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Is It Time for Arkansas to Consider Pretrial Reform?

Judge Cindy Grace Thyer

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IS IT TIME FOR ARKANSAS TO CONSIDER PRETRIAL REFORM?

*The Honorable Cindy Grace Thyer**

ABSTRACT

Approximately two-thirds of the national jail population consists of pretrial detainees—people who are constitutionally presumed innocent of the charges they are facing. Many, if not most, of these individuals are incarcerated because they are unable to post money bail. This article explores some of the complexities of pretrial release/detention reform. It begins with the history of bail from its early use in England through its grounding in each American state’s constitution, with special emphasis upon the reforms that have occurred in the American system of pretrial release since the 1920s. Drawing on information and experiences from states across the nation, coupled with a review of current Arkansas law, I offer several proposals for future reform efforts from a judicial perspective and conclude that it is indeed time for Arkansas to consider pretrial reform.

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I. INTRODUCTION

“Each day, in several thousand jailhouses and courtrooms nationwide, we criminalize poverty.”¹ It has been estimated that “[t]wo-thirds of the jail population is presumptively innocent. They are people—fathers, mothers, sons, daughters, husbands, wives—being detained prior to a criminal trial. In many cases, they are caged in jail cells solely because they cannot afford a monetary payment.”² On any given day in America, almost half a million individuals are being held in jail awaiting trial.³ Because of the growing awareness of pretrial detention inequities and because of the inherent costs of pretrial detention, many cities, counties, and states across the nation have been re-evaluating their systems of pretrial release and detention for those accused of violating the law. This movement has been energized by several factors: 1) the ongoing recognition of the economic and racial disparities that accompany the setting of money bail for those who have been charged with, but not convicted of, a crime; 2) the increasing costs of incarceration to communities and to incarcerated individuals; and 3) the likelihood that incarcerated individuals plead guilty to crimes they did not commit to ensure an earlier release from jail.⁴

This Article begins with an early history of bail and detention focusing on the purpose for and the evolution of money bail.⁵ Next, I outline the rise of commercial bail bonding.⁶ Parts IV through VI focus the discussion on the current bail system and reform approaches some states have initiated. I then concentrate on Arkansas, identifying different areas in the Arkansas pretrial detention context where meaningful improvement could be achieved that would greatly benefit the accused and the state as a whole.⁷

1. Thea L. Sebastian & Alec Karakatsanis, *Challenging Money Bail in the Courts*, 57 JUDGES’ J., no. 3, 2018, at 23.

2. *Id.*; see also Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL’Y INITIATIVE (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html> [hereinafter *The Whole Pie*].

3. Roy Walmsley, *World Pre-Trial/Remand Imprisonment List* 1, 5 (3d ed.), http://prisonstudies.org/sites/default/files/resources/downloads/wptribl_3rd_edition.pdf; see also John Jay C. of Crim. Just., *Pretrial Practice: Rethinking the Front End of the Criminal Justice System. A Report on the Roundtable on Pretrial Release* (Mar. 2015), http://johnjaypri.org/wp-content/uploads/2016/04/RoundtableReport_web1.pdf.

4. Sebastian & Karakatsanis, *supra* note 1, at 26–27.

5. See *infra* Part II.

6. See *infra* Part III.

7. See *infra* Parts VII–VIII.

II. HISTORY OF BAIL

To fully understand the engine behind what has been called the third generation of bail reform in America,⁸ it is important to explore the early history of bail both in England and the United States. While bail can be traced to ancient Rome, money bail as it exists today has an English lineage. When the Germanic Angles and Saxons migrated to Britain following the collapse of the Roman Empire in the fifth century, they brought with them the tradition of settling family disputes through “blood feuds,” wherein the families of the accused and the aggrieved would battle one another until one or both of the families were killed.⁹

To state the obvious, the system was barbaric. Over time, the Anglo-Saxons developed a pretrial system that attributed a monetary value to an aggrieved individual, his property, or both that took into account the wrong committed and the family rank of the involved individuals.¹⁰ The monetary fine was known as a “bot” or “wergeld.”¹¹ The accused had to pay a full wergeld amount for killing a person of a certain social rank and a partial wergeld amount for injuries of various degrees.¹² Becoming concerned that an accused might abscond to avoid paying the wergeld, the Anglo-Saxons required the accused to produce a surety (usually a family member) who would ensure the accused appeared in court and who would also agree to pay the wergeld if the accused was convicted or defaulted.¹³ Therefore, if the accused did flee, the surety would pay the wergeld to the aggrieved party, and the matter would be over.¹⁴ Because the amount of the pledge (called “bail”) was the same amount as the wergeld if convicted, there was an underlying certainty and fairness in the process.¹⁵

However, when the Normans invaded Britain in 1066, they replaced the wergeld system of monetary fines for most offenses with a system that would be recognized today as corporal punishment coupled with incarceration.¹⁶ Essentially, crimes in the Anglo-Saxon era were private affairs, whereas under Norman rule, crimes became public affairs involving the

8. Timothy R. Schnacke, *A Brief History of Bail*, 57 JUDGES' J., no. 3, 2018, at 4.

9. *Id.* at 5.

10. *Id.*

11. *Wergild*, MERRIAM-WEBSTER DICTIONARY ONLINE, <https://www.merriam-webster.com/dictionary/wergild> (last visited Mar. 20, 2019) (“wer” meaning “man” and “geld” meaning “payment.”) (also spelled “wergeld”).

12. Schnacke, *supra* note 8, at 5.

13. Timothy R. Schnacke, Michael R. Jones & Claire M.B. Brooker, *The History of Bail and Pretrial Release*, PRETRIAL JUST. INST. (Sept. 23, 2010) https://b3cdn.net/crjustice/2b990da76de40361b6_rzm6ii4zp.pdf [hereinafter *The History of Bail*].

14. *Id.* at 2.

15. Schnacke, *supra* note 8, at 5.

16. *The History of Bail*, *supra* note 13, at 2.

state.¹⁷ For example, it was not until after the Norman invasion that alleged crimes were presented to a jury.¹⁸ The jury presentment process resulted in increased arrests, and significant delays between arrest and trial resulted due to the itinerant justice system.¹⁹ Corruption and systemic abuses were endemic. Magistrates had broad discretion to make release decisions, and sheriffs controlled the physical custody of detainees.²⁰ Both groups were particularly susceptible to graft.²¹

Bail historian William Duker notes that sheriffs of that time worked under a writ *de homine replegiano*,²² which mandated that a detainee be released unless he was accused of committing a nonbailable offense.²³ This writ, known as the “writ of liberty” or “writ of freedom,” contained the first written list of nonbailable offenses.²⁴

Listing the nonbailable offenses, however, did little to ameliorate the graft. By 1274, the situation had risen to the attention of King Edward I. He was particularly concerned that sheriffs were “(1) detaining otherwise bailable defendants unless those defendants paid money, and (2) . . . releasing otherwise unbailable defendants for large amounts of money.”²⁵ Finding the practices equally offensive, King Edward’s first Parliament enacted the Statute of Westminster in 1275.²⁶ This statute contained the first legislative “bail/no bail scheme”²⁷ and it clearly stated that unless an accused was to be held without bail, the detainees who were charged with bailable offenses had to be released.²⁸ The statute also provided for stiff penalties against a recalcitrant sheriff.²⁹ The release decision, as set forth in the statute, codified existing law—which required a prediction of the trial’s outcome by considering the character of the accused, the weight of the evidence, and the nature

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 3.

22. *De homine replegiano*, LAW DICTIONARY ONLINE, <https://thelawdictionary.org/de-homine-replegiando/> (last visited Dec. 30, 2019) (Latin for “replevying a man.” This writ has been superseded almost completely in modern practice by that of habeas corpus.).

23. William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 34–36 (1977–78); see also *Elkison v. Deliesseline*, 8 F.Cas. 493, 493 (C.C.D.S.C. 1823) (providing one of the earliest discussions of this writ in the U.S.).

24. See Duker, *supra* note 23, at 44.

25. Schnacke, *supra* note 8, at 5.

26. Statute of Westminster, The First (1275), 3 Edw. C. 15 (Eng.), <http://www.legislation.gov.uk/aep/Edw1/3/5> [hereinafter The Statute].

27. Schnacke, *supra* note 8, at 5.

28. The Statute, *supra* note 26; see also ELSA DE HASS, ANTIQUITIES OF BAIL: ORIGIN AND HISTORICAL DEVELOPMENT IN CRIMINAL CASES TO THE YEAR 1275 at 95–96 (AMS Press 1966) (1940).

29. The Statute, *supra* note 26.

of the charge.³⁰ This release decision process reflected public values because it applied “criminal sanctions to individuals in accordance with the probability of their guilt.”³¹ Thus,

“Bail” as release and “no bail” as detention became a common theme running through English history over the next 500 years, a period in which various reforms were enacted to address abuses manifested in the detention of bailable defendants and the release of unbailable ones.³²

The American colonies initially adopted England’s laws relating to the bail and detention of the accused.³³ As to bail, once a court determined a defendant to be bailable, a surety would pledge an amount that would be paid in the event of a default. Money, however, was not required upfront to secure a defendant’s release. Rather, it was a system of “recognizances.”³⁴ The English bail/no bail dichotomy, along with the understanding that “bail” equaled release and “no bail” equaled detention, remained until differences in beliefs among the colonies about criminal justice led to more liberal criminal penalties and bail laws.³⁵ In 1641, Massachusetts became the first colony to replace a multitude of English bail laws with an absolute right to bail for non-capital offenses in its Body of Liberties.³⁶ Massachusetts also removed from the list of capital crimes the offenses of burglary, robbery, and larceny.³⁷ Most importantly, however, Massachusetts was the first colony to embrace a liberal “right to bail” that specifically disregarded the English concepts relating to the strength of the evidence and the character of the accused.³⁸ While the Massachusetts Charter of Liberties and Privileges was a significant step forward in bail reform, it never actually became a part of the state’s constitution nor was it used as a model for other states in the post-Revolutionary War era.³⁹

In 1682, Pennsylvania adopted an even more liberal provision in its constitution, and it granted bail to all defendants except those charged with a

30. Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*, NAT’L INST. OF CORR. 1, 27 (Sept. 2014), <https://s3.amazonaws.com/static.nicic.gov/Library/028360.pdf> [hereinafter *Fundamentals*]; See also June Carbone, *Seeing Through the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 524–26 (1983).

31. See Carbone, *supra* note 30, at 527.

32. Schnacke, *supra* note 8, at 5.

33. *Fundamentals*, *supra* note 30, at 28.

34. Schnacke, *supra* note 8, at 6 (citing Paul Lermack, *The Law of Recognizances in Colonial Pennsylvania*, 50 TEMP. L.Q. 475 (1976–1977)).

35. *Fundamentals*, *supra* note 30, at 28.

36. Carbone, *supra* note 30, at 530.

37. *Id.*

38. *Id.* at 531.

39. *Id.*

capital offense “where proof is evident or the presumption great.”⁴⁰ Unlike Massachusetts’ provision, the Pennsylvania Constitution’s new standard placed evidentiary fact finding back into the bail eligibility determination “to permit bail for those accused of capital offenses, not to deny bail to those whose guilt was certain.”⁴¹ With independence, the State of Pennsylvania reincorporated its bail/no bail provision into its new constitution in 1776.⁴²

Although the Constitution of the United States does not contain an explicit right to bail, the First Congress established such a right in the Judiciary Act of 1789. Writing for the Court in *Stack v. Boyle*,⁴³ Chief Justice Vinson noted that:

From the passage of the Judiciary Act of 1789 to the present Federal Rules of Criminal Procedure, federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.⁴⁴

While *Stack* specifically recognized the right to bail, it did nothing to outline the parameters of the right, thereby leaving to Congress and the states the more difficult questions surrounding its implementation. Bail historian Matthew Hegreness noted that the right to bail that emerged from Pennsylvania’s Constitution became a model for many states’ constitutional bail provisions, and it endured by being carried over into state constitutions through the nineteenth and twentieth centuries.⁴⁵ He stated that “[i]n state constitutions from the Founding through the Nixon era, the right to bail was automatic and inalienable for all crimes not punishable by death. Even persons accused of capital crimes were entitled to bail as a matter of constitutional right unless the evidence of their guilt was great.”⁴⁶

In studying each state’s constitution through November 2013, Hegreness expressed concern that the right to bail is “vanishing.”⁴⁷ He noted the right to bail was protected by “more than three-fourths of the states—the

40. *Id.* (citing 5 THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3061 (Francis Newton Thorpe ed., 1909)).

41. Carbone, *supra* note 30, at 531; *see also* Schnacke, *Fundamentals*, *supra* note 25, at 28.

42. Carbone, *supra* note 30, at 532.

43. 342 U.S. 1 (1951).

44. *Id.* at 4 (internal citations omitted).

45. Matthew J. Hegreness, *America’s Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 913 (2013).

46. *Id.* at 912.

47. *Id.* at 967.

threshold required for a constitutional amendment—from 1845 until 1982, and it has been protected by at least half of the states from 1812 through the present.⁴⁸ He argues that the states who have modified their constitutions to broaden the “detention eligibility net” have eroded what he referred to as the most protected constitutional right for over 200 years—the right to bail—by allowing more and more offenses to be added for a consideration of no bail and by allowing additional factors that are outside constitutional parameters for courts to consider in pretrial detention hearings.⁴⁹

Arkansas has retained the original constitutional bail/no bail framework Pennsylvania first adopted in 1692. Arkansas’s Constitution provides that “[a]ll persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or presumption great.”⁵⁰ As pointed out by former Arkansas Supreme Court Chief Justice Brill in *Trujillo v. State*, the individual right to be “bailable upon sufficient sureties” is firmly rooted in the Arkansas Constitution, having appeared “almost verbatim in each of the four previous constitutions of the state of Arkansas.”⁵¹

III. COMMERCIAL BAIL BONDING

Aside from the state constitutionalization of a right to bail starting in the late 1600s, another change was on the horizon as the 1800s came into focus. Until then, English and American courts declared surety indemnification unlawful with the mindset that if a surety had been paid or had been assured he would be paid the amount that could potentially be forfeited, he no longer had the incentive to ensure the defendant’s condition of release was performed.⁵² However, in the 1800s, both countries faced a shortage of individuals who were willing to become a personal surety for a defendant without pay.⁵³ American judges responded to this dilemma by placing secured money conditions on defendants hoping they could “self-pay” to secure their release.⁵⁴ When defendants could not pay the required amount, they remained in detention until their charges were resolved. This system of “unintentional detention” led American courts to introduce and eventually embrace commercial sureties into the bail system.⁵⁵

48. *Id.* at 913.

49. *Id.* at 913.

50. ARK. CONST. art. II, § 8.

51. 2016 Ark. 49, at 10, 483 S.W.3d 801, 807 (Brill, J., dissenting).

52. *Fundamentals*, *supra* note 30, at 25–26.

53. *Id.* at 26.

54. *Id.*

55. *Id.*

The Philippines was the only Western democracy to follow America's lead. England and all other countries facing the issue chose to modify their own bail systems in varying ways but have steadfastly refused to "infus[e] profit and indemnification into the criminal pretrial process."⁵⁶ It has been noted that, but for the Philippines and the United States:

[T]he rest of the common law heritage countries not only reject [bail for profit], but many take steps to defend against its emergence. Whether they employ criminal or only civil remedies to obstruct its development, the underlying view is the same. Bail that is compensated in whole or in part is seen as perverting the course of justice.⁵⁷

Similarly, another commentator has noted that while initially introduced to assist in the release of bailable defendants, the involvement of commercial sureties in the United States had the unintended consequence of changing the system from one of unsecured financial conditions (where money was paid only upon default) to one of secured financial conditions (where an up-front payment was required before release).⁵⁸ This commentator has stated that "the result [of requiring money to be paid to secure a defendant's release] has been an increase in the detention of bailable defendants over the last 100 years," and he attributes the use of secured money bonds to be "at the heart of virtually every problem experienced in American pretrial release and detention."⁵⁹ Furthermore, he argued that secured money bonds are an impediment to release because they keep low-risk defendants in jail for lack of money, and that secured money bonds interfere with detention because they enable very high-risk defendants to pay for release when their detention is necessary.⁶⁰

Whether money bail is deemed an evil to be avoided at all costs or an essential service to defendants and to the community is regularly debated and has proven quite controversial. In response to the criticisms lodged about money bail, the bail industry defends its practice as both defending the "constitutional right to bail" and also by describing its services as vital to the

56. Timothy R. Schnacke, "Model" Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention, *CTR. FOR LEGAL AND EVIDENCE-BASED PRACS.* 1, 29 (Apr. 18, 2017), http://www.clebp.org/images/04-18-2017_Model_Bail_Laws_CLEPB_pdf [hereinafter *Model Bail Laws*].

57. F.E. DEVINE, *COMMERCIAL BAIL BONDING: A COMPARISON OF COMMON LAW ALTERNATIVES* 201 (Praeger 1991); see also Adam Liptak, *Illegal Globally, Bail for Profit Remains in U.S.*, *N.Y. TIMES* (Jan. 29, 2008), http://www.nytimes.com/2008/01/29/us/29bail.html?pagewanted=all&_r=0.

58. *Fundamentals*, *supra* note 30, at 26.

59. *Fundamentals*, *supra* note 30, at 26; *Model Bail Laws*, *supra* note 56, at 30.

60. *Model Bail Laws*, *supra* note 56, at 30.

functioning of the legal system.⁶¹ Bail agents assert that under the current system, a defendant who cannot afford a money bail set by a court can secure his release by posting a percentage of that amount with a bond company in an amount typically less than 10%.⁶² Some jurisdictions permit bail bondsmen to discount the amount and to negotiate the money or property to satisfy the bond premium. If the defendant does not appear for a required court date, the bail company must retrieve the defendant or forfeit the full amount of the original money bond.⁶³ Bail bondsmen agree that bail amounts can be out of reach for many defendants, but they point out that it is judges, not the bond companies, who have the discretion to adjust bond amounts as necessary.⁶⁴

If commercial bail bonding is abolished—which has been done in only four states: Illinois, Kentucky, Wisconsin, and Oregon⁶⁵—bondsmen believe more people will be incarcerated, “and the government will have to pursue those who skip trial, costing taxpayers millions of dollars.”⁶⁶ They further argue that a 2004 study from the University of Chicago Journal of Law and Economics⁶⁷ confirms that the true value of bail is not in reducing the number of missed court appearances but in remedying the situation when a defendant fails to appear for court. Bail bondsmen assert they are the “true long arms of the law” by more successfully returning fleeing defendants to court and reducing long-term fugitive rates.⁶⁸ With an estimated \$14 billion in bail bonds being issued nationwide each year and an annual industry profit of \$2 billion,⁶⁹ the bail industry has been successful in blocking efforts to eliminate the use of money bail.

61. See *Protecting the Fundamental Constitutional Right to Bail: Opposing Preventative Detention Policies*, AM. BAIL COALITION, <http://ambailcoalition.org/4th-gen-protecting-the-constitutional-right-to-bail/> (last visited Dec. 30, 2019).

62. *Bail and How it Works*, AM. BAIL COALITION, <http://ambailcoalition.org/bail-how-it-works/> (last visited Dec. 30, 2019).

63. *Id.*

64. See *Fact or Myth?*, AM. BAIL COALITION, <http://ambailcoalition.org/fact-or-myth/> (last visited Mar. 21, 2019).

65. Russell Nichols, *States Struggle to Regulate the Bond Industry*, GOVERNING (Apr. 2011), <http://www.governing.com/topics/public-justice-safety/States-Struggle-to-Regulate-the-Bond-Industry.html>.

66. Shirsho Dasgupta, *The Death of the Bondsmen?*, https://uscstoryspace.com/2018-2019/shirshod/Fall_Final (last visited Mar. 21, 2019).

67. Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J.L. ECON. 93 (2004).

68. Helland & Tabarrok, *supra* note 61, at 118; see also *Fact or Myth?*, *supra* note 64.

69. Gillian B. White, *Who Really Makes Money Off of Bail Bonds?*, THE ATLANTIC (May 12, 2017), <https://www.theatlantic.com/business/archive/2017/05/bail-bonds/526542/>; see also *Release: The Bail Bond Industry is For Profit, But Not for Good*, JUST. POL’Y INST. (Sept. 18, 2012), <http://www.justicepolicy.org/news/4389>.

IV. GENERATIONS OF BAIL REFORM

Historically, efforts at reform have occurred whenailable defendants remain in jail, and defendants whom society would consider unailable go free. The first generation of bail reform began in the 1920s and culminated in the 1960s with the passage of the federal Bail Reform Act of 1966.⁷⁰ The focus of this period of reform was on the bail side of the equation—making sureailable defendants were not unnecessarily detained and finding alternatives to the traditional money bail system. Some of the more significant aspects of this reform period were the development of and reliance upon social science research focused on assessing risk of flight, the creation of pretrial services agencies to assist courts with release and detention decisions, and the utilization of nonfinancial conditions and personal recognizance bonds as alternatives to requiring a secured financial bond before release.⁷¹

The second generation of bail reform dated from the early 1970s into the late 1980s. The focus of this period of reform was on the “no bail,” or detention side of the equation, and came about after there were greater instances of defendants fleeing to avoid trial and committing new crimes after they had been released. Until this period, laws were not in place to address the intentional detention of noncapital defendants.⁷² What bail historian Schnacke calls “America’s Big Fix,” was the passage of the D.C. Court Reform and Criminal Procedure Act of 1970⁷³ and the Federal Bail Reform Act of 1984.⁷⁴ He notes that these acts (1) established a “detention eligibility net” to determine at the outset which defendants were subject to release before trial; (2) delimited a narrow set of individuals who, because of public safety concerns, should be intentionally detained while awaiting trial; and (3) attempted to eliminate “unintentional” detention by placing significant limitations on the use of money as a barrier to release.⁷⁵ Also, until 1970, court appearance was the primary consideration in limiting a defendant’s pretrial freedom. For the first time, both acts added public safety as a valid pretrial-detention consideration.

The landmark U.S. Supreme Court opinion in *United States v. Salerno*⁷⁶ upheld the 1984 Act, which authorized defendants charged with certain

70. Schnacke, *supra* note 8, at 7; Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (1966).

71. See Schnacke, *supra* note 8, at 35.

72. *Id.* at 34–35.

73. District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (1970) (codified at D.C. CODE ANN. §§ 23-1321 to 1332).

74. Federal Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984).

75. Schnacke, *supra* note 8, at 35.

76. 481 U.S. 739 (1987).

serious felonies to be detained pretrial when the Government proved by clear and convincing evidence after an evidentiary hearing that no release conditions could “reasonably assure . . . the safety of any other person and the community.”⁷⁷ Chief Justice Rehnquist, writing for the majority, reasoned that the Act had a legitimate and compelling non-punitive, regulatory purpose and that it provided defendants procedural safeguards including the right to counsel, to testify, to present witnesses, to cross-examine witnesses, and to proffer evidence.⁷⁸ The Court further noted that the Act required a court to support a decision to detain by making written findings concerning the applicable statutory factors, and the decision to detain was immediately reviewable.⁷⁹

Schnacke writes that America is in its “third generation” of bail reform after the states rebuffed prior federal reforms.⁸⁰ The focal points of the present reforms are release (bail) and detention (no bail). Schnacke asserts that the reforms are driven by:

(1) pretrial research, which illuminates flaws in our assumptions of defendant risk underlying current American bail laws, and (2) lawsuits, which are avoiding excessive bail claims and are relying on equal protection and due process jurisprudence to fight for the elimination of secured money bonds and to force states to justify and limit preventive detention.⁸¹

V. PLACING CURRENT INCARCERATION NUMBERS IN PERSPECTIVE

The extremely high incarceration rates in the United States have sparked both proactive reform efforts and litigation. The numbers are alarming. A recent report estimates that there are 2.3 million individuals currently incarcerated in 1,719 state prisons, 109 federal prisons, 1,772 juvenile correctional facilities, 3,163 local jails, and various other facilities.⁸² “Incarceration has become the nation’s default response to crime, with, for example, 70% of convictions resulting in confinement—far more than other de-

77. 18 U.S.C. § 3142 *et seq.* (1982 ed. and Supp. III).

78. *Salerno*, 481 U.S. at 751–52.

79. *Id.* at 752. *But see id.* at 762–63 (Justice Marshall in a strongly worded dissent stated that “[t]he very pith and purpose of this statute is an abhorrent limitation of the presumption of innocence. The majority’s untenable conclusion that the present Act is constitutional arises from the specious denial of the role of the Bail Clause and the Due Process Clause in protecting the invaluable guarantee afforded by the presumption of innocence.”).

80. Schnacke, *supra* note 8, at 35.

81. *Id.*

82. *See The Whole Pie*, *supra* note 2.

veloped nations with comparable crime rates.”⁸³ The numbers come into sharper relief when compared to other nations. If each state in the United States was considered an independent nation, the top twenty-three incarceration rates in the world would be occupied by individual states.⁸⁴ Oklahoma currently has the unfortunate distinction of being the “world’s prison capital” with an incarceration rate of 1079 per 100,000 citizens.⁸⁵ Not far behind Oklahoma on this list, Arkansas ranks sixth with an incarceration rate of 900 per 100,000 citizens⁸⁶ and is considered “off the charts” next to other stable democracies in its incarceration rate in the global comparison.⁸⁷

Of the total number of individuals incarcerated in the United States, almost half a million of them are being held in detention awaiting trial.⁸⁸ This makes the United States the world leader in pretrial detention at three times the world average.⁸⁹ Despite the fact that the crime rate and number of arrests have fallen since the mid-1990s, the Bureau of Justice Statistics reports that United States’ pretrial detainees make up two-thirds of jail inmates (up from roughly one-half in 1990) and 95% of the growth in jail population over the last twenty years.⁹⁰ There are approximately 11 million jail admissions each year, and, at any given time, local jails house almost half a million people awaiting trial.⁹¹ The costs of detaining an accused pretrial are staggering. It is estimated that “more than half (\$13.6 billion) of the cost of running local jails is spent detaining people who have not yet been convicted.”⁹²

83. Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POL’Y INITIATIVE (June 2018), <https://www.prisonpolicy.org/global/2018.html> [hereinafter Wagner, *Global Context*].

84. *Id.*

85. *Id.*

86. *Id.* (The global numbers account for juveniles held in detention facilities (555 in Arkansas), defendants involuntarily committed to state psychiatric hospitals because they were found not guilty by reason of insanity (123 in Arkansas) or for evaluation of competency to stand trial (9 in Arkansas), and those detained federally either pretrial or serving a sentence (2,229 in Arkansas)). For consideration of Arkansas’s incarceration rate for prison and jail population only (800 per 100,000 citizens), see BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 25211, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2016, 1, 11 (2018), <https://www.bjs.gov/content/pub/pdf/cpus16.pdf>.

87. See Wagner, *Global Context*, *supra* note 83.

88. See Walmsley, *supra* note 3, at 5; see also John Jay C. of Crim. Just., *supra* note 3, at 14.

89. See Walmsley, *supra* note 3, at 5.

90. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUST., JAIL INMATES AT MIDEAR 2014 1, 1 (2015); see also PATRICK LIU ET AL., THE ECONOMICS OF BAIL AND PRETRIAL DETENTION 4 (The Hamilton Project, 2018).

91. See LIU, *supra* note 90, at 4; see also BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUST., JAIL INMATES IN 2016 1, 1–2 (2018) [hereinafter JAIL INMATES IN 2016].

92. PRETRIAL JUSTICE INST., PRETRIAL JUSTICE: HOW MUCH DOES IT COST? 2 (2017); Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON

Many defendants remain incarcerated pretrial because they are unable to pay a relatively low money bail. In fact, the overall share of defendants who were required to post a money bail to avoid pretrial detention increased from 53% in 1990 to 72% in 2009, while the share of defendants released pretrial without the obligation of posting a money bail dropped by 15%.⁹³ In Philadelphia, between 2006 and 2013, a study found that defendants were unable to secure their release from pretrial detention because they could not afford a money bail of \$500.⁹⁴ Philadelphians are not unique. A 2016 Federal Reserve study found that 47% of Americans did not have \$400 on hand to pay for an emergency, such as a bail fee, and the only way they could come up with the money was to sell something or borrow the money, if they could get it at all.⁹⁵

With Arkansas consistently ranking in the top ten states with the highest rate of poverty, in sixth place as of 2017 with a poverty rate of 17.2%,⁹⁶ it is not surprising that many of the state's non-violent or misdemeanor pretrial detainees are unable to secure release because they are unable to pay their money bail.

It is a reality that the present American system of secured money bail favors those with means to pay while penalizing those without means to afford money bail by their continued incarceration. With release from jail hinging upon the ability to pay a bail fee, many defendants remain in jail until their cases are resolved, which has caused a growing disparity in the incarceration of impoverished defendants. Similarly situated defendants secure their release solely based on their individual ability to pay. With African Americans experiencing poverty at twice the rate of whites,⁹⁷ racial disparities in prison and jail populations persist. For example, a recent report noted that "racial disparities are particularly stark for black Americans, who make up 40% of the incarcerated population despite representing only 13%

POL'Y INITIATIVE (Jan. 2017), <https://www.prisonpolicy.org/reports/money.html> [hereinafter *Following the Money*].

93. See LIU, *supra* note 90, at 5.

94. Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L., ECON., & ORG. 511, 511–542 (2018).

95. Neal Gabler, *The Secret Shame of Middle-Class Americans*, THE ATLANTIC (May 2016), <http://www.theatlantic.com/magazine/archive/2016/05/my-secret-shame/476415>.

96. Claire Hansen, *States with the Highest Poverty Rate*, U.S. NEWS & WORLD REP. (Sept. 26, 2017), <http://www.usnews.com/news/best-states/slideshows/the-10-states-with-the-highest-poverty-rate>.

97. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, P60-263, INCOME AND POVERTY IN THE UNITED STATES: 2017, 1, 13 (2018) (noting the poverty rate of blacks at 21.2% compared to whites at 10.7%); see also Elise Gould & Jessica Schieder, *Poverty Persists 50 Years after the Poor People's Campaign*, ECON. POL'Y INST. (May 17, 2018), <https://www.epi.org/publication/poverty-persists-50-years-after-the-poor-peoples-campaign-black-poverty-rates-are-more-than-twice-as-high-as-white-poverty-rates/>.

of the United States population.”⁹⁸ Similarly, African Americans are significantly overrepresented in Arkansas prisons and jails, representing 42% of the incarcerated population while comprising only 15% of the state’s overall population.⁹⁹ By comparison, whites comprise only 50% of the prison population while comprising 75% of the state population.¹⁰⁰

Unnecessary pretrial detention also carries significant personal costs. In addition to the experience of the incarceration itself, costs to individuals incarcerated pretrial can include loss of employment and housing, loss of insurance and benefits, risk of disease and mistreatment, and stigma due to incarceration, just to name a few.¹⁰¹ Each of these can create tremendous strain on individuals and their families. There is also the risk that children may go into foster care when their parents are incarcerated, and they are left without an appropriate caregiver. In fact, incarceration of a parent was the third most common reason for children being placed in foster care in Arkansas in 2018, behind only neglect and substance abuse.¹⁰² To place the numbers in perspective, there were 774 children, representing 24% of children in foster care, whose placement involved an incarcerated parent.¹⁰³ Not only do taxpayers bear the financial responsibility of the medical insurance, board payments, and other expenses for children in foster care, but the toll placed upon children by being in foster care has the potential to create long-term trauma for children and their families.

Aside from those costs, studies have confirmed that defendants incarcerated pretrial choose to enter pleas of guilty to secure their release rather than choosing to remain in jail until a court hearing or trial when legitimate

98. *The Whole Pie*, *supra* note 2, at 22; *see also* U.S. DEP’T HEALTH & HUMAN SERVS. OFFICE OF DISEASE PREVENTION AND HEALTH PROMOTION, *Social Determinants of Health*, <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-health/interventions-resources/incarceration> [hereinafter *Social Determinants of Health*] (noting higher rates of incarceration as well as disproportionate numbers of arrests and convictions among racial/ethnic minorities); *see also*, Ashley Nellis, *The Color of Justice: Racial & Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT 1, 3–5 (2018), <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf> (finding that even a state like Massachusetts with a lower overall rate of incarceration rate can still experience a large disparity in white versus Hispanic incarceration).

99. Alexi Jones, *Correctional Control 2018: Incarceration and Supervision by State*, PRISON POL’Y INITIATIVE (Dec. 2018), <https://www.prisonpolicy.org/profiles/AR.html>.

100. *Id.*

101. *See, e.g.*, Sebastian & Karakatsanis, *supra* note 1; *Social Determinants of Health*, *supra* note 98; *see also* CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCHOOL, MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 10–13 (2016) [hereinafter MOVING BEYOND MONEY].

102. ANNUAL REPORT CARD, STATE FISCAL YEAR 2018, 198 (July 1, 2017 to June 30, 2018) Produced by Arkansas Dep’t of Human Services Division of Children and Family Services by National Council on Crime and Delinquency Children’s Research Center.

103. *Id.*

defenses could be raised.¹⁰⁴ Studies have also found that pretrial detention has had the effect of lengthening the defendant's sentence by 42% and increasing the amount of non-bail court fees by 41%.¹⁰⁵

John Raphling further observes that the harm done to defendants who have gone into debt to pay a bail fee, who remain incarcerated to await the opportunity to assert a defense, or who agree to accept felony convictions in order to secure a jail release significantly damages the integrity of courts. His concerns are that these realities cause communities to be perceived "not as places of justice, where evidence is carefully weighed and all are treated with dignity, respect, and humanity, but as places where poor people are abused."¹⁰⁶ This is yet another reason why it is important that courts should work diligently to ensure that just and equitable outcomes are reached in each case.

VI. NATIONWIDE REFORM EFFORTS

Nationwide, there is a wealth of information describing the legal and societal problems that have come about following the country's transformation from its traditional bail/no bail dichotomy to its present pretrial detention process and the unintended consequences described above. Countless studies, scholarly articles, news reports, and court opinions have chronicled the journey that states, counties, and cities have taken to address the shortcomings of present pretrial detention systems.

Because the material is vast, information from a select number of states was chosen to outline several key areas of reform. Key areas include: 1) what caused each state to address the issue of pretrial reform; 2) whether the reform was spearheaded by the executive, judicial, or legislative branch; 3) the role of litigation, if any, in pressing for reforms or in reacting to government actions already taken; 4) the types of reforms taken; 5) how they were taken; and 6) the known effects of the reforms taken. A couple of the jurisdictions listed below are highlighted because they are considered pioneers in their reform efforts and can provide an example to jurisdictions considering movement to a system without money bail. Other states are included to display the variety of changes they have made to improve upon their pretrial systems and whether those changes are resulting in the desired outcomes. Therefore, the following jurisdictions represent only a few who

104. Will Dobbie et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV., no. 2, 2018, at 224–25, 234, 236; Stevenson, *supra* note 94, at 512–13.

105. See Stevenson, *supra* note 94, at 513, 534–35.

106. John Raphling, *Efficient Injustice: Too Much Pretrial Incarceration Damages the Integrity of Our Courts*, 57 JUDGES' J., no. 2, 2018, at 14, 17.

have confronted the same issues Arkansas will likely be required to address in the future.

A. Washington, D.C.

Washington, D.C. was one of the first jurisdictions to completely reform its system of pretrial justice, and its pretrial services agency is considered as one of the “pioneering institutions of its kind.”¹⁰⁷ Its story is fascinating. It began in 1963 when the District of Columbia Junior Bar Association toured the Washington, D.C. city jail. After observing the jail conditions and learning of the many defendants who had been held awaiting trial because they had been unable to pay their money bail, these young lawyers issued a “scathing report.”¹⁰⁸ After the report was released, the Georgetown Law School pursued and subsequently received a grant to fund a pilot bail project, similar to New York City’s Manhattan Bail Project. When the D.C. Bail Project began with a staff of six, it was tasked with gathering information on a select number of pretrial detainees to bring before judges, who were not accustomed at that time to receiving detailed information about defendants during bail hearings.¹⁰⁹

With the passage of the Federal Bail Reform Act of 1966, judges were required to consider factors including community ties, residential status, and employment in making pretrial release decisions.¹¹⁰ Difficulties arose in implementing the requirements of the Bail Reform Act’s mandate that defendants be released on the least restrictive conditions that would ensure their reappearance in court. As a result, in 1968, United States District Judge George Hart created a commission charged with studying the implementation of the Act. In 1970, Congress adopted most of the Hart Commission recommendations as part of the D.C. Court Reform and Criminal Procedure Act.¹¹¹ This Act required judges to consider not only the risk of a defendant’s failure to appear, but also required consideration of risk to public safety in making a pretrial release decision. The Act also authorized preventive detention in limited circumstances and expanded the authority of what had

107. PRETRIAL JUSTICE INST., THE STATE OF PRETRIAL JUSTICE IN AMERICA at 3 (2017), [hereinafter STATE OF PRETRIAL JUSTICE], <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=f9d452f6-ac5a-b8e7-5d68-0969abd2cc82&forceDialog=0> (citing U.S. v. Salerno, 481 U.S. 739 (1987)).

108. PRETRIAL JUSTICE INST., THE D.C. PRETRIAL SERVICES AGENCY: LESSONS FROM FIVE DECADES OF INNOVATION AND GROWTH, 2 CASE STUDIES 1, <https://www.psa.gov/sites/default/files/PJI-DCPSACaseStudy.pdf>

109. *Id.*

110. *Id.* at 3.

111. *Id.*

become known as the D.C. Bail Agency to supervise all defendants who were on non-surety release.¹¹²

Money bail continued to have a presence in the D.C. court system until 1992 when legislation was passed expanding the scope of pretrial detention while also prohibiting courts from requiring a monetary bail that would keep defendants in detention awaiting trial. Section 2, §23–1321(c)(3) of the D.C. Code continues to provide that:

A judicial officer may not impose a financial condition under paragraph (1)(B)(xii) or (xiii) of this subsection to assure the safety of any other person or the community, but may impose such a financial condition to reasonably assure the defendant's presence at all court proceedings *that does not result in the preventive detention of the person*, except as provided in § 23-1322(b).¹¹³

The emphasized portion has been credited for being the single most important factor in eliminating commercial bail bonding and limiting the use of monetary bail in Washington, D.C.¹¹⁴

The Pretrial Services Agency of the District of Columbia, as it is now known, has become a critical part of the court system by providing important information to judges in making pretrial release and detention decisions. This information is obtained from their interviews of defendants who are then brought before a court within 24 hours of arrest (even though they are legally required to be brought within 48 hours of arrest).¹¹⁵ The Agency also provides a multitude of key services to defendants who are released pretrial. Among those services, the Agency works with courts to avoid issuance of warrants for defendants who have failed to appear for reasonable cause, provides comprehensive drug testing services, provides varying levels of supervision depending on their identified needs, and provides intensive supervision of higher risk defendants through utilization of halfway houses.¹¹⁶

Today, in Washington, D.C., 92% of arrested people are released prior to trial, and no one is incarcerated based on inability to pay.¹¹⁷ Other significant statistics from the D.C. program are that 89% of arrested people who were released before trial were not arrested for new charges while they were awaiting trial, and 98% were not rearrested for committing a violent offense while awaiting trial.¹¹⁸ Washington, D.C.'s history is important for several

112. *Id.*; Pub. L. No. 91-358, § 23-1321–1322, 84 Stat. 642 (1970).

113. D.C. Code Ann. §23–321 (2019) (emphasis added).

114. PRETRIAL JUSTICE INST., *supra* note 108, at 5.

115. *Id.* at 3.

116. *Id.* at 5.

117. *Id.* at 3.

118. *Id.*

reasons. Among them is that it demonstrates that identifying a pretrial system that ensures the appearance of defendants and also protects the public from dangerous offenders takes resources, a set of agreed principles to guide change, and genuine investment from all members of the justice system. Washington D.C.'s 50-year history in pretrial services and reforms is unique, and it has continued to serve as a model for other jurisdictions who have considered reforms more recently.

Washington D.C.'s success, however, appears to be the exception rather than the norm. In studying pretrial reform efforts nationwide, the Pretrial Justice Institute ("PJI") concluded that the state of pretrial justice in America "falls far short" of Justice Rehnquist's vision.¹¹⁹ Only one state—New Jersey—received an "A" in the PJI report.¹²⁰ Arkansas, along with sixteen other states, received an "F."¹²¹

B. New Jersey

It was a comprehensive effort spearheaded by New Jersey's executive and judicial leadership that eventually earned New Jersey's "A" on the PJI scale.¹²² New Jersey's reforms were prompted by an in-depth study in 2012 which revealed that 73.3% of those in New Jersey county jails were awaiting trial and that 38.5% of the total jail population were eligible for release by paying money bail that they could not afford to pay.¹²³ The study revealed that one in eight inmates was in custody due to an inability to pay \$2,500 or less and that the median length of pretrial detention was 314 days.¹²⁴ Following the study, New Jersey Governor Chris Christie called for a constitutional amendment to limit pretrial release in the most serious cases. In 2013, New Jersey's Chief Justice established the Joint Committee on Criminal Justice (JCCJ), comprised of staff from the Governor's office and the Legislature, judges, court administrators, private counsel, prosecutors, and public defenders, tasked with the purpose of examining the State's then-current bail system.¹²⁵ The report from the JCCJ's efforts revealed that "a

119. STATE OF PRETRIAL JUSTICE, *supra* note 107, at 3.

120. *Id.* at 4 and Appendix. (Note that the report reflects work that has been completed, not work in progress, which is important given many states are actively engaged in pretrial improvement efforts which are not reflected in the data.)

121. *Id.*

122. *Id.*

123. MARIE VAN NOSTRAND, DRUG POLICY ALLIANCE, NEW JERSEY JAIL POPULATION ANALYSIS: IDENTIFYING OPPORTUNITIES TO SAFELY AND RESPONSIBLY REDUCE THE JAIL POPULATION 13 (2013), http://www.drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf.

124. *Id.*

125. REPORT OF THE JOINT COMM. ON CRIMINAL JUSTICE 2 (2014), <https://www.njcourts.gov/courts/assets/criminal/finalreport3202014.pdf>.

resource-based system often results in the detention of poor defendants who present manageable risks of pretrial misconduct and often results in the release of more affluent defendants who present more severe and frequently unmanageable risks of pretrial misconduct.¹²⁶ The JCCJ, citing more than a half-century of research, emphasized the following significant consequences that flow from pretrial custody, and stated that “defendants detained in jail while awaiting trial (1) plead guilty more often; (2) are convicted more often; (3) are sentenced to prison more often; and (4) receive harsher prison sentences than those who are released during the pretrial period.”¹²⁷

Following the release of the study and JCCJ report, the people of New Jersey voted to amend their Constitution¹²⁸ to establish the circumstances under which defendants would be denied release before trial,¹²⁹ and the Legislature passed the comprehensive Criminal Justice Reform Act (“Reform Act”).¹³⁰ The Reform Act was enacted for the purpose of reducing the reliance on financial conditions of release,¹³¹ and it set forth a detailed process that courts must follow when deciding whether to detain a defendant pretrial.¹³² Money bail may be used only as a last resort and only when the court is able to articulate reasons as to why other release conditions would be insufficient to ensure court appearance and safety to the public.¹³³ The court is required to take into consideration, among other factors, the recommenda-

126. *Id.* at 26.

127. *Id.* at 1–2.

128. Voters approved the constitutional amendment by a margin of 61.8% to 38.2% in November 2014. *See Holland v. Rosen*, 895 F.3d 272, 280 (3d Cir. 2018) (citing N.J. DIV. OF ELECTIONS, OFFICIAL LIST: PUBLIC QUESTION RESULTS FOR 11/4/2014 GENERAL ELECTION PUBLIC QUESTION NO. 1 (Dec. 2014)).

129. Article 1, section 11 of the New Jersey Constitution reads:

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

Before the amendment, Section 11 was identical to Arkansas’s companion provision, stating that “[a]ll persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great.” N.J. CONST. art. I, ¶ 11 (1947).

130. N.J. STAT. ANN. § 2A:162-15 *et seq.* (West 2017).

131. *Id.* § 2A:162-15.

132. *Id.* § 2A:162-22.

133. *See id.* § 2A:162-20.

tion from the risk assessment instrument prepared by the state's pretrial services program.¹³⁴

In anticipation of the legislative changes, New Jersey courts detained 34.1% fewer defendants pretrial between mid-2015 and mid-2017.¹³⁵ Since New Jersey's new system was fully implemented in January 2017, the number of defendants detained pretrial dropped by 15% in its first six months.¹³⁶

The New Jersey reforms sparked litigation spearheaded by the bail bond industry. The plaintiff, joined by a corporate surety for bail bonds, challenged the Reform Act on the grounds that it violated the Eighth Amendment, the Due Process Clause of the Fourteenth Amendment, and the Fourth Amendment of the United States Constitution.¹³⁷ In 2018, the Third Circuit Court of Appeals affirmed a District Court ruling and held that the corporate surety had no standing to bring suit, and that there was no constitutional right for a defendant to secure his pretrial release by payment of money or through a corporate surety bond.¹³⁸

C. Alaska

The Pretrial Justice Institute named Alaska a "State to Watch" in its 2017 report.¹³⁹ Alaska's reforms were precipitated by concerns over the growing cost of incarceration. Alaska's spending on corrections had increased from \$184 million to \$327 million between 2005 and 2014.¹⁴⁰ Additionally, Alaska had constructed a new \$240 million correctional center in 2012.¹⁴¹ Alaska's prison population had grown by 27% between 2005 and 2014, nearly three times faster than the resident population,¹⁴² and there had been an 81% increase in the number of people held pretrial over a ten-year period.¹⁴³ It was estimated that without a major shift in policy, the state's prison population would overcome the state's ability to house them by 2017.¹⁴⁴

134. *Id.* § 2A:162-20(f). New Jersey uses the Public Safety Assessment developed in partnership with the Laura and John Arnold Foundation, which is used by many other jurisdictions. *See* AM. CIV. LIBERTIES UNION OF N.J. ET AL., THE NEW JERSEY PRETRIAL JUSTICE MANUAL 6 (2016).

135. STATE OF PRETRIAL JUSTICE, *supra* note 107, at 4.

136. *Id.*

137. *Holland v. Rosen*, 895 F.3d 272, 278 (3d Cir. 2018).

138. *Id.* at 302.

139. STATE OF PRETRIAL JUSTICE, *supra* note 107, at 5.

140. ALASKA CRIMINAL JUSTICE COMM'N, A PRACTITIONER'S GUIDE TO CRIMINAL JUSTICE REFORM 3 (2018) [hereinafter PRACTITIONER'S GUIDE].

141. *Id.*

142. *Id.*

143. STATE OF PRETRIAL JUSTICE, *supra* note 107, at 5.

144. PRACTITIONER'S GUIDE, *supra* note 140, at 3.

In response to this data, in 2014, the Alaska State Legislature unanimously passed Senate Bill 64 which created the Alaska Criminal Justice Commission (the “Commission”) comprised of “legislators, judges, law enforcement officials, the State’s Attorney General and Public Defender, the Corrections Commissioner, and members representing crime victims, Alaska Natives, and the Mental Health Trust Authority.”¹⁴⁵ The Commission was charged with reviewing the state’s entire criminal justice system for the purpose of making recommendations for legislative and budgetary changes.¹⁴⁶ The recommendations from the Commission became a part of Senate Bill 91 (“SB 91”) which, after being considered by five legislative committees in over fifty public committee hearings, was easily passed by the legislature and then signed into law by former Alaska Governor, Bill Walker, in July 2016.¹⁴⁷

The new law was more comprehensive than New Jersey’s reforms because it addressed all aspects of the criminal justice system from the moment a person is arrested to the period following their release from incarceration. Like New Jersey’s Reform Act, SB 91 created a pretrial services division that was required to conduct assessments for use in making recommendations to courts concerning pretrial release.¹⁴⁸ Senate Bill 91 also contained provisions requiring mandatory release for certain types of crime and also reclassified certain offenses and their presumptive sentencing range.¹⁴⁹

However, SB 91 had a rough start. After the state found itself gripped in an opioid epidemic and facing an increase in vehicle thefts, the public and some practitioners demanded change.¹⁵⁰ In response, swift and significant changes were made to SB 91 in 2017¹⁵¹ and 2018,¹⁵² and those changes appear to have addressed the earlier concerns. On November 1, 2018, the Commission released a new report concluding that “there are early indicators that some components of criminal justice reform have worked as intended.”¹⁵³ The report found that resources had been more focused on dangerous, violent offenders since the passage of the reform bills, that a greater

145. *Id.*

146. *Id.*

147. *Id.*; see S.B. 91, 29th Leg., 2d Sess. (Ala. 2016).

148. PRACTITIONER’S GUIDE, *supra* note 140, at 5.

149. See S.B. 91, 29th Leg., 2d Sess. (Ala. 2016).

150. See ALASKA CRIMINAL JUSTICE COMM’N, 2018 ANNUAL REPORT 42–47 (2018); Daniella Rivera, *The Tumultuous Relationship Between SB 91 and Addiction in Alaska*, KTVA NEWS (Nov. 8, 2018), <https://www.ktva.com/story/39450440/the-tumultuous-relationship-between-sb-91-and-addiction-in-alaska>; Alan Greenblatt, *After Reforming Criminal Justice, Alaska Has Second Thoughts*, GOVERNING (Feb. 2018), <https://www.governing.com/topics/public-justice-safety/gov-alaska-criminal-justice-increasing-crime-rates.html>.

151. See S.B. 54 and S.B. 55, 30th Leg., 1st Sess. (Ala. 2017).

152. See H.B. 312, 30th Leg., 2d Sess. (Ala. 2018).

153. ALASKA CRIMINAL JUSTICE COMM’N, 2018 ANNUAL REPORT 70 (2018).

proportion of pretrial defendants were being released pretrial, that there had been a decrease in the disparity in the rate of release for Alaskan Natives, and that a larger portion of felons on supervision had been successfully discharged from reporting.¹⁵⁴ It also found that the failure to appear rate had not changed but that the prison population had decreased to the extent that one correctional facility was closed.¹⁵⁵

D. California

California is another state making significant reforms through efforts by all three branches of government. In early 2016, The Chief Justice of the California Supreme Court in her annual State of the Judiciary address to the California Legislature expressed that California's system of pretrial detention/release was of concern to the judicial branch.¹⁵⁶ She questioned whether the state's current bail system was serving its purpose of protecting the safety of the public and assuring defendants appeared in court or whether the system would be more effective if a risk assessment tool was utilized.¹⁵⁷ The Chief Justice proposed creating more pretrial release programs "[b]ecause we must not penalize the poor for being poor."¹⁵⁸ Later that year, she established a Pretrial Detention Reform Workgroup made up of eleven judges and one court executive officer. This group was charged with conducting that investigation. Workgroup members received an "exhaustive education in the complex issues involved" and heard from state and national experts in each area of the pretrial process including bail industry representatives who offered recommendations for reform.¹⁵⁹ The year-long effort culminated in a unanimous report with ten recommendations that included replacing money bail with a risk-based assessment tool, and implementing a supervision program that bases pretrial release decisions on a defendant's threat to public safety and his likelihood to appear to appear in court when required.¹⁶⁰

Relying in part upon the recommendations from the work group, in August 2018, then-Governor Jerry Brown signed into law Senate Bill 10 which is considered "one of the most sweeping criminal justice reforms of

154. *Id.*

155. *Id.*

156. Tani G. Cantil-Sakauye, Chief Justice, California Supreme Court, California Supreme Court, State of the Judiciary, Address to a Joint Session of the California Legislature (Mar. 8, 2016), <https://www.courts.ca.gov/34477.htm?print=1>.

157. *Id.*

158. *Id.*

159. PRETRIAL DETENTION REFORM WORKGROUP, PRETRIAL DETENTION REFORM: RECOMMENDATIONS TO THE CHIEF JUSTICE 6 (2017).

160. *Id.* at 50–56.

his administration.”¹⁶¹ However, the final bill upset some early supporters, who complained that the bill did not go far enough because it gave too much discretion to judges to incarcerate more people, and because it failed to provide enough oversight of risk-assessment tools found to be biased against communities of color.¹⁶² Bail bonding companies and their insurance underwriters, who had been adamantly opposed to the legislation because it would virtually eliminate the money bail industry in California,¹⁶³ received confirmation in January 2019 that they had gathered enough signatures to require a referendum on Senate Bill 10. The vote on the referendum, which will not occur until the fall of 2020, will delay the implementation of the bill until after the vote.¹⁶⁴

Separately, challenges to the money bail system are pending in the California Supreme Court and in two federal district courts in California. A ruling by one or more of these courts could potentially result in a modification of the money bail system before the referendum in 2020.

E. New Mexico

New Mexico, also considered a “State to Watch” by the PJI,¹⁶⁵ has been in the midst of pretrial justice reform. After the New Mexico Supreme Court’s decision in *State v. Brown*,¹⁶⁶ the Court established a committee to assess the pretrial justice system.¹⁶⁷ Following submission of the recommendations by the committee, New Mexico’s Chief Justice launched an initiative to amend New Mexico’s constitutional provision addressing bail. The

161. Jazmine Ulloa, *California Gov. Jerry Brown Signs Overhaul of Bail System, Saying Now ‘Rich and Poor Alike are Treated Fairly’*, L.A. TIMES (Aug. 28, 2018), <https://www.latimes.com/politics/la-pol-ca-brown-signs-bail-reform-20180828-story.html>.

162. *Id.*

163. The California Bail Agents Association had proposed a uniform statewide bail schedule after it conceded that the present system was inequitable. Katy Murphy, *Bail Reform in California Will Wait Until Next Year, But There’s Good News for Those Pushing for Change*, THE MERCURY NEWS (Sept. 12, 2017), <https://www.mercurynews.com/2017/08/25/bail-reform-in-california-will-wait-until-next-year-but-now-jerry-brown-is-behind-it/>.

164. Julia Cheever, *Bail Reform Law on Hold as Referendum Heads for November 2020 Ballot*, S.F. EXAMINER (Jan. 17, 2019), <http://www.sfexaminer.com/bail-reform-law-hold-referendum-heads-november-2020-ballot/>.

165. STATE OF PRETRIAL JUSTICE, *supra* note 107, at 8.

166. 2014-NMSC-038, 338 P.3d 1276 (N.M. 2014) (trial court was reversed for requiring defendant to post money bail based solely on the nature and seriousness of the charged offense when the evidence demonstrated that less restrictive conditions of pretrial release would be sufficient); *see also*, *State v. Brown*, 396 P.3d 171 (N.M. App. 2017) (charges against same defendant ultimately dismissed for lack of speedy trial when he remained in “preventive detention” for forty-two months without a trial).

167. In re Establishment of the Pretrial Release Ad Hoc Committee, Order No. 15-8110 (N.M. 2015).

initiative passed in November 2016, with 91% legislative approval and 87% voter approval.¹⁶⁸ It provides for preventive detention on grounds of dangerousness and prohibits detention of a defendant solely due to financial inability to post money bail.¹⁶⁹

In July 2017, after receiving recommendations from the state's bail reform work group, the New Mexico Supreme Court modified its court rules to bring them in line with the constitutional changes and to address all aspects of pretrial detention and release.¹⁷⁰ The rules also allow for use of validated risk assessment instruments and programs to provide supervision to certain defendants pretrial.¹⁷¹ The rules further require probable cause hearings within 48 hours and for conditions of pretrial release to be established within 72 hours of arrest.¹⁷² Money bail is still permitted by the new rules, but it can only be used to ensure court appearance and is the sixth option in order of priority for a court to consider in a release decision.¹⁷³

Following the passage of the new constitutional amendment and the changes in the court rules to comport with the amendment, the Bail Bond Association of New Mexico, three New Mexico Senators, one member of the New Mexico House of Representatives, and a criminal defendant who had been charged in New Mexico state court with aggravated assault and

168. THE NEW MEXICO SUPREME COURT, KEY FACTS AND LAW REGARDING PRETRIAL RELEASE AND DETENTION (2017), https://www.nmcourts.gov/uploads/files/REVISED-Pretrial%20Release%20and%20Detention%20Key%20Facts%209_28.pdf.

169. Article 2, Section 13 of the Constitution of New Mexico was amended to read:

All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when proof is evident or the presumption great and in situations in which bail is specifically prohibited by this section. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Bail may be denied by a court of record pending trial for a defendant charged with a felony if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community. An appeal from an order denying bail shall be given preference over all other matters.

A person who is not detainable on the grounds of dangerousness nor a flight risk in the absence of bond and is otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond. A defendant who is neither a danger nor a flight risk and who has a financial inability to post a money or property bond may file a motion with the court requesting relief from the requirement to post bond. The court shall rule on the motion in an expedited matter.

170. See New Mexico Rules Annotated at www.nmcompcomm.us for Court Rules and Rule changes in District, Metropolitan, Municipal and Magistrate courts following the 2017 New Mexico Constitutional Amendment.

171. Rule 5-408 (C), (D) NMRA (2017).

172. Rule 5-301 NMRA (2019).

173. Rule 5-401 NMRA (2019).

released on non-monetary conditions prior to trial, filed suit against the New Mexico Supreme Court justices along with other judges, court executive officers, and the county board of commissioners.¹⁷⁴ The suit alleged in part that the defendant's pretrial risk assessment, which prioritized nonmonetary conditions of release, was violative of the Eighth Amendment's guarantee against excessive bail, the Fourth Amendment's protections from unreasonable searches and seizures, and the Due Process Clause of the Fourteenth Amendment.¹⁷⁵ Relying on *Salerno*, the federal district court rejected the argument that a bailable defendant had a constitutional right to be afforded the option of money bail.¹⁷⁶

F. Kentucky

Kentucky, one of only nine states receiving a "B" grade by the Pretrial Justice Institute,¹⁷⁷ has also been considered a pioneer in pretrial justice reform. In 1976, at the urging of then Governor Julian Carroll, it became the first state to implement pretrial services on a statewide scale and was the second state to completely outlaw commercial bail bonding.¹⁷⁸ The pretrial services program completely replaced the state's previous system that relied upon commercial bail bonding. While money bail remains an option in Kentucky, it is limited and only available through the court system.¹⁷⁹ Some of the defendants who are released on nonmonetary conditions or on their own recognizance are supervised by one of approximately 217 pretrial officers statewide.¹⁸⁰ With a unified court system, there is consistency in how the

174. *Collins v. Daniel*, No. 1:17-cv-00776-RJ-KK, Slip Op. 19-23 (D.N.M. Dec. 11, 2017).

175. *Id.*

176. *Id.* at 41–42. After the opinion was released, the District Court granted the Judicial Defendants' Motion for Sanctions finding that:

Plaintiffs' counsel violated Rule 11(b)(2) [of the Federal Rules of Civil Procedure] by not making a sufficient inquiry into the legal basis for the legislator Plaintiffs' standing and the Bail Bond Association of New Mexico's standing as well as Plaintiffs' claims for money damages against Judicial Defendants regardless of their immunity defenses. The Court finds that sanctions are necessary to deter Plaintiffs' counsel and other similarly situated individuals from repeating this sort of conduct" and the Plaintiffs' counsel was ordered to pay the attorneys' fees and costs of the Judicial Defendants.

Collins v. Daniel, No. 1:17-cv-00776-RJ (D. N. M. Jan. 4, 2018).

177. STATE OF PRETRIAL JUSTICE, *supra* note 107, at 11.

178. *See Stephens v. Bonding Ass'n of Kentucky*, 538 S.W.2d 580 (1976) (trial court was reversed for finding the General Assembly's prohibition against commercial bail bonding unconstitutional).

179. *See KY. REV. STAT. ANN.* § 431.520 (LexisNexis 2019) (discussing pretrial release protocols).

180. *Virtual Tour of Kentucky Pretrial Services*, KY. CT. OF JUST., <https://courts.ky.gov/courtprograms/pretrialservices/Pages/virtualltour.aspx> (last visited Dec. 30, 2019).

pretrial process operates in each of the state's 120 counties. Since 2016, trained pretrial services officers, relying upon the Public Safety Assessment ("PSA") developed by the Laura and John Arnold Foundation (now "Arnold Ventures"), have been authorized to administratively release some defendants who were charged with low-level, non-violent misdemeanors without judicial involvement.¹⁸¹

Years after Kentucky's early reforms were implemented, adjustments had to be made. Following a noticeable increase in the growth of its prison population statewide, in August 2017, Kentucky's Governor established an "inter-branch" work group with the judicial and legislative leadership to embark upon an in-depth study of its criminal justice system.¹⁸² The Kentucky CJPAC Justice Reinvestment Work Group ("Work Group") was tasked with "developing fiscally-sound, data driven criminal justice policies that protect public safety, hold offenders accountable, reduce corrections populations, and safely reintegrate offenders back into a productive role in society."¹⁸³ As to the pretrial detention component of their study, they found that:

Emerging research around effective pretrial policy supports Kentucky's current direction, and highlights opportunities for improvement. Currently, two-thirds of all district court bookings are released at some point before disposition or indictment, though there is substantial variation in release rates statewide. Pretrial success rates for those who are currently released in Kentucky are very high: 88 percent of both felony and misdemeanor defendants released pretrial in 2015 had no new arrest during their pretrial period.¹⁸⁴

The Work Group also determined that despite Kentucky's statutory presumption against the use of secured monetary bail there had been substantial growth in the use of monetary bail for low-risk defendants from 22% to 31% for the years 2012 to 2016.¹⁸⁵ As such, the Work Group recommended expansion of the existing pretrial Administrative Release Program and a further limitation on the use of money bail.¹⁸⁶

Kentucky's Work Group report highlights the fact that pretrial detention is just one component of a massive criminal justice system that has many parts. The report also illustrates that there will be an ongoing need to keep detailed data so that the progress of reforms, or lack thereof, can be

181. *Id.*; see generally PUBLIC SAFETY ASSESSMENT, <https://www.psapretrial.org/about/research> (last visited Dec. 31, 2019).

182. KY. CJPAC JUSTICE REINVESTMENT WORK GROUP, FINAL REPORT 3 (2017).

183. *Id.* at 16.

184. *Id.*

185. *Id.* at 20.

186. *Id.* at 19–20.

monitored in order to determine the effectiveness of the changes that have been put in place and to adjust as necessary.

G. Harris County, Texas

Pretrial Justice Institute researchers have observed that jurisdictions who have more recently focused on pretrial reform have led the way in changing pretrial practices through the formation of commissions, judicial training, and court rule changes. On the other hand, some jurisdictions have been forced to implement change as a result of litigation when courts have found that existing laws or practices have failed to satisfy an individual's constitutional guarantees.¹⁸⁷

Some proposals for reform were underway in Harris County, Texas, when three misdemeanor arrestees filed suit in federal court against Harris County under 42 U.S.C. § 1983.¹⁸⁸ The arrestees claimed that the county's policies deprived them of their due process and equal protection rights when they were incarcerated pretrial due to their inability to pay a secured money bail, and without a timely or meaningful consideration of their ability to pay.¹⁸⁹ In a 120-page opinion, the United States District Court found that despite statutory requirements to the contrary, hearing officers were adhering to strict bail schedules without considering factors such as community safety, the charge, and the arrestee's ability to pay.¹⁹⁰ In addition, the Court found that probable cause hearings, where bail was to be determined, were not taking place within 24 hours of arrest as the statute required.¹⁹¹ Further, the hearings were superficial, often lasting only a few minutes.¹⁹² Arrestees were advised to be silent during these hearings, and they were not allowed to submit any evidence regarding their ability to post bond.¹⁹³ The District Court ultimately granted plaintiffs' motion for preliminary injunction finding that they established a likelihood of success on the merits of its claims that the County's policies violated procedural due process and equal protection guarantees by imposing pretrial detention on indigent misdemeanor arrestees.¹⁹⁴

In crafting its remedy, the District Court delineated specific procedures that would be required to satisfy constitutional due process when setting

187. *See, eg.*, *Odonnell v. Harris Cty.*, 251 F. Supp. 3d 1052 (S.D. Tex., 2017).

188. 42 U.S.C. § 1983 "provides a cause of action for state deprivations of federal rights." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1721 (2019).

189. *Odonnell*, 251 F. Supp. 3d at 1130–64 (S.D. Tex., 2017).

190. *Id.* at 1083.

191. *Id.* at 1112.

192. *Id.* at 1091.

193. *Id.* at 1130–1158.

194. *Id.*

bail. The court held that due process requires: (1) notice to the arrestee that information he provides during the pretrial services interview will be used to determine his eligibility for release or detention; (2) a hearing at which the arrestee has an opportunity to be heard and to present evidence; (3) an impartial magistrate; (4) a written statement by the magistrate outlining the evidence relied upon to conclude that secured money bail is the only reasonable alternative to ensure the arrestee attends future court appearances and abides by applicable laws before trial; and (5) probable cause hearings within 24 hours of arrest.¹⁹⁵

The United States Court of Appeals for the Fifth Circuit concurred with the district court that the plaintiffs established a likelihood of success on the merits of its claims.¹⁹⁶ However, the Fifth Circuit considered it too onerous to require magistrates to issue written opinions as to their findings.¹⁹⁷ Rather, the Court stated that “since the constitutional defect in the process afforded was the automatic imposition of pretrial detention on indigent misdemeanor arrestees, requiring magistrates to specifically enunciate their individualized, case-specific reasons for so doing is a sufficient remedy.”¹⁹⁸ The Court further concluded that federal due process entitled arrestees to a hearing within 48 hours, not the more strict 24 hours imposed by the district court.¹⁹⁹ Therefore, the Fifth Circuit vacated the preliminary injunction and remanded the case to the lower court to create a more narrowly tailored injunction.²⁰⁰

It is estimated that the *ODonnell* litigation, as it has come to be known, has cost Harris County approximately \$9 million.²⁰¹ In response to the *ODonnell* rulings, a new slate of Harris County judges plan to present their plan for comprehensive bail reform to the federal district judge in hopes of concluding the federal litigation.²⁰² Simultaneously, Texas legislators have filed bills to reform the state’s bail system to allow detainees who are not public safety risks to avoid lengthy pretrial detention while ensuring that

195. *ODonnell*, 251 F. Supp. 3d at 1161–65.

196. *ODonnell v. Harris Cty.* 892 F.3d 147, 152 (5th Cir. 2018).

197. *Id.* at 160.

198. *Id.* at 160.

199. *Id.* (citing *Riverside v. McLaughlin*, 500 U.S. 44, 58 (1991), which interpreted *Gerstein v. Pugh*, 420 U.S. 103 (1975) as establishing a right to a probable cause hearing, including the right to bail determination, within 48 hours of arrest).

200. *Id.* at 166.

201. Gabrielle Banks, *Harris County Judges Unveil Drastic New Plan for Releasing Defendants on No-Cash Bail*, HOUS. CHRONICLE (Jan. 18, 2019), <https://www.chron.com/news/houston-texas/houston/article/Harris-County-judges-to-unveil-drastic-new-plan-13541189.php>.

202. *Id.*

arrestees who pose dangers to the community remain in jail.²⁰³ Under the bills, judges who conduct bail hearings will be required to consider an assessment to measure an arrestee's flight or public safety risk.²⁰⁴ Judges would be required to impose the least restrictive conditions of release and the lowest amount of money bail or personal bond to ensure public safety and that defendants appear for court when required.²⁰⁵

H. Other Jurisdictions

Other cities, counties and municipalities, have also addressed reforms independent of their states.²⁰⁶ In some jurisdictions, like New Orleans, community stakeholders worry that adverse legal rulings will have devastating effects on their court related budgets as judges have declared that funding the courts through the fees, fines, and costs that defendants are ordered to pay is unconstitutional.²⁰⁷

The reform efforts and progress of those jurisdictions and others will be invaluable in identifying what reforms would be most effective for Arkansas as it moves toward its own efforts at bail reform.

VII. IS THE ARKANSAS SYSTEM OF PRETRIAL DETENTION IN NEED OF REFORM?

Without statewide data to determine how many inmates are being held pretrial in Arkansas and for what purpose, without data to reveal the amount and use of money bail (whether through a bond company or with cash bail), and without data to measure the average length of pretrial detention, it impossible to know the true picture of this often-ignored segment of Arkansas's criminal justice system. What is known is that:

203. Richard Lee, *Texas Lawmakers Consider Bail Reform Legislation*, N. DALL. GAZETTE (Feb. 2, 2019), <https://northdallasgazette.com/2019/02/04/texas-lawmakers-consider-bail-reform-legislation>.

204. *Id.*

205. See S.B. 628, 86th Leg. (Tex. 2019); H.B. 1323, 86th Leg. (Tex. 2019).

206. See, e.g., *Edwards v. Cofield*, 301 F. Supp. 3d 1136 (M.D. Ala. 2018); *Walker v. City of Calhoun*, No. 4:15-cv-00170-HLM (N.D. Ga. June 16, 2017) (order overturning preliminary injunction); see also James Asher, *New Orleans City Council Eliminates Bail Requirements for Most Petty Crimes*, THE LENS (Jan. 12, 2017), <https://thelensnola.org/2017/01/12/new-orleans-city-council-eliminates-bail-requirements-for-most-petty-crimes/>; Heather Nolan, *And Bail Will No Longer Be Used in New Orleans Juvenile Court as a Condition of Pretrial Release*, NOLA.COM (Jan. 4, 2019), <https://www.nola.com/crime/2019/01/bail-will-no-longer-be-used-in-new-orleans-juvenile-court-as-a-condition-of-pre-trial-release.html>.

207. Matt Sledge, *New Orleans Judges Enter 'Unchartered Territory,' and Budget Peril After Federal Court Decisions*, THE ADVOCATE (Aug. 11, 2018), https://www.theadvocate.com/new_orleans/news/courts/article_2503a6e0-9daa-11e8-bc2f-df4ccc402f0f.html.

- Arkansas has a global incarceration rate for *prisons and jails* of 900/100,000 residents, which is greater than the United States' rate of 698/100,000 and is considered "off the charts" next to other similar jurisdictions.²⁰⁸
- The United States' *jail only* incarceration rate was 229 per 100,000 residents at mid-year 2016,²⁰⁹ roughly one-third of its global incarceration rate.
- 65.1% of those incarcerated in local jails are awaiting trial²¹⁰ at an estimated cost of \$13.6 billion, according to a nationwide report.²¹¹
- From the time period of 1979-80 to 2012-13, Arkansas ranked 8th nationwide for its 385% increase in spending on *prison and jail* corrections over spending for education for grades pre-kindergarten through 12th grade.²¹²
- Incarceration of a parent was the third most common reason for children being placed in foster care in Arkansas in 2018, behind only neglect and substance abuse. There were 774 children, representing 24% of children in foster care, whose placement into foster care involved having a parent incarcerated.²¹³

Even without much needed data in Arkansas to identify the specific pretrial detainee population and the associated costs, what is known provides a compelling reason for an in-depth evaluation of the state's pretrial system to determine specific areas where improvements may be made.

VIII. RECOMMENDATIONS FOR THE ARKANSAS PRETRIAL SYSTEM MOVING FORWARD

As the research above demonstrates, the opportunities for improvement in the Arkansas pretrial justice system are numerous. Arkansas's system, like others, is comprised of many actors, and there are many variables in its complex machinery. It can choose whether to learn from other states that have been proactive in making pretrial justice reforms as well as from the states whose laws and practices have been challenged through long and expensive litigation. Hopefully, Arkansas will proceed proactively and wisely with the important tasks ahead without being forced into change by litiga-

208. Wagner, *Global Context*, *supra* note 83.

209. JAIL INMATES IN 2016, *supra* note 91.

210. *Id.* at 4.

211. *Following the Money*, *supra* note 92.

212. U.S. DEP'T OF EDUC., POLICY AND PROGRAM STUDIES SERV., *Trends in State and Local Expenditures on Corrections and Education* 1 (2016).

213. STATE OF ARK. DEP'T OF HUMAN SERV., ANNUAL REPORT CARD, STATE FISCAL YEAR 2018, at 11 (2018).

tion that taxes its already strained state resources. Moving forward, the following recommendations are offered.

A. Create a Task Force

Most jurisdictions that have taken on pretrial criminal justice reform, as illustrated in Section V above, have begun with the studies and recommendations of a task force, commission, or work group. It is likewise imperative in Arkansas that a task force, or the like, be created that is comprised of dedicated, knowledgeable, and diverse pretrial release stakeholders who will work together to assess its overall pretrial justice system and make recommendations for meaningful improvement. Task force members must be willing to study the history of bail and detention and to learn applicable state and federal laws. It is also important that the task force hear from a broad group of individuals who are regularly involved in the current system, including law enforcement, bail bond agents, judges, and attorneys. The voices of ex-offenders, concerned citizens, and mental health/substance abuse providers also need to be considered in this conversation. It is imperative that task force members understand the complexities of the current pretrial system from the initial law enforcement contact through the time a case is resolved through trial, plea, or dismissal.

The cost of pretrial detention reform will also be a significant consideration for the task force. Given the number and types of variables in the cost assessments from other jurisdictions that have undertaken similar reforms, an exact comparison may not exist. Jurisdictions vary widely in what they include in the total cost of the reforms. For example, while most jurisdictions include in their overall budget the cost of personnel needed to perform the tasks of administering the pretrial assessment tool, states vary on whether they include costs of the design and implementation of the assessment tool, necessary hardware and software, electronic monitoring, and hearing/trial reminder systems to prevent missed court appearances. The task force would also have to consider whether any cost savings could be realized from a restructuring of Arkansas's present system of community supervision. With Arkansas ranking ninth in the country in the number of adults under community supervision in 2016, there may be an incentive to look for opportunities to revamp the supervision system for a more streamlined system overall.

It is also critical that the task force monitor the outcomes that are being reported in the states that have implemented pretrial detention reform. For example, in Maryland, following a change in court rules in 2017 restricting cash bail for use as a last resort, a 2018 report indicated that while fewer defendants were being held in detention on cash bail, there has been a noticeable increase in the number of defendants being held without bail pend-

ing trial.²¹⁴ One explanation offered for the increase in defendants being held without bail is the lack of a broad range of resources for people who could otherwise be released on their own recognizance.²¹⁵ There are also concerns that courts will replace money bail with onerous forms of supervision, including electronic monitoring, which advocates argue can be as punitive as incarceration.²¹⁶ Learning from other states' pretrial reform accomplishments and also from any unintended consequences that may have come about as a result of reforms being implemented in those states will be useful information as the task force proceeds with its recommendations for reform in Arkansas.

Whether the task force is created by the executive, legislative, or judicial branch, worthwhile reforms cannot occur without its members conducting an honest, comprehensive assessment of Arkansas's existing pretrial system. Only then can the task force craft clear goals in each area of the pretrial justice system and outline a detailed approach for how the goals may be accomplished statewide.

B. Re-evaluate Arkansas's Use of Money Bail

One of the most critical issues for the task force's consideration in Arkansas's criminal justice system is the issue of money bail. As the United States Supreme Court has reiterated, "[t]here can be no equal justice where the trial a man gets depends on the amount of money he has."²¹⁷

Although bail was known historically as the process of release for an individual charged with a crime, over time it has become an instrument to ensure certain defendants remain incarcerated pending a trial. During the late 1980s, as many as forty-one states, including Arkansas, limited the class of individuals who were not entitled to release to those who were charged with a capital offense, "when the proof is evident or presumption great."²¹⁸ But, over time, many states have broadened the "detention eligibility net" to include additional offenses or classes of defendants either based upon risk of flight to avoid trial or, in some states, a consideration of whether an individ-

214. Lynh Bui, *Reforms Intended to End Excessive Cash Bail in Md. Are Keeping More in Jail Longer, Report Says*, THE WASH. POST (July 2, 2018), https://www.washingtonpost.com/local/public-safety/reforms-intended-to-end-excessive-cash-bail-in-md-are-keeping-more-in-jail-longer-report-says/2018/07/02/bb97b306-731d-11e8-b4b7-308400242c2e_story.html?noredirect=on&utm_term=.6d7c9cf1b05e.

215. *Id.*

216. See, e.g., Stephanie Wykstra, *Bail Reform, Which Could Save Millions of Unconvicted People From Jail, Explained*, VOX (Oct. 17, 2018), <https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice-inequality>.

217. *Griffin v. Illinois*, 351 U.S. 12, 19 (1956); see also, *Williams v. Illinois*, 399 U.S. 235, 241 (1970).

218. Hegreness, *supra* note 45, at 968.

ual poses a high risk of causing danger to the community. These policy decisions are serious, have broad-reaching implications, and should be carefully studied. Regardless of whether Arkansas chooses to retain its present constitutional framework, it needs to take a hard look at the current system which discriminates among defendants who are similarly-situated in terms of their history, charge, and flight risk by detaining defendants who lack the ability to pay a money bail, while permitting the financially capable defendants to go free.

For jurisdictions that continue to use money bail, Harvard Law School's Criminal Justice Policy Program recommends measures that can be implemented to mitigate its adverse consequences.²¹⁹ One measure would require courts to determine whether a defendant is capable of paying a money bail. The Supreme Court has held that a defendant may not be incarcerated based upon his inability to pay unless the court has inquired as to his financial ability and has determined that the failure to pay was willful or that there is no other alternative that would promote the government's legitimate interests.²²⁰ Using *Turner v. Rogers*²²¹ as a guide, the Harvard Criminal Justice Policy Program envisioned that an ability-to-pay determination in a bail hearing would include: 1) notice to the defendant that his ability to pay will be an important issue in determining the amount of money bail; 2) use of a standard form; 3) an indigency presumption at an established threshold; 4) the right to counsel; 5) a hearing on the record; and 6) a right to prompt review of an adverse bail determination.²²²

Another measure would require that bail determinations be individualized, as opposed to the use of bail schedules that determine a minimum money bail amount or bail range for certain categories of offenses. Adopting this measure would keep the use of money bail in line with its original purpose of ensuring a defendant's return to court as ordered.²²³ The American Bar Association Standards are consistent with this measure in that they insist that financial conditions be imposed only when no other less restrictive condition of release will reasonably ensure the defendant's appearance in court.²²⁴

219. See MOVING BEYOND MONEY, *supra* note 101, at 10–13.

220. *Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983).

221. 564 U.S. 431, 449 (2011) (holding that the incarceration of a person for unpaid child support obligations without inquiring into the person's financial status constituted a Due Process violation).

222. See MOVING BEYOND MONEY, *supra* note 101, at 10–11.

223. *Id.* at 12.

224. AM. BAR ASS'N STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE § 10-1.4(a) (3d ed. 2007) (“Additional conditions should be imposed on release only when the need is demonstrated by the facts of the individual case reasonably to ensure appearance at court proceedings, to protect the community, victims, witnesses or any other person and to maintain the integrity of the judicial process.”).

The final Harvard measure would “regulate or prohibit compensated sureties.”²²⁵ The Harvard report recognized that commercial sureties in some cases enable a defendant to secure release by allowing the defendant to pay less than a full bond amount.²²⁶ However, concerns over commercial surety practices of selectively choosing which defendants to allow to post a bond and concerns over “inadequate training and aggressive pricing policies” led to the recommendation that the role of commercial sureties be reduced by allowing defendants to pay to the courts a monetary deposit which may be returned at the conclusion of each case.²²⁷

The reduction or elimination of commercial sureties in Arkansas would be a significant departure from established court practices which are very reliant upon commercial sureties. It is important that the task force understands the role and function of commercial bail bonding in Arkansas as they craft recommendations for pretrial reform.

C. Consider the Establishment of a Pretrial Services Agency

If the task force recommends an elimination or reduction in the reliance on money bail, utilization of a well-trained and efficient pretrial services agency will be critical. Many jurisdictions across the country have relied upon pretrial services agencies to screen defendants in order to gather information for making pretrial release recommendations, to remind defendants of upcoming court dates,²²⁸ to make referrals for mental health and sub-

225. See MOVING BEYOND MONEY, *supra* note 101, at 12–13.

226. *Id.* at 12.

227. *Id.*; See also AM. BAR ASS’N STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE § 10-1.4(f), which states that:

Consistent with the processes provided in these Standards, compensated sureties should be abolished. When financial bail is imposed, the defendant should be released on the deposit of cash or securities with the court of not more than ten percent of the amount of the bail, to be determined at the conclusion of the case.

228. See *Mesa County Pretrial SMART Praxis*, PRETRIAL JUST. INST. (2013), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=1a61dd31-11fd-1063-067c-352f7a3fc461> (From July 2013 to December 2014, the County reduced its pretrial jail population by 27% without adverse public safety implications.); see also Timothy R. Schnacke et al., *Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado FTA Pilot Project and Resulting Court Date Notification Program*, 48 COURT REV. 86, 88 (2012); WENDY F. WHITE, COURT HEARING CALL NOTIFICATION PROJECT 2 (2006), <https://community.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=34fdeae8-c04e-a57d-9cca-e5a8d4460252>.

stance abuse disorders, and to provide supervision for higher risk defendants.²²⁹ ABA Pretrial Release Standard 10-1.10 recommends that:

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.²³⁰

Courts that have made significant advancements in the area of pretrial reform have done so by requiring pretrial services agencies to utilize validated risk assessment instruments prepared from data gathered about individual defendants to inform courts in making pretrial release decisions. The use of pretrial risk assessment tools has been controversial and has been the subject of much research and debate.²³¹ The proponents of these tools argue that they reduce subjective bias inherent in judicial decision making, enable more consistency in pretrial decisions, improve transparency, and offer accountability through the ability to monitor and adjust outcomes over time.²³² Proponents also assert that relying upon "statistical risk can minimize detention rates while maximizing appearance rates, public safety, or both."²³³ Opponents, on the other hand, have identified serious concerns regarding the "accuracy, racial equality, and contestability" of risk assessment tools.²³⁴

One of the most popular pretrial risk assessment tools is the Public Safety Assessment (PSA) developed by the Laura and John Arnold Founda-

229. See MOVING BEYOND MONEY, *supra* note 101, at 16 (citing studies that found that medium and high-risk defendants released with supervision have lower rates of failure to appear and re-arrest compared to defendants released without supervision).

230. ABA STANDARDS § 10-1.10.

231. Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L. J. 2218, 2227–28 (2019); see, e.g., Melissa Hamilton, *Risk-Needs Assessment: Constitutional and Ethical Challenges*, 52 AM. CRIM. L. REV. 231 (2015); Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT'G REP. 237 (2015); Josh Kelety, *Why a MacArthur Grant-Funded Project to Reduce Crowding Inside the Spokane Jail Hit a Dead End*, INLANDER (Dec. 6, 2018), <https://www.inlander.com/spokane/why-a-macarthur-grant-funded-project-to-reduce-crowding-inside-the-spokane-county-jail-hit-a-dead-end/Content?oid=15374672>.

232. Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, in 3 REFORMING CRIMINAL JUSTICE 21, 34 (Erik Luna ed., 2017), https://law.asu.edu/sites/default/files/pdf/academy_for_justice/2_Reforming-Criminal_Justice_Vol_3_Pretrial-Detention-and-Bail.pdf.

233. *Id.*

234. *Id.*; see also Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.

tion previously referenced herein. Based upon extensive information gathered from 750,000 cases from 300 jurisdictions, researchers developed nine factors relating to a person's age, current charge, and criminal activity (not factors such as race, ethnicity, or geography) that would best predict the risks of failing to appear for court dates, new criminal activity, and new violent criminal activity.²³⁵ The PSA is not a substitute for a judge's pretrial release decision but rather provides additional information to assist in the judge's decision.²³⁶ Although researchers have indicated that the PSA is proving to be a reliable and accurate predictor of pretrial outcomes,²³⁷ it is critical that courts receive specialized training in how instruments such as the PSA are prepared (the factors contained in each assessment and the limitations of assessments) and how they are to be used as one of many tools in making a fair and appropriate pretrial release decision.

The task force should explore all current research in making recommendations as to the utilization of a pretrial assessment in Arkansas. If an assessment is chosen as a tool to be used in a judge's decision-making process, then best practices should be utilized to avoid the areas of concern listed above.²³⁸

Some jurisdictions expand the scope of their existing probation or parole agencies to provide services to pretrial detainees. However, the Harvard report notes that the National Association of Pretrial Services Agencies (NAPSA) identifies as a best practice the creation of a separate agency to administer pretrial services in order to ensure independence.²³⁹ NAPSA recommends that if a pretrial services program is contained within a probation or law enforcement department, it should serve as an "independent entity."²⁴⁰

D. Create a Uniform, Statewide Data Collection System to Gather and Monitor Pretrial Justice System Information

There is a dearth of information available to determine the true picture of pretrial detention in Arkansas. There is no requirement for law enforce-

235. PUBLIC SAFETY ASSESSMENT, *supra* note 179.

236. *Id.*

237. *Id.*

238. Stevenson & Mayson, *supra* note 232, at 38–39 (best practices include transparency in the identity and weighting of risk assessment factors, careful determination in the risk factors to assess, thorough training and communication to understand what the tool does and does not measure, considering what degree of statistical risk requires detaining an individual pretrial, and careful implementation and monitoring of the risk assessment tool).

239. See MOVING BEYOND MONEY, *supra* note 101, at 15 (citing NAT'L ASS'N OF PRETRIAL SERVS. AGENCIES, STANDARDS ON PRETRIAL RELEASE 14 (3rd ed. 2004), <https://info.nicic.gov/nicrp/system/files/napsa-standards-2004.pdf>).

240. *Id.*

ment agencies to submit this information to any central database, nor is there a statewide database for the collection of this information. Although the Arkansas Department of Correction (ADC) keeps data, including the number of individuals who have been sentenced to the ADC or to a community correction facility who are being held in local jails awaiting transport (post-trial detainees), the ADC does not gather information regarding pretrial detainees.

To obtain this information at present, a jail-by-jail inquiry must ensue. Local and county jails typically keep data only on a day-to-day basis and do not retain this information, unless they keep it at the request of a local quorum court or other county/city governmental entity for a brief time period.²⁴¹ In a snapshot view, jails have data reflecting the charge, if filed, a detainee faces, the amount of money bail that has been set, how many pretrial detainees are awaiting a mental evaluation, how many are awaiting ADC or community correction transport, etc.²⁴² They do not specifically monitor or report data concerning the amount of time a pretrial detainee remains in their custody awaiting trial. Although it is possible to pull data from each county

241. For example, the Washington County Sheriff's Office reported that of the 774 individuals in its county jail as of January 31, 2020, 461 of them had pending felonies (this number includes Washington and Madison County inmates as well as district court and ADC commits with pending felony charges). It was reported that after arraignment, it averages 60-90 days for those individuals to proceed to trial. Email from Lt. Nolan Ake, Washington County Detention Center, to Cindy Thyer (Jan 31, 2020 at 11:55 CST) (on file with author). By way of comparison, on January 16, 2019, there were 703 individuals in the jail with 296 awaiting trial on felony charges with an average stay prior to trial of 90 days. Email from Washington County Sheriff Tim Helder to Cindy Thyer (Jan. 16, 2019 at 17:30:10 CST) (on file with author). Annually, for 2018, the average daily population was 642 with 194 pretrial detainees, and the 2019 average jail population was 693 with 315 pretrial detainees. Email from Lt. Nolan Ake, Washington County Detention Center, to Cindy Thyer (Jan 31, 2020 at 11:55 CST) (on file with author).

Washington County keeps data for regular submission to its Quorum Court law enforcement committee. Email from Washington County Sheriff Tim Helder to Cindy Thyer (Jan. 16, 2019 at 17:30:10 CST) (on file with author).

In addition, Pulaski County reported that of the 1243 individuals detained in its jail on January 23, 2019, approximately 779 were awaiting trial for felony charges. It is unknown the average length of stay for these detainees prior to their charges being resolved by plea or trial. Email from Major Matthew Briggs, Pulaski County Sheriff's Office, to Cindy Thyer (Jan. 23, 2019 at 08:28:12 CST) (on file with author).

Craighead County reported that of the 325 inmates in its detention facility as of January 23, 2020, 102 inmates were waiting for their first circuit court appearance and 72 were awaiting trial on felony charges. Craighead County uses the Relativity program for all of its booking and jail data, but Corporal Kaycee Nichols indicated that "[d]etermining an average stay for these inmates is almost impossible. There is not a report that we can pull in our system that provides a detailed breakdown." Emails from Corp. Kaycee Nichols, Craighead County Sheriff's Office, to Cindy Thyer (Jan. 23, 2020 at 14:57 CST and March 3, 2020 at 13:52 CST) (on file with author).

242. *Id.*

for each detainee and calculate the period of time for each between the time of arrest and the time of the disposition of the charges, such a calculation statewide would be painstaking and would only be reflective of snapshots of data due to the lack of requirement that the data be summarized and generated on a monthly, quarterly, or yearly basis.

As Utah's special committee examining pretrial release practices determined in 2015, "[a] significant obstacle affecting Utah's ability to enact reforms in this area is a lack of data. The collection and retention of pretrial release and supervision data in the state is unfortunately inconsistent and incomplete."²⁴³ As in Arkansas, the Utah committee observed that there were "different data systems in the different branches designed to accomplish different things."²⁴⁴ As such, one of the committee's key recommendations was that "all pretrial release and supervision stakeholders work to create uniform, statewide data collection systems or to improve or modify existing systems."²⁴⁵

The National Center for State Courts' Pretrial Justice Center for Courts cited Utah's concerns in its brief which emphasized that "[d]ata-driven decision making is central to criminal justice reform."²⁴⁶ As such, the Arkansas pretrial detention task force should prioritize developing a system of statewide pretrial detention/release data, not only to assess the current situation relating to pretrial detention, but also to enable the state to measure its progress as it moves forward.

E. Ensure Arkansas Statutes and Court Rules Are Consistent with One Another and with the Arkansas Constitution

As the task force considers possible changes to the pretrial detention process, it should carefully study the Arkansas Constitution alongside state statutes and court rules to ensure their uniformity, including their reference to bail in its original context as a process of release. For example, currently, Arkansas's constitution²⁴⁷ and court rules²⁴⁸ use the term "bailable" or "bail"

243. UTAH STATE COURTS, REPORT TO THE UTAH JUDICIAL COUNCIL ON PRETRIAL RELEASE AND SUPERVISION PRACTICES 30 (2015), <https://www.utcourts.gov/resources/reports/docs/Pretrial%20Release%20and%20Supervision%20Practices%20Final%20Report.pdf>.

244. *Id.* at 52.

245. *Id.*

246. NAT'L CTR. FOR STATE COURTS' PRETRIAL JUST CTR. FOR COURTS, DATA SUPPORTING PRETRIAL JUSTICE REFORMS 8 (2017).

247. ARK. CONST. art. II, § 8 (1874).

248. For example, Rule 9.1(a) of the Arkansas Rules of Criminal Procedure states that "[a]t the first appearance the judicial officer may release the defendant on his personal recognizance or upon an order to appear," and a list of non-monetary conditions of pretrial release follow. In addition, Rule 9.2 governs "Release on Money Bail" and specifies that money bail shall be set by a judicial officer "only after he determines that no other conditions will rea-

to refer to release or the process of release, but statutorily the term “bail” is used synonymously with money,²⁴⁹ which is only a condition of release. Bail historian Timothy Schnacke writes that:

Bail as a process of release accords not only with history and the law, but also with scholar’s definitions (in 1793, Anthony Highmore defined bail as ‘the means of giving liberty to a prisoner,’ and in 1927, Arthur Beeley defined bail as the release of a person from custody, the federal government’s usage (calling bail as a process in at least one document), and the use by organizations such as the American Bar Association, which has quoted Black’s Law Dictionary’s definition of bail as a ‘process by which a person is released from custody.’²⁵⁰

Much confusion comes about when jurisdictions define bail as one of its conditions—money. Therefore, as Arkansas turns an eye toward improving its system of pretrial release and detention, one of the first steps will be to properly define bail statutorily as a process of release.

F. Require the Task Force to Ground Its Comprehensive Recommendations for Pretrial Improvement in Current Legal Authority While Also Considering Established American Bar Association Standards of Pretrial Release

Much can be learned from other states that have implemented pretrial reform both proactively and in response to litigation. Learning from what has been successful, and what has not, can be instructive and can preserve precious time and resources. Many jurisdictions that have implemented reform, as well as those jurisdictions that are in the process of determining what improvements are needed, have relied upon American Bar Association (ABA) Pretrial Release Standards for guidance.²⁵¹ The ABA Standards are

sonably ensure the appearance of the defendant in court.” ARK. R. CRIM. P. 9.2(a). The Comment to Rule 9.2 is clear: “Money bail in any form ought to be a last resort and should be used only to assure the defendant’s appearance. It is believed that damage to the integrity of the legal process will best be avoided by limiting bail to its lawful function.”

249. For example, “admission to bail” is defined as “an order from a competent court or magistrate that the defendant be discharged from actual custody on *bail* and fixing the *amount of bail*.” ARK. CODE ANN. § 16-84-101(1) (emphasis added); “Taking of bail” means “the acceptance of a person authorized to take *bail* . . . and shall not include “the fixing of the *amount of bail*.” ARK. CODE ANN. § 16-84-101(6)(A)–(B) (emphasis added). In addition, there are statutes that list individuals who are “authorized to *take bail*” and the responsibilities of officers “*taking bail*.” ARK. CODE ANN. §§ 16-84-102, 105 (emphasis added).

250. *Fundamentals*, *supra* note 30, at 92.

251. The American Bar Association Pretrial Release Standards, now in its Third Edition, are one of twenty-four individual sets of standards that have been promulgated by the ABA since it embarked upon its Criminal Justice Standards Project in 1964. Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, CRIMINAL

ambitious, and many are quite a departure from the statutes, court rules, and practices in some jurisdictions, including Arkansas. However, as the task force embarks upon recommendations for the pretrial detention process, the ABA Standards should be a part of those pretrial reform conversations. A few of the Standards that may be of particular interest to Arkansas judges presiding over pretrial hearings are noted below.

One ABA standard relating to the pretrial hearing process concerns the first judicial appearance. In Arkansas, Arkansas Rules of Criminal Procedure Rule 8.1's "Prompt first appearance" requires only that "[a]n arrested person who is not released by citation or by other lawful manner shall be taken before a judicial officer *without unnecessary delay*."²⁵² Although this rule requires a mandatory prompt hearing, a court's failure to hold a preliminary hearing does not require a dismissal of the charges, but may be a basis to suppress a statement made while in custody.²⁵³

In significant contrast to Arkansas's "prompt" hearing requirement, the ABA Pretrial Release Standard for the timeliness of the first judicial appearance requires that if a defendant is not released on citation or otherwise, "[t]he defendant should be presented at the next judicial session within [six hours] after arrest. In jurisdictions where this is not possible, the defendant should in no instance be held by police longer than 24 hours without appearing before a judicial officer."²⁵⁴ The Fifth Circuit in *ODonnell* rejected a 24-hour first appearance requirement holding that a preliminary hearing that took place within 48-hours of arrest satisfied due process standards.²⁵⁵ Whether Arkansas adopts a 6-hour, 24-hour, 48-hour, or other time-specific

JUSTICE, Winter 2019, https://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/makingofstandards_marcus.pdf. It has been estimated that ABA standards have been quoted or cited in more than 120 U.S. Supreme Court opinions, 700 federal circuit court opinions, 2,400 state supreme court opinions, and 2,100 law journal articles. PRETRIAL JUSTICE INST., GUIDELINES FOR ANALYZING STATE AND LOCAL PRETRIAL LAWS, II-ii (2017), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=f8c73743-57bc-5065-4b85-324e2bb28ba6&forceDialog=0>.

252. ARK. R. CRIM. P. 8.1 (emphasis added).

253. See *Cook v. State*, 274 Ark. 244, 623 S.W.2d 820 (1981) (stating that while Rule 8.1 is mandatory, not discretionary, failure to hold preliminary hearing until 32 days after arrest does not require dismissal); *Bolden v. State*, 262 Ark. 718, 561 S.W.2d 281 (1978), *rev'd on other grounds*, 267 Ark. 504, 593 S.W.2d 156 (1980). *But see* *Wayland v. City of Springdale*, 933 F.2d 668 (8th Cir. 1991) (city could be answerable for constitutional violation under 42 U.S.C. § 1983).

254. In addition, ABA Pretrial Release Standard 10-4.2(a) contemplates a pretrial services agency being able to conduct an interview with the defendant and gather information prior to the first appearance, which makes Standard 10-4.1. AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE § 10-4.2(a) (3d ed. 2007).

255. *ODonnell v. Harris Cty.*, 892 F.3d 147, 160 (5th Cir. 2018) (citing *Riverside v. McLaughlin*, 500 U.S. 44, 58 (1991) which interpreted *Gerstein v. Pugh*, 420 U.S. 103 (1975), as establishing a right to a probable cause hearing, including the right to bail determination, within 48 hours of arrest).

standard for a preliminary hearing, consideration should be given to establishing a specific time frame rather than a general “prompt” hearing requirement.

An additional ABA Standard specific to the detention hearing process is ABA Standard 10-5.10 which sets forth the recommended procedure and burden of proof governing pretrial detention hearings when pretrial detention is requested by the prosecutor. Unlike the Arkansas Rules of Criminal Procedure, which do not require an adversarial hearing in a pretrial release determination, ABA Standard 10-5.10 states that defendants in pretrial detention hearings have “a right to (i) be present and be represented by counsel and, if financially unable to obtain counsel, to have counsel appointed; (ii) testify and present witnesses on his or her own behalf; (iii) confront and cross-examine prosecuting witnesses; and (iv) present information by proffer or otherwise.”²⁵⁶ These factors, along with the prosecutor’s burden of “clear and convincing evidence,” the requirement that the court make written findings of fact following a decision to detain, and the provision for immediate appellate review of a detention decision were significant to the *Salerno* majority in concluding the Bail Reform Act of 1984 passed Fifth Amendment Due Process muster.²⁵⁷

In further contrast to Arkansas’s present rules, the ABA Standards require that a court announce on the record (or in written findings of fact within three days) the reasons for detaining a defendant pretrial.²⁵⁸ There is no similar requirement in the Arkansas Rules of Criminal Procedure.

Also foreign to the Arkansas rules is ABA Standard 10-5.10(g)(ii) which outlines a graduated procedure for pretrial detention review beginning with a *de novo* review of the pretrial detention decision within 90 days if the defendant has not proceeded to trial, then an additional hearing requirement before another 90-day extension can be granted, and finally a mandate for conditional release of a defendant if not tried within the last 90-day period.

Concerning appellate review, ABA Pretrial Release Standard 10-5.10(h) provides that “[a] pretrial detention order should be immediately appealable by either the prosecution or the defense and should receive expedited appellate review.”²⁵⁹ In contrast, the Arkansas Supreme Court has held

256. AM. BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE § 10-5.10(g)(ii) (3d ed.2007).

257. *United States v. Salerno*, 481 U.S. 739, 751–52 (1987). *See also, ODonnell*, 892 F.3d at 157–61 (upholding the Texas District Court’s determination that due process required courts to conduct a pretrial hearing at which the arrestee has an opportunity to be heard and to present evidence).

258. AM. BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE § 10-5.10(g)(ii) (3d ed. 2007).

259. AM. BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE § 10-5.10(h) (3d ed. 2007).

that a writ of certiorari is the proper mechanism for a defendant to seek review of an adverse money bail determination.²⁶⁰

Finally, ABA Standard 10-5.11 recommends that “[e]very jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice. These accelerated time limitations should be shorter than current speedy trial time limitations applicable to defendants on pretrial release.” Not only is this standard designed to give meaning to a defendant’s Constitutional right to a speedy trial and to minimize unnecessary detention and its accompanying costs, but it is also important in the effort to avoid situations where defendants are entering a plea of guilty simply to avoid incarceration.

Adopting any of these Standards would be a drastic departure from current Arkansas rules and practice, and courts and prosecutors who are charged with managing heavy criminal dockets would have to make significant changes in their docket management systems. Furthermore, significant resources could be required to implement the above standards, including funding for pretrial services agencies and additional judicial and attorney resources for the increased hearing requirements.

As stated above, the ABA Pretrial Release Standards are not mandatory, although many of the standards have been adopted by jurisdictions nationwide and should be considered. As Arkansas moves forward, its reform efforts must be guided by legal precedent, the lessons learned from other jurisdictions, and established pretrial release standards.

IX. CONCLUSION

Over hundreds of years, money bail has transformed from the payment of a wergeld to ensure a defendant’s return to court into a system where money bail is the barrier to release for low-risk defendants without financial means to pay. The judicial system has likewise transformed from one where release was the norm, except for the most serious offenses, to one where pretrial detention is commonplace for offenders that pose no risk to the community. While recognizing that some defendants must be detained pretrial to ensure their appearance in court and/or to protect the safety of the community, limited resources must be prioritized to house only those individuals and not the individuals who are simply too poor to post money bail.

In considering the costs to individuals, to their families and to society as a whole, we all share the responsibility of ensuring that the Arkansas Constitution, statutes, and court rules do not perpetuate a system of crimi-

260. *Trujillo v. State*, 2016 Ark. 49, at 2, 483 S.W.3d 801, 803.

nalizing poverty nor a system that generates racial inequities; that Constitutional guarantees are satisfied for those who are charged with crimes, both for those defendants who are rightfully detained pretrial and those who are not; and that best practices in each area of the pretrial detention process be embraced in order to sustain the reforms we seek. Judges and attorneys have a vested interest in protecting the integrity of the court system so that it is, and is perceived to be, a reservoir of justice where all litigants and parties are treated fairly, equally, and respectfully regardless of their racial, ethnic, or socioeconomic status.