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Assessing Risk and Cash Bail in Massachusetts

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Abstract

The use of risk assessments to determine the outcome of bail hearings has the potential to eliminate inequality in bail decisions and establish an impartial uniformity for the use of bail in jurisdictions across Massachusetts – but only when the assessments are based on empirical evidence and combined with judicial discretion. In April of 2018, Massachusetts passed a criminal justice reform bill. Under the new reform, a judge must take into account a defendant's ability to pay bail when a bail amount is set. I measured the success of the bill through an ethnographic study, by sitting in on bail hearings and observing the bail setting process. Despite the new reform bill in Massachusetts, I found that only 22 percent (28/128) of judges asked the defendant about their ability to afford bail – and with the exception of one defendant, all stated that they were unable to afford the proposed bail. Despite that, the bail amount was changed in only three of the cases – two to release with non-monetary conditions, and one to release on personal recognizance. I also found that there exists no system or assessment for judges to reference when determining a defendant's flight risk or dangerousness. Decisions are seemingly based entirely on the judge's discretion, a method determined to be largely ineffective by multiple experts. Bail reform has been the subject of intense debate within the criminal justice field for years, especially since the Bail Reform Act of 1984. As this debate continues, a solution for the best use of bail in Massachusetts is constantly developing, but has yet to be found.

Assessing Risk and Cash Bail in Massachusetts

Posted on the sides of buildings, buses, sidewalk benches, and billboards alike is a familiar slogan – "In Jail? WE can BAIL!" Commercial bail bondsmen post advertisements virtually anywhere they believe it will attract those that need their services. In crime drama television shows, the defendant often only has to pay 10 percent of their bail amount, which is the most common deposit required of bail bondsmen to post. Bail, specifically the bail-bond industry, has permeated every aspect of the media to the point that nearly every American citizen knows what bail is and what it means to post it. Or do they?

The bail hearing is an extremely vital moment in the criminal justice system. Evidence shows that this decision, often made in only a few minutes, will impact every stage of a defendant's case and life alike (Neal, 2012). If a defendant is held on pretrial detention, they are likely to lose their job or miss school, which can lead to the loss of support for family members or the loss of a home and personal belongings. Further, defendants held for as short as two days are likely to experience psychological or physical difficulties are they are away from their home and support system (Neal, 2012). In these cases, pretrial detention is strongly linked to an increase in guilty pleas, as the pressure to get out of jail increases and access to counsel for defense is limited (Sacks & Ackerman, 2012), yet 20 percent of those held on pretrial detention will have their cases dropped before it even gets to trial (Gregory, 2018).

Generally, the assignment of cash bail has been shown to increase the likelihood of a conviction by 12 percent (Gupta, Hansman, & Frenchman, 2016), with the conviction rate increasing to as high as 30 percent when the defendant was unable to afford the bail amount (Stevenson, 2018). The majority of these convictions were a result of plea deals, as many defendants did not have the means to fight their case in court or were simply unable to afford the

bail amount and needed to return home (Stevenson, 2018). Further, those held in pretrial detention are also likely to plead guilty *faster* than those who are released prior to trial (Sacks & Ackerman, 2012). Defendants who decide not to plead out and are held in pretrial detention for the entire pretrial period as a result are three to five times more likely to be sentenced to jail or prison, with an average sentence length longer than those who are released pretrial (Lowenkamp, VanNostrand, & Holsinger, 2012).

These effects matter, and they matter to more than just the defendant directly experiencing it. Higher pretrial detention means there are more people in jail, often times simply because the defendant is not able to afford the bail amount assigned to them by the judge (Neal, 2012). High jail populations are costing the United States millions of dollars a year. There are numerous incalculable costs associated with jail time, which include the costs of recidivism as a result of jail time (on the victims and on society) and the costs to the defendants family when their financial or emotional support is removed from the house dynamics, which has even shown to lead to future crime by children when a parental figure is no longer present (Baughman, 2018). Again, these effects, these *costs*, should and do matter to more than a defendant. The act of detaining one defendant pretrial has incalculable costs, and the costs that can be calculated are extreme.

A leading contributor to this growing problem is the use of money bail across the country and the overall lack of proper alternatives to money bail for jurisdictions to have as a resource. Over the years, money bail has become an increasingly difficult problem to address. As arrests continue to grow, the bail bond industry also continues to grow. This leads many defendants into a trap that is hard to get out of. In addition, money bail is a class based system. Two defendants commit the same crime and receive the same bail amount – seems fair. However, on deeper

consideration, defendant one has an annual salary 3 times that of defendant two and thus is able to post bail within hours of arrest. It is not unlikely that defendant two may spend anywhere from a few days to several months in jail. Thus, two people accused of the same crime will receive widely different treatment and experiences based entirely on how much money they make. Historically, this has not always been the case.

Chapter One

History of Bail in the United States

The history of bail is long, its roots dating back several centuries to the Magna Carta in 1215. In England, the presumption of innocence and the concept of due process was beginning to be so essential, that the concept of bail was created to solve the issue of holding individuals before they had been determined guilty. The founding concept of bail is that accused criminals should be able to obtain release from custody before formal proceedings with the law. Between 1215 and the 1600s, England enacted several reforms to standardize the right to bail for the accused – they limited the discretion that the sheriffs had on bailable offenses, and detailed both that bail must be set for the accused for all noncapital offenses and that the accused must not be assigned a bail that is excessive (Appleman, 2012). The importance of these changes still impact how bail is used today, as they established that the accused had a right to bail and further asserted that the determination of guilt or innocence is only proper during a trial.

As many people began to migrate from England into the new colonies, British common law became the law of the colonies as well. The British American colonies continued to strengthen the right to bail and in 1641, the Massachusetts Body of Liberties “declared that all crimes were bailable except capital crimes, contempt in open court, and cases in which the

legislature expressly denied bail." This still gave a significant amount of discretion to the court, but made progress towards limiting the overuse of pretrial detention through denial of bail. Over the next hundred years, as the colonies slowly became the United States of America, British common law was eventually modified and transformed into the Constitution in 1787. Much of the law concerning bail stayed the same, maintaining that every citizen has a constitutionally protected right to bail. The United States Congress passed the Judiciary Act of 1779, which further clarified that all accused persons should granted bail, except in capital cases where the punishment may be death (Appleman, 2012). At this time, the right to bail was guaranteed and only in extreme cases could this right be denied. To be denied this right was greatly considered a violation of the presumption of innocence (Baughman, 2018).

American law changed little during the early years. Until the twentieth century, very few changes were made to the right to bail – only two major cases affecting bail occurred between the 1770s and the early 1900s. In one case, *Ex parte Milburn* (1835), the Supreme Court affirmed that the purpose of bail is not to determine guilt or prevent future crime, rather it is to ensure the return of the defendant back to court for trial (Scott, 1989). In *Hudson* v. *Parker* (1895), the Supreme Court affirmed that determinations of guilt may only be done by a jury, and defendants may not undergo punishment for a crime until they are determined guilty (*United States* v. *Salerno*, 1986). These cases further asserted that a violation of the right to bail also became a violation of the Due Process Clause of the 5th Amendment and the presumption of innocence afforded to citizens in the 6th Amendment of the US Constitution (Baughman, 2018). The Constitution and these cases helped to guide how bail was used in the United States up until the early twentieth century.

Bail usage changed significantly during the 1900s, with three major reforms to bail. These reforms were primarily in response to increasing crime rates and the increase in bail bond use. After reports in 1954 that showed that an increasing number of people held pretrial were low income, leading to a great increase in private and commercial bondsmen, pilot programs like release-on-recognizance (ROR) and other pretrial release methods were created (Neal, 2012). In addition to these programs, which were largely successful, the 1966 and 1984 Bail Reform Acts were enacted as a response to bail issues and rising crime rates, as the community and government alike were becoming increasingly concerned with repeat felony offenders and the safety of the community when dangerous offenders were released pretrial (Neal, 2012). The reform efforts did have some success at lowering the dependence of the criminal justice system on commercial bail bondsmen and addressing society's concerns, but as time passes into the 21st century, the reforms seem to have had the opposite effect they were originally intended to make.

In 1944, the Federal Rule of Criminal Procedure 46 changed what the courts could take into account in setting a bail amount. These included "the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant" (18 U.S.C § 3142). The new amendments contradicted several older concepts of bail, including that guilt could not be determined until trial and that noncapital defendants should be granted release before trial (Baughman, 2018). In addition, the 1944 reform also opened the door for judges to begin to take the character of the defendant, a highly subjective determination, into account when determining bail.

Changes to bail continued and sprouted another reform, the Bail Reform Act of 1966. The new reform greatly widened a judge's discretion, stating that although the assumption would still be that defendants charged with noncapital crimes are released, a judge may use their

discretion to deny bail if they feel that the release would not "reasonably assure the appearance of the person as required" in court (Baughman, 2018, p. 24). To make this decision, judges were allowed to consider a variety of factors, including "the nature of the offense charged, the weight of the evidence against the accused, family ties, employment, financial resources, character and mental condition, the length of residence in the community, his record of convictions, and his record of appearance at court appearances" (Baughman, 2018, p. 24). Perhaps the most concerning of these factors is that judges were now granted the ability to weigh evidence against the defendant during a bail hearing, which historically was solely the job of a jury. Eventually, "the pretrial decision became *whether* to release a person on bail rather than *how* to release the person on bail" (Baughman, 2018, p. 22).

The last major reform was the Bail Reform Act of 1984, and is the current bail system that the United States works under. The main change in the 1984 Act is that it now allowed judges to take into account "the nature and seriousness of the danger to any person or the community that would be posed by the person's release" (Baughman, 2018, p. 25). This change is significant, as it is the first time that judges could determine the "dangerousness" of a defendant in determining bail hearings. In addition, the 1984 Act added categories under which a defendant would be automatically detained, which included crimes of violence, offenses with life terms or death sentences, some drug offenses, repeat felony offenders, and those who pose a serious flight risk or are too dangerous to a witness or jury member (Baughman, 2018). This new reform, in addition to the 1966 Act and the 1944 reform created a long list by which a defendant was now able to be judged before a trial to determine whether they would be granted bail, the effect of which lead to a great increase in pretrial detentions. These reforms greatly undermined the work done in British and early American law, which originally worked in the opposite

direction to establish more laws *granting* bail to defendants. Challenges to this 1984 Act in *United States* v. *Salerno* were defeated on the grounds that "the protection the Act provided did not violate Constitutional rights as long as detention was not applied excessive" (Neal, 2012, p. 6).

Following the Bail Reform Act of 1984, courts must release defendants pretrial under the "least restrictive" conditions which would "reasonably assure the appearance of the person as required and the safety of any other person and the community" (18 U.S.C § 3142, para. 6). A court may only detain a defendant when there are no conditions which would both "reasonably" prevent the defendant from fleeing and maintain the safety of any person or the community. Release on personal recognizance is the expected outcome of a bail hearing, and all other outcomes are the "carefully limited exception" (18 U.S.C. § 3142, para. 6). Despite the law, release on personal recognizance is neither the expected bail outcome for defendants nor the most common bail outcome – cash bail is. Bail use no longer adheres to the strict guidelines set forth in the Bail Reform Act of 1984, as the rates of cash bail use does not constitute a "carefully limited exception" for the outcome of a bail hearing. Understanding the bail hearing is essential to the greater conversation of bail nationwide and in Massachusetts specifically. To consider what would constitute the least restrictive condition under the 1984 Bail Reform Act, it is helpful to know all of the possible outcomes of a bail hearing.

Current Bail Issues and Outcomes

According to U.S. Code § 3142, bail hearings have four outcomes: release on personal recognizance or upon execution of an unsecured appearance bond, release on condition/s as determined by the judge, temporary detainment on conditional release or deportation, and

detainment. Pretrial detention refers to any situation where the defendant is detained and pretrial release refers to any situation where a defendant is released pretrial – with or without conditions. Release on personal recognizance (ROR) is when the defendant is released from custody with no conditions and told to return to court at a later date. ROR is one of the most common types of pretrial release, and is commonly referred to as "unsecured bail" (Baughman, 2018, p.p. 48). Release on condition/s as determined by the judge includes a few different types of bail: supervised release, conditional release, and surety bail. Release on condition/s is the most common outcome of a bail hearing, however, when judges set conditions for release it is not uncommon for them to combine several different types of conditions (Neal, 2012).

Supervised release is the release of a defendant with an agency which supervises a defendant on release and ensures their appearance at their court date. This method is quickly gaining support as pretrial service agencies are created in jurisdictions nationwide with success rates as high as 90 percent for released defendants return to court (Neal, 2012, p.p. 27). Conditional release permits the release of a defendant on bail, as long as they agree to adhere to a set of conditions imposed by the court. A defendant can be given one or several conditions as a part of their bail, some examples of which include electronic monitoring, home confinement, or diversion programs, which divert individuals into treatment instead of the courts (Baughman, 2018).

Surety bail is when a third-party (either another person or a company) is responsible for a defendant to return to court. Surety includes unsecured bond, deposit bail, property bail, cash bail and commercial bail bonds. In an unsecured bond, the defendant signs a contract assuring their appearance in court, and is only responsible for the bail amount after their failure to appear (FTA). Deposit bail is when the defendant is responsible for a percentage of the bail amount

directly with the court to obtain release, and the fee is returned following their appearance at a later court date. Property bail is similar, except the defendant uses property instead of money for the same purpose of obtaining their release (Baughman, 2018).

Cash bail and commercial bail bonds are perhaps the most controversial outcomes of a bail hearing. Defendants are responsible for paying the court the full bail amount, which they will get back once they show up for court. However, it is often the case that a defendant or their family is not able to come up with funds to pay the full bail amount. Commercial bail bondsmen ask for a percentage of the bail (usually 10 percent) and assume responsibility to the court for the defendant. The bondsmen keeps the 10 percent as a fee for their services (Baughman, 2018). On the surface, the cash bail system seems to work. However, research has shown that cash bail is no more successful at reducing flight risk, preventing further crime, or ensuring the defendant shows up for court than alternative bail options like pretrial services (Stevenson, 2018). In addition, researchers have found that cash bail disproportionately affects low-income individuals, leading to a higher number of people being detained pretrial simply because of a lack of ability to pay (Gupta et.al., 2016).

Cash bail, along with commercial bail bondsmen and bail schedules, has made possible the denial of the constitutionally protected right to bail for specific groups of people, based on race and/or socioeconomic status. For these reasons, while bail itself has been established as a constitutional right, money-based bail and pretrial detention have gathered a number of constitutional arguments *against* them over the years due to its violation of the Fifth Amendment right to the presumption of innocence, the Sixth Amendment right to counsel and trial by jury, the Eighth Amendment right against excessive bail, the Thirteenth Amendment right to be free from involuntary servitude, and the Fourteenth Amendment right to due process and liberty

(Baughman, 2018). Pretrial detention itself has driven 95 percent of jail population growth since 2000, which costs the United States approximately $13.6 billion a year (Minton & Zeng, 2015; Wagner & Rabuy, 2017). A leading contributor to the increase in pretrial detention is the use of cash bail (Neal, 2012).

States are heading in several other directions in order to secure a more effective pretrial system. In order to increase the number of defendants being safely released pretrial, experts commonly recommend getting to the source of the problem by reducing arrests with citations and diversion programs (Civil Rights Corps, n.d.). Experts also suggest the introduction of pretrial services as a bail outcome; increased use of ROR, ROR w/ conditions, and unsecured appearance bonds; increased funding for indigent criminal defense in general, and increased presence of counsel during bail hearings specifically (Baughman, 2018; Rabuy & Kopf, 2016; Neal, 2012; Civil Rights Corps, n.d.). These alternatives to cash bail and pretrial detention are equally, if not more, successful than cash bail. For example, a version of pretrial services used in New York – text message reminders to defendants encouraging their court appearances – has reduced failure to appear rates by 26 percent compared to those receiving no messages (Cooke et. al., 2018).

Increased use of risk assessments during bail hearings have also had significant effects on pretrial detention, lowering rates as much as 20 percent in some states (Baughman, 2018; Gregory, 2018). In general, risk assessments that are developed for use in bail hearings typically calculate two specific risks. The first is the likelihood that a defendant will fail to appear in court (FTA) and the second is the risk that the defendant will reoffend while released on bail, or the dangerousness of the defendant (Arnold Ventures, 2016). The assessment will account for a variety of factors that may increase or decrease the likelihood of FTA or recidivism, such as age and previous offenses, and calculate a risk score (Northpointe, 2015). Judges can use a risk score

to determine if a defendant should be released on their own recognizance, or if other measures need to be taken to ensure public safety and the defendant's appearance in court. There exists a healthy number of publications on the use of risk assessments for bail determinations – some oppose its use due to racial disparities and the unreliability of the assessments to determine FTA or recidivism, others support them because they provide an standardized look at defendants and produce a standard score to determine pretrial release – ultimately lowering the number of people held in jails daily awaiting trial – which may be more fair and accurate than a single judge's discretion (Angwin, Larson, Mattu, & Kirchener, 2016; Ahsan, 2017).

Risk assessments are one of the most controversial parts of a pretrial bail hearing. Several states have moved away from money bail and implemented risk assessments as the new way to determine how to set bail. The majority of states are using risk assessments in conjunction with money bail, with the primary bail decision being made based on the assessment score. California, although not the first to use risk assessments, is the first state to rely almost entirely on the use of an assessment after they abolished cash bail completely in late 2018 following an appellate court decision that declared its use unconstitutional (Romo, 2018). Little can be said at this time on the effectiveness of this approach, as the new law does not officially go into effect until October of 2019. The movement is not new, however, and discussions about Massachusetts moving away from a cash-based system and towards a risk-based system have occurred regularly in the past five years. A bill titled "An Act reforming pretrial process," was discussed in the House in 2015 (H. 1584) and more recently amended and refiled in 2017 (H. 3120). The bill has yet to be signed into law, but proposes many changes to the pretrial system in Massachusetts. Among these is a requirement for Massachusetts to use risk assessments for bail determinations.

While many states have begun to rely on risk assessment scores to determine bail outcomes, it is important to note that judicial discretion also plays a large part in the bail decision. The judge eventually has the final say in a bail outcome, regardless of a risk assessment score or recommendation from an expert. It is also the responsibility of the judge to determine what a risk assessment score means in the context of the defendant's situation, and to respond accordingly. Judicial discretion is a vital failsafe for risk assessments since the judge is able to override potentially inaccurate risk scores and may decide to be more lenient on a particular defendant who shows that they are trying to change or improve on their situation. That being said, it remains a prominent concern that the fate of a defendant ultimately lies in the hands of a single person, who, while well trained, will likely be influenced by their own biases and life experiences when making their bail decisions.

Despite bail reform efforts and research dating back into the 1950s, very little has actually changed in the bail process on a national level. However, California is just one among several states across the nation who have become increasingly concerned with their use of bail and have started to largely overhaul their bail systems. These states include New York, New Jersey, Illinois, and Kentucky, among others. Massachusetts joined this list when bail reform was included as part of the Criminal Justice Reform Bill, passed in April of 2018. This reform followed *Brangan v. Commonwealth* in 2017, a case in which the Supreme Judicial Court of Massachusetts held that "judges must issue findings of fact when setting unaffordable bail for indigent defendants" (131 Harv. L. Rev. 1497). Under the bill, judges are now required to "take into account the person's financial resources" (Bill No. 2371, 2016, §166) before setting a monetary bail amount. defendants about their ability to afford bail before setting a monetary bail

amount. This new model of determining bail in Massachusetts will be referred to as the "affordability model."

Chapter Two

The State of Jails and Bail Reform Nationwide

Across the nation, jail populations are overflowing with inmates. Over the course of a year, there will be 10.3 jail admissions – an estimated 6 million of which are admissions of new, unique offenders (Sawyer & Wagner, 2019). In 2016, approximately 740,000 inmates were held in county and city jails in the United States, with an average daily amount of 612,000 individuals held in jails for local authorities (Zeng, 2018). A massive 462,000 of those held for local authorities (76%) are pretrial detainees who have not been convicted (Sawyer & Wagner, 2019). The large number of individuals held on pretrial detention is one contributor to the larger issue of mass incarceration, and is a major motivation behind bail reform in the United States.

Bail reform has been approached using a variety of methods in the United States. Some states have eliminated cash bail entirely, or are currently working to eliminate or reduce its use. Other states have implemented or increased the use of risk assessments and pretrial services, either to replace or reduce the use of cash bail. A few states have combined different methods or created a new one entirely. For example, in Massachusetts, the affordability model is used to reduce the state's reliance on money bail for pretrial release and to aid judges in making an informed decision on the best use of bail for a defendant. There are multiple constituencies currently advocating and pushing for bail reform across the United States. Some of the most notable include the American Bar Association, Civil Rights Corps, the ACLU, the National Association of Pretrial Service Agencies, and the Pretrial Justice Institute.

Different Directions in Bail Reform

Bail reform has slowly gained traction over the years and there have been several solutions offered to solve the bail question. Few of the issues have gained enough support for policy change, however the more attention on bail the more change we can see. The elimination of cash bail and the use of risk assessments at bail hearings to aid in bail decisions are two of the most popular directions in bail reform so far, as they target the largest issues that bail research has found. Advocates of bail reform also support alternative methods which can be used in place of cash bail or risk assessment, which include limiting pretrial detention overall, which can be made further possibly by requiring the use of least restrictive conditions before bail is utilized, introducing a rigorous pretrial detention process, expediting pretrial release, and eliminating pretrial fees. Some states have also introduced programs that combine various bail reform efforts to best fit their needs, such as the affordability model in Massachusetts. In addition to these issues, smaller issues that will likely impact bail practices include prohibiting shackling of arrestees during bail hearings (unless findings of imminent danger exist), delaying bench warrants, and investing in community-based programs to reduce the likelihood of an arrest in the first place.

The Elimination of Cash Bail & Bail Schedules

A major reform to reduce the number of defendants held on pretrial detention has been the elimination of cash bail and bail schedules. Cash bail is not a new concept, and its use has been steadily growing since the early 1900's. In fact, the 1944, 1966, and 1984 Bail Reform Acts were each developed at least in part due to a rising concern over an increasing reliance on the bail bond industry and cash bail in general (Baughman, 2018). The purpose of bail historically has been to obtain release pretrial, and the use of cash bail is just one of the means by which a

defendant may be able to do so. Specifically, cash bail is used to increase the likelihood that a defendant will appear for subsequent court hearings after release. However, cash bail more commonly leads to defendants being held pretrial due to a lack of ability to pay their bail amounts (Baughman, 2018). Setting a condition of bail based on financial resources leads to a disparity between defendants who are able to obtain release and defendants who are held pretrial that is based entirely on their or their family's income (Baughman, 2018). In addition, cash bail impacts minority populations at a higher percentage, as minorities are also impacted by poverty at higher rates (Neal, 2012). Even bail amounts of $1,000 – of which a ten percent deposit ($100) can be paid to a bail bondsmen – is unaffordable for some defendants (Neal, 2012). Race and class disparities is one of the most commonly referenced reason for the abolishment of cash bail.

Another common reason for the abolishment of cash bail is that it is no more successful at increasing community safety than other, less restrictive options for bail (Neal, 2012). Cash bail has been shown to cause more damage to the defendant and their family than it does protect the community from dangerous individuals (Neal, 2012). This is in part due to the lack of a formal system for judges to set cash bail amounts and the use of cash bail as a method of detaining individuals when there is not enough to support a denial of cash bail (Baughman, 2018). In addition, while the intention of setting a cash bail amount is also to increases reappearance in court, evidence shows that it still performs worse than other forms of pretrial outcomes like pretrial services (Baughman, 2018). The disparities in cash bail use and the increased amount of defendants held pretrial as a result of cash bail, have led to several constitutional arguments against the use of cash bail.

Most often, bail amounts are set by a judge. However, in some jurisdictions, including a few in Massachusetts, police officers or bail magistrates may set bail based on a bail schedule. A

bail schedule is a list of predetermined bail amounts based on the type of charge, and typically only include misdemeanors with bail amounts as high as $2,500 (Baughman, 2018). Some jurisdictions also include a few felonies, but it is rare as it is much more difficult to decide a set amount for bail for those charged with felonies since it typically involves questioning the dangerousness of the defendant. Bail schedules have been supported as they allow for those charged with relatively minor crimes to be released faster, as they do not have to wait for a court hearing. Some defendants are able to be released on bail just hours after their arrest. This also helps to relieve some of the pressure of bail hearings on the court.

While bail schedules seem like a valid method to increase pretrial release, they actually lead to an increased rate of pretrial detention as the use of cash bail becomes a uniform system to default to in order to set bail, even in cases where the defendant may have been released on their own recognizance or on other non-monetary conditions had they appeared before a judge (Baughman, 2018). Bail schedules are also a violation of the Due Process Clause and presumption of innocence under the Fourteenth Amendment, as they do not allow for a defendant to appear before a judge for an individualized assessment. It can also be argued that schedules violate the Excessive Bail under the Eight Amendment as the predetermined bail amount may be too high for a defendant to afford. Bail schedules result in the punishment of a defendant based solely on their arrest (Baughman, 2018).

The detention of a defendant pretrial must be justified by the law. The argument for the use of cash bail is that is allows a defendant to obtain release pretrial while still providing assurance to the court that the defendant will reappear. However, while cash bail does allow for the release of some defendants pretrial, it also results in the detention of many other defendants for no other reason than their inability to pay bail. There is no legal reason for these individuals

to be detained pretrial, and as a result several of their constitutional rights are violated. The result becomes that defendants are now "routinely denied the presumption of innocence and instead suffer a presumption of punishment" (Baughman, 2018, p. 36) as a result of cash bail. Many have argued in the court that the use of cash bail and pretrial detention as a result is unconstitutional, but few have been successful.

The proposed arguments include that the right to bail is fundamental to liberty, and depriving a person of that liberty through a long or unjustified pretrial detention is a violation of the Fourteenth Amendment (Herman, 1988, p. 174). In addition, the presumption of innocence and due process under the Fifth Amendment are violated when an individual is held pretrial on an unaffordable bail amount without a formal determination of guilt by the court (Baughman, 2018). Cash bail can also be argued as a violation of the Excessive Bail clause under the Eight Amendment, as excessive bail is defined as bail that is beyond the defendant's means and bail that is greater than necessary to achieve the desired purpose of bail (Galen v. City of Los Angeles, 2007; United States v. Polouizzi, 2010). The Court has failed thus far to define "excessive" in the context of the Eight Amendment. Each of these arguments have been rejected by the court over the years, but are still commonly used in cases as arguments against pretrial detention today. Many are slowly gaining in success as they go further in the court system. One of the most successful arguments against pretrial detention thus far was in *McGarry v. Pallito* (2012), where the Supreme Court determined that McGarry's Thirteenth Amendment right to be free from involuntary servitude was violated. Those in jail are often required to work long hours with minimal pay, and the Supreme Court determined that the work conditions McGarry was subjected to and because he was threatened both verbally and physically by staff to force him to work, his rights from involuntary servitude was violated.

These arguments may have been minimally successful in the Courts, but they have been successful outside of them. Several states – Massachusetts, New Jersey, Colorado, Virginia, Alaska, and others – have begun to limit their use of cash bail in favor of other bail outcomes. While many states are moving towards abolishment, California is the only states so far which has completely abolished the use of cash bail. The new law, going into effect in October of 2019, has faced harsh criticism from many of the contingencies who had supported previous versions of the bill as the new bill no longer included an alternative system by which bail decisions would be made. Essentially, California decided to overhaul one system without setting up the foundation to build a new one, and the contingencies are concerned that this lack of a system will lead to worse outcomes than cash bail. While these contingencies are not fighting to reinstate cash bail, they are fighting for the use of an alternative system for when the law goes into effect. In addition, the bail bond industry is also strongly opposed to the new law, and are actively fighting it. This is unsurprising, as those in the bail bond industry have a financial motivation to support the continued use of cash bail.

The Use of Pretrial Risk Assessments

Pretrial Risk Assessments (PRAs) have existed in federal district courts since the passage of the Pretrial Service Act of 1982. Although they are not new, PRAs have grown exponentially in recent years. Risk assessment use in general has been a highly controversial topic since they were first introduced, and many experts have focused on the possible consequences of its use for bail determinations. Some experts argue for its use in bail determinations as it provides a standardized method for judges to make bail decisions. One the opposite end, there are four primary concerns of those who oppose the use of PRAs.

The most common of these concerns is the risk of race and other biases, essentially it is the classic argument that algorithms will fall short – algorithms calculate a risk score based on the data put into it, but if the data is already biased then the algorithm is likely to produce a biased result (Eckhouse, Lum, Conti-Cook, & Cinccolini, 2018; Jones, 2013). Another argument is that laws are created in specific jurisdictions and individual societies, therefore no risk assessment can function on a national level (Baughman, 2018). In addition, in the jurisdictions that are using algorithms, some argue that judges are not relying on risk assessments that have been critically evaluated and properly implemented (Mayson, 2018). Finally, the last concern is that algorithms cannot effectively process the complexity of human action, as there are too many factors involved to process in a singular assessment (Baughman, 2018).

The experts are rightfully concerned, as algorithms can output biased or useless results. However, research shows that racial inequalities in PRAs lies "neither in the input data, nor in a particular algorithm, nor in algorithmic methodology. The deep problem is the nature of prediction itself" (Mayson, 2018, p. 1). This directly refutes the argument the PRA itself is responsible for biased decision making during bail hearing and that the bias is a result of the inputted data. Rather, the simple method of using past actions as a predictive value for future actions will inevitably lead to some inaccuracies and bias in the result (Mayson, 2018). Due to the possibility that biased information can go into a risk assessment, it is absolutely essential that the factors used to determine the risk are based on an objective assessment, rather than subjective assessment, as subjective risk prediction is particularly vulnerable to implicit and explicit bias (Mayson, 2018).

Objective factors for a risk assessment include most factors which are fact – they cannot be influenced by opinion. This includes factors such as history of flight and past criminal activity

and convictions, age, marriage status, address, and property or phone owner, among others. Considering the current criminal charge and previous convictions has been shown to be predictive of future crime, even having an active status in the criminal justice system can be predictive of rearrest if the defendant is released (Baughman, 2018, p. 69; Baradaran & McIntyre, 2012). The most predictive factor in PRAs overall is past criminal activity, especially if they are violent when dangerousness is the main consideration (Baughman, 2018, p. 69; Baradaran & McIntire, 2012). Other risk assessment factors that have been consistently validated by multiple studies include prior failure-to-appear (or flight risk), the present charge being a felony, having another pending case, being unemployed, and having a history of drug abuse (Neal, 2012).

Subjective assessments are extremely common in the United States. In states that do not have a formal risk assessment, the entire bail decision is based on a subjective assessment of the defendant's risk (Baughman, 2018). Some factors that may be included in a subjective assessment are the defendant's finances, character or reputation, gang affiliation, general attitude in or out of court, and family situation. Since these factors are not based in fact and are not used in valid risk assessments, they are highly susceptible to bias. Subjective assessments also include judicial discretion and intuition, which are commonly used during the majority of bail hearings across the United States. Some subjective factors which have been supported by research for use in PRAs include active community supervision at time of arrest, community ties, residence stability, and caregiver responsibilities (Neal, 2012).

Having some subjective factors considered during a bail hearing is unavoidable. Even still, it is necessary to reduce the presence of subjective factors and intuition to a minimum to increase the accuracy of risk predictions (Baughman, 2018). Since no jurisdiction has eliminated

the use of judicial discretion, subjective determinations will always exist, despite the presence of a strong and validated risk assessment tool. All the current research shows that this discretion, despite being subjective in nature, is actually essential for the success of a PRA (Baughman, 2018). When a risk score is calculated based on the objective factors, which considers the empirically supported factors, the judge must use their own discretion to give value to the number. It is the judge's sole responsibility to interpret what a risk score means, and ultimately determine the bail outcome for the defendant despite the risk score. Further, when the constitutionality of PSAs were questioned based on the Due Process Clause of the Fourteenth amendment due to their lack personalization, the Virginia Court of Appeals determined that it does not constitute a violation since PSAs are non-binding as they are primarily only used as a guiding tool for judges to base their decision on (Brooks v. Commonwealth, 2004; Baughman, 2018).

Overall, PRAs are successful as long as they meet the criteria needed to counteract the potential problems. They must be empirically based, with a reliance on *objective* factors, and tailored to each jurisdiction according to their unique demographics (Mamalian, 2011). There still exist some issues with crime prediction tools in general, which cannot be addressed with PRAs. The prediction of human behavior, whether done by an assessment or discretion, is inherently complex, thus error will always be involved as a function of an assessment. Further, validating a risk assessment is difficult as it is expensive and difficult to conduct studies to do so, and there is a lack of standardized definitions for some factors used in risk assessments. As a result, it is rather difficult to determine what actually constitutes terms like "pretrial failure," and "new criminal activity" (Baughman, 2018, p. 73). Implementing new PRAs also requires the cooperation of the government, as well as education, money, and support to actually induce any

change in the system (Baughman, 2018). However, despite the upfront costs of implementing PRAs, research has shown that by using risk assessments, "courts could release 28 percent more defendants at an estimated cost savings of $78 billion in the last decade" (Baughman, 2018, p. 92). Therefore, while it may seem expensive, PRAs actually end up saving the taxpayer money in the long run due to decreased spending on jail inmates. Finally, further follow-up is also necessary after the new PRA is implemented to make sure that it is accurately and successfully achieving what it was created to do.

Pretrial risk assessments are already in use in over 300 jurisdictions across the United States to lower or replace the use of cash bail, and while the number is steadily increasing, it is estimated that it still only constitutes approximately 10 percent of all jurisdictions nationwide (Baughman, 2018; Woodruff, 2013; VanNostrand & Lowenkamp, 2013, p. 3). PRAs are currently used statewide in several states, including New Jersey, Virginia, and California, and have been largely successful. Throughout 2018 in New Jersey, only 102 out of over 44,000 defendants were ordered to post monetary bail, following the implementation of pretrial services and risk assessments (Rabner & Grant, 2019, p. 7). Following their implementation of the risk assessment, the average court appearance in New Jersey remined high at 89 percent in both 2014 and 2017 (Rabner & Grant, 2019, p.p. 14-5). Virginia, which implemented its own pretrial risk assessment has seen similar results to those in New Jersey.

The change to a pretrial risk in California is slow, and as a result they have not seen the same success with the PSA to the same extent of the other states. It is important to mention this, however, as the contingencies who previously supported the abolishment of cash bail in California backed away from their support of the bill primarily due to the suggestion of introducing PRAs in place of cash bail. These contingencies are not concerned about risk

assessments per se, but are instead concerned about the lack of validated assessments that are currently available to replace it as California Courts are still trying to determine what validated PRA tools will consist of in the state.

Overall, research shows that when safeguards like validated PRAs and proper judicial discretion is utilized, as many as 25 percent more defendants may be safely released from jail pretrial (Baradaran & McIntyre, 2012). Pretrial detention rates in states using PRAs are still rising, as they still allow for the possibility that a judge will set a cash bail amount that they may be unable to afford. Thus, some experts have argued both for increased use of PRAs and the elimination of cash bail to ensure that this situation does not exist (Mayson, 2018; Eckhouse, Lum, Conti-Cook, & Ciccolini, 2018). Ultimately, PRAs support the release of non-dangerous individuals who may have otherwise been held pretrial on cash bail, and help provide insight into the population that *does* present a flight or safety risk, which helps jurisdictions avoid unnecessary pretrial detention of defendants that would have otherwise returned to court had they been released, and points to the population of defendants that do propose an safety risk to the community (Neal, 2012).

Other Directions in Bail Reform

In addition to the elimination of cash bail and the increased use of pretrial risk assessments, some experts argue that alternatives to money-based bail, such as pretrial services, an increase in the use of unsecured appearance bonds and ROR, diversion programs, and the use of risk assessments during bail hearings are just as or even more effective than money-based bail (Billings, 2016; Kelleher, 2016). These alternatives have higher success rates at reducing both the number of people who fail to appear to court and the number of dangerous individuals who are released, without the constitutional issues that are caused by money bail (Neal, 2012). They

also cost taxpayers significantly less in direct costs to run than money bail, as it reduces the jail intake costs and the overall number of people held on pretrial detention, the costs of which represent 17 percent of corrections spending (Stevenson & Mayson, 2017).

The use of pretrial service agencies (PSA) and diversion programs have been steadily increasing since the 1970s, becoming more common across the nation as states begin to limit their reliance on cash bail (NCSC, 2019). Pretrial services help verify interview information and criminal history for the courts, which can also increase accuracy for risk assessments as pretrial service agencies also make recommendations to the court based on an assessed risk level. PSA also follow up with defendants when they are unable to meet the conditions of their release and are appointed with the supervision of defendants who have been released, including court date reminders through phone calls or texts in some states (NCSC, n.d.). Uptrust (2018), a company that provides these text reminders, reported that in multiple jurisdictions their services have led to a decrease by 75 percent in FTA rate, and found that on average 20 percent of low-income defendants will miss court without the benefit of personalized reminders.

The goal of diversion programs is to redirect potential defendants to other services such as rehabilitation or mental health services, in an attempt to target the source of their problems and thus reduce additional criminal activity (Baughman, 2018). The use of alternatives like pretrial services and diversion programs also have a great potential to add to society, as evidence shows it can reduce recidivism rates (which reduces victimization in general as well as reduces the costs of processing an defendant again) as defendants do not experience the negative psychological effects of prison and may receive additional support while out on bail through pretrial services (Baughman, 2018). It also increases the defendant's contribution to society as

defendants out on bail are still able to work and help provide for themselves and their families (Neal, 2012).

Unlike secured bonds, release on personal recognizance, with or without conditions, and unsecured appearance bonds, do not require an upfront payment to the court but are just as effective at assuring the appearance of the defendant at court and maintaining public safety as secured bonds are (Jones, 2013). A large majority of people accused of offenses can be ROR and trusted by the court, as low risk defendants generally complete the pretrial process successfully without any incidence of re-arrest (Neal, 2012). A negative pretrial outcome that officers try to avoid is FTA, so some officers hesitate before granting ROR to a defendant. Yet, "many missed court appearances are not due to flight but simple interruptions to life" (Neal, 2012, p. 32), meaning the majority of defendants who do not make schedules court dates miss them due to reasons like lack of transportation, work conflicts, or being misinformed on the location of their proceedings – not because they intend to flee.

Conditional release can also expand the amount of people who can be safely released pretrial, so long as it is used in conjunction with a valid risk assessment tool to assure the safety of the community if the defendant is released. Today, each of these methods are used in several states, both to reduce cash bail use and to decrease overall pretrial detention rates, with successful results. As bail reform evolves over the next few years, it is likely that many more states will begin to use similar approaches to address their own bail discrepancies. While these approaches do not solve the whole problem of overfilled jails and pretrial detention, they certainly do make a dent on the overall population, saving taxpayers millions of dollars a year in the process.

Chapter Three

The Massachusetts Model - Affordability

Little to no research has been done to determine how effective the affordability model has been in Massachusetts courtrooms. In addition, although there exists a number of publications on the success of risk assessments in bail hearings and methods for release on bail that are non-monetary, Massachusetts has yet to integrate them to the extent seen in other states. The goal of this project was to determine whether the affordability model was successful, meaning both whether or not judges were simply asking defendants if they can afford a money bail amount and whether the judges adjusted bail or offered an alternative to money bail if the defendant admitted they could not afford a proposed amount. In addition, a specific focus of the project was on how judges determined the money bail amount they set for each offense, how they determined this amount given the history of the defendant, and whether there were any calculable differences between judges when determining bail amounts.

An ethnographic study was conducted at a South Shore, Massachusetts courthouse. Subjects were observed from the gallery of the courtroom while they participated in their bail hearing. No direct communication between the researcher or the subjects occurred, and all gathered information is a matter of public record. The subject pool totaled 128 individuals that were brought up on misdemeanor and felony level charges. Some defendants were charged with multiple offenses. Data gathered from the bail hearings included all information on the background of the defendant which was detailed during the bail hearing to the judge by either the defendant, their counsel, or by a judicial assistant. In addition, all conversations between the judge, defendant, and counsel (if counsel was present) during the bail hearing was also noted and tracked. Specific information tracked included every time the judge asked the defendant about their ability to afford bail, and whether the judge asked that question before or after proposing a

bail amount; what the defendants responded to the question about affordability, if they were asked; whether the judge changed or offered to change a proposed bail amount following this conversation; and what the new proposed bail was. It was found that the primary outcome of bail hearings was release on bail with monetary conditions – monetary bail was set in 64 percent of the cases (82/128).

The goal of this study was to two-fold. First, it took a critical approach to the use of cash bail as a condition of pretrial release under the new affordability model in Massachusetts following the new bail reform under the Criminal Justice Reform Bill. Second, the effectiveness of the affordability approach was examined in comparison to the use of risk assessments and judicial discretion. To determine whether risk assessments would be useful in Massachusetts courtrooms, the information gathered during observations of bail hearings and of data released to the public following the bail hearings were run through an established risk assessment, the *Virginia Pretrial Risk Assessment Instrument (VPRAI).* The VPRAI was selected primarily due to the expansive criteria that must be run to calculate a risk score, and the success that Virginia has had in implementing it in their courtrooms. The risk score output by the VPRAI was then compared to the judge's determination of bail to analyze the differences in the output between the risk assessment and the judge's discretion.

Overall, the results of this study emphasized that risk assessments have a great potential to standardize the use of bail across the board, making determinations fair for every defendant, and to illustrate that they may be practically implemented in Massachusetts courtrooms. In addition, the results of the study showed a continuing reliance on money based bail in Massachusetts, even after the new bail reform. Under the new reform, judges are only required to *ask* the defendant if they were able to afford bail. Judges are not obligated to *act* on the financial

situation of the defendant, and thus they still exercise full discretion in bail decisions while lacking an overall structure to aid in the bail determinations which may help eliminate unfair treatment between defendants. These points are illustrated by the qualitative data collection and observational research done in the Massachusetts courtroom.

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