Moving Past Arbitrary Bail: A Proposal for More Deliberative Pretrial Decision-Making

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I. Introduction

THE 1980s USHERED in a punitive age in the American criminal legal system that has either been credited with the "great crime decline" of the last 25 years or blamed for its role in driving mass incarceration. With respect to pretrial practice, the Supreme Court's 1987 *U.S. v. Salerno* decision allowed for greater discretion in the use of money bail, explicitly permitting judges to consider risk to community safety during bail hearings, in addition to the traditional consideration of flight risk (*United States v. Salerno*, 1987). Over the ensuing decades, a quiet but steadily increasing reliance on cash and commercial security bonds took hold in courts across the country, resulting in a 60 percent increase in the use of financial conditions between 1990 and 2009, and an accompanying twofold increase in bail amounts levied (Hood & Schneider, 2019).

In the present day, money bail is the default release mechanism in many courts across the country, overwhelming jails, feeding mass incarceration, and contributing to acute racial disparities in incarceration (Menefee, 2018). On any given day in 2019, local jails held 735,000 people, a modest decrease from the daily count of 767,000 ten years earlier. Two-thirds were held while awaiting trial. The jail incarceration rate was over three times higher for Black people than for White people (Zeng & Minton, 2021).

A. A Budding Reform Era

Despite stubborn levels of incarceration, recent years have seen increased attention to the collateral consequences and inequities of pretrial detention, kicking off a new wave of pretrial reform. Like prior efforts in the 1960s, current initiatives tend to focus on reducing the use of financial conditions that result in more pretrial detention. However, the contemporary pretrial justice movement is unique in several ways. First, advances in the collection and analysis of justice-system data have allowed for a more robust justification of the need for reform and the emergence of data-driven strategies. Second, the rapid spread of pretrial supervision and services programs has broadened the field of release options from the traditional polar alternatives of unaffordable bail on the one hand or release with no conditions on the other. Finally, the pretrial justice movement is now more closely aligned with the broader push for racial equity throughout the criminal justice system.

B. The Challenge of Good Implementation

Despite recent steps forward, a survey of the research literature quickly reveals a mix of halting progress—significant in some, but meager in other jurisdictions—and an array of implementation deficits that have curtailed the reach of many reforms. Ultimately, the divide is one of policy versus practice. Many reforms depend on the judges who make pretrial decisions every day to implement new tools such as risk assessments and pretrial supervision. But recent experience and years of prior research suggest reforms relying on judicial discretion may fall short without structural change to courtroom practice that supports deliberative decision-making.

In this article, we propose improving the impact of pretrial reforms that depend on discretion by slowing down, restructuring, and increasing the quality and quantity of information available during arraignments or bond hearings.

II. Recent Pretrial Reforms: A Brief Survey of Research and Practice

Recent pretrial reform efforts have taken three primary forms: (1) development of intermediate pretrial options besides "bail or nothing"; (2) implementation of structured decision-making protocols during pretrial hearings, many of them based on formal risk algorithms; and (3) state-level reform legislation and precedential court decisions that curtail the types of cases where money bail is legally permissible or restrict the setting of unaffordable bail. We review the literature on each of these strategies below.

A. Pretrial Supervision and Services as a Pretrial Option

For years, Washington, D.C., operated a system in which close to nine in ten people are released pretrial and, in most cases, assigned to a supervision regimen that varies systematically based on people's assessed risk of re-offense (Pretrial Services Agency for the District of Columbia, ND). However, reflected in the very existence of this special issue of *Federal Probation*, while the expansion of pretrial supervision and services elsewhere has been slow to date, it is an integral component of recent reform efforts.

For example, procedures for implementing New Jersey's 2017 bail reform law expressly require the availability of three distinct intensities of pretrial supervision in every county, as well as the option of ordering electronic monitoring or home detention for cases on the high end of the risk spectrum but for whom detention is deemed inappropriate (ACLU of New Jersey; National Association of Criminal Defense Lawyers; New Jersey Public Defenders Office, 2016). New York's bail reform is less prescriptive, but similarly requires all counties to make pretrial supervision available to judges in any case—either with treatment or not—with no eligibility restrictions (Rempel & Rodriguez, 2020)

Research in multiple jurisdictions points to the potential effectiveness of pretrial supervision, indicating that it does not increase rearrest rates, while it does increase court attendance—and is especially effective with those least likely to attend court otherwise (APPR, 2021; Skemer, Redcross, & Bloom, 2021).

B. Structured Decision Making

Structured decision protocols tie the results of risk algorithms to recommendations for release on recognizance, one of several possible intensities of supervision, or monetary conditions (Hu, KiDeuk, & Mohr, 2017). Although some well-known pretrial assessment tools, such as the PSA and the VPRAI, have been widely implemented and validated across jurisdictions, protocols regarding their application tend to be unique to the local jurisdictions that adopt them. As a result, research regarding the theoretical implications of these tools has proliferated (Goel et al., 2018) but there have been few rigorous evaluations of their application in practice.

Several studies suggest that if judges adhered to a risk assessment's recommendations, they could reduce recidivism, pretrial detention, or both (Baradaran & McIntyre, 2011; Kleinberg et al., 2018). However, the few implementation studies that exist have produced mixed results depending on the jurisdiction studied and generally point to a dearth of judges following the recommendations of the jurisdiction's formally adopted decision-making matrices (Bechtel, Holsinger, Lowenkamp, & Warren, 2017; Viljoen et al., 2019). For example, recent studies in both Kentucky and Florida suggest that structured decision protocols could have but did not yield sustained reductions in pretrial detention, mainly because judges often chose to override the recommendations tied to the assessment (Stevenson, 2017; Copp, Casey, Blomberg, & Pesta, 2022).

Research also indicates that risk assessments can exacerbate racial disparities by erroneously overclassifying Black and Latino people as higher risk than their White counterparts (Angwin, Larson, Mattu, & Kirchner, 2016; Picard, Watkins, Rempel, & Kerodal, 2019) This tendency is largely driven by historic bias that is "baked" into the criminal history data that underlies most public safety risk assessment tools, leading to a "bias in, bias out" conundrum (Mayson, 2019). Moreover, the racial disparities inevitably seep into structured protocols that jurisdictions use to determine conditions of release or supervision levels, leading to more punitive outcomes for Black and Latino defendants (Picard et al., 2019).

Given the well-documented downstream consequences of detention, the widespread mistrust of risk algorithms among decision-makers is not without merit (Heaton & Stevenson, 2019). However, even if it is the predominant practice today, structured decision-making by no means requires the use of potentially biased public safety risk assessments, as we discuss below with reference to our proposed reform in New York City.

C. State Level Reforms Fully or Partially Eliminating Bail

Over the last ten years, bail reform legislation has passed in a diverse array of states, including Kentucky, New York, New Jersey, Illinois, and New Mexico. The nature of these reforms varies by state, with Illinois (2022) eliminating the option of bail (Chicago Appleseed Center for Fair Courts, 2021), New York (2020) eliminating bail for most misdemeanors and nonviolent felonies but retaining bail for violent felonies (Rempel & Rodriguez, 2019), and New Jersey (2017) and New Mexico (2016)

placing risk-based limitations on who can be detained pretrial or requiring pretrial hearings to establish cause for detention (ACLU of New Jersey, et al., 2017; Dole, Denman, Robinson, White, & Maus, 2019). Systematic evaluations of the effects of pretrial reform legislation remain nascent given the recency of some of the legislation. The research that does exist suggests that state-level reforms have the potential to reduce pretrial detention without increasing crime (Anderson, Redcross, Valentine, & Miratrix, 2019; Lu, Bond, Chauhan, & Rempel, 2022).

Failure to comply with standing court precedents with respect to excessive bail have also figured into recent reforms. In 1951, the Supreme Court ruled bail is excessive if it is "set at a figure higher than an amount reasonably calculated… to fulfill [assuring the presence of the accused]" (*Stack v. Boyle*, 1986). Yet, as national studies of pretrial detention and bail payment make clear, unaffordable bail has been a stubborn reality for more than 70 years. In response, the last five years have seen courts in California, Georgia, Louisiana, Maryland, Massachusetts, New York, and Texas all find that people's ability to afford bail must be assessed and considered.[1] However, except for Harris County, Texas (Heaton, 2022), evaluations of the impact of these court decisions suggest poor implementation has curbed their efficacy in practice (Lu & Rempel, 2022).

III. Pretrial Reform and the Controversy Over Judicial Discretion

Why is there public controversy regarding pretrial reforms that seek to reduce pretrial detention caused by unaffordable bail? Among other reasons, it is a common perception that bail reform ties the hands of judges and, in so doing, requires judges to release too many people and inevitably leads to an increase in crime. In a period when crime and violence are on the rise, the belief that part of the crime

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[1] For example, in California, see: *In re Humphrey*, S247278 Supreme Court of California (2021) (decided: 3/25/2021). In Louisiana, see, *Caliste v. Cantrell*, No. 17-6197, 2018 U.S. Dist. LEXIS 43338 (E.D. La. Mar. 16, 2018). In Maryland, see *Bradds v. Randolph*, 239 Md. App. 50 (2018) (decided 2/20/18). In Massachusetts, see *Brangan v. Commonwealth*, 477 Mass. 691 (2017) (decided 8/25/2017). In New York, see People ex rel. *Desgranges v. Anderson*, 59 Misc. 3d 238 (Sup. Ct. 2018) (decided 1/31/18). In Texas, see *Daves v. Dallas City*, 341 F. Supp. 3d 688 (N.D. Tex. 2018) (decided 9/20/2018).

problem lies with prescriptive reforms that take bail and detention flatly off the table is increasingly popular among judges, moderate and conservative legislators alike, and the public (e.g., see Grasso, 2022).

The critics correctly observe that many bail reforms curtail judicial discretion to use money bail in some or all cases. Noted above, Harris County's reforms eliminated bail in most misdemeanor cases, as did New York's for most misdemeanors and nonviolent felonies. With its rigorous hearing requirements, strict presumption of release for most charges, and presumptive decision-making matrix (ACLU of New Jersey, 2016), New Jersey's reform also created boundaries for when judges could expeditiously detain people. Yet, while rigorous studies are scant, available research does not support the idea that reduced judicial discretion is driving recent crime increases (Ropac & Rempel, 2022; Sorenson, 2021; Zhou et al.,2021). To the contrary, new research on New York's bail reforms has found that provisions depriving judges of the ability to set bail in most misdemeanor and nonviolent felony cases actually *reduced* recidivism over two years, when compared to similar cases facing bail in the year before the reforms were implemented (Lu & Rempel, Forthcoming).

Furthermore, contrary to stark claims suggesting that reforms wholly tie judges' hands, most bail reform laws (and some court-ordered reforms) have significant charge-based carve-outs. In addition, reforms that restrict bail-setting, such as those in New Jersey and New York, also give judges *more* discretion to select from a large menu of release conditions, including pretrial supervision with or without treatment conditions and electronic monitoring. It is worth noting, however, that opponents of bail reform who advocate for judicial discretion are not truly making a generalized argument that reforms reduced it. They are making a specific argument about judges' right to detain or set bail based solely on discretion. For the critics, creating more discretion in the form of an enlarged menu of non-monetary conditions may be beside the point.

A. Is Judges' Discretion to Detain People Worth Preserving?

Perhaps more important than whether judges are losing discretion is the unfortunate reality that judicial discretion does not necessarily produce better or fairer pretrial decisions.

First, regarding the lack of better decisions,

recent research in a large southeastern study suggests that the stated goals in implementing pretrial reforms—reduced pretrial detention and reduced racial disparities—was thwarted by the use of judicial overrides (Copp et al., 2022). Similar findings across a diverse range of jurisdictions suggest that inadequate implementation of structured decision protocols, risk algorithms, or charge-based constraints on the use of money bail often fail via decision-maker mistrust of protocols and subsequent overrides of recommendations (Shook & Sarri, 2007; Chappell, Maggard, & Higgins, 2013; Cohen, Lowenkamp, Bechtel, & Flores, 2020). Moreover, when left to exercise discretion, judges tend to inaccurately classify people as high risk, leading to increased pretrial detention for those unlikely to be rearrested and disproportionately impacting Black and Latino people (Baradaran & McIntyre, 2011; Kleinberg et al., 2017).

Regarding the lack of fairer decisions, the significant Black-White gap that exists today in the nation's pretrial jail populations did not first materialize during the recent "reform era," but over decades of discretionary decision-making. Recent scholarship expressly identifies racial disparities in judges' detention decisions (Eaglin & Solomon, 2016, Leslie & Pope, 2017), with one study attributing two-thirds of the racial disparity in New York City's pretrial decisions to racial discrimination after controlling for other factors (Arnold, Dobbie, & Hull, 2020). In fact, within this very issue of *Federal Probation*, a study of discretionary decisions by judges in New York State found that they led to significant racial disparities. Not surprisingly, disparities were greatest among charges that remained eligible for bail after the passage of the state's bail reform law; conversely, charges mostly subject to reduced discretion through the elimination of bail saw fewer disparities (Lu & Rempel, 2023).

Finally, decades of empirical research on judicial discretion caution against the assumption that judges are consciously making individualized decisions with an eye toward preserving public safety. Instead, judges facing high-stakes decisions with relatively little pertinent information and limited time to deliberate tend to revert to heuristic shortcuts and intuitive rather than deliberative decision-making approaches (Rachlinski & Wistrich, 2017a). Intuitive decision-making is more likely to result in racial and socioeconomic disparities, given well-documented implicit biases among judges—including adherence to peer group expectations, vulnerability to

cognitive shortcuts like anchoring, and bias in favor of the judge's "in-group" (e.g., White judges will be more lenient with White accused individuals) (Bennet, 2014). While there is less research specific to the pretrial phase, heavy caseloads and time pressure are inherent to the pretrial phase of the justice system, likely accentuating the use of potentially biased heuristics in lieu of thoughtful, data-driven decision making.

B. Restructuring Pretrial Decision-Making

Several theoretical solutions have been proposed for addressing disparities in judicial decision-making, including the cognitive and implicit biases that contribute to the problem. Solutions include the use of second appearances before rendering a decision, reductions in caseload pressure, training for decision makers, two-stage decision processes, and written rather than verbal decisions (Rempel et al., 2021; Wistrich & Rachlinski, 2017b). For the most part, however, these strategies are not featured in most pretrial reform initiatives, which tend to focus on improving the type of information judges have available and placing legal restraints on the use of discretion. As a result, the impact of these proposed solutions on pretrial decisions is not known, and the recommendations remain largely theoretical.

In this article, we propose a model decision-making process that directly addresses the obstacles that prevent deliberative decision-making and exacerbate racial disparities in pretrial outcomes.

IV. New York City as a Case in Point

Given our experience and knowledge within New York City, we use it as a case study for why judicial decision-making reforms are needed and how they could work in practice. While New York City may be unique in terms of case volume and the extent of resources available to individuals who are released pretrial, it is remarkably like other jurisdictions across the country in terms of how the court responds to cases where money bail is a legal option (referred to as "bail eligible" in New York). In short, decision-making in these cases is largely reliant on the discretion of judges with limited time and information to support deliberation.

A. New York's Bail Reform Law

Introduced above, New York State legislators passed a sweeping bail reform law that went

into effect in 2020 and seeks to reduce pretrial detention through four main elements. First, the law eliminates bail for most misdemeanors and nonviolent felonies. Second, the law sets a series of standards guiding judicial discretion, ostensibly establishing conditions for more consistent and informed decision-making across different judges. For example, the law includes a presumption of release, which requires courts to release people with no conditions *unless* there is a "risk of flight." When a risk of flight is present, the court must then set the "least restrictive conditions" that can suffice to assure court attendance and compliance with other conditions of pretrial release. Finally, the law specifies a long list of non-monetary conditions from which courts can select—including pretrial supervision and electronic monitoring (Rempel & Rodriguez, 2019).

B. Implementation Deficits

In general, the New York State bail law has led to significantly lower rates of monetary bail-setting and pretrial detention, a predictable outcome given the range of charges that became flatly ineligible for money bail. Yet, several other provisions that rely on judicial discretion have been implemented only to varying degrees. For instance, while the City's validated release assessment that measures likelihood of returning to court overwhelmingly recommends individuals for release and does so at similar rates regardless of people's race/ethnicity (Peterson, 2020), judges usually *do not* adhere to the tool's recommendations in cases remaining eligible for bail (Rempel & Weill, 2021). Further, despite the reformed statute's mandate to consider financial circumstances when bail is set in the post-reform era, cash amounts are higher, and individuals are *less* likely to pay the bail when compared to the pre-reform era (NYC Comptroller Brad Lander, 2022; Lu & Rempel, 2022).

V. Reimagining the Arraignment Process

While there are challenges to any effort to reform ingrained procedures, New York City can serve as a useful site for imagining what decision-making reforms might look like due to its ready-made possession of relevant laws and infrastructure.

A. Background: The Current Pretrial Process in NYC

In New York City, most individuals are arraigned within 24 hours following arrest.

While about a third of misdemeanors are disposed right at the arraignment, the most significant event for all other cases is the judge making a release decision. Here is how it works.

First, the prosecutor speaks, offering a summary of the allegations, the individual's prior criminal history (if any), and a narrative justification for bail or some other release recommendation, such as supervised release in cases ineligible for bail. The defense attorney then presents an argument for why the judge should consider release on recognizance or other non-monetary conditions for bail-eligible cases. These arguments and the judge's ensuing release decision often take place in a matter of minutes. Under New York law, even in bail-eligible cases, if the judge finds a demonstrable risk of flight,[2] they must then set the "least restrictive condition" necessary. Judges may not set bail unless first finding that less restrictive conditions such as supervised release will not suffice. For the most part, however, this process is also mostly subjective in the status quo. While a supervised release staff member is present in the courtroom during the release decision to answer questions regarding suitability for pretrial supervision if there are any, this is not usually the case.

B. Strategies for More Deliberative Decision-Making

Much as in New York, in courts across the country, pretrial hearings (or "arraignments" in the New York City context) are handled quickly and can yield inconsistent and racially disparate outcomes. The proposed reforms seek to establish slower and more careful deliberation through a revised arraignment structure and a more information-rich process. This process would involve three essential elements, detailed below, and could potentially be implemented through court directives with or without accompanying laws. For larger jurisdictions like New York City, the proposed restructuring also creates opportunities to off-ramp lower risk cases and make the more deliberative process more manageable in terms of caseloads.

1. Two-Step Decision Making. In contrast to the current arraignment process in New York, where risk for flight and release

conditions assignment are integrated into one decision, the proposed structure would purposefully bifurcate the process into two distinct steps to occur for everyone appearing before the court.

The first step would involve a determination of whether the individual presents a demonstrated risk of flight—or risk to public safety outside the New York State context. Individuals without such risk should be released on their own recognizance, making legally and practically moot any discussion of conditions (e.g., bail or supervised release).

Second, only when a pretrial risk is established would the court hear a second round of arguments and recommend appropriate release conditions be set based on a pretrial supervision representative's recommendation. This second round would include providing more relevant information directly to the judge than in current practice.[3]

In New York, this strategy would encourage judges and other court practitioners to focus on the primary legal issue before the court first—*whether there is any basis in the first place to divert from the constitutionally mandated presumption of release*—and only then intentionally shift to the matter of release conditions, selecting the "least restrictive" as New York's law explicitly requires. In most other jurisdictions, a similar process of identifying the least restrictive condition could play out as a matter of court policy. Once establishing that conditions of some kind are necessary, judges could be presented with a recommendation for release conditions based on an assessed probability of pretrial compliance. A finding that someone is likely to comply with supervision or support would lead to a recommendation of supervision in lieu of bail. In other words, the aim of setting no more than the least restrictive condition necessary is often implicit, but making this consideration *explicit* is certainly feasible as a policy matter in many jurisdictions.

Both inside and outside the New York context, the practice of conducting a deliberative process that foregrounds the question of whether any credible pretrial risk exists before jumping ahead to a discussion of pretrial

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[2] This decision may be based on the current validated "risk of flight" tool that informs eligibility for pretrial supervision as announced by the pretrial supervision agent during the hearing, but also may be based on judicial discretion or factors that are not currently tracked in the available data.

[3] For a New York City-specific variant of this proposal, see Rempel, M., Rodriguez, K., Nims, T., Weill, J., Katznelson, Z., & Volpe, M. (2021). Closing Rikers Island: A roadmap for reducing jail in New York City. New York, NY: Independent Commission on New York City Criminal Justice and Incarceration Reform and the Center for Court Innovation. Available at: https://www.courtinnovation.org/publications/reducing_jail_Rikers.

conditions has the potential to lessen unnecessary supervision and preserve court resources.

2. More Complete Information at Initial Hearing. Without disrupting established processes, we also propose that the initial two-step hearing be informed by enhanced information based on a needs assessment and mitigating contextual information. Given the clear harms of pretrial detention, we argue that enabling courts to have the best information possible before setting a bail that could result in pretrial jail time is a necessary and minimum requirement. In the status quo, courts may have varying degrees of information when making a pretrial determination, potentially including the results of a validated assessment tool or contextual information provided by a prosecutor or defense attorney. In the case of New York City, while judges receive paperwork with a formal recommendation based on the result of a pre-arraignment likelihood of court appearance assessment, it plays a minimal role in practice. In many other jurisdictions, we can assume even less information is available in advance of a decision, perhaps limited exclusively to the individual's demographic and contact information and the charges they are facing. In either situation, the judge must make deeply consequential decisions about pretrial liberty based on a dearth of information.

In the New York City context, pretrial services representatives already conduct interviews to verify demographic information, identify needs and challenges the individual may be facing, and determine what kind of supports and level of supervision would be appropriate following release. However, defeating what could be the most important purpose, *this information gathering in New York City occurs after the fact and has no bearing on what the judge decides.* Pretrial services obtain information about people's needs only after the arraignment has happened and only for those cases that the judge releases to supervision and *not* to those where the court has set bail.

Instead, we propose that the courts use a more in-depth needs assessment to develop specific criteria that could make an individual "default" eligible for release to supervision at arraignment (while retaining the judge's discretion to override this eligibility). The criteria could be based on "static" factors (e.g., past charges and convictions, nature and recency of justice system involvement) present in information available to the court prior to the individual's appearance. Based on

these criteria being met, a supervised release representative may speak to the individual and ask a few brief questions to better inform the court regarding the individual's ability to return to court. In other words, pretrial agents who are not official court actors and have specific knowledge regarding service needs and challenges faced by many individuals before the court may be in the best position to advise the court regarding the potential for successful release of a particular individual. This does not mean that individuals who work for the local pretrial services agency would be offering discretionary recommendations; pretrial services recommendations would be based on the default criteria for how and for whom that assessment is used, in a manner that would be discussed and agreed upon by local stakeholders as a policy matter.

New York City already has the necessary resources to shift to such an approach. For other jurisdictions with established supervised release programs that also conduct some assessment (though perhaps a limited one) prior to a first hearing, the early assessment model described above may be easily adapted. In other jurisdictions, we recognize there may be a need to invest in new pretrial services infrastructure. The benefit of such an investment is providing needs and resources information that could nudge court practice toward release to services in lieu of potentially far more costly overuses of bail and of housing people in detention.

3. Hold a Second Call for Release Conditions. The final element of our proposed reform involves a second call during which the judge could hear the results of a full assessment and recommendation for services and supervision. If the judge's preliminary decision (or declared inclination) is to set money bail, the proposal is to hold an explicit and more in-depth inquiry into possible pretrial services or other nonmonetary conditions to mitigate the risk that led to this initial preference for bail *before actually imposing it*. More specifically, we propose a same-day adjournment with the purpose of reconsidering bail.

In New York City, after allowing for the initial bail application, if the judge is still considering pretrial detention via money bail or remand, the judge should temporarily adjourn (or "second call") the case for 2-4 hours. Including only those cases where bail or remand has been seriously considered by the court will be particularly important for New York and other high-volume jurisdictions to

make the second call feasible. This time would be used for a pretrial supervision representative to conduct a full needs assessment. The case would then be re-called before the court so the representative can share the results on the record, providing the judge with more in-depth information than was available at the first call and a recommendation for supervised release where warranted. This additional time and information could give the judge an opportunity to more deliberately consider whether pretrial detention or money bail are necessary, and to consider the proposed supervision plan as an alternative to setting money bail.

Importantly, the use of a second-call approach might seem to tax judicial and other staff resources since it effectively adds a second same-day court appearance. But, in fact, this is a strategy to conserve resources by interjecting a comprehensive interview into the process only where the results could meaningfully alter a pending decision to set bail when risk could be mitigated through supervision or services.

For jurisdictions outside of New York City, the adaptability of the proposed second call element will vary and may require the establishment of an independent agency whose role it is to gather needs assessment during adjournment and to connect released individuals to appropriate services (e.g., a local community-based organization). However, we believe that this element, in combination with a policy directive that separates the consideration of eligibility for release from consideration of specific release conditions, has the potential to mitigate the impact of implicit and cognitive biases in pretrial decisions.

VI. Implications for Local and National Practice

In jurisdictions across the country, courts often operate with limited case information and under strenuous time constraints—as little as a few minutes per case—when making decisions concerning pretrial release conditions. These pressures are exacerbated by the high stakes inherent in pretrial hearings, during which judges must balance each individual's presumption of innocence and right to pretrial liberty against the need to assure court appearance and public safety while cases are pending. For nearly 50 years, courts across the country have increasingly come to rely on unaffordable money bail to detain individuals perceived to be a public safety risk, tipping the

overall balance of pretrial justice away from a presumption of release.

Recent efforts at pretrial reform have focused largely on improving information provided to judges (e.g., use of risk assessment tools) and decreasing the number of cases in which judges may consider money bail or outright detention (e.g., bail reform laws). While such efforts are laudable, we argue that they are insufficient to achieving the ideal system, one in which pretrial liberty is the norm and historic racial inequities are minimized. Our review of the current research on pretrial reform and judicial decision-making supports this view, pointing toward reform implementation failure and implicit bias among judges as major hurdles to achieving a fair and effective system of justice.

Acknowledging that a constant challenge for judges in high-pressure hearings is making decisions that rely on non-arbitrary facts and avoid implicit bias, we argue that a slower, more structured pretrial hearing process that allows for deliberate decision-making could improve pretrial outcomes. Using New York City as a template, we propose a model structure for deliberative decision-making that could potentially work for jurisdictions across the country and help set a new standard for evidence-based pretrial practice. Given the well-documented role of money bail in producing racial disparities in the system and subsequent collateral consequences, we believe this model holds the potential to create a fairer justice system.

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