS IN THE DISTRICT OF COLUMBIA: REPORT, RECOMMENDATIONS, AND PROPOSED LEGISLATION, COUNCIL FOR COURT EXCELLENCE 3 (2012), available at [http://www.courtexcellence.org/uploads/publications/CCE\\_Post\\_Arrest\\_Report\\_and\\_Legislative\\_ProposalFINAL.pdf](http://www.courtexcellence.org/uploads/publications/CCE_Post_Arrest_Report_and_Legislative_ProposalFINAL.pdf) (“[T]he District of Columbia is considered to be a model for the rest of the nation with respect to the core concept of pretrial release standards . . . .”); Bruce Beaudin, *The D.C. Pretrial Services Agency: Lessons From Five Decades of Innovation and Growth*, 2 CASE STUDIES 1, 1 (2010), available at <http://www.psa.gov/sites/default/files/PJI-DCPSACaseStudy.pdf> (noting that the D.C. Pretrial Services Agency “is universally acknowledged by stakeholders within the District [of Columbia] as being indispensable to the operation of the criminal justice system”).

63. *Court Support*, PRETRIAL SERVS. AGENCY FOR THE DIST. OF COLUMBIA, [http://www.psa.gov/?q=programs/court\\_support](http://www.psa.gov/?q=programs/court_support) (last visited Oct. 23, 2013).

minimize those risks.<sup>64</sup> Investigation, reporting, assessment, and supervision are the core functions of a pretrial services agency.<sup>65</sup> This pretrial model has also been successfully implemented in numerous jurisdictions across the country to reduce reliance on pretrial detention without a corresponding increase in rearrests or failures to return to court among the defendants who are placed in pretrial community supervision programs.<sup>66</sup>

By contrast, however, many jurisdictions have no pretrial services agency or have an agency without the capacity to perform the investigative, reporting and assessment functions needed by courts to make informed bail determinations.<sup>67</sup> The lack of such services exists despite the fact that most state bail laws require bail officials to consider the background and criminal history of defendants in setting bail.<sup>68</sup> As a result, bail officials are forced to make “quick and dirty” decisions, relying solely on their “gut instincts” or the customary policies and practices in the jurisdiction.<sup>69</sup> This uninformed decision making process frequently causes bail officials to impose a monetary bond by default, without giving full consideration to available non-financial release options.<sup>70</sup>

64. *Id.*

65. See PRETRIAL JUSTICE INSTITUTE, PRETRIAL SERVICES PROGRAM IMPLEMENTATION: A STARTER KIT 5 (2012), available at <http://www.pretrial.org/download/featured/PJI%20Pretrial%20Services%20Program%20Implementation%20A%20Starter%20Kit.pdf> (discussing the core functions of a pretrial services program).

66. See generally BARRY MAHONEY ET AL., NAT'L INST. OF JUSTICE, PRETRIAL SERVICES PROGRAMS: RESPONSIBILITIES AND POTENTIAL 1 (2001), available at <https://www.ncjrs.gov/pdffiles1/nij/181939.pdf> (discussing how pretrial services programs can “minimize unnecessary pretrial detention, reduce jail crowding, increase public safety, ensure that released defendants appear for scheduled court events, and lessen invidious discrimination between rich and poor in the pretrial process”).

67. See *Pretrial Release Conditions*, *supra* note 56 (listing conditions of pretrial release authorized by state statutes).

68. See *infra* Part III.B and notes 142–143, for discussion of Minnesota bail laws which mandate consideration of the defendant’s background and criminal history in the bail determination process, but gives the court discretion in obtaining a bail report prior to setting bail.

69. MARIE VANNOSTRAND ET AL., LUMINOSITY, INC., PRETRIAL CASE PROCESSING IN MAINE: A STUDY OF SYSTEM EFFICIENCY & EFFECTIVENESS 143, 145, 147–48 (2006), available at <http://static.nicic.gov/Library/022013.pdf> (finding that a lack of relevant information “related to criminal history . . . defendant’s character and physical and mental condition; . . . employment history . . . ; financial resources; [etc] . . . carries significant consequences not only for the pretrial defendant, but also for the safety of the community, the integrity of the judicial process, and the utilization of our often overtaxed criminal justice resources.”).

70. See, e.g., THE ABELL FOUNDATION, THE PRETRIAL RELEASE PROJECT: A STUDY OF MARYLAND’S PRETRIAL RELEASE AND BAIL SYSTEM 23–25 (2001) [hereinafter THE PRETRIAL RELEASE PROJECT] (“[T]he [Maryland] statutory mandate, requiring the least onerous options possible for release, is routinely contravened, because judicial

In addition to the overall lack of information available to bail officials, bail determinations are frequently made when there are dozens of other defendants on the crowded court calendar that must be processed in a relatively short amount of time. This premium on judicial efficiency adds to the arbitrariness and dysfunction in the bail determination process. For example, Connecticut bail hearings have been described as follows:

In practice, when determining bail, judges have little time to consider the prescribed factors, especially in overcrowded courts. The average arraignment takes about 5 minutes, sometimes less. In that time, the judge gets only a snapshot of each case.<sup>71</sup>

The time pressure and information deficiencies also result in arbitrariness in setting the bond amount. As one Connecticut judge candidly admitted: "a judge can justify almost any bond . . . [c]ertain judges will assess certain cases differently. You can assemble a room full of judges and the range of bail for the same crime can vary from \$5,000 to \$250,000. It's their individual decision."<sup>72</sup> Similarly, a recent study of the bail process in Baltimore, Maryland, found: "[a]s there is currently no standard that regulates the bail amount a person receives for any given offense, identifying which offense typically receives which bail amount is impossible."<sup>73</sup>

Another complicating factor in bail determinations is the fact that in some jurisdictions the bail official is not a judge or even a lawyer. In Maine, for example, bail determinations are made by a bail commissioner appointed by the chief judge of the state district court. Bail commissioners must be Maine residents and must complete an eight-hour training course within a year of appointment (though they can begin making bail determinations before they complete the training course).<sup>74</sup> A comprehensive report addressing bail determinations in Maine found some bail commissioners were former newspaper report-

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officers lack critical information."), *available at* [http://www.abell.org/pubsitem/hhs\\_pretrial\\_9.01.pdf](http://www.abell.org/pubsitem/hhs_pretrial_9.01.pdf).

71. Kathryn Malizia, *Assembly Line Justice*, *NEW JOURNAL* (New Haven) (Sept. 01, 2009), <http://www.thenewjournalat Yale.com/2002/09/assembly-line-justice/>.

72. Commissioners and judges have to decide bail in a very short time based on very limited information about a person. As a result many judges presume that the allegations against the arrestee are true. *See* JUSTICE POL'Y INST., *BALTIMORE BEHIND BARS: HOW TO REDUCE THE JAIL POPULATION, SAVE MONEY AND IMPROVE PUBLIC SAFETY* 21–26 (2010) [hereinafter *BALTIMORE BEHIND BARS*]; *see also* JUSTICE POL'Y INST., *BAILING ON BALTIMORE: VOICES FROM THE FRONT LINES OF THE JUSTICE SYSTEM* 4 (2012) [hereinafter *BAILING ON BALTIMORE*]; Malizia, *supra* note 71.

73. *BALTIMORE BEHIND BARS*, *supra* note 72, at 26.

74. ME. REV. STAT. ANN. tit. 15, § 1023 (2012).

ers, insurance salesmen and maintenance workers.<sup>75</sup> Similarly, initial bail determinations in Baltimore, Maryland, are made by non-judicial officers.<sup>76</sup> In Baltimore, the bail hearing occurs in the detention center where bail commissioners appointed by the court conduct hearings in small “cells.”<sup>77</sup> Bail commissioners are separated from the inmates by a glass partition and use openings in the partition to speak to the defendant and pass papers to them.<sup>78</sup> The bail hearings are not recorded, closed to the public, and traditionally take place without counsel present.<sup>79</sup> Moreover, although the commissioner’s bail determination is subject to review by a judge, studies show that the judges adjust the initial bail determination in less than a quarter of cases.<sup>80</sup>

The bail determination process in many state courts creates a grave risk of an erroneous and arbitrary deprivation of liberty. The lack of background information on the arrestee, the scant legal restrictions placed on bail determinations, and the overall lack of formality and accountability of the bail determination process create the “perfect storm” for arbitrary bail determinations and offer very little protection against the consideration of race or any other impermissible factor when making bail determinations. This risk is especially great in jurisdictions where the bail official is not a lawyer and the defendant is not represented by a counsel at the bail hearing.

### C. *The Consequences of Current Bail Determination Practices*

According to a 2013 Department of Justice report, over sixty percent of the people housed in jails across the country are pretrial detain-

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75. See VANNOSTRAND, *supra* note 69, at 144 (stating that the minimal requirements for bail commissioners were inadequate and urged the Court to consider expanding the training to include topics such as the role of the presumption of innocence in bail setting, the Fifth Amendment right to due process of law, the Fourteenth Amendment right to equal protection under the law, and an education on the Eighth Amendment prohibition against the imposition of excessive bail); see also Emily Guerin et al., *Report: People Need Almost No Legal training to Set Bail*, BANGOR DAILY NEWS, Mar. 22, 2011, <http://bangordailynews.com/2011/03/22/business/maine%E2%80%99s-bail-system-a-19th-century-holdoverpart-1-of-4people-who-set-bail-in-maine-have-almost-no-legal-training/>.

76. As of 2001, one quarter of Maryland bail’s commissioners were not college graduates, only fifteen percent had graduated from law school, and some commissioners had either paralegal training or had taken some law school courses. THE PRETRIAL RELEASE PROJECT, *supra* note 70, at 20, n.75.

77. *Id.* at 21.

78. *Id.*

79. *Id.*

80. BAILING ON BALTIMORE, *supra* note 72, at 4; BALTIMORE BEHIND BARS, *supra* note 72, at 26.

ees.<sup>81</sup> This figure is much higher in certain cities.<sup>82</sup> In fact, the population in pretrial detention is a major cause of jail overcrowding across the country.<sup>83</sup> While a percentage of pretrial defendants are confined because the court has determined that they pose a danger or present a flight risk, seventy-five percent of pretrial detainees are charged with relatively minor property crimes, drug offenses or other non-violent acts,<sup>84</sup> and remain in jail simply because the money bond was set in an amount they cannot afford to pay.<sup>85</sup> For some, even a low or nominal bond is beyond their reach.<sup>86</sup> As a result, money bail becomes a *sub rosa* form of preventive detention for the poor and nonviolent, and "bail eligible" pretrial detainees languish in local jails

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81. TODD D. MINTON, U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2012 - STATISTICAL TABLES, at 1 (2013), available at <http://www.bjs.gov/content/pub/pdf/jim12st.pdf> (showing that the percentage of pretrial detainees in jail has remained unchanged since 2005).

82. E.g., MARIE VANNOSTRAND, LUMINOSITY, INC., NEW JERSEY JAIL POPULATION ANALYSIS: IDENTIFYING OPPORTUNITIES TO SAFELY AND RESPONSIBLY REDUCE JAIL POPULATION 11 (2013), available at [http://www.drugpolicy.org/sites/default/files/New\\_Jersey\\_Jail\\_Population\\_Analysis\\_March\\_2013.pdf](http://www.drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf) (reporting that about seventy-three percent of the jail population consists of pretrial detainees); Marcia Johnson & Lockett Anthony Johnson, *Bail: Reforming Policies to Address Overcrowded Jails, the Impact of Race on Detention, and Community Revival in Harris County, Texas*, 7 NW. J. L. & SOC. POL'Y 42, 48-49 (2012) (stating that in Texas, pretrial population is eighty percent felony and sixty-four percent misdemeanors); OFFICE OF HAWAIIAN AFFAIRS, THE DISPARATE TREATMENT OF NATIVE HAWAIIANS IN THE CRIMINAL JUSTICE SYSTEM 30 (2010), available at [http://www.oha.org/sites/default/files/ir\\_final\\_web\\_rev.pdf](http://www.oha.org/sites/default/files/ir_final_web_rev.pdf) (stating that in 2009 approximately seventy-four percent of the people admitted to jail were pretrial detainees); VANNOSTRAND, *supra* note 69, at 11 (finding that sixty-three percent of the jail population in Maine in 2006 comprised pretrial inmates).

83. See Laura Sullivan, *Bail Burden Keeps U.S. Jails Stuffed with Inmates*, NAT'L PUB. RADIO (Jan. 21, 2010), <http://www.npr.org/2010/01/21/122725771/Bail-Burden-Keeps-U-S-Jails-Stuffed>.

84. Williams, *supra* note 55.

85. THOMAS H. COHEN & BRIAN A. REAVES, STATE COURT PROCESSING STATISTICS 1990-2004: PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 1 (2008), available at <http://www.prisonpolicy.org/scans/bjs/prfdsc.pdf>; see also Sullivan, *supra* note 84.

86. E.g., HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY 1 (2010) [hereinafter THE PRICE OF FREEDOM], available at [http://www.hrw.org/sites/default/files/reports/us1210webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf). A 2013 report on New Jersey jails revealed that thirty-eight percent of the pretrial inmates received a monetary bond that they could not afford to pay. There were approximately 800 inmates held in custody who could have secured their release for \$500 or less. In total, New Jersey confined over 1,500 people because of their inability to pay a bond of \$2,500 or less. This group comprised twelve percent of the entire jail population. VANNOSTRAND, NEW JERSEY JAIL POPULATION ANALYSIS, *supra* note 82, at 13; BALTIMORE BEHIND BARS, *supra* note 74, at 25-27 (explaining that at the start of 2010, there were 276 people in jail in Baltimore because they were unable to post a bail amount of \$5,000 or less).

for weeks or even months until their criminal charges are resolved.<sup>87</sup> Because most pretrial detainees are charged with minor offenses, they probably would not receive a sentence of incarceration if convicted. Thus, ironically, they will be required to spend far more time behind bars pretrial while they are presumed innocent than they will be required to serve after they are convicted and are subject to punishment.<sup>88</sup>

Pretrial detention also has an adverse impact on the adjudication trajectory of a criminal case. In effect, the decision to detain a defendant pretrial, or the decision to impose a money bond that the defendant cannot afford which results in pretrial detention is tantamount to a decision to convict. According to the Department of Justice, seventy-eight percent of defendants held on bail are eventually convicted, but just sixty percent of released defendants are ultimately convicted.<sup>89</sup> Defendants placed in pretrial detention are also more likely to plead guilty, and tend to get worse plea offers from prosecutors than released defendants.<sup>90</sup> As a result, pretrial detainees are more likely to plead to a more serious felony offense.<sup>91</sup> Defendants subjected to pretrial detention also face a much greater prospect of incarceration and receive longer prison sentences than released defendants with similar charges and a similar criminal history.<sup>92</sup> A national study published in

87. THE PRICE OF FREEDOM, *supra* note 86, at 26

88. Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1309 (2013); Johnson & Johnson, *supra* note 82, at 52 (stating that at least 200 people in Texas jails held longer than the minimum sentence for the crime of which they were accused).

89. COHEN & REAVES, *supra* note 85, at 7.

90. *Id.*; E. Britt Patterson & Michael J. Lynch, *Bias in Formalized Bail Procedures*, in RACE AND CRIMINAL JUSTICE 40 (Michael J. Lynch & E. Britt Patterson eds., 1991) (citing studies dating back to 1932 finding that those unable to make bail are more likely to be found guilty than those who make bail); Shima Baradaran & Frank McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 555 n.275 (2012) (reporting that the impact of pretrial detention on the sentence imposed shows that detained defendants are more likely to be found guilty, plead guilty, and serve prison time and will serve longer sentences in prison).

91. Traci Schlesinger, *The Cumulative Effects of Racial Disparities in Criminal Processing*, 7 J. INST. JUST. & INT'L STUD. 261, 271 (2007) (finding, after a study of 36,000 cases nationwide, that pretrial detainees have a twenty-three percent greater chance of being adjudicated as felons, as opposed to getting charges reduced to misdemeanors).

92. Meghan Sacks & Alissa R. Ackerman, *Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment?*, 20 CRIM. JUST. POL'Y REV. 1, 1, 11 (Oct. 2012) (documenting a study of 634 cases processed in 2004 from all twenty one counties in New Jersey and concluding that "defendants who were held in pretrial detention received longer sentences than those who were able to post bail"); Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1051-52 (1954) (concluding that defendants unable to pay money bail

2007 found that defendants placed in pretrial detention were four times more likely to be sentenced to incarceration and received sentences eighty-six percent longer than defendants who were released pretrial.<sup>93</sup> One scholar explained:

In an effort to assess the dangerousness of an offender during sentencing, pretrial release may be one of the most readily available and seemingly valid measures. In effect, it allows the judge to rely on an earlier assessment of the offender's dangerousness. If the individual was deemed safe enough to be released into the community pending trial—with either low bail or release on recognizance—then expectations on future dangerousness are likely to be low.<sup>94</sup>

Beyond the long-term impact of pretrial detention on the pending case, pretrial detainees are subjected to countless personal hardships due to their confinement, including loss of employment, and strains on family ties and financial resources. In some facilities, pretrial defendants are housed in the same facility—and sometimes in the same cell—with convicted prisoners. Thus, though pretrial detainees remain presumed innocent, they are subjected to the exact same conditions as those prisoners whose confinement serves as punishment.<sup>95</sup> Due to the deplorable conditions and overcrowding in some local jails, pretrial detainees are exposed to diseases, physical violence, sexual assault, and face a very real risk of death.<sup>96</sup>

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are more likely to be convicted and receive higher sentences than those able to pay money bail and be released).

93. Schlesinger, *supra* note 91, at 261, 264, 270–71 (explaining the findings of a study of a representative sample of 36,000 men charged with felony drug offenses from sixty five of the seventy five most populous counties in the country during 1990–2002); *see also* Christine Tartaro & Christopher M. Sedelmaier, *A Tale of Two Counties: The Impact of Pretrial Release, Race and Ethnicity Upon Sentencing Decisions*, 22 CRIM. JUST. STUD. 203, 212, 215 (2009) (finding that of roughly 1,600 felony cases filed in May 1998, pretrial detention was a “significant predictor” in the judge’s decision to sentence the defendant to a period of incarceration). In fact, pretrial detainees were four times more likely to be sentenced to incarceration than were defendants who were released before trial. Race further exacerbated the pretrial detention disparity, as African American pretrial detainees tended to receive longer sentences. *Id.*

94. *See* Tartaro & Sedelmaier, *supra* note 93, at 206.

95. ALLEN J. BECK ET AL., U.S. DEP’T OF JUSTICE BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12, at 6, 8–9 (2013), *available at* <http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf> (finding over 22,000 reports of sexual victimization in jails and only thirty-four of the 358 jails surveyed had no reports of sexual victimization); Appleman, *supra* note 88, at 1312–21 (citing examples where individuals sentenced to pretrial detention in jails are subject to horrible conditions including misconduct by guards, abuse, strip-searches, overcrowding, and not being fed enough food).

96. Appleman, *supra* note 88, at 1312–16; Johnson & Johnson, *supra* note 82, at 74–75 (noting that from 2001–2009 more than one hundred detainees died in Houston

Also, as Justice Jackson observed in *Stack v. Boyle*, defendants in pretrial detention are “handicapped in consulting with counsel, searching for evidence and witnesses, and preparing a defense.”<sup>97</sup> Pretrial detainees do not have the opportunity to obtain or continue employment, participate in drug treatment, or otherwise demonstrate to the court that they can be law-abiding citizens and do not pose a danger to the community.<sup>98</sup> Thus, the short-term deprivation of liberty occasioned by pretrial detention is exacerbated by the potential long-term adverse impact of pretrial detention on the defendant’s life and the resolution of the criminal charges.

## II.

### RACIAL DISPARITIES IN BAIL DETERMINATIONS

Over the last fifty years, research studies have consistently found that African American defendants receive significantly harsher bail outcomes than those imposed on white defendants. Specifically, nearly every study on the impact of race in bail determinations has concluded that African Americans are subjected to pretrial detention at a higher rate and are subjected to higher bail amounts than are white arrestees with similar charges and similar criminal histories. The adverse impact of the defendant’s race on the outcome of the bail determination is not a new or recent problem, nor is it confined to specific types of cases. Criminologists and researchers have published over twenty five studies documenting racial disparities in bail determinations in state cases,<sup>99</sup> federal cases,<sup>100</sup> and juvenile delinquency pro-

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and Harris County jails, seventy percent pretrial; almost one-third of the deaths involved unsanitary conditions, allegations of physical abuse, and higher rates of serious infections, including sexually transmitted diseases, TB, HIV, and staff infections).

97. *Stack v. Boyle*, 342 U.S. 1, 8 (1952) (Jackson, J., concurring); see also JOHN S. GOLDKAMP, *TWO CLASSES OF ACCUSED: THE STUDY OF BAIL AND DETENTION IN AMERICAN JUSTICE* 185–213 (1979) (discussing how pretrial detained defendants are less able to build adequate defenses and are more severely sentenced).

98. Sacks & Ackerman, *supra* note 92, at 13.

99. Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 *JUST. Q.* 170, 187 (2005); Stephen DeMuth, *Racial and Ethnic Differences in Pretrial Release and Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees*, 41 *CRIMINOLOGY* 873, 880–81 (2003).

100. See, e.g., Cassia Spohn, *Race, Sex, and Pretrial Detention in Federal Court: Indirect Effects and Cumulative Disadvantage*, 57 *U. KAN. L. REV.* 879 (2009) (using data on defendants convicted of drug offenses in federal district courts in Minnesota, Nebraska, and Iowa); Celesta A. Albonetti et al., *Criminal Justice Decision Making as a Stratification Process: The Role of Race and Stratification Resources in Pretrial Release*, 5 *J. QUANTITATIVE CRIMINOLOGY* 57 (1989) (studying ten federal district courts—Brooklyn, Manhattan, Chicago, Philadelphia, Baltimore, Dallas, Kansas City, Atlanta, Los Angeles and Detroit).

ceedings.<sup>101</sup> The adverse impact of race in bail determinations also is not isolated to particular regions of the country. The problem is pervasive. Researchers documented racial disparities in bail determinations in studies of northeast urban areas,<sup>102</sup> mid-western urban areas,<sup>103</sup> southern counties,<sup>104</sup> mid-western counties,<sup>105</sup> and northern counties.<sup>106</sup> Researchers also documented similar patterns of ethnic disparities in bail determinations for Latino defendants.<sup>107</sup>

#### A. *The First Generation Studies of Race and Bail: 1970–2000*

In 2003, Professor Marvin D. Free, Jr. completed a meta-analysis of twenty-five different studies on the impact of race in bail determinations published between 1970 and 2000. In each study, researchers identified representative samples of criminal cases, isolated particular legal and extra-legal factors,<sup>108</sup> and employed various metrics and statistical analyses to determine whether race played a role in bail deter-

101. *E.g.*, Eleanor Hinton Hoytt et al., *Reducing Racial Disparities in Juvenile Detention* (2001), available at <http://www.aecf.org/upload/publicationfiles/reducing%20racial%20disparities.pdf> (addressing how from 1983 to 1997 the overall youth detention population increased by forty-seven percent, but eighty percent of the youth being detained during this time period were minority youth).

102. *E.g.*, Ian Ayers & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987, 1024 (1994) (examining racial discrimination in bail determinations in New Haven, Connecticut).

103. *E.g.*, John Wooldredge, *Distinguishing Race Effects on Pre-trial Release and Sentencing Decisions*, 29 JUST. Q. 41 (2012) (focusing on a large urban area in Ohio).

104. *E.g.*, Shawn D. Bushway & Jonah B. Gelbach, *Testing for Racial Discrimination in Bail Setting Using Nonparametric Estimation of a Parametric Model* (Nat'l Sci. Found., Working Paper No. SES0718955, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1990324](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990324) ) (studying Broward County, Florida, and Dallas County, Texas); Patterson & Lynch, *supra* note 90, at 36–53 (investigating a North Florida County).

105. *E.g.*, K.B. Turner & James B. Johnson, *A Comparison of Bail Amounts for Hispanics, Whites, and African Americans: A Single County Analysis*, 30 AM. J. OF CRIM. JUST. 35, 43 (2005) (documenting racial disparities in Lancaster County, Nebraska).

106. *E.g.*, Tina Freiburger & Catherine D. Marcum, *The Impact of Race on the Pre-trial Decision*, 35 AM. J. OF CRIM. JUST. 76 (2010) (singling out a mid-size county in Pennsylvania).

107. *See, e.g.*, Turner & Johnson, *supra* note 105; DAVID LEVIN, PRETRIAL JUSTICE INST., *PRETRIAL RELEASE OF LATINO DEFENDANTS FINAL REPORT* (2008), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/223852.pdf> (finding that Latino defendants are more likely to receive financial pretrial release than non-Latino defendants); DeMuth, *supra* note 99, at 897, 899 (noting that Hispanic defendants receive significantly higher bail amounts than black or white defendants and that "Hispanic defendants face a 'triple disadvantage' at the pretrial release stage—they are the group most likely to have to pay bail, the group with the highest bail amounts, and the group least able to pay bail").

108. In their analysis, researchers used various social science methods to control for legal factors in the case (i.e., offense severity, pending criminal charges, prior convic-

minations. In eighteen studies, researchers concluded that African American defendants were subjected to more severe treatment than white defendants.<sup>109</sup> Moreover, research studies show that even when judges have access to relevant background information—both positive and negative—race still plays a role in the outcome of the bail determination. For example, one major national study examined bail determinations in over 5000 felony cases adjudicated in the federal district courts in Brooklyn, Manhattan, Chicago, Philadelphia, Baltimore, Dallas, Kansas City, Atlanta, Los Angeles and Detroit.<sup>110</sup> Researchers compared the bail outcomes for African American and white defendants, all of whom had prior felony convictions and higher socioeconomic or “stratification” factors (i.e., advanced education and higher income level). The researchers found that white defendants with a prior felony conviction received more favorable bail outcomes than similarly-situated African American defendants.<sup>111</sup> Moreover, although both African American and white defendants benefitted in the bail determination based on their education and income level, these factors “operate to the greater advantage of whites than blacks” in the bail determination process.<sup>112</sup>

Other first generation studies found that African Americans were charged a higher money bond to secure their pretrial release than were white defendants.<sup>113</sup> Also, white defendants were more likely to receive a money bond than were African American defendants with similar criminal charges and similar criminal histories.<sup>114</sup> Also, local community ties, generally viewed as a positive factor in determining risk of flight, were found to decrease the bond amount for white residents, but not African American defendants.<sup>115</sup> More recent studies have likewise found that bail officials generally tend to impose higher bail amounts on African American defendants.<sup>116</sup>

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tions), as well as specific extra-legal factors (including the defendant’s employment status, residency in the jurisdiction, income, race, sex, and age).

109. Marvin D. Free, Jr., *Race and Presentencing Decisions: The Cost of Being African American*, in RACIAL ISSUES IN CRIMINAL JUSTICE: THE CASE OF AFRICAN AMERICANS 137, 140–41 (Marvin D. Free, Jr. ed., 2003).

110. See Albonetti et al., *supra* note 100, at 64–65.

111. *Id.* at 78.

112. *Id.*

113. Patterson & Lynch, *supra* note 90, at 36–53 (reporting a study involving 335 non-narcotics felony arrests from 1985–86 in a North Florida County).

114. *Id.* (reporting a study involving 335 non-narcotics felony arrests from 1985–86 in a North Florida County).

115. *Id.*

116. *E.g.*, Ayers & Waldfoegel, *supra* note 102, at 1024, 1039 (finding that bail set for minority defendant is “unjustifiably high” with bail amounts for black males averaged thirty five percent higher than white males even controlling for seriousness of

B. *The Second Generation Studies of Race and Bail: 2001–2012*

The second generation of research studies on the role of race in bail determinations relies primarily on the volume of national criminal justice data compiled by the Department of Justice as part of the State Court Processing Statistics Project (SCPS).<sup>117</sup> One study examined bail determinations in over 30,000 property, drug, and violent criminal cases filed in over forty-five counties across the country.<sup>118</sup> Controlling for important legal and extralegal factors relevant to bail determinations, the study found that African Americans were sixty-six percent more likely to be in jail pretrial than were white defendants, and that Latino defendants were ninety-one percent more likely to be detained pretrial.<sup>119</sup> Overall, the odds of similarly-situated African American and Latino defendants being held on bail because they were unable to pay the bond amounts imposed were twice that of white defendants.<sup>120</sup>

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the offense). Ayers and Waldfofel concluded that while there may be other non-discriminatory, justifiable explanations for the racial disparity, "courts increase bail for some characteristic unrelated to defendant flight propensity . . . [and] minority male defendants are most likely to have this characteristic." *Id.*; see also Malizia, *supra* note 71 (discussing a 1991 study conducted by the Hartford Courant which examine 150,000 cases throughout the state of Connecticut and found that "black and Hispanic defendants without a criminal record had to post on average twice that of white defendants to get out of jail"); Brant Houston & Jack Ewing, *Racial Inequity Still Evident in Setting of Bail*, HARTFORD COURANT, May 17, 1992, [http://articles.courant.com/1992-05-17/news/0000200294\\_1\\_bail-disparities-white-men](http://articles.courant.com/1992-05-17/news/0000200294_1_bail-disparities-white-men) (finding that Connecticut's judges are still making members of minority groups pay far more than whites to get out of jail). Judges set bails for black and Hispanic men in 1991 that were sixty-two percent to seventy two percent higher than those for white men, according to a computer-assisted review of about 67,000 criminal cases by *The Hartford Courant*. *Id.*

117. Since 1988, the Department of Justice Bureau of Justice Statistics has supported the State Court Processing Statistics (SCPS) project. SCPS is a criminal justice data collection project that receives comprehensive data from local courts on criminal case processing in cases involving felony offenses. The SCPS data is collected from the seventy five largest counties (in forty jurisdictions) where fifty percent of all criminal prosecutions in the United States occur. SCPS data is collected biennially and aggregated to provide a national picture of the criminal justice system for use by criminal justice officials, academics, journalists, legislators, courts and researchers. SCPS collects information about the felony defendants (including sex, race, age, prior record) and information about the criminal case (including arrest offense, criminal history, bail and pretrial release, court appearance record, rearrests while on pretrial release, type and outcome of adjudication, and type and sentence). Each SCPS series gathers data on 14,000 to 16,000 criminal cases. See *Data Collection: State Court Processing Statistics (SCPS)*, BUREAU OF JUSTICE STATISTICS, [http://www.bjs.gov/index.cfm?ty=dcdetail&iid=282#BJS\\_data\\_experts](http://www.bjs.gov/index.cfm?ty=dcdetail&iid=282#BJS_data_experts) (last visited June 8, 2013).

118. DeMuth, *supra* note 99, at 888 n.7.

119. *Id.* at 895.

120. *Id.* at 897 ("For many black and Hispanic defendants, a financial release decision is, in effect, a denial of release.").

Another 2005 study examined bail determinations in over 36,000 felony state court cases across the country.<sup>121</sup> The study found that “being Black increases a defendant’s odds of being held in jail pretrial by 25%.”<sup>122</sup> Similar to earlier studies, this study also concluded that poverty plays a role in pretrial outcomes. Researchers found that even when the court imposed a money bond, African Americans “have odds of making bail that are approximately half those of Whites with the same bail amounts and legal characteristics.”<sup>123</sup> Indigent Latinos faced similar disadvantages compared to white defendants.<sup>124</sup>

The research conducted since Professor Free’s meta-analysis confirms the findings reached in earlier studies. The two most recent studies—both published since 2010—found that African American defendants face higher bail amounts than white arrestees with similar criminal charges and criminal histories<sup>125</sup> and, when race is combined with other legally relevant factors, African Americans have lower odds of non-financial release and greater odds of pretrial detention.<sup>126</sup>

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121. Schlesinger, *supra* note 99, at 175 (examining cases filed during the ten-year period from 1990-2000).

122. *Id.* at 181.

123. *Id.* at 183; see also Traci Schlesinger, *The Cumulative Effects of Racial Disparities in Criminal Processing*, 7 J. INST. JUST. & INT’L STUD. 261, 271 (2007) (examining, using SCPS data, over 36,000 cases involving Black, White and Latino men charged with drug offenses during the period of 1990–2002, and finding that “Black defendants have odds of being granted a financial release that are nine percent lower and odds of being denied bail that are forty four percent higher than White defendants with similar legal characteristics”); Freiburger & Marcum, *supra* note 106, at 79, 82 (finding, in a study of three hundred twelve drug cases processed in a court in a mid-size county in Pennsylvania from 2000–2003, that black defendants were eighty percent less likely than white defendants to be granted release on personal recognizance).

124. Schlesinger, *Racial and Ethnic Disparity*, *supra* note 99, at 183.

125. Bushway & Gelbach, *supra* note 104, at 1. Using SCPS data for 2000–2002, the study found that “black defendants are assigned greater bail levels than whites accused of similar offenses. Specifically, black bail amounts are \$7,000 higher for violent crimes; \$13,000 higher for drug crimes, and \$10,000 higher for minor public order crimes. Researchers found there is “evidence of bias against blacks in bail setting” in Broward and Dallas counties across all offense types. Researchers concluded that, “it is entirely possible that judges (i) do not wish to discriminate, but (ii) they nevertheless see bail using heuristics that have a discriminatory effect”. *Id.* at 10, 31–32.

126. Wooldredge, *supra* note 103, at 41. This study examined 5000 felony defendants—either African American or white—processed in 2005 in one of Ohio’s largest urban jurisdictions and found that race plus other legally relevant factors (and not race alone) combined to produce racial disparities. African American males age eighteen to twenty nine, who were eligible for financial release experienced lower odds of ROR, higher bond amounts, and higher odds of incarceration in prison relative to other demographic subgroups, even with the inclusion of rigorous controls for legally relevant criteria. *Id.* Also, there was a statistically significant racial disparity between bail amount and whether ROR was imposed for young African American defendants. *Id.*

C. *The Cause of Racial Disparities in Bail Determinations*

There is relative agreement among criminologists regarding the reasons for the persistent pattern of racial disparities in bail determinations. As discussed in Part II, bail officials are vested with tremendous discretionary authority, have very few legal constraints, and possess scant relevant background information on the defendant when making bail determinations. Criminologists believe this combination of factors forces bail officials to create their own internal guidelines, relying on racial stereotypes and biases to assist them in deciding whether a defendant is dangerous or a flight risk, and what amount of bond should be imposed.<sup>127</sup> Criminologist Stephen DeMuth explains:

Legal decision making is complex, repetitive, and often constrained by information, time and resources in ways that produce considerable ambiguity or uncertainty for arriving at a "satisfactory" decision. As an adaptation to these constraints, a "perceptual shorthand" for decision making emerges that allows for more simple and efficient processing of cases by court actors. . . . [L]egal agents may rely on the defendant's current offense and criminal history, but also on stereotypes linked to the defendant's race. . . . On the basis of these stereotypes, judges may project behavioral expectations about such things as the offender's risk of recidivism or danger to the community. Once in place and continuously reinforced, such patterned thinking and acting are resistant to change and may result in the inclusion of racial and ethnic biases in criminal case processing.<sup>128</sup>

Legal scholar, Professor Marcia Johnson, also cites the degree of discretionary authority vested in bail officials as a contributing factor in racial disparities in bail determinations:

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127. *E.g.*, Tartaro & Sedelmaier, *supra* note 93, at 218 ("There is no doubt that the criminal justice system is overtaxed. Stemming from a need to keep the system moving, court officials are often forced to make decisions based on less than complete information; pretrial release is included among these decisions. Unfortunately, it would appear that defendant race and ethnicity may be used in some locations as a shorthand measure of perceived dangerousness or flight risk to help make such decisions in the absence of other information."); Schlesinger, *supra* note 99, at 187 ("Judges use racialized attributions to fill in the knowledge gaps created by limited information on cases and defendants. Through this process, racial and ethnic stereotypes become pertinent 'knowledge' that direct criminal justice decisions."); *see also* Wooldredge, *supra* note 103, at 67 (noting that at initial court appearances, a judge's "attempt to assess an offender's risk for flight and dangerousness to the community with little available information" could lead to "considerations of criminal stereotypes."); Turner & Johnson, *supra* note 107, at 50 (2005) (finding that higher bail amounts for Latino defendants were perhaps attributable to negative stereotypes).

128. DeMuth, *supra* note 99, at 880–81.

The broad breadth of discretion that judges have makes it easier for them to improperly consider race even in an otherwise race-neutral bail system. For example, a judge . . . may determine that a defendant is dangerous simply based on his or her stereotype of what a dangerous offender is, which in some cases might mean simply that the defendant is African-American and male.<sup>129</sup>

In sum, extensive social science research establishes that, in jurisdictions across the country, when bail officials make the discretionary decision to grant pretrial release and decide the bond amount to be imposed, the race of the arrestee plays a role in a way that disproportionately and adversely subjects African Americans to pretrial detention and harsher bail conditions. Race-neutral explanations of the persistent patterns of racial disparities are belied by the fact that the relevant information that bail officials could legitimately use to differentiate bail outcomes for white and African American defendants is rarely known by the bail official at the time of the bail determination. Moreover, even when the relevant background information of white and African American arrestees is taken into account by researchers, studies confirm that white defendants still receive more favorable bail decisions than do African American defendants with comparable backgrounds. Whether the racial divide documented in these studies is the product of racial animus or subtle implicit bias by bail officials,<sup>130</sup> the pattern of disadvantage suffered by minority defendants in bail determinations should be addressed with reforms to the bail determination process.

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129. Johnson & Johnson, *supra* note 82, at 65 (using Harris County to exemplify the problems that individuals who are detained pre-trial face).

130. *See generally* IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., 2012); *see also* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1125, 1146 (2012) (pointing out that judges are not “immune from implicit bias” and highlighting empirical evidence that reveals that “White judges showed strong implicit attitudes favoring Whites over Blacks”); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1221 (2009) (reporting that judges hold implicit biases and that such implicit biases can impact judicial judgment, particularly in the context where judges are not cognizant of the need to monitor their decisions for racial bias); CHERYL STAATS, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2013, at 35–45 (2013), *available at* [http://www.kirwaninstitute.osu.edu/reports/2013/03\\_2013\\_SOTS-Implicit\\_Bias.pdf](http://www.kirwaninstitute.osu.edu/reports/2013/03_2013_SOTS-Implicit_Bias.pdf) (arguing that implicit biases permeate the criminal justice system in a variety of ways and can have the effect of imposing unfair outcomes); Justin D. Levinson, *Forgotten Racial Equality, Implicit Bias, Decision Making, and Misremembering*, 57 DUKE L.J. 345, 345 (2007) (arguing that “implicit racial biases affect the way judges and jurors encode, store, and recall relevant case facts”); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 946 (2006) (introducing implicit bias as a new science and highlighting its significance to discrimination law).

## III.

THE RACIAL JUSTICE IMPROVEMENT PROJECT & PRETRIAL  
RACIAL JUSTICE REFORM

In the fall of 2010, the Criminal Justice Section of the American Bar Association (ABA) launched the Racial Justice Improvement Project, a grant-funded initiative to address racial disparities in local criminal justice systems.<sup>131</sup> At the outset, the work of ABA project was guided by the fact that the power to implement systemic reform in the criminal justice system requires collaboration among the various component agencies that control the criminal adjudication process: the courts, the police, the prosecutor's office, the public defender, and the agencies responsible for managing the people under criminal justice supervision (i.e., corrections, probation, parole). The project also recognized that while there are statutes, rules and regulations that define the duties and responsibilities of each criminal justice agency, many of the critical decisions made in criminal cases are the product of discretionary authority (i.e., whether to arrest, whether to file felony charges, whether to grant pretrial release, whether to accept a guilty plea in lieu of trial, whether to seek probation revocation). Over time, this discretionary authority developed into institutionalized policies and practices. Though race-neutral, some of these informal, unwritten policies and practices can have a disparate impact on particular racial or ethnic groups. The ABA Racial Justice Improvement Project was designed to address racial disparities by facilitating collaboration among criminal justice stakeholders and reforming discretionary policies and practices that produce racial disparities.<sup>132</sup>

Each jurisdiction selected to participate in the ABA project formed a "racial justice task force" consisting of an agency director or representative from each criminal justice agency with discretionary authority. After each task force was formed, the groups were asked to identify a specific racial disparity in their criminal justice system that could be addressed through a policy reform initiative. To ensure success during the two-year grant period, the ABA project placed several restrictions on the work of each racial justice task force. First, the

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131. The author served as the director of the project from 2010–2012 and worked closely with the Saint Louis County task force in the development and implementation of their racial justice reform initiatives. More information on the project is available at <http://racialjusticeproject.weebly.com/>. The Racial Justice Improvement Project was funded by a grant from the Department of Justice, Bureau of Justice Assistance (BJA).

132. Cynthia Jones, *Confronting Race in the Criminal Justice System: The ABA's Racial Justice Improvement Project*, CRIM. JUST., Summer 2012, at 12, available at [http://sentencingproject.org/doc/publications/confronting\\_race\\_cj\\_system.pdf](http://sentencingproject.org/doc/publications/confronting_race_cj_system.pdf).

racial justice reform proposal developed by each task force had to be based on the reform of a policy that could be altered within the bounds of the current law in the jurisdiction. Next, each racial justice reform had to be an initiative that the criminal justice leaders on task force had the power to implement. Additionally, the ABA project required data to confirm the existence of the racial disparity and data to measure the effectiveness of the racial justice reform proposed.

A. *The Saint Louis County (Duluth), Minnesota Racial Justice Task Force*<sup>133</sup>

Saint Louis County, Minnesota is over 170 miles long, and stretches across the northeastern border of the state of Minnesota. Although African Americans make up only one percent of the county population, and Native Americans comprise nearly two percent of the County residents, both of these minority populations are over-represented in the criminal justice system and over-represented among pre-trial detainees.<sup>134</sup> The Saint Louis County racial justice task force (“Duluth task force”) consists of the County Attorney (chief prosecutor), the Chief Public Defender, the Deputy Chief of Police, an experienced criminal court trial judge (formerly a county prosecutor), a representative of the American Indian Commission, the head of the local probation office (also charged with the coordination of pretrial services), and a task force coordinator who performs the herculean administrative and managerial tasks required to advance the work of the task force. The Duluth task force chose to focus its efforts on addressing racial disparities in bail and pretrial detention in Saint Louis County.

B. *The Bail Laws in Minnesota*

Like the majority of states, there is a right to bail in the state of Minnesota. Section 7 of the Minnesota state constitution provides that “all persons before conviction shall be bailable by sufficient sureties.”<sup>135</sup> The Supreme Court of Minnesota has held that the state constitutional bail provision “limits government power to detain an

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133. For more background information on the task force, see THE RACIAL JUSTICE IMPROVEMENT PROJECT, <http://racialjusticeproject.weebly.com/minnesota.html> (last visited Oct. 23, 2013).

134. Jones, *supra* note 132 at 3.

135. MINN. CONST., art. 1, § 7. The Minnesota state constitution creates an exception for capital offenses, but with the abolition of capital punishment in the state, the Supreme Court of Minnesota has ruled that “all crimes are bailable.” State v. Brooks, 604 N.W.2d 345, 351 (Minn. 2000).

accused prior to trial” and is intended to “protect the accused rather than the courts.”<sup>136</sup> The Minnesota constitution, consistent with U.S. Constitution, also prohibits excessive bail,<sup>137</sup> and Minnesota state statutes set forth the maximum amount of bail that can be imposed for specific categories of crimes.<sup>138</sup> In addition, Rule 6.02 of the Minnesota state rules of criminal procedure sets forth the process by which bail determinations are to be made. The rule provides:

A person charged with an offense must be released without bail when ordered by the prosecutor, court, or any person designated by the court to perform that function. On appearance before the court, a person must be released on personal recognizance or an unsecured appearance bond unless a court determines that release will endanger the public safety or will not reasonably assure the defendant’s appearance. When this determination is made, the court must, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release that will reasonably assure the person’s appearance as ordered, or, if no single condition gives that assurance, any combination of the following conditions:

- (a) Place the defendant under the supervision of a person who, or organization that, agrees to supervise;
- (b) Place restrictions on travel, association, or residence during release;
- (c) Require an appearance bond, cash deposit, or other security; or
- (d) Impose other conditions necessary to assure appearance as ordered.<sup>139</sup>

The rule also unequivocally states: “the court must set money bail without other conditions on which the defendant may be released by posting cash or sureties.”<sup>140</sup> In *State v. Brooks*, the Supreme Court of Minnesota stated that Rule 6.02 establishes “a preference for pre-trial release with no monetary conditions” and was designed to “de-emphasize monetary bail and encourage release on the least restrictive conditions.”<sup>141</sup> To further guide bail determinations, Rule 6.02 sets forth a list of thirteen factors that judges “*must*” consider in setting conditions of release,<sup>142</sup> but provides that the court “*may*” investigate

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136. *Id.* at 350.

137. MINN. CONST., art. 1, § 5 (“Excessive bail shall not be required . . .”).

138. MINN. STAT. ANN. § 629.471 (West 2010).

139. MINN. R. CRIM. P. 6.02(1) (2012).

140. *Id.*

141. *Brooks*, 604 N.W.2d at 351, 353.

142. MINN. R. CRIM. P. 6.02(2) (2012) (requiring a court to consider “(a) the nature and circumstances of the offense charged; (b) the weight of the evidence; (c) family ties; (d) employment; (e) financial resources; (f) character and mental condition; (g)

the defendant's background "before or at the defendant's court appearance" or direct that such investigation be conducted by probation services or other qualified agency.<sup>143</sup>

In practice in Saint Louis County, the bail determination is made by the arraignment court judge at a hearing held within two days of arrest. Because there is no preventive detention statute that would allow the court to remand a defendant who is dangerous, the arraignment judge has three options in making the bail determination: (1) release on recognizance or on an unsecured bond; (2) impose a monetary bond in any amount, up to the maximum allowable by statute; or (3) offer a monetary bond with an alternative of supervised release, with conditions of release (e.g., drug testing, regular reporting in person) monitored by the probation office. Typically, in deciding which of these options to select, the arraignment judge does not have a bail report on the defendant's background, and must rely exclusively on: the name of the arrestee, the current charge, and the arrestee's prior criminal history in the State of Minnesota (if any). This is far less than Rule 6.02 demands judges to consider in making bail determinations. Arraignment court judges generally do not know whether the defendant is married, a lifelong resident of the county, or a full-time college student. The "presumption of release with no monetary conditions" envisioned by the court in *Brooks* does not prevent the routine imposition of a money bond that an indigent defendant is unable to post.<sup>144</sup>

In Saint Louis County, the probation office is charged with gathering background information on each arrestee and preparing a bail report to assist the court in making bail determinations. Bail reports are only prepared, however, when specifically requested by the judge, and bail reports are not available in every felony case.<sup>145</sup> The probation officers also provide community supervision for pretrial defendants, and are usually consulted by the court before a defendant is placed under their supervision.<sup>146</sup> These practices have resulted in a pretrial incarceration rate so severe that, for the last few years, Saint

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length of residence in the community; (h) criminal convictions; (i) prior history of appearing in court; (j) prior flight to avoid prosecution; (k) the victim's safety; (l) any other person's safety; (m) the community's safety").

143. *Id.* at 6.02(3). It is not clear how the court will engage in a thorough assessment of the mandatory considerations if the investigation into the defendant's background that envisioned by the factors is not also mandatory.

144. Email from Judge John DeSanto, to author (July 7, 2013) (on file with the author).

145. See Jones, *supra* note 132, at 15.

146. *Id.*

Louis County has spent over \$1 million to house its prisoners (most of whom are pretrial) in jails in neighboring counties in the state.<sup>147</sup>

### *C. The Path to Pretrial Racial Justice Reform*

Within the scope of the Minnesota bail laws, the Duluth task force executed a plan to identify and change the policies and practices in the bail determination process that produced unwarranted racial disparities in pretrial detention. The wealth of institutional knowledge and the collective expertise of the task force members gave their work credibility among their professional peers and in the local community. As a result, the task force was able to gain access to data, conduct interviews, gather information, and develop racial justice reform measures that were practical and well-received within the local criminal justice system. From 2010 through 2012, the work of the task force proceeded in three stages: investigation, education, and implementation.

#### *1. Investigation*

After deciding to focus their racial justice reform efforts on pretrial detention and the bail determination process, the Duluth task force invited other supporting players in the criminal justice system to join the task force, including a representative from the county jail where pretrial detainees are housed, and a representative from the probation office where a percentage of pretrial defendants are screened and supervised. Once the expanded task force was assembled, the group formed a "working hypothesis" on the cause of the racial disparities in their bail determination process. Some task force members opined that arraignment court judges tended to place a higher bond on defendants who lived long distances from the court house because the bail official believed these individuals would be less likely to return to court.<sup>148</sup> This practice, some task force members believed, had a disparate impact on the Native American population living on reservations that are located a great distance from all three courthouses in the

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147. Fred Friedman, Chief Public Defender, St. Louis County, Speech at the National Legal Aid and Defender Association (NLADA) Conference (Dec. 8, 2012), available at <http://racialjusticeproject.weebly.com/video-gallery.html>; Honorable John DeSanto, Judge, St. Louis County, Speech at the National Conference of Racial and Ethnic Fairness in the Courts (May 11, 2012), available at <http://racialjusticeproject.weebly.com/video-gallery.html> ("RJIP, Omaha, Nebraska I").

148. Fred Friedman, Speech at the Racial Justice Summit (Oct. 5, 2011), available at <http://www.youtube.com/watch?v=KDCuB7XCmIs&feature=youtu.be> (stating that the Duluth racial justice task force is working to "try to reduce the disadvantage of poverty and geography in bail").

county, as well as many African Americans defendants who are arrested in the county but reside in more urban areas of the state. Another theory developed by the task force members to explain the pretrial detention patterns in Saint Louis County was that arraignment court judges were overly deferential to probation officers' assessment of whether a pretrial defendant would be a good candidate for pretrial release.

Next, the task force set out to secure data on bail determinations, arraignment proceedings and pretrial detention. Once the data on bail determinations was collected from the court, the task force engaged the services of a noted criminologist expert from the local university to analyze the data and prepare a report to confirm or dispel their belief that racial disparities exist in pretrial detention, as well as their theories as to the cause of any disparity. The expert's report examined all felony cases in the county during 2009 and 2010.<sup>149</sup> The report revealed that whites were at least twice as likely as other racial categories to be released on their own recognizance, and minority defendants were more likely to have a money bond imposed.<sup>150</sup> The report also disclosed the fact that the money bond imposed on African American defendants was higher than the bond amount set for white defendants.<sup>151</sup> In fact, the median bond amount imposed on African American defendants was double the bond amounts set for white defendants.<sup>152</sup> These racial disparities remained even when controlling for offense severity level, number of felony charges, and the defendants' criminal history (i.e., whether the arrestee was on probation at the time of arraignment).<sup>153</sup>

The next investigative step of the task force was to seek the input of arraignment court judges on the bail determination process. A subcommittee of the task force conducted interviews with every arraignment court judge in the county.<sup>154</sup> Using the Rule 6.02 bail factors,<sup>155</sup> the task force asked each judge what weight they attributed to each factor when making bail determinations. Several judges admitted that

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149. Robert R. Weidner, Racial Justice Improvement Project Pretrial Detention and Release Decisions in Saint Louis County, Minnesota in 2009 & 2010 (August 8, 2011) (unpublished manuscript) (on file with author); *see also* Jones, *supra* note 132, at 4.

150. Weidner, *supra* note 149, at 4.

151. *Id.* at 5.

152. *Id.* at 5–6.

153. *Id.* at 6–7.

154. Honorable John DeSanto, *supra* note 147; Telephone Interview with Rebecca St. George, Coordinator, Duluth Task Force (2011).

155. MINN. R. CRIM. P. 6.02(2) (2012).

they set higher bail for violent offenses in order to keep the defendant from being released, in effect using bail "not as an aide to release" as articulated by the Minnesota Supreme Court, but as a means of preventive detention.<sup>156</sup> With respect to employment and financial resources, several judges stated that they gave this information "no weight at all" in the bail determination process, others stated that the information is not ordinarily collected and would only be available if the defendant applied for public defender representation. While community safety and victim safety were significant factors for most judges, the defendant's character, local residency, and family ties were somewhat less significant for many of the judges, notwithstanding the obvious relevance of this information in assessing flight risk.

When the judges were specifically asked about the role that race plays in the bail determination process, they appreciated that disparities exist in pretrial detention, but attributed such racial disparities to "poverty" or "socioeconomics."<sup>157</sup> In addition, the judges confirmed the hypotheses of the task force regarding the influence of probation officers in the bail determination process. Several judges acknowledged that if the probation officer opposes supervised release, the judge will honor that position and impose a money bond.<sup>158</sup> The judges also reported that probation officers inform the judges when they would prefer not to supervise specific pretrial defendants due to the distance the defendant lives from the court house.<sup>159</sup> Thus, while arraignment court judges have the legal responsibility to make bail determinations, the task force learned that probation officers had undue influence in the bail determination process. Finally, many of the arraignment court judges were receptive to the task force offer to provide training on effective bail determination practices.<sup>160</sup>

The final step in the investigation stage of the work of the task force involved discussions with the probation office regarding their practices in arraignment court. The task force learned that the probation office does not have the time, staffing or resources to prepare bail reports on every arrestee.<sup>161</sup> Probation also disclosed that the office had recently instituted a risk assessment tool to determine whether a

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156. Telephone Interview with Rebecca St. George, *supra* note 154.

157. *See also* Honorable John DeSanto, *supra* note 147 (stating that the interviews with judges revealed, among other things, variant bail setting practices based on the "implicit and somewhat explicit" biases of the judges).

158. Telephone Interview with Rebecca St. George, *supra* note 154.

159. *Id.*

160. *Id.*

161. Telephone interview with Kay Arola, Executive Director, Arrowhead Probation (2011 & 2012).

defendant is low, medium or high risk for supervised release.<sup>162</sup> The probation office representatives acknowledged that some defendants simply could not be supervised because they lived too far to report in person each week as required by their standard pretrial supervision requirements.<sup>163</sup>

The information gathered by the task force during the investigation phase of their work provided a snapshot of the courtroom culture and the courtroom dynamics during the bail determination process. Foremost, as is characteristic of many bail determination proceedings around the country, the judges in Saint Louis County do not have most of the critical information needed to make informed bail determinations. Second, money bonds are overused by judges for the improper purpose of holding a defendant in pretrial detention. This practice has a disparate impact on impoverished defendants, most of whom are African American or Native American. Finally, in discharging their oversight of pretrial defendants on supervised release, the probation officers were not using best practices for pretrial community supervision. They were imposing supervision requirements, which were appropriate for post-conviction defendants on probation, but were much too onerous for pretrial defendants, especially those who lived in remote areas of the county or in other parts of the state. These issues helped to guide the next phase of the work of the task force.

## 2. *Education*

The wealth of information gathered during the investigation and data collection stage consumed most of the first year of ABA project. Thereafter, the Duluth task force participated in training to educate themselves on the best practices in bail determinations and pretrial community supervision. In the fall of 2011, the task force members attended the ABA Racial Justice Improvement Project training conference in Washington, DC, where they met with the director of the District of Columbia Pretrial Services Agency and several representatives of the Pretrial Justice Institute. The task force members explained the Saint Louis County bail determination process to a panel of seasoned experts, received valuable suggestions for improvement, and acquired a wealth of information on national standards in pretrial supervision.<sup>164</sup> Second, the task force sent several representatives—including the trial judge on the task force (who is also an arraignment judge) and

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162. *Id.*

163. *Id.*

164. *See generally* THE RACIAL JUSTICE IMPROVEMENT PROJECT, <http://racialjusticeproject.weebly.com/rjip-in-the-media.html> (last visited Oct. 23, 2013).

the head of the probation office—to the National Association of Pretrial Services (NAPSA) conference to meet with representatives and experts in bail, diversion and pretrial release from across the country.<sup>165</sup> This training marked a turning point for the participants and the project. Upon returning to his arraignment calendar after the conference, the task force judge realized that he had been overusing money bonds without regard to considerations of community safety and flight risk. This realization prompted him alter his bail determination practices.<sup>166</sup> The NAPSA training also inspired the probation office to make changes in its pretrial practices, including a re-evaluation of its weekly in-person reporting requirement for pretrial defendants and a re-evaluation of the role that the probation officers play in bail determinations during arraignment proceedings.

The next phase of the task force education initiative involved training the arraignment court judges and probation officers in Saint Louis County. The Duluth task force sponsored a day-long training for all of the judges and all of the probation officers in the county. Experts from around the country provided much needed instruction on Minnesota bail laws, national pretrial release standards, the factors that should influence the flight risk/dangerousness determination, and the best practices in placing low risk defendants on non-financial or supervised release. The judges and probation officers were also informed of the racial disparity findings in the report commissioned by the task force. Both judges and probation officers were each given several hours of training by experts on identifying and minimizing the impact of implicit bias in discretionary decision making.

### 3. *Implementation*

In the final months of their formal participation in the ABA project, the task force began implementing their racial justice reform initiatives. This work is ongoing. While the education initiatives of the task force laid much of the groundwork for reform, there were specific policy changes that the task force identified as contributing factors in the racial disparities in pretrial detention. First, the task force seeks to ensure that judges have bail reports in all felony cases before making a bail determination.<sup>167</sup> To accomplish this goal, the task force is working with probation to reduce or eliminate the production of bail reports in misdemeanor cases and other cases where the defendant faces little

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165. See NATIONAL ASSOCIATION OF PRETRIAL AGENCIES, <http://www.napsa.org/> (last visited Oct. 23, 2013).

166. Honorable John DeSanto, *supra* note 147.

167. Honorable John DeSanto, *supra* note 147.

prospect of detention. This would allow probation to work within its current budget and devote substantially more resources to gathering the critical information needed to prepare bail reports in felony cases. The probation office also requested the assistance of the task force in evaluating the risk assessment tool it uses to prepare bail reports and make bail recommendations to judges. The task force recruited an expert from the Pretrial Justice Institute to complete this evaluation. As a result, the probation office made several changes in the way probation officers report information to the court. The task force is also working with probation to automate the pretrial risk assessment tool to reduce the risk that the biases of the probation officers will be reflected in bail recommendations. To encourage judges not to rely exclusively on money bonds and fully utilize supervised community release options available under Minnesota law, the task force is preparing a chart for judges to have while on the bench when making bail determinations that sets forth the range of available non-financial release options. The task force would also like to work with probation and the court to expand community release options (i.e., electronic monitoring). Finally, the task force plans to institute procedures for regular data collection on bail determinations to monitor the progress of their on-going reform efforts. These reforms are a significant step towards addressing the information deficit that exists in the County when judges set bail at arraignment. By ensuring that probation officers deliver timely, comprehensive, fact-based bail reports to the court, these reforms should significantly reduce the likelihood that bail decisions will be made based solely on a judge's "gut feelings," which can infuse personal biases and racial stereotypes into the bail determination process.

The problems with the bail determination process in Saint Louis County are common to many other jurisdictions across the country and the pathway to pretrial racial justice created by the Duluth task force—data collection, research, education, and policy reform—could prove instructive in other jurisdictions. At the outset, the work of the criminal justice officials in Saint Louis County was data-driven. They focused considerable time and energy on collecting the facts and obtaining an expert data analysis on bail determinations without relying on anecdotes or outside perceptions of their bail process. Moreover, like most other jurisdictions, the bail practices in Saint Louis County had not been previously examined to determine whether, in practice, they honored the presumption of release and burdened only the most dangerous, high risk defendants with pretrial detention. Upon examination, the Duluth task force found that bail decisions in the County

were not guided by a careful consideration of the long list of relevant factors set forth in the bail laws, but by long-standing, informal policies and practices which have the unintended consequence of over-incarcerating pretrial defendants and creating racial disparities among pretrial detainees. When the negative effects of these policies were exposed and criminal justice officials were introduced to better pretrial practices, judges, probation officers, and other stakeholders were receptive to reform. In sum, many of the problems in bail determinations that create dysfunction and arbitrariness in bail determinations—the lack of relevant background information on the defendant and the over-reliance on money bonds—also contribute to racial disparities in bail outcomes among African American and white defendants. Instituting better bail practices for all defendants will prove vital to addressing racial disparities in pretrial detention. Other jurisdictions faced with similar bail practices, and similar patterns of racial disparities, will likely find the formula successfully executed in Duluth to be useful model for pretrial reform.

#### IV.

##### A FORMULA FOR PRETRIAL JUSTICE REFORM: LESSONS LEARNED FROM DULUTH AND BEYOND

There are several key policy reforms that should be adopted in local criminal justice systems to reform the bail determination process and reduce racial disparities in pretrial detention. While there is no “one-size-fits-all” cure for the problems in the bail system, there are some measures that will improve the discretionary decision making process and prevent the unwarranted detention of thousands of “bailable,” non-violent, low risk and moderate risk pretrial defendants. These reforms will allow the court to have more transparency and better oversight of the bail process, and reform some of the policies and practices that can lead to racial disparities in bail determinations.

##### *A. Provide Training on the Fundamentals of Bail*

Although the presumption of release and the right to bail are core tenets of most state bail laws, these principles are largely ignored in practice. Because bail determinations are routinely treated as insignificant administrative proceedings, bail officials are not given adequate training on the basic legal principles of bail and given guidance on how to make proper bail decisions. This instruction should also in-

clude training on national standards<sup>168</sup> and best practices. As seen in Duluth, this basic education must precede all other policy reforms. There are numerous experts in pretrial justice across the country that provide technical assistance, conduct training conferences, and produce volumes of training materials for judges and other criminal justice officials.<sup>169</sup> These training programs have been instrumental in helping many state, county and local criminal justice systems successfully implement reforms that expand pretrial release, protect the safety of the community, and reduce jail overcrowding, without increasing the failure to appear rate.<sup>170</sup> These training programs and resources should be a critical component of any initiative to address racial disparities in bail determinations.

### B. *Require Evidence-Based Bail Determinations*

Federal and most state bail laws mandate that bail officials make an individual assessment of each defendant's background and criminal history in setting bail. This individualized assessment is also constitutionally required by the Supreme Court's holding in *Stack v. Boyle*. Therefore, bail officials must have relevant background information on each defendant and make factual findings in support of their determination that the defendant poses a flight or safety risk. As discussed above, frequently the relevant background information on each defen-

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168. ABA Standard for Criminal Justice, *Pretrial Release* § 10-4.2 (a) (3d ed. 2002). ("In all cases in which the defendant is in custody and charged with a criminal offense, an investigation to provide information relating to pretrial release should be conducted by pretrial services or the judicial officer prior to or contemporaneous with a defendant's first appearance.")

169. Training topics include making smart, evidence-based bail determinations; the development and use of objective risk assessment tools; the creation and management of pretrial community supervision programs; and pretrial detention standards. *E.g.*, THE PRETRIAL JUSTICE INSTITUTE, <http://www.pretrial.org/infostop/local-assistance/> (last visited Nov. 10, 2013); *Correctional Training Opportunities*, NAT'L INST. OF CORRECTIONS, <http://nicic.gov/Training/> (last visited Oct. 23, 2013).

170. *See e.g.*, THE TRANSFORMATION OF PRETRIAL SERVICES IN ALLEGHENY COUNTY, PENNSYLVANIA: DEVELOPMENT OF BEST PRACTICES AND VALIDATION OF RISK ASSESSMENT, PRETRIAL JUST. INST. (2007) (unpublished report) (on file with author) (showing that, following extensive year-long technical assistance from the Pretrial Justice Institute, the county was able to increase the number of bail reports (with verified information) on pretrial defendants by sixty percent use a validated risk assessment tool in formulating release recommendations to the court, and increase the level of supervision provided to defendants who are released pending trial); MECKLENBURG CNTY MANAGER'S OFFICE, 2010 BAIL POLICY REVIEW 1-2 (2011), available at <http://charmec.org/mecklenburg/county/CountyManagersOffice/CriminalJusticeServices/Documents/Evaluations%20CJP/2011%20Bail%20Policy%20Report.pdf> (finding that 2010 changes to bail policy resulted in lower monetary bonds, a greater number of people released pretrial, no increase in re-arrest rates or failures to appear in court).

dant is not available at the time bail is set. The absence of this information leads to arbitrary bail decisions and unwarranted racial disparities. The national standards and best practices for bail determinations include the creation of a pretrial services agency, or performance of the pretrial services function within an existing agency, like probation.<sup>171</sup> The proper scope of pretrial services should include the use of an objective risk assessment tool, the collection and verification of background information on arrestees, and the administration of a safe and effective non-financial, supervised community release program for pretrial defendants.<sup>172</sup> This pretrial justice model has been endorsed by national organizations representing a broad cross-section of criminal justice stakeholders, including state court chief justices,<sup>173</sup> public defenders and criminal defense attorneys,<sup>174</sup> prosecutors,<sup>175</sup> state legislators,<sup>176</sup> court administrators,<sup>177</sup> police chiefs,<sup>178</sup> jail ad-

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171. ABA Standard for Criminal Justice, *Pretrial Release* § 10-1.10 (3d ed. 2002) (“Every jurisdiction should establish a pretrial services agency or program to collect and present the necessary information, present risk assessments, and, consistent with court policy, make release recommendations required by the judicial officer in making release decisions, including the defendant’s eligibility for diversion, treatment or other alternative adjudication programs, such as drug or other treatment courts. Pretrial services should also monitor, supervise, and assist defendants released prior to trial, and to review the status and release eligibility of detained defendants for the court on an ongoing basis.”)

172. PRETRIAL JUSTICE INSTITUTE, *supra* note 65, at 5–10.

173. CONFERENCE OF CHIEF JUSTICES, RESOLUTION 3: ENDORSING THE CONFERENCE OF STATE COURT ADMINISTRATORS POLICY PAPER ON EVIDENCE-BASED PRETRIAL RELEASE (2013) (“Whereas, imposing conditions on a defendant that are appropriate for that individual following a valid pretrial assessment substantially reduces pretrial detention without impairing the judicial process or threatening public safety[.]”), *available at* <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/01302013-pretrial-release-Endorsing-COSCA-Paper-EvidenceBased-Pretrial-Release.ashx>.

174. AMERICAN COUNCIL OF CHIEF DEFENDERS, POLICY STATEMENT ON FAIR AND EFFECTIVE PRETRIAL JUSTICE PRACTICES (2011), *available at* [http://nlada.net/sites/default/files/na\\_accdpretrialstmt\\_06042011.pdf](http://nlada.net/sites/default/files/na_accdpretrialstmt_06042011.pdf); *Board Resolution Concerning Pretrial Release and Limited Use of Financial Bond*, NAT’L ASS’N OF CRIMINAL DEF. LAWYERS (July 28, 2012), <http://www.nacdl.org/resolutions/2012am1/>.

175. ASS’N OF PROSECUTING ATTORNEYS, POLICY STATEMENT ON PRETRIAL JUSTICE (2011), *available at* <http://www.apainc.org/html/APA+Pretrial+Policy+Statement.pdf> (“The Board of Directors of the Association of Prosecuting Attorneys recognizes the value of accurate and reliable pretrial information provided to prosecutors and magistrates for the enhancement of public safety, safeguarding the judicial process, and aiding prosecutors in their ability to determine appropriate diversions and special court admissions. Pretrial services employing validated risk assessments provide useful data and offer practical information essential to making informed decisions during court proceedings and determining conditions of supervision and sentencing, when appropriate.”).

176. NAT’L ASS’N OF COUNTIES, THE AMERICAN COUNTY PLATFORM AND RESOLUTIONS 2011–2012 (2012), *available at* <http://www.naco.org/legislation/policies/docu>

ministrators,<sup>179</sup> and probation and parole officers.<sup>180</sup> Jurisdictions seeking pretrial reform should strive to meet these standard.

Although in some jurisdictions, like Saint Louis County, the basic components needed to provide comprehensive pretrial services already exist (i.e., a pretrial services agency, bail reports, use of a risk assessment tool, non-financial pretrial community supervision programs), there is still an over-reliance on the use of financial conditions of release. Thus, in many other jurisdictions, moving from a financial release-based bail system to a pretrial system rooted in community supervision is not realistic and could not be accomplished solely through policy reform measures. Notwithstanding the absence of an entity charged with performing the vital pretrial services functions, most bail laws still require bail officials to make an individualized assessment of the defendant in setting bail. Thus, criminal justice stakeholders must implement policies and practices to ensure that critical background information on each defendant is collected before bail decisions are made. In the absence of an agency or entity tasked with performing pretrial functions, the various criminal justice stakeholders at the front-end of the criminal justice system should be required to assist in the collection of the defendant's background information. Public defenders can collect some information from their clients and should be present when the bail determination is made. Likewise, prosecutors who seek pretrial detention or high monetary bail should be required to present the court with specific information (other than the facts related to the charge) to support a finding of flight or safety risk. Law enforcement personnel can also be engaged to collect and verify criminal background information on arrestees prior to the bail hearing. Finally, the bail official can ask questions during the hearing to ascertain pertinent information regarding employment, education,

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ments/american%20county%20platform%20and%20resolutions%20cover%20page%2011-12.pdf.

177. ARTHUR W. PEPIN, CONFERENCE OF STATE COURT ADM'RS, 2012–2013 POLICY PAPER: EVIDENCE-BASED PRETRIAL RELEASE (2013), available at <http://cosca.ncsc.org/~media/microsites/files/cosca/policy%20papers/evidence%20based%20pre-trial%20release%20-final.ashx>.

178. INT'L ASS'N OF CHIEFS OF POLICE, LAW ENFORCEMENT'S LEADERSHIP ROLE IN THE PRETRIAL RELEASE AND DETENTION PROCESS (2011), available at <http://www.theiacp.org/PublicationsGuides/ResearchCenter/Publications/tabid/299/Default.aspx?v=1&id=1400>.

179. AMERICAN JAIL ASS'N, RESOLUTIONS OF THE AMERICAN JAIL ASSOCIATION: PRETRIAL JUSTICE 33 (2010), available at [https://members.aja.org/assets/cms/files/Membership/Resolutions%2004\\_2012.pdf](https://members.aja.org/assets/cms/files/Membership/Resolutions%2004_2012.pdf).

180. AMERICAN PROBATION & PAROLE ASS'N, PRETRIAL SUPERVISION RESOLUTION (2010), available at [http://www.appa-net.org/eweb/Dynamicpage.aspx?site=APPA\\_2&webcode=IB\\_Resolution&wps\\_key=3fa8c704-5ebc-4163-9be8-ca48a106a259](http://www.appa-net.org/eweb/Dynamicpage.aspx?site=APPA_2&webcode=IB_Resolution&wps_key=3fa8c704-5ebc-4163-9be8-ca48a106a259).

and community ties. Once this information is gathered, bail officials will have a solid factual basis for making bail determinations. Though imperfect, this collective information-gathering would be a significant improvement over bail practices.

In addition to collecting the information required to make a bail determination, bail officials should be required to document the factual basis for their finding that the defendant poses a flight or safety risk which justifies any decision to impose a monetary bond or other conditions that could result in pretrial detention. This factual justification requirement is a critical component of insuring that the bail officials (some of whom are not lawyers and have no legal training) comply with state bail laws and do not make arbitrary bail determinations based on impermissible factors (i.e., the race or ethnicity of the defendant). The factual justification requirement is also consistent with the procedural safeguards that the Court in *Schall* and *Salerno* found to sufficiently protect the accused from an erroneous deprivation of liberty in the context of preventive detention proceedings.

Bail officials will likely oppose the requirement to provide a factual justification for bail decisions and contend that any such requirement is impractical in light of the need for expediency in processing numerous defendants on the overcrowded court docket. While the federal Bail Reform Act requires written findings of fact following an adversarial evidentiary hearing, the documentation proposal urged here need not be as formal nor as detailed as a written court order. Court procedures in many jurisdictions already require bail officials to create some form of written record of the bail determination that, at a minimum, records the bond amount, the next court date, and any other release conditions imposed. This same record can also include the bail official's factual basis for finding that the defendant poses a flight or safety risk. For example, the bail official could write on the order: "threatened retaliation against the victim," "violated stay away order in another pending case," "tampered with electronic monitoring equipment," or "no stable residence in the area." The dual requirements of collecting relevant background information and providing a factual basis for bail determinations could significantly deter bail officials from relying solely on their instincts or impermissible factors (such as race or ethnicity) in setting bail.

### *C. Institute Oversight and Accountability Measures in the Bail Determination Process*

Bail determinations are low visibility proceedings that are sometimes conducted without lawyers present and frequently occur outside

of a formal courtroom setting. There is often very little scrutiny of individual bail determinations, and almost no systemic review of the thousands of bail decisions made by bail officials in the jurisdiction on an annual basis. These factors shroud the decision making process of bail officials and allow patterns of racial disparities in bail determinations to go undetected. Courts have a responsibility to ensure accuracy and fairness at each stage of a criminal case. Failure to provide oversight of the bail determination process threatens the integrity of the entire criminal adjudication process, especially when, as discussed above, pretrial detention has a long-term adverse effect on the entire criminal case. Accordingly, bail determinations should be monitored to detect and address unwarranted patterns of racial disparities among white and African American pretrial defendants.

One approach to establishing a system of oversight and accountability in bail determinations is the creation of a permanent bail oversight committee. The committee should consist of representatives from each agency involved in the bail determination process, and should receive regular reports on the bail determinations made by every bail official. These reports should, at a minimum, include information on the number of defendants released, the number of defendants detained, the number of defendants held on money bonds, the factual basis provided for each bail determination and, importantly, the race of each defendant. In most jurisdictions, much (if not all) of this data is already collected by the court. Thus, creation of this report would not be a major administrative burden or prohibitively expensive. Finally, bail officials should know that their bail decisions are subject to scrutiny on a regular basis by the oversight committee. Bail officials should be given copies of the reports produced on their bail decisions and informed of any patterns of racial disparities. Knowledge that their bail determinations are scrutinized on a regular basis will afford bail officials the opportunity to self-correct their bail practices and address any implicit biases that could be causing racial disparities in bail outcomes.<sup>181</sup> Thereafter, if the bail oversight

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181. See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1221 (2009) (reporting that “when judges are aware of a need to monitor their own responses for the influence of implicit racial biases, and are motivated to suppress that bias, they appear to be able to do so”); see also NAT’L CTR. FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: FREQUENTLY ASKED QUESTIONS 17 (2012), available at <http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/Implicit%20Bias%20FAQs%20rev.ashx> (recommending that decision makers “adopt a thoughtful, deliberative, and self-aware process for inspecting how one’s decisions were made”); STAATS, *supra* note 130, at 53–63; see generally PAMELA M. CASEY ET AL., NAT’L CTR. FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCA-

committee identifies patterns of racial disparities, the court is in a position to take corrective action.

#### CONCLUSION

The dysfunction in the bail determination process not only results in over-incarceration of pretrial defendants and jail over-crowding more generally, but also produces unwarranted racial disparities in bail outcomes among white and African American defendants. Education and policy reforms can be implemented to re-focus bail determinations on flight risk and community safety. However, more accountability and oversight is needed to ensure that bail officials are using proper criteria in making the flight/safety determination. The widespread racial disparities in bail determinations are caused, in part, by the virtually unbridled and unchecked discretion that bail officials have in setting bail. Instead of engaging in a deliberative, individualized assessment of a defendant's flight and safety risk, bail officials compensate for the absence of critical background information with arbitrary money bonds that result in pretrial detention for the poor and costly jail overcrowding for local governments. These flawed bail determination practices can be reformed by criminal justice stakeholders by adopting policy reforms that will fundamentally alter the flawed bail determination practices currently employed, reduce the over-incarceration of low and moderate risk, indigent pretrial defendants, and eliminate unwarranted racial disparities in pretrial detention.

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TION (2012), available at [http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB\\_report\\_033012.ashx](http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_report_033012.ashx) (highlighting California, Minnesota and North Dakota's judicial education on implicit bias programs and reporting that awareness about implicit bias may help motivate decision makers to actively "correct for bias in their own judgments and behaviors").

