

Condemned to Repeat History? Why the Last Movement for Bail Reform Failed, and How This One Can Succeed

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I. INTRODUCTION

Before signing the Bail Reform Act of 1966, President Lyndon B. Johnson described the widespread problems he hoped the Act would remedy.¹ While moneyed defendants could pay bail and return home to await their trials, he said, the poor defendant “languishes in jail weeks, months, and perhaps even years before trial. He does not stay in jail because he is guilty He does not stay in jail because he is any more likely to flee before trial. He stays in jail for one reason only—he stays in jail because he is poor.”² President Johnson illustrated the need

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1. President Lyndon B. Johnson, Remarks at the Signing of the Bail Reform Act of 1966 (June 22, 1966), <http://www.presidency.ucsb.edu/ws/?pid=27666>.

2. *Id.*

for the Act by telling the story of a man who could not make bail and spent fifty-four days in jail, awaiting trial for a traffic offense for which he could be sentenced to no more than five days.³

President Johnson's words ring as true today as they did in 1966. Recently, one count showed that in an American jail, about a third of the inmates were awaiting trial for traffic violations.⁴ Across America, around two-thirds of jail inmates (about 450,000 people) have not been convicted of any crime.⁵ They are there awaiting trial, generally because they are poor and could not afford bail.⁶ Many spend years incarcerated awaiting their trial.⁷ As President Johnson said in 1966, many of them are not dangerous or likely to flee. A recent study found that about two-thirds of jailed misdemeanor defendants would likely not reoffend if released pretrial.⁸ Moreover, the bail system was never intended to keep unconvicted people behind bars—it was meant to ensure people appeared for their court dates.⁹ So, why are hundreds of thousands of people—many of them innocent, none of them convicted—in jail?

The Bail Reform Act of 1966 was the signature achievement of a nationwide movement for pretrial reform,¹⁰ but within a decade, a “tough-on-crime” counter-movement had peeled back that movement's advances. In fact, this was relatively easy for the tough-on-crime movement, because the 1960s reforms did not eliminate the bail industry and did not prohibit judges from setting money bail. Instead, the 1960s reforms generally encouraged judges to be lenient in setting bail, which the counter-movement largely ended through laws encouraging pretrial detention and high bail.¹¹ Since then, for decades, American jails have filled with

3. *See id.*

4. *See* Casey Smith & Cary Aspinwall, *Increasing Number Going to Jail for Not Paying Fines*, TULSA WORLD (Nov. 3, 2013), http://www.tulsaworld.com/news/local/increasing-number-going-to-jail-for-not-paying-fines/article_8b8d2229-c7ad-5e7f-aea2-baeb13390880.html.

5. TIMOTHY R. SCHNACKE ET AL., PRETRIAL JUSTICE INST., A HISTORY OF BAIL AND PRETRIAL RELEASE 20 (2010), <http://www.pretrial.org/download/pji-reports/PJI-History%20of%20Bail%20Revised.pdf>; KATAL CTR. FOR HEALTH, EQUITY, & JUSTICE, BASIC PRINCIPLES FOR MONEY BAIL REFORM (June 14, 2017), <http://university.pretrial.org/viewdocument/8-basic-principles-for-money-bail-r>.

6. *See* KATAL CTR. FOR HEALTH, EQUITY, & JUSTICE, *supra* note 5.

7. HUMAN RIGHTS WATCH, “NOT IN IT FOR JUSTICE”: HOW CALIFORNIA'S PRETRIAL DETENTION AND BAIL SYSTEM UNFAIRLY PUNISHES POOR PEOPLE (2017), <https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly> [hereinafter NOT IN IT FOR JUSTICE].

8. INDEP. COMM'N ON N.Y. CITY CRIM. JUST. & INCARCERATION REFORM, A MORE JUST NEW YORK CITY 43 (2017), <http://static1.squarespace.com/static/577d72ee2e69cfa9dd2b7a5e/t/58e0d7c08419c29a7b1f2da8/1491130312339/Independent+Commission+Final+Report.pdf>.

9. *See* Bryce Covert, *America Is Waking up to the Injustice of Cash Bail*, THE NATION (Oct. 19, 2017), <https://www.thenation.com/article/america-is-waking-up-to-the-injustice-of-cash-bail> (noting that for centuries in England and later the United States, the sole purpose of bail was to ensure that the defendant would return to court, but that conservative American politicians who wished to project a tough-on-crime image in the 1980s pioneered a new type of bail law aimed at imposing bail so high that most defendants would be forced to stay in jail pretrial).

10. This Note will use “bail reform,” “pretrial reform,” and “pretrial justice” interchangeably, in line with the current bail-reform movement's general agreement that a fairer and more just system for defendants who have not yet had their trial would require eliminating or greatly restricting money bail, as well as potentially other reforms.

11. *See* SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950–1990 71–72 (1993).

people not convicted of any crime—people caught in jail simply because they could not afford bail—and today, the problem is far worse than in 1966.¹²

Over the past few years, a new pretrial justice movement has emerged. Advocates are telling the stories of the lives pretrial detention has needlessly ruined. They are filing lawsuits alleging that money bail is unconstitutional, some of which have pushed jurisdictions to change their practices.¹³ Advocates for pretrial justice have succeeded in pushing for legislative change in states including New Jersey, Kentucky, Illinois, and Connecticut, and they are pushing for federal legislation that would push states to eliminate money bail.¹⁴ States are responding by beginning to change their pretrial systems.¹⁵ Yet this movement is beginning to make the same mistakes as the 1960s movement. Like the earlier movement, it is in some cases opting for politically-expedient reforms that encourage judges to release some low-risk defendants pretrial.¹⁶ History has indicated such half-measures are unlikely to succeed in the long run and can even re-entrench existing class and racial disparities in the bail system.¹⁷

The current movement can still succeed if it can unite in demanding comprehensive reforms that eliminate money bail. The movement must work to end pretrial incarceration for all but serious violent crimes, create programs to supervise released defendants, and ensure defendants get the treatment or help they need to not reoffend. Decades of research have indicated that a strategy like this, which helps keep defendants' families together, keeps defendants employed, helps prevent wrongful conviction and unnecessary guilty pleas, and does not needlessly inflict the mental and emotional harms of incarceration, is the most socially and fiscally effective alternative to a system of pretrial money bail.¹⁸ The movement

12. See Cassie Miller, *The Two-Tiered Justice System: Money Bail in Historical Perspective*, S. POVERTY LAW CTR. (June 6, 2017), <https://www.splcenter.org/20170606/two-tiered-justice-system-money-bail-historical-perspective>; SCHNACKE ET AL., *supra* note 5, at 20.

13. See *Ending American Money Bail*, EQUAL JUSTICE UNDER LAW, <http://equaljusticeunderlaw.org/wp/current-cases/ending-the-american-money-bail-system/> (last visited Apr. 13, 2018) (reporting that, through litigation, the organization has brought an end to money bail in Clanton, Alabama; Velda City, Missouri; Ann, Missouri; Moss Point, Mississippi; Dothan, Alabama; Ascension Parish, Louisiana; and Dodge City, Kansas).

14. See *infra* Part II.B for further discussion of state-level legislative changes. See also No Money Bail Act of 2016, H.R. 4611, 114th Cong. § 2 (2016), <https://lieu.house.gov/sites/lieu.house.gov/files/No%20Money%20Bail%20Act%20of%202016%20-%20Bill%20Text.pdf> (bill that would require states to end the use of money bail to remain eligible for certain federal grants).

15. See also HARVARD CRIMINAL JUSTICE POLICY PROGRAM, MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 15 (2016), <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf> (noting that Colorado, Hawaii, Nevada, New Jersey, Vermont, and West Virginia have recently created or strengthened their existing pretrial-services agencies).

16. See *infra* Part III.C

17. See *infra* Part III.B for a discussion of why risk assessments alone may not improve and in fact potentially reinforce the problems with the bail system; Part III.C for a discussion of why the jurisdictions that are adopting risk assessments as their sole bail reform are achieving inferior results to those that are adopting more comprehensive reforms; see also HARVARD CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 15 (describing the ways that risk assessments can perpetuate racial and class disparities in the pretrial process).

18. See NOT IN IT FOR JUSTICE, *supra* note 7; RAM SUBRAMANIAN ET AL., INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 12–17 (2015), <http://archive.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report.pdf> [hereinafter INCARCERATION'S FRONT DOOR]. *Not in It for Justice* offers a thorough discussion of the benefits of pretrial release, including an analysis of why conviction rates are lower for people released pretrial. In essence, they can work on their case by

likely has the energy and public support now to make comprehensive reforms happen¹⁹ and it can succeed if it refuses to accept compromises that, history indicates, will ultimately undermine it.

This note will proceed in three parts. Part I will describe the 1960s movement for bail reform, its successes, why it largely failed, and what can be learned from its failures and its few enduring successes. Part II will turn to the modern movement. It will describe the large, diverse coalition that makes up the modern movement and what that coalition has already achieved, including victories through litigation and legislation that have reformed the pretrial practices of jurisdictions across the country. It will then analyze the greatest challenge the movement faces: agreeing on and implementing a strategy that will achieve enduring positive change. Part III will describe how this movement can avoid repeating its forerunner's mistakes, build on its successes, and achieve lasting pretrial justice.

II. THE FIRST BAIL-REFORM MOVEMENT

In the 1960s, researchers and philanthropists launched a bail-reform movement that grew rapidly, achieved nationwide change, and ended almost as quickly as its reforms were largely scaled back or forgotten. This section will describe the movement's successes and its ultimate failure, which the movement allowed by accepting fragile compromises instead of pushing for thorough reform. It will also discuss the 1960s movement's few lasting successes, including establishing the first pretrial-services agencies and banning the commercial bail industry in some states. Finally, this section will consider what can be learned from these failures and successes.

A. The Anatomy and Achievements of the 1960s Bail-Reform Movement

The first bail-reform movement, which sparked nationwide change in the span of just a few years, began with a simple experiment. It started in New York City in 1961.²⁰ A young journalist named Herbert Sturz and a successful businessman,

gathering evidence and more easily communicating with their lawyer, and when they appear in court, they can be well-groomed and appear in formal clothing instead of jail uniforms, and they are also likelier to be in a healthy mental state than those who have been incarcerated. NOT IN IT FOR JUSTICE, *supra* note 7. It also discusses how prosecutors use the strategy of convincing judges to set high bails to get defendants to accept guilty pleas in exchange for early release. *Id.*

19. See Covert, *supra* note 9 (discussing the wide range of groups that are currently fighting for comprehensive pretrial reform); see also Teresa Mathew, *Bail Reform Takes Flight in Philly*, CITYLAB (Feb. 2, 2018), <https://www.citylab.com/equity/2018/02/bail-reform-takes-flight-in-philly/552212/> (“Philadelphia is a new entrant to a movement that has been on the upswing . . . Last year, New Orleans implemented a pilot program that used a risk-assessment tool to cut down on cash bail. Atlanta is considering a proposal to eliminate cash bonds next week. Nashville has plans to overhaul its pre-trial release program early this year. ‘There’s a real movement across the country,’ said Pilar Weiss, project director of the National Bail Fund Network. ‘We see local organizations and community bail funds that have been highlighting the issue, whether it’s on the city or county level, and people are starting to take note.’”).

20. Scott Kohler, *Vera Institute of Justice Manhattan Bail Project*, CTR. FOR STRATEGIC PHILANTHROPY & CIVIL SOCIETY, https://cspcs.sanford.duke.edu/sites/default/files/descriptive/manhattan_bail_project.pdf (last visited Apr. 13, 2018).

Louis Schweitzer, visited a Manhattan jail.²¹ While there, they realized many of the inmates were there because they could not afford bail.²² Struck by the injustice of this system, they decided to develop an alternative.²³ With funding from Schweitzer, Sturz developed a solution: a risk-assessment system based on family and employment ties and previous criminal record, which judges could use to decide whether a defendant was safe to release without money bail.²⁴

Schweitzer and Sturz founded the Manhattan Bail Project (now the Vera Foundation), which persuaded New York City judges to run an experiment that would compare judges' normal decision making about pretrial release against release decisions made on the Project's recommendation.²⁵ The results were striking: while judges released only fourteen percent of people without bail in the traditional system, they released sixty percent of those that the Project recommended bail-free.²⁶ Of the defendants the Project recommended be released, 98.4% returned for their trial.²⁷ This success led all five boroughs to institutionalize this risk-assessment system.²⁸

The Manhattan Bail Project inspired rapid nationwide change, aided by stories showing how punishing pretrial detention could be and further research showing that because poor people generally could not afford bail, many stayed in jail regardless of innocence.²⁹ Researchers also found that pretrial release affected conviction rates.³⁰ People released pretrial were 250% more likely to be acquitted, which translated into the incarceration of fewer innocent people.³¹ These studies and stories, combined with the Manhattan Bail Project's success, "captured the attention of the White House, the Congress, the news media, and a national network of reformers and scholars."³²

The Manhattan Bail Project inspired "dozens of innovative bail programs in local jurisdictions, the landmark federal Bail Reform Act in 1966, and bail-reform laws in several states."³³ Many of the new laws, including the federal Bail Reform

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* This project—then called the Manhattan Bail Project—quickly grew into the Vera Foundation, an organization that is still working to reform pretrial systems. *Id.* As announced on the court record before the Vera Foundation began making recommendations on bail determinations, "[t]he Vera Foundation will, through a formal means of questionnaire, try to determine whether or not a defendant has roots, whether or not he's been employed in this community for a lengthy time and whether or not he's a fit subject to be out, not in prison, but on the street during this time that his case finally goes to trial or some disposition is made." City Magistrates' Court in the City of New York, In the Matter of Bail Procedures in the Magistrates' Court and the Court of Special Sessions 3 (Oct. 16, 1961), https://storage.googleapis.com/vera-web-assets/downloads/Publications/manhattan-bail-project-official-court-transcripts-october-1961-june-1962/legacy_downloads/MBPTranscripts1962.pdf.

25. See Kohler, *supra* note 20.

26. See *id.*

27. See *id.*

28. See *id.*

29. WALKER, *supra* note 11, at 54.

30. See Kohler, *supra* note 20.

31. See *id.*

32. WALKER, *supra* note 11, at 54.

33. *Id.* One example of the Manhattan Bail Project's impact is that President Johnson discussed it in his remarks prior to signing the Bail Reform Act of 1966: "What is most shocking about the[] costs [of money bail]—to both individuals and to the public—is that they are totally unnecessary. First proof of that

Act, encouraged judges to release defendants on their own recognizance—in other words, releasing defendants if they promised in writing to appear in court—unless the judge believed the defendant would flee.³⁴

Some states went further. Illinois, Kentucky, Wisconsin, and Oregon outlawed the commercial bail industry entirely.³⁵ Many states, and the District of Columbia, also created pretrial-services agencies, which, like the Manhattan Bail Project, gathered information about defendants and recommended to the court whether they should be released.³⁶ Some pretrial-services agencies also connected defendants to drug-treatment programs and other services that helped them resolve the problems that led to their arrest.³⁷

These reforms dramatically reduced jail populations. Between 1962 and 1971, the number of felony defendants incarcerated pretrial dropped by a third.³⁸ In some places, the changes were even greater. For example, during that time, the percentage of defendants Minneapolis incarcerated pretrial dropped from fifty-four to thirteen percent.³⁹

B. Why the First Bail-Reform Movement Ultimately Failed

Within the next decade, another nationwide movement undid nearly all of the advances of the 1960s. Beginning in the 1970s, concern about rising crime swept the country.⁴⁰ Preventative detention laws, which allowed judges to order defendants detained if the judge thought they posed a safety concern, started

fact came because of really one man's outrage against injustice. I am talking now of Mr. Louis Schweitzer, who pioneered the development of a substitute for the money bail system by establishing the Vera Foundation and the Manhattan bail project. The lesson of that project was simple. If a judge is given adequate information, he, the judge, can determine that many defendants can be released without any need for money bail. They will return faithfully for trial." President Lyndon B. Johnson, *supra* note 1.

34. See Bail Reform Act of 1966, Pub. L. 89-465, 80 Stat. 214 (1966), <https://www.gpo.gov/fdsys/pkg/STATUTE-80/pdf/STATUTE-80-Pg214.pdf>; see also WALKER, *supra* note 11, at 65–66.

35. See Cliff Collins, *The Question of Commercial Bail: Bail Industry Wants Oregon to Return to System It Once Rejected*, OR. ST. B. BULL. (Oct. 2014), <https://www.osbar.org/publications/bulletin/14oct/bailbonds.html>. Illinois outlawed commercial bail in 1963; SCHNACKE ET AL., *supra* note 5, at 10–11. Kentucky outlawed the commercial bail industry in 1976. ADMIN. OFFICE OF THE COURTS, KY. COURT OF JUSTICE, PRETRIAL REFORM IN KENTUCKY 3 (2013), <https://www.pretrial.org/download/infostop/Pretrial%20Reform%20in%20Kentucky%20Implementation%20Guide%202013.pdf>. Oregon outlawed commercial bail in 1978. Russell Nichols, *States Struggle to Regulate the Bond Industry*, GOVERNING (Apr. 2011), <http://www.governing.com/topics/public-justice-safety/States-Struggle-to-Regulate-the-Bond-Industry.html>. Wisconsin outlawed commercial bail in 1979. Dave Umhoefer, *Taylor Says Alleged Advantage to Bail Bonds Is Not Backed by Any Evidence*, POLITIFACT (June 23, 2013), <http://www.politifact.com/wisconsin/statements/2013/jun/23/lena-taylor/taylor-says-alleged-advantage-bail-bonds-not-backe/>.

36. SCHNACKE ET AL., *supra* note 5, at 10–11; see also CYNTHIA A. MAMALIAN, PRETRIAL JUSTICE INST., STATE OF THE SCIENCE OF PRETRIAL RISK ASSESSMENT 12 (2011); D.C. PRETRIAL SERVS. AGENCY, <https://www.psa.gov/> (last visited Apr. 13, 2018); Nichols, *supra* note 35 (noting that D.C. created its pretrial-services agency in 1968, and many jurisdictions followed soon after it).

37. See ADMIN. OFFICE OF THE COURTS, *supra* note 35.

38. See Miller, *supra* note 12.

39. See *id.*

40. WALKER, *supra* note 11, at 65–66; TIMOTHY R. SCHNACKE, CTR. FOR LEGAL & EVIDENCE BASED PRACTICES, BEST PRACTICES IN BOND SETTING: COLORADO'S NEW PRETRIAL BAIL LAW 20 (2013), <https://www.pretrial.org/download/law-policy/Best%20Practices%20in%20Bond%20Setting%20-%20Colorado.pdf>.

gaining popularity.⁴¹ By 1984, thirty-four states had some form of preventative detention law.⁴² This culminated in a federal preventative detention law, the Bail Reform Act of 1984.⁴³ Caught up in public anxiety about crime, judges began ignoring the 1960s laws setting a presumption of release on recognizance.⁴⁴ Pretrial resource centers closed due to funding cuts, and thus could no longer persuade judges to release low-risk defendants.⁴⁵

Between the 1970s and the early 2000s, money bail continued to gain power.⁴⁶ The bail industry lobby and the conservative American Legislative Exchange Council collaborated to promote commercial bail and eliminate the remaining pretrial-services agencies.⁴⁷ They often succeeded: in the 1990s, money bail became more common than release on recognizance.⁴⁸ Jail populations continued to climb.⁴⁹

Some argue that the Manhattan Bail Project and its progeny, which emphasized releasing employed defendants, reinforced pretrial inequality.⁵⁰ As critics pointed out, these risk assessments highly valued consistent employment history, which racial minorities, people with disabilities, and other people subject to discrimination were less likely to have.⁵¹ This led to racial minorities and people with disabilities being disproportionately rated bad risks and to judges releasing them less often on recognizance.⁵² The 1960s reforms may thus have strengthened the bail system by giving the disproportionate detention of poor, minority, and disabled people the appearance of scientific rationality, and masking the discrimination underlying their detention.⁵³

The 1960s movement did have some enduring successes, including the creation of the first pretrial-services agencies and the elimination of money bail in several states. Pretrial-services agencies still exist in 300 jurisdictions nationwide.⁵⁴ The District of Columbia's pretrial-services agency has particularly flourished and illustrates how such an agency, if well run and well financed, can

41. See WALKER, *supra* note 11, at 55.

42. *Id.* at 54–55; see also Miller, *supra* note 12.

43. See 18 U.S.C. § 3142 (2008); Margaret S. Gain, *The Bail Reform Act of 1984 and United States v. Salerno: Too Easy to Believe*, 39 CASE W. RES. L. REV. 1371 (1989).

44. WALKER, *supra* note 11, at 70–71.

45. *Id.*

46. See SCHNACKE ET AL., *supra* note 5, at 21. Concerns about jail overcrowding did lead judges to increase reliance on pretrial-services agencies and release more people on their own recognizance, but the bail industry and the American Legislative Exchange Council fought this with a campaign called “Strike Back!” in which they painted pretrial resource agencies as “free bail” and “criminal welfare programs.” *Id.* This campaign was fairly successful in stymying movement away from money bail. *Id.*

47. *Id.*

48. See Miller, *supra* note 12.

49. See SCHNACKE ET AL., *supra* note 5, at 20. The so-called War on Drugs, the “culmination of a conservative ascendancy built on law-and-order rhetoric,” was largely responsible for this increase in jail and prison populations; preventative detention was just one aspect of this conservative regime, which also dramatically increased policing and sentences. Miller, *supra* note 12.

50. See WALKER, *supra* note 11, at 71–72.

51. *See id.*

52. *See id.*

53. *See id.*; NOT IN IT FOR JUSTICE, *supra* note 7.

54. SCHNACKE ET AL., *supra* note 5, at 17.

prevent unnecessary pretrial detention without undermining community safety.⁵⁵ Eliminating commercial bail in four states was another success: not one of those states has reversed that policy.⁵⁶ In fact, two other states and the District of Columbia eventually joined those four states in effectively outlawing commercial bail.⁵⁷ But banning commercial bail is not a panacea.⁵⁸ Some of the states that banned commercial bail simply made bail payable to the state instead of private bondsmen.⁵⁹ This has proven to be an ineffective reform, because it can incentivize states to use money bail as a fundraising strategy and may not reduce bail or incarceration rates.⁶⁰ Nonetheless, the fact that none of the states that have eliminated commercial bail have reintroduced it indicates banning commercial bail is a durable reform—perhaps because it reduces the power of the commercial bail lobby within the state.⁶¹

III. THE MODERN BAIL-REFORM MOVEMENT

The modern bail-reform movement is in many ways similar to that of the 1960s—but with some differences that could potentially make it more successful. Like the earlier movement, it has used storytelling to raise awareness of the disproportionate burden bail imposes on poor people, and of the harms unnecessary pretrial detention inflicts on defendants. Also like the earlier movement, it has garnered support from state and federal legislators, and (during the Obama administration), the executive branch.⁶² The modern bail-reform

55. Currently, eighty-eight percent of defendants in D.C. are released pretrial without bail, and between 2007 and 2012, ninety percent of those released defendants went to all court appearances, and over ninety-one percent did not reoffend while awaiting their trial. D.C. has succeeded in part because it has a well-funded pretrial-services agency and an excellent public defender office. *See* HARVARD CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 15, at 15.

56. *See* Collins, *supra* note 35.

57. *See id.*

58. For example, Oregon, a state that has not had private bail since the 1970s, has unusually high failure-to-appear rates. *See* Nichols, *supra* note 35.

59. *See* Rebecca McCray, *Ditching the Bondsman Is Only Part of the Battle for Bail Reform*, IN JUSTICE TODAY (Nov. 22, 2017), <https://injusticetoday.com/ditching-the-bondsman-is-only-part-of-the-battle-for-bail-reform-3dd8e4198213>.

60. *See id.*

61. Illustrating the durability of outlawing commercial bail, one Oregon district attorney told *Governing* magazine that he would staunchly oppose reintroducing the money bail industry: controlled by the statutes and codes that police are, and they have a profit motive. I don't want a bunch of guys looking like bikers, kicking down doors to nab some guy because some bail bond company has \$1,000 at risk." *Id.* Also, while Oregon may have higher failure-to-appear rates, this is not true of all states without commercial bail; for example, there is no evidence that Wisconsin does. *See* Dave Umhoefer, *Vos Says Study Shows Defendants Skip Court Appearances More Frequently in Wisconsin Than in Other States*, POLITIFACT (June 24, 2013), <http://www.politifact.com/wisconsin/statements/2013/jun/24/robin-vos/vos-says-study-shows-defendants-skip-court-appearances/> (reporting that there is no evidence Wisconsin has higher failure-to-appear rates than states with commercial bail). This success likely helps the reform of outlawing commercial bail endure.

62. For example, under President Obama, the Civil Rights Division of the Department of Justice issued a Dear Colleague letter to state and local judges informing them that jailing people simply because they cannot afford bail violates the Constitution. *See* Vanita Gupta, Acting Assistant Att'y Gen., Civil Rights Div., Remarks at Southern Center for Human Rights Symposium on the Criminalization of Race and Poverty (Sept. 20, 2016), <https://www.justice.gov/opa/speech/head-civil-rights-division-vanita-gupta-delivers-remarks-southern-center-human-rights>.

movement is, however, already a more richly varied coalition than the movement of the 1960s, which could help it maintain energy, innovativeness, and determination to resist fragile compromises.⁶³

This section will describe how the modern movement arose and the coalition that built it. It will describe the movement's overarching strategy—building outrage through storytelling, direct action, and litigation, and using this outrage to push for legislative change—and its achievements to date. Finally, taking lessons from the short-lived reforms of the 1960s, this section will analyze the movement's greatest challenges going forward: agreeing to a common goal and not sacrificing political expediency for lasting change.

A. Anatomy of the Modern Bail-Reform Movement

The movement for pretrial reform is part of a larger nationwide movement for criminal-justice reform.⁶⁴ It became a distinct movement⁶⁵ because journalists, celebrities, litigators, and politicians collectively raised awareness of the problems with money bail, fomented public anger at the injustices it creates, and raised interest in ending those injustices.⁶⁶

The modern movement for pretrial justice began to coalesce in 2011, the year Kentucky instructed judges to release low-risk defendants on personal recognizance,⁶⁷ Colorado began studying bail reform,⁶⁸ and Attorney General Eric Holder announced an initiative to study how effective pretrial services could

63. See Covert, *supra* note 9 (describing the range of people and interests involved in the bail-reform movement).

64. See PETER EDELMAN, NOT A CRIME TO BE POOR 4 (2017) (discussing the growth of the nationwide movement fighting the hyper-policing, criminalization, and incarceration of poor and minority Americans).

65. "As people are looking for ways to impact mass incarceration, bail has become a space that feels attainable . . . People are fed up and this feels like a place where we can get change." Arisa Hatch, *How Black Women Are Leading the Way on Bail Reform*, ESSENCE (Sep. 26, 2017), <https://www.essence.com/news/black-women-leading-criminal-justice-bail-reform> (quoting Scott Roberts, director of criminal justice work at Color of Change). Bail may also be an appealing project for criminal justice reformers because the people affected are not yet convicted of any crime, and many are in fact innocent. See *id.*

66. See Ann E. Marimow, *When It Comes to Pretrial Release, Few Other Jurisdictions Do It D.C.'s Way*, WASH. POST (July 4, 2016), <http://wapo.st/29sfECB>.

67. See B. SCOTT WEST, KY. DEP'T OF PUBLIC ADVOCACY, RACIAL DISPARITIES & BAIL REFORM IN KENTUCKY (2015), <http://www.pretrial.org/download/Racial%20Disparities%20and%20Bail%20Reform%20in%20Kentucky.pdf> (noting that Kentucky reformed its bail system in response to jail overcrowding). Before 2011, pretrial-services agencies, the Pretrial Justice Institute, and other progressives had largely been on the defensive, fighting the bail industry's efforts to further expand money bail. See Miller, *supra* note 12. Even a 2014 article painted the bail industry as ascendant: "Before ABC [the bail industry lobbying group] began lobbying, in 1990, commercial bail accounted for just 23 percent of pretrial releases, while release on recognizance accounted for 40 percent. Today, only 23 percent of those let go before trial are released on recognizance, while 49 percent must purchase commercial bail. Since 1990, average bail amounts have almost tripled for felony cases. Between 2004 and 2012, revenues of the ABC companies whose income comes almost entirely from bail increased 21 percent." Shane Bauer, *Inside the Wild, Shadowy, and Highly Lucrative Bail Industry*, MOTHER JONES (Jun. 2014), <http://www.motherjones.com/politics/2014/06/bail-bond-prison-industry>.

68. See SCHNACKE ET AL., *supra* note 5, at 1, 46. Colorado passed a bail-reform bill, which encouraged judges to release defendants on unsecured bonds, in 2013. *Id.*

reduce jail populations.⁶⁹ But it did not take off until around 2014, when journalists grabbed national attention with shocking stories of injustice caused by bail. Activists, litigators, and legislators worked quickly to translate this anger into action. Just a few years later, the movement now spans from small groups of activists to large, professional organizations dedicated to the cause.⁷⁰ These groups are working for bail reform through a wide range of avenues, including journalism, producing academic studies and reports documenting the harms of money bail, innovation, litigation, and legislation.

1. The Role of Journalists

Public outrage has driven this movement. Journalists kindled this outrage by telling the stories of people harmed by money bail.⁷¹ The story of Kalief Browder is one of the best known. As a teen, Browder was charged with theft.⁷² He spent three years in Rikers Island, where guards and inmates abused him, before the city dropped the charges against him.⁷³ He left Rikers struggling with mental illness as a result of what he had experienced there, and in 2015, he committed suicide.⁷⁴ His story shook many across the country. Celebrities including Jay Z and Rosie O'Donnell spoke about how he endured this experience, which ultimately caused him to end his life, simply because he could not afford bail.⁷⁵ Rand Paul used his story on the campaign trail to illustrate the need for bail reform.⁷⁶

2. The Role of Activists

Activists have likewise brought stories about lives ruined by wrongful or unnecessary detention to the public's attention, spurring interest in the problem.⁷⁷ Some activists are raising awareness by setting up bail funds, small nonprofits that give indigent people money for bail.⁷⁸ Bail funds demonstrate that if poor people

69. See Eric Holder, Att'y Gen., Speech at the National Symposium on Pretrial Justice (June 1, 2011), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-symposium-pretrial-justice>.

70. See *About PJI*, PRETRIAL JUSTICE INST., <http://www.pretrial.org/about/> (last visited Apr. 13, 2018).

71. See Marimow, *supra* note 66 (“A push for pretrial justice has gained momentum and attention in part because of recent prominent cases, including the \$500,000 bail set for a Baltimore protester after the death of Freddie Gray and the detention of a teenage boy, held at Rikers Island for three years on robbery charges that eventually were dismissed. He killed himself last year, two years after being released.”).

72. See Jennifer Gonnerman, *Kalief Browder, 1993–2015*, NEW YORKER (June 7, 2015), <https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015>.

73. See *id.*

74. See *id.*

75. See *id.*

76. See *id.*

77. See Covert, *supra* note 9 (“The seeds of today’s wave of reform were planted by a Justice Department symposium on pretrial detention in 2011. . . . But it took the stories of people like Kalief Browder . . . and Sandra Bland, who was taken into custody in Texas after being pulled over for failure to signal and couldn’t afford bail, and who hanged herself while in jail, to illuminate the horrors of the bail system.”).

78. Examples of bail funds are the Brooklyn Community Bail Fund, Bronx Freedom Fund, Chicago Community Bond Fund, Massachusetts Bail Fund, Tennessee community bail funds in Memphis and Nashville, Minnesota Freedom Fund, and the Northwest Community Bail Fund in Seattle. See SARAH

are released without paying bail themselves, they will generally not reoffend while released and will return for trial.⁷⁹ Many bail funds also raise awareness of specific problems, by bailing out protesters to fight the jailing of activists or bailing out transgender women accused of prostitution to protest the criminalization of sex work.⁸⁰

Another even more grassroots version of bail funds is community “bail-out days,” often held on Mother’s and Father’s Day.⁸¹ On bail-out days, community members pool money to bail people out of jail and welcome them with a party that can include food, flowers, bouncy houses for their children to play in—and journalists to document their experiences.⁸² Through bail-out days, activists raise awareness and sympathy for the families harmed by money bail—in one organizer’s words, “readying the ground to move into campaigns to end cash money bail.”⁸³

3. The Role of Lobbyists

Bolstered by this awareness and interest, both grassroots and professional groups have mobilized successful campaigns to change state bail laws, often working together with larger professional organizations like the American Civil Liberties Union (ACLU).⁸⁴ For example, Essie Justice Group, a grassroots

PHILLIPS ET AL., SMART DECARCERATION INITIATIVE, NATIONAL SURVEY OF BAIL FUNDS (2017), https://advancingjustice.wustl.edu/Documents/Bail_Fund%20Report_Final_071417.pdf. New York City has even set up a city-run bail fund in protest of the state’s bail laws. See Teresa Mathew, *Why New York City Created Its Own Fund to Bail People out of Jail*, CITYLAB (Dec. 1, 2017), <https://www.citylab.com/equity/2017/12/nyc-bail-fund/546155/>.

79. Alysia Santo, *Bail Reformers Aren’t Waiting for Bail Reform*, MARSHALL PROJECT (Aug. 23, 2016), <https://www.themarshallproject.org/2016/08/23/bail-reformers-aren-t-waiting-for-bail-reform>. For example, the Bronx Freedom Fund has reported that ninety-seven percent of the people for whom it has put up bail returned for their court dates. See Jason Flom & Inimai Chettiar, *Jailing the Poor and Releasing the Rich*, US NEWS (Oct. 19, 2016), <https://www.usnews.com/opinion/civil-wars/articles/2016-10-19/its-time-for-states-to-abolish-money-bail-which-preys-on-the-poor>.

80. See Santo, *supra* note 79; Flom & Chettiar, *supra* note 79. There are bail funds that bail out protesters in Baltimore, Oakland, Ferguson, Cleveland, and Baton Rouge. See Santo, *supra* note 79. There is a bail fund that protests the criminalization of sex work by bailing out transgender women of color accused of prostitution in Queens. See *id.* Many bail funds say they are trying to work themselves out of a job by raising awareness of the problems with money bail and pushing for an end to it. Sharlyn Grace, the founder of a bail fund in Chicago, says “the fund functions as a Band-Aid on a larger wound, so her group also pushes for systemic change.” Covert, *supra* note 9. As Grace put it, “we don’t think we should have to exist.” *Id.*

81. *A Labor of Love: Black Mama’s Bail Out Action + Reflection*, SOUTHERNERS ON NEW GROUND (May 16, 2017), <http://southernersonnewground.org/2017/05/a-labor-of-love/>.

82. *Id.* Bail-out days may also provide people who are released with temporary housing, medical care, and other necessities. See *id.*

83. *Id.*

84. Jazmine Ulloa, *This Group Is Putting Women at the Center of the Battle to Fix California’s Bail System*, L.A. TIMES (Oct. 19, 2017), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-essie-justice-group-targets-the-heavy-1504712270-htmstory.html> (noting that the Essie Justice Group was one of the leading proponents of the pending bill for bail reform in California); Dani McClain, *Inside the Movement to Free People Who Are Only in Jail Because They Can’t Afford Bail*, COLORLINES (Sept. 6, 2017), <https://www.colorlines.com/articles/inside-movement-free-people-who-are-only-jail-because-cant-afford-bail> (noting that community bail-out days “raised more than \$1 million for the direct actions and brought new energy to the decades-old struggle to end cash bail”).

network of women with relatives in jail,⁸⁵ is credited as a driving force behind a bail-reform bill in the California legislature that the governor has promised to sign in 2018.⁸⁶ The group raised support for the bill by training women who have been incarcerated or who have incarcerated family members to effectively lobby their representatives and speak to the media, thus centering the stories of low-income women whose lives have been torn apart by money bail.⁸⁷

4. The Role of Researchers

To support lobbying and awareness-raising efforts, professional organizations are studying the harms of money bail and devising and testing solutions. The Pretrial Justice Institute, Vera Institute, Human Rights Watch, and the ACLU, among others, have researched the social harms money bail causes, giving advocates and legislators credible data.⁸⁸ The Vera Institute has led the way in researching and testing alternatives to money bail, such as text messages reminding defendants to return to court.⁸⁹

5. The Role of Innovators

Innovators have also played a significant role in the movement by developing risk-assessment systems, like the system the Vera Institute pioneered, that judges can use to decide whether to release a defendant pretrial, instead of releasing them if they can pay money bail.⁹⁰ One such innovator, the Arnold Foundation, developed a risk-assessment algorithm that it distributes free to jurisdictions that wish to replace money bail with a determination of whether the defendant is safe to release pretrial.⁹¹ Twenty-nine jurisdictions around the country, including

85. See Ulloa, *supra* note 84. Other groups that have been very active in pushing legislative reforms to money bail are the Lawyers Committee for Civil Rights, SEIU, Legal Services for Prisoners with Children, Courage Campaign, Leadership Conference on Civil and Human Rights, NAACP Legal Defense and Educational Fund, and National Association of Criminal Defense Lawyers.

86. *See id.*

87. Hatch, *supra* note 65.

88. See *Pretrial Injustice*, PRETRIAL JUSTICE INST., <http://www.pretrial.org/the-problem/pretrial-injustice/> (last visited Apr. 5, 2018); John Raphling, *Plead Guilty, Go Home. Plead Not Guilty, Stay in Jail*, HUMAN RIGHTS WATCH (May 17, 2017), <https://www.hrw.org/news/2017/05/17/plead-guilty-go-home-plead-not-guilty-stay-jail>; AM. CIVIL LIBERTIES UNION CAMPAIGN FOR SMART JUSTICE & COLOR OF CHANGE, *SELLING OFF OUR FREEDOM: HOW INSURANCE CORPORATIONS HAVE TAKEN OVER OUR BAIL SYSTEM* (2017), https://www.aclu.org/sites/default/files/field_document/059_bail_report_2_1.pdf.

89. See, e.g., INSHA RAHMAN, VERA INST. OF JUSTICE, *AGAINST THE ODDS?: EXPERIMENTING WITH ALTERNATIVE FORMS OF BAIL IN NEW YORK CITY'S CRIMINAL COURTS* (2017), https://storage.googleapis.com/vera-web-assets/downloads/Publications/against-the-odds-bail-reform-new-york-city-criminal-courts/legacy_downloads/Against_the_Odds_Bail_report_FINAL3.pdf. Other notable knowledge producers include the Movement for Black Lives, Law for Black Lives, Color of Change, the Pew Charitable Trusts, and Justice Policy Institute.

90. See *INCARCERATION'S FRONT DOOR*, *supra* note 18.

91. The algorithm, called the Public Safety Assessment, "uses nine factors pulled from the administrative record to produce those two risk scores and flag defendants who pose an elevated risk of committing a violent crime. . . . These factors include a defendant's age, current charge, and key aspects of a person's criminal history. The PSA does not take into account race, gender, employment status, level of education, or history of substance use." *Public Safety Assessment: A Risk Tool That Promotes Safety*,

Arizona, Kentucky, New Jersey, and Cook County in Illinois, have started using Arnold's algorithm.⁹² As discussed *infra* at III.C, advocates debate the desirability of replacing money bail with risk assessments, but regardless, these innovators have significantly impacted the movement.⁹³

6. The Role of Litigators

Litigators are also important players in the movement.⁹⁴ In 2014, two recent law school graduates started a legal organization named Equal Justice Under Law, and began suing cities and counties across the South and Midwest for unconstitutional bail practices.⁹⁵ Since then, that group, its spinoff organization Civil Rights Corps, and other organizations like the ACLU, the Southern Poverty Law Center, and ArchCity Defenders, have brought dozens of lawsuits against cities challenging the constitutionality of money bail.⁹⁶ The Obama Justice Department even intervened in one case brought by Equal Justice Under Law against Alabama, stating its position that the state's money-bail system was unconstitutional.⁹⁷

The litigators' primary argument is that money bail violates the fundamental right to liberty enshrined in the Fourteenth Amendment.⁹⁸ They point to a trio of Supreme Court cases supporting their argument. *Bearden v. Georgia*, a 1983 case concerning a man incarcerated because he could not pay a fine, held that depriving a person of her "freedom simply because, through no fault of [her] own, [she] cannot pay [a] fine . . . would be contrary to the fundamental fairness required by

Equity, and Justice, LAURA & JOHN ARNOLD FOUND. (Aug. 14, 2017), <http://www.arnoldfoundation.org/public-safety-assessment-risk-tool-promotes-safety-equity-justice/>.

92. See *More Than 20 Cities and States Adopt Risk Assessment Tool to Help Judges Decide Which Defendants to Detain Prior to Trial*, LAURA & JOHN ARNOLD FOUND. (June 26, 2015), <http://www.arnoldfoundation.org/more-than-20-cities-and-states-adopt-risk-assessment-tool-to-help-judges-decide-which-defendants-to-detain-prior-to-trial/>.

93. See HARVARD CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 15 (cautioning that pretrial risk assessments can perpetuate racial and class inequality); Kamala D. Harris & Rand Paul, *Kamala Harris and Rand Paul: To Shrink Jails, Let's Reform Bail*, N.Y. TIMES (July 20, 2017), <https://nyti.ms/2tjr9kY> (opining that risk assessments are not only more fair than money bail, but also will keep the public safer by keeping dangerous criminals locked up instead of letting them out on bail and that it will help save money).

94. See *Ending American Money Bail*, *supra* note 13.

95. See *id.* That group has since split into two organizations, Equal Justice Under Law and Civil Rights Corps. See Michael Zuckerman, *Criminal Injustice*, HARV. MAG. (Sept. 2017), <https://www.harvardmagazine.com/2017/09/karakatsanis-criminal-justice-reform>.

96. See, e.g., Miller, *supra* note 12 (noting that "[a]fter an Alabama judge issued an opinion condemning the state's practice of jailing defendants because of their inability to make bail, the Southern Poverty Law Center and the Civil Rights Corps worked with the state's 75 largest municipal courts to end bail practices in misdemeanor cases that unfairly punish the poor. Pretrial detention declined dramatically as a result. In the city of Hoover, for example, the population of municipal court defendants in the jail has fallen by 90%. Similar cases have achieved success around the country. The SPLC is currently pursuing a suit in Randolph County, Alabama, that challenges the money bail system for both misdemeanors and felonies, one of the first cases of its kind.").

97. See Statement of Interest of the United States at 1, *Jones v. City of Clanton*, No. 15-cv-34, 2015 WL 5387219 (M.D. Ala. Feb. 13, 2015) (stating that incarcerating individuals because they are unable to pay bail violates the Equal Protection Clause of the Fourteenth Amendment).

98. See *Buffin v. City & Cty. of S.F.*, No. 15-cv-04959, 2018 WL 424362, at *8 (N.D. Ca. Jan. 16, 2018).

the Fourteenth Amendment.”⁹⁹ *Tate v. Short* concerned a man incarcerated only because he could not afford to pay a fine, which, if unpaid, automatically converted to prison time under state law.¹⁰⁰ *Tate* held that the Equal Protection Clause forbids jailing an individual because he “is indigent and cannot forthwith pay the fine in full.”¹⁰¹ Similarly, *Williams v. Illinois*, in which an indigent defendant challenged a state statute allowing prisoners to be kept in jail beyond the maximum sentence for their crime to “work off” fines and fees, held that the man’s imprisonment due to inability to pay violated the Equal Protection Clause.¹⁰²

The organizations’ stated goal is to win enough lawsuits across the country that “even the suggestion of a lawsuit causes jurisdictions to amend unconstitutional practices.”¹⁰³ They are making headway.¹⁰⁴ For example, in February 2018, the Fifth Circuit ruled in a case brought by Civil Rights Corps that Harris County, Texas’ money-bail system violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment.¹⁰⁵

7. The Role of Government Actors

Government actors, from federal and state attorneys general to legislators and judges, have also played a significant role in the movement. As U.S. Attorney General, Eric Holder brought national attention to the problem of money bail.¹⁰⁶ Kim Ogg, attorney general of Harris County, Texas, and Dennis Herrera, city attorney for San Francisco, both received nationwide attention for declaring they would not oppose lawsuits challenging their respective jurisdictions’ use of money bail.¹⁰⁷ Maryland’s attorney general, Brian Frosh, kick-started Maryland’s bail

99. 461 U.S. 660, 672–73 (1983). Equal Justice Under Law, for example, relies on *Bearden* and other similar Supreme Court cases in arguing that money bail is unconstitutional. See Plaintiffs’ Motion for Summary Judgment at 6–7, *Buffin*, 2017 WL 5476678 (Oct. 31, 2017) (No. 15-cv-04959).

100. 401 U.S. 395, 398 (1971).

101. *Id.*

102. 399 U.S. 235, 240–41, 244 (1970).

103. *Judges Are Doing It for Themselves*, PRETRIAL JUSTICE INST. (Sept. 19, 2017), <http://www.pretrial.org/judges-are-doing-it-for-themselves/>. This note takes the position that even were the Supreme Court to declare money bail unconstitutional, this would aid the movement but would not itself end pretrial injustice—ending pretrial injustice requires more holistic solutions that set presumptions of release and support defendants to ensure they get reminders, treatment, and other services to prevent recidivism and ensure they return to trial. See NOT IN IT FOR JUSTICE, *supra* note 7.

104. See, e.g., *United States v. Flowers*, 946 F. Supp. 2d 1295, 1302 (M.D. Ala. 2013) (holding “the Constitution’s guarantee of equal protection is inhospitable to” the pretrial incarceration of defendants unable to pay for home monitoring).

105. *O’Donnell v. Harris Cty.*, 882 F.3d 528 (5th Cir. 2018); *A Historic Win in the Fight to End Wealth Based Pretrial Detention*, CIVIL RIGHTS CORPS, <http://www.civilrightscorps.org/historic-victory-in-harris-county-texas/> (last visited Apr. 13, 2018).

106. See Holder, *supra* note 69; see also Memorandum from Eric Holder et al. to Brian E. Frosh, Md. Att’y Gen. (Oct. 3, 2016), <http://www.opd.state.md.us/Portals/0/Downloads/Covington%20white%20paper%20Maryland%20Wealth-Based%20Pretrial%20Detention%20Scheme.pdf>.

107. See Brian Rogers, *District Attorney Kim Ogg Weighs in on Bail Reform*, HOUSTON CHRON. (Mar. 3, 2017), <http://www.chron.com/news/houston-texas/houston/article/District-attorney-Kim-Ogg-weighs-in-on-bail-10975459.php>. Ogg was responding to community pressure to renounce the current money bail system, after activist groups the Texas Organizing Project and Color of Change had the previous attorney general removed because of his pro-bail stance. See Hatch, *supra* note 65. See also Press Release, City Att’y of S.F., *Herrera Says State Bail Schedule Is Unconstitutional, Announces He Won’t Defend It in Lawsuit* (Nov. 1, 2016), <https://www.sfcityattorney.org/2016/11/01/herrera-says-state-bail-schedule->

reforms by writing a letter to the state's House of Delegates saying the state's money bail system was likely unconstitutional.¹⁰⁸ Philadelphia's district attorney, Larry Krasner, recently announced that his office would stop recommending money bail in a wide range of misdemeanor cases, from possession of marijuana to prostitution and theft.¹⁰⁹

In the U.S. Congress, Representative Ted Lieu of California has voiced his support for ending money bail and introduced a bill in 2016 with that goal.¹¹⁰ Senators Kamala Harris and Rand Paul have also advocated for bail reform for several years.¹¹¹ State legislators have also played important roles. To take one example, California state Senator Bob Hertzberg and Assembly Member Rob Bonta have been working on passing bail-reform legislation for many years and success appears to be within reach.¹¹²

Judges have also played important roles in the movement: California's Chief Justice received significant attention for her recommendation that risk-assessment tools and a supervision program replace money bail.¹¹³ Maryland's highest court changed the state's rules on bail, requiring judges to consider releasing each defendant on non-monetary bail, and if they do set bail, to set an amount the defendant can afford.¹¹⁴ Some Colorado judges, moved by the court's opinion in

unconstitutional-announces-wont-defend-lawsuit/ ("City Attorney Dennis Herrera today declared that the state's current bail system is unconstitutional, and, in a court filing, Herrera said he will not defend the bail system in a federal class-action lawsuit brought by a national civil rights group against San Francisco's sheriff.").

108. See Rachel Baye, *Maryland AG Says Bail System Likely Unconstitutional*, WYPR (Jan. 20, 2017), <http://wyp.org/post/maryland-ag-says-bail-system-likely-unconstitutional>.

109. Alicia Victoria Lozano, *Philadelphia District Attorney Larry Krasner Ends Cash Bail for Low-Level Offenses*, NBC PHILA. (Feb. 21, 2018), <https://www.nbcphiladelphia.com/news/local/The-End-of-Cash-Bail-in-Philadelphia-District-Attorney-to-Issue-Policy-Change-474728233.html>.

110. See Press Release, Rep. Ted Lieu, Congressman Lieu Introduces the "No Money Bail Act of 2016" (Feb. 24, 2016), <https://lieu.house.gov/media-center/press-releases/congressman-ted-w-lieu-introduces-no-money-bail-act-2016-0>.

111. Senators Harris and Paul co-sponsored the Pretrial Integrity and Safety Act of 2017, which "would authorize a \$10 million grant over three years to encourage states to reform or replace the ineffective money bail system that requires people who haven't been convicted of a crime to be detained pretrial unless they can afford to bail themselves out." Taryn Finley, *Kamala Harris Is Dedicating Her First Major Legislative Effort to Bail Reform*, HUFFINGTON POST (July 21, 2017), https://www.huffingtonpost.com/entry/kamala-harris-bail-reform-bill_us_596f9583e4b01696c6a2387f.

112. Senator Hertzberg and Assembly Member Bonta's bill would require counties to establish pretrial-services agencies, and have those agencies assess each arrestee to determine whether he can likely be safely released, and recommend the least restrictive conditions likely to ensure that the person abides by the terms of his release. S.B. 10, 2017-18 Sess. (Cal. 2017), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB10.

113. See Press Release, Cal. Courts, Chief Justice Workgroup: Money Bail Is "Unsafe and Unfair" (Oct. 24, 2017), <https://newsroom.courts.ca.gov/news/chief-justice-workgroup-money-bail-is-unsafe-and-unfair> (reporting that "[a] workgroup established by Chief Justice Tani G. Cantil-Sakauye to study California's bail system issued a slate of recommendations on Tuesday, saying money bail should be replaced by a risk-based assessment and supervision program that determines whether to jail defendants before trial based on their threat to public safety and their likelihood of making a court appearance"). New Mexico's Chief Justice has also been a vocal advocate for bail reform. See Duane Barbati, *Daniels Talks About Bail Reform at Conference*, ALAMOGORDO DAILY NEWS (Oct. 2, 2017), <http://www.alamogordonews.com/story/news/crime/2017/10/02/daniels-talks-bail-reform-conference/725978001/>.

114. See Caryn York & Larry Stafford, *One Small Step Forward on Bail Reform in Md.*, BALTIMORE SUN (June 29, 2017), <http://www.baltimoresun.com/news/opinion/oped/bs-ed-op-0703-bail-rule-july-2017-0629-story.html>.

the *Harris County* case holding money bail unconstitutional,¹¹⁵ have on their own initiative stopped requiring money bail.¹¹⁶

B. Achievements of the Modern Bail-Reform Movement

The movement to end money bail has made strides nationwide. It has done so in large part through storytelling, which has helped it overcome both public disinterest in helping criminal defendants and a well-resourced and energetic bail lobby by shifting public attention to the human beings and families impacted by money bail. The movement has used the attention it has gained through storytelling—whether the storytellers are journalists, activists, or lawyers—to pursue legislative and policy changes.¹¹⁷ These changes largely fall into two groups: comprehensive pretrial reforms and policies encouraging judges to release low-risk defendants. As this section will explore, the comprehensive changes have generally been more successful.

One of the movement's most important achievements has been raising awareness of the problems associated with money bail, as this awareness has been critical to the movement's subsequent successes. The stories of Kalief Browder and others inspired Senators Rand Paul and Kamala Harris to work on bail reform.¹¹⁸ A number of states, particularly on the coasts, have passed or are considering bail-reform laws because activists brought their own stories and the stories of other people affected by money bail to the public consciousness—as, for instance, Essie Justice Group has done in California.¹¹⁹ Midwestern and Southern

115. See *O'Donnell v. Harris Cty.*, 882 F.3d 528 (5th Cir. 2018).

116. Allison Sherry, *Local Judges Are Driving Bail Reforms Across Colorado*, COLO. PUB. RADIO (Jan. 23, 2018), <http://www.cpr.org/news/story/local-judges-are-driving-bail-reforms-across-colorado>.

117. This note takes the position that litigation challenging the constitutionality of money bail is primarily important not because judicial decisions will ensure pretrial justice, but because lawsuits that highlight the heart-wrenching stories of plaintiffs harmed by money bail, and judges' recognition that money bail often clashes with the Fourteenth Amendment, can garner significant public attention and push legislators to create lasting, holistic reforms. The Supreme Court has already held that the Equal Protection Clause of the Fourteenth Amendment prohibits "punishing a person for his poverty." *Bearden v. Georgia*, 461 U.S. 660, 671 (1983). That 1980s-era declaration has done little for the impoverished millions who have since languished in jails pretrial. A Supreme Court declaration that money bail is unconstitutional would be a terrific accomplishment for the movement. States, however, must go further to implement programs preventing crime, prohibiting unnecessary pretrial detention, and providing defendants the services they need to not recidivate, to ensure that the reforms are effective and durable. See NOT IN IT FOR JUSTICE, *supra* note 7.

118. See Harris & Paul, *supra* note 93.

119. For example, Kentucky and Virginia, as well as counties in North Carolina and Pennsylvania, have shifted from money bail to risk-assessment systems, often accompanied by other reforms, including strengthening pretrial services, and reported positive results, including increased numbers of people released pretrial, nearly all defendants coming to their court dates. Six states have recently passed legislation creating or strengthening pretrial-services agencies, most of them coastal: New Jersey, Vermont, West Virginia, Hawaii, Colorado, and Nevada. HARVARD CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 15. Maryland's Court of Appeals recently changed its pretrial release rules to emphasize pretrial release and de-emphasize money bail, and the Maryland legislature voted not to overturn it. Ovetta Wiggins, *Jury Still Out on Maryland's New Bail Rules*, WASH. POST (July 5, 2017), <http://wapo.st/2tDjSQy>. In 2017, California came close to passing a bail-reform bill, and Governor Jerry Brown has promised to make passing the bill a priority in 2018. See Katy Murphy, *Bail Reform in California Will Wait Until Next Year, But There's Good News for Those Pushing for Change*, MERCURY NEWS (Aug. 25,

states have also passed bail reforms, although often in response to lawsuits challenging the constitutionality of their bail systems—but this, too, is partly a response to a certain kind of storytelling: storytelling about and by plaintiffs who have been harmed by money bail.¹²⁰ Indeed, litigation has been a particularly effective catalyst, leading many jurisdictions to abandon money bail.¹²¹

The movement has begun to win comprehensive pretrial reforms. For example, Kentucky—which had already established pretrial services in the 1970s¹²²—successfully replaced money bail in many cases with supervised pretrial release, using ankle monitors to ensure defendants return to court and drug treatment to address root causes of the defendant’s alleged crime.¹²³ In one year, Kentucky kept 540,709 arrestees out of jail, saving the state millions of dollars.¹²⁴ Of those Kentuckians released on their own recognizance or to a supervision program, ninety percent went to all court proceedings and did not reoffend pretrial.¹²⁵ In 2017, New Jersey passed legislation requiring citations for low-level offenses instead of arrest and instructing judges to release defendants on non-monetary bail, unless the judge believes that bail or incarceration is the only mechanism that can ensure the defendant returns for trial or does not reoffend pretrial.¹²⁶ The state’s jail population reportedly dropped by fifteen to sixteen percent in the first year after the reform.¹²⁷ Both Kentucky’s and New Jersey’s reforms have so far succeeded in reducing jail populations without any statewide increase in crime.¹²⁸ New Orleans recently began using a Vera Institute-developed risk-assessment tool and other reforms, such as eliminating bail for minor offenses and increasing its ability to supervise released defendants instead of incarcerating them, and has likewise started seeing positive results.¹²⁹

2017), <https://www.mercurynews.com/2017/08/25/bail-reform-in-california-will-wait-until-next-year-but-now-jerry-brown-is-behind-it/>.

120. See Covert, *supra* note 9.

121. See *id.* (noting that lawsuits challenging the constitutionality of money bail have spread across the country, and that many jurisdictions have changed their pretrial systems as a result). For example, after Equal Justice Under Law “filed a class-action lawsuit against Cook County, Illinois, the county’s chief judge issued an order that eliminated the practice of setting bail amounts so high that people end up in jail.” *Id.* Equal Justice Under Law has also settled cases with Clanton, AL, Velda City, MO, Ann, MO, Moss Point, MS, Dothan, AL, Ascension Parish, LA, and Dodge City, KS, in which those jurisdictions agreed to end their use of money bail. See *Ending American Money Bail*, *supra* note 13.

122. See ADMIN. OFFICE OF THE COURTS, *supra* note 35, at 3.

123. See Teresa Wilitz, *Locked Up: Is Cash Bail on the Way Out?*, PEW CHARITABLE TR.: STATELINE (Mar. 1, 2017), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/03/01/locked-up-is-cash-bail-on-the-way-out>.

124. AM. BAR ASS’N. CRIMINAL JUSTICE SECTION, STATE POLICY IMPLEMENTATION PROJECT, PRETRIAL RELEASE REFORM 5, https://www.americanbar.org/content/dam/aba/administrative/criminal_justice/spip_pretrialrelease.authcheckdam.pdf.

125. *Id.*

126. See Alan Feuer, *New Jersey Is Front Line in a National Battle over Bail*, N.Y. TIMES (Aug. 21, 2017), <https://nyti.ms/2vj9vhq>; Rebecca Everett, *Here’s How N.J. Scores on Bail Reform (Hint: It’s Better Than Other States)*, NJ.COM (Nov. 1, 2017), http://www.nj.com/news/index.ssf/2017/11/nj_only_state_to_get_a_grade_from_national_bail_re.html.

127. Beth Fertig, *What Can New York Learn from New Jersey’s Bail Reform?*, WNYC (Jan. 4, 2018), <https://www.wnyc.org/story/year-one-nj-bail-reform-fewer-prisoners-and-more-tweaks/>.

128. See *id.*

129. See Aviva Shen, *New Orleans’ Great Bail Reform Experiment*, CITY LAB (Oct. 19, 2017), <https://www.citylab.com/equity/2017/10/new-orleans-great-bail-reform-experiment/543396/> (reporting that since New Orleans implemented these reforms, jail populations have decreased significantly, crime

Some states have opted for less aggressive reform by passing laws setting a presumption of release and requiring courts to inquire into defendants' ability to pay and to not impose unduly harsh restrictions on released defendants. Illinois recently passed a law setting a presumption of release for most crimes other than violent felonies and requiring judges to use the least restrictive method (such as electronic monitoring or drug counseling) that the judge deems suitable to ensure that defendants return to court.¹³⁰ New Mexico recently instructed judges to release most misdemeanor defendants on recognizance.¹³¹ Connecticut passed a law prohibiting judges from assigning misdemeanor defendants bail in almost all circumstances and requiring them, like in Illinois, to impose the least restrictive conditions they deem suitable.¹³² Colorado passed a law promoting the use of pretrial services and risk assessments and encouraging judges to require the least restrictive conditions reasonable.¹³³ These laws, which are reminiscent of the presumption-of-release laws passed in the 1960s, are unlikely to bring about significant change because, like their forerunners, they do not prohibit judges from setting monetary bail.¹³⁴ For example, Colorado's reforms have had little effect because judges have resisted implementing them—just as judges did in the 1960s and 70s.¹³⁵

Many jurisdictions are also making the modest change of using risk assessments to help judges decide whether to release defendants instead of money bail.¹³⁶ Dozens of local governments and a handful of states now use risk assessments.¹³⁷ Some adopted them as a condition to settle lawsuits challenging their money-bail systems.¹³⁸ Some have seen success with them, including Kentucky, New Jersey, and the City of New Orleans—although, as discussed *supra* at III.B, these jurisdictions adopted other reforms at the same time, such as

levels committed by defendants have stayed roughly the same, and people show up for their court proceedings at roughly the same rates).

130. See 725 ILL. COMP. STAT. 5/110-5 (2018).

131. See N.M. R. CRIM. P. 5-409; Tamara Williams, *New Mexico Overhauls Bail and Pretrial Detention System with Recommendations from Committee Chaired by Professor Leo Romero*, U.N.M. SCH. L. (June 14, 2017), <http://lawschool.unm.edu/news/2017/06/nm-overhauls-bail-and-pretrial-detention-system.html>.

132. See CONN. GEN. STAT. § 54-64a (2018).

133. See COLO. REV. STAT. § 16-1-104 (2013).

134. See *supra* Part II.

135. See Joshua Luna, *Bail Reform in Colorado: A Presumption of Release*, 88 U. COLO. L. REV. 1067, 1076–81 (2017).

136. See NOT IN IT FOR JUSTICE, *supra* note 7 (noting that there is a “current trend of using profile-based statistical predications of risk instead of money bail as the basis for pretrial detention or supervision decisions”).

137. See LAURA & JOHN ARNOLD FOUND., *supra* note 92.

138. See Lorelei Laird, *Court Systems Rethink the Use of Financial Bail, Which Some Say Penalizes the Poor*, AM. B. ASS'N J. (Apr. 2016), http://www.abajournal.com/magazine/article/courts_are_rethinking_bail (noting that jurisdictions that prosecute felonies may adopt risk-assessment systems as a condition of settling a lawsuit, although at least in Equal Justice Under Law cases, most cities have settled simply with the agreement to cease using money bail, because they do not prosecute felonies and thus have a diminished concern that their defendants are dangerous).

expanded pretrial services for defendants, which may have helped to ensure that released defendants returned for trial and did not reoffend.¹³⁹

Many jurisdictions that have adopted risk assessments as their sole reform have seen little improvement, and in some cases, conditions worsened: Harris County, Ohio, saw increased pretrial incarceration and more early guilty pleas after adopting a risk-assessment system in place of money bail.¹⁴⁰ After Maryland largely replaced money bail with risk assessment, the number of defendants allowed to return home to await trial increased, but a significant number committed crimes and missed court dates.¹⁴¹ Implementing risk assessments without other reforms has thus not been a success.

C. The Movement's Challenge: Agreeing to a Common Vision for Lasting Change

Because the movement for pretrial justice has well-financed and dedicated opponents, it must agree to, and focus its efforts on, a set of comprehensive reforms that will achieve lasting positive results.¹⁴² The movement is already dividing on strategy, with legislators and others pushing for simpler, more politically feasible reforms such as shifting from a money-based bail system to a computerized risk assessment, while many advocates urge that comprehensive reforms are needed. Many activists argue that simply giving judges a risk-analysis algorithm would not remedy the injustices of the bail system—and they are likely right, because the 1960s movement already tried that strategy, with little lasting effect.¹⁴³ This is the most important lesson to be taken from the last movement: that reforms must deeply reshape the bail system, because if a reform can be easily reversed, the bail industry will likely reverse it.

Legislators interested in bail reform tend to favor risk assessments, perhaps because they appear neutral and scientific. For example, Senators Kamala Harris and Rand Paul's bail-reform bill focuses on replacing money bail with risk assessments.¹⁴⁴ Likewise, New York Governor Andrew Cuomo has proposed implementing the Arnold Foundation's risk assessment statewide.¹⁴⁵ Replacing

139. See John Raphling, *Human Rights Watch Advises Against Using Profile-Based Risk Assessment in Bail Reform*, HUMAN RIGHTS WATCH (July 17, 2017), <https://www.hrw.org/news/2017/07/17/human-rights-watch-advises-against-using-profile-based-risk-assessment-bail-reform>.

140. See *id.*

141. See Wiggins, *supra* note 119.

142. The bail bond industry is valued at \$2 billion. See Miller, *supra* note 12. After New Jersey passed legislation reforming its bail system, the bail industry filed two lawsuits challenging the reforms; the bail industry likewise sued the New Mexico courts after they reformed their own bail rules. See Feuer, *supra* note 126. The bail bond industry also spent over \$170,000 fighting California's most recent reform bill. See Ulloa, *supra* note 84. These examples illustrate the bail industry's power, and its determination to fight bail reforms.

143. See WALKER, *supra* note 11, at 71–72.

144. See H.R. 4019, 115th Cong. (1st Sess. 2017), <https://www.congress.gov/bill/115th-congress/house-bill/4019/text>.

145. See Beth Fertig, *Could Bail Reform Come to New York in 2018?*, WNYC (Dec. 28, 2017), <https://www.wnyc.org/story/could-bail-reform-come-new-york-2018/>; David Howard King, 'Dangerousness' Aspect of Cuomo's Bail Plan Troubles Reformers, GOTHAM GAZETTE (Jan. 22, 2016), <http://www.gothamgazette.com/index.php/government/6106-dangerousness-aspect-of-cuomos-bail-plan-troubles-reformers>.

money bail with risk assessments is appealing because it promises to save taxpayer dollars by reducing the population of low-risk people held in jails, while also allowing judges to incarcerate high-risk defendants who currently obtain pretrial release by paying bail.¹⁴⁶ This allows advocates to argue that bail reform is financially wise and tough on crime, as well as more just and compassionate, because it would reduce the number of innocent and low-risk people needlessly incarcerated.¹⁴⁷

In contrast, many dedicated activists agree that a multi-prong strategy is necessary. They argue that the movement should push to end money bail in all or most circumstances by reducing the number of people arrested for minor offenses (through measures such as decriminalization of minor offenses, citation instead of arrest), narrowing the list of crimes for which a defendant can be held on bail, increasing the number of therapeutic and rehabilitative alternatives to jail, and providing for non-restrictive pretrial supervision, such as call and text reminders of court dates.¹⁴⁸

Some activists argue that risk assessments are dangerous because they offer a seemingly simple solution to a complex problem and have the potential to mask racial and other disparities in pretrial incarceration with a veneer of scientific rationality, thereby preserving the inequalities in the bail system while making legislators and the public believe that the problem has been solved.¹⁴⁹ Moreover,

146. See Harris & Paul, *supra* note 93 (explaining that the co-sponsored bail-reform bill would save money by not keeping low-risk people in jail, while keeping people safer. They cite a study that found in “two large jurisdictions, nearly half of the defendants considered ‘high risk’ were released simply because they could afford to post bail” and assert that their proposed reforms would help judges keep these people in jail).

147. See *id.*

148. See NOT IN IT FOR JUSTICE, *supra* note 7 (arguing that states should require law enforcement officers to cite and release defendants in all misdemeanor and non-violent felony cases instead of arresting them; require pretrial release absent proof that the defendant poses a particular threat to the community; and “[r]eject the use of statistical predictions of the likelihood of pretrial misconduct as a basis for or factor in setting bail or pretrial detention”); *The Solution*, PRETRIAL JUSTICE INST., <http://www.pretrial.org/solutions/> (last visited Apr. 13, 2018) (recommending pretrial risk assessment, pretrial supervision and monitoring, citation in lieu of arrest for nonviolent offenses, elimination of bond schedules, screening of criminal cases by an experienced prosecutor, presence of defense counsel at initial appearance, availability of preventative detention if due process is provided, and collection and analysis of performance measures); KATAL CTR. FOR HEALTH, EQUITY, & JUSTICE, *supra* note 5 (advocating for drastically limiting pretrial detention; well-financed and evidence-based pretrial services that use the least-restrictive means available; risk-assessment instruments that are “empirically based” and used only to determine what the least restrictive conditions of release and supervision can be for a defendant; the complete eradication of profit-generating pretrial practices, publicly-available recordkeeping on pretrial detention, decriminalization of low-level offenses, and less-biased policing); AM. CIVIL LIBERTIES UNION CAMPAIGN FOR SMART JUSTICE & COLOR OF CHANGE, *supra* note 88 (recommending that states abolish the for-profit bail industry); REDCROSS ET AL., VERA INST. OF JUSTICE, NEW YORK CITY’S PRETRIAL SUPERVISED RELEASE PROGRAM: AN ALTERNATIVE TO BAIL (2017), [https://www.mdrc.org/sites/default/files/Supervised Release%20Brief%202017.pdf](https://www.mdrc.org/sites/default/files/Supervised%20Release%20Brief%202017.pdf) (supporting supervised release in place of money bail, and the use of release on recognizance, or if necessary, partially-secured bonds, but eliminating for-profit bail bonds entirely).

149. See HARVARD CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 15, at 22. Note that evidence on the issue of whether risk assessments disproportionately and unnecessarily recommend that people of color be detained is mixed. For example, the Pretrial Justice Institute argues that risk assessments are not necessarily racially biased, and cited a study showing that Kentucky’s is not. See PRETRIAL JUSTICE INST., RACE & PRETRIAL RISK ASSESSMENT, <http://www.pretrial.org/download/pji-reports/Race%20&%20Pretrial%20Risk%20Assessment.pdf>. Other studies show significant racial disparities. See HARVARD CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 15, at 22.

activists point to studies showing that judges, who do not want to be blamed if a defendant misbehaves while released, rely on risk-assessment tools in cases where they recommend detention, but often disregard them if they recommend release.¹⁵⁰ This can translate to jail populations staying the same or even increasing—thus having the opposite of the intended effect.¹⁵¹ Moreover, this suggests that because judges can ignore the risk assessment and order a defendant detained, replacing money bail with risk assessments may have little long-term effect.

IV. THIS MOVEMENT CAN SUCCEED WHERE THE LAST ONE FAILED

This movement can succeed if it does not accept reforms that have been shown to be ineffective—such as switching from money bail to risk assessments—and instead pushes for comprehensive changes.¹⁵² Encouraging judges to release defendants on recognizance, particularly when coupled with creating a vibrant pretrial-services agency, is a positive reform.¹⁵³ Yet judges may resist implementing these reforms and even if they do faithfully implement a recognizance-based system, such a policy is easily reversed. Here, too, the last movement offers a lesson on what could make the modern movement endure: ending money bail. Eliminating money bail, reducing the number of crimes for which people can be detained pretrial, and instituting support systems for defendants to ensure they come to court and do not reoffend, are reforms that—particularly if implemented together—will help defendants today and last into the future.

This movement must avoid adopting risk assessments as a lone replacement for money bail, because studies of the Manhattan Bail Project and its progeny showed risk assessments perpetuate racial and class inequality in pretrial release and may not even reduce incarceration overall.¹⁵⁴ Studies have found that encouraging judges to release defendants, as risk assessments ostensibly do, is ineffective because judges are risk-averse.¹⁵⁵ Adopting risk assessments without other reforms is thus the sort of small reform that the first bail-reform movement largely settled for, and is, thus, unlikely to succeed in the long term.

150. See NOT IN IT FOR JUSTICE, *supra* note 7 (“In California, there is evidence that judges use profile-based risk assessment tools to support setting bail, but often disregard the tools when they recommend release. The Santa Cruz County Probation Department reported judges followed the profile-based risk assessment tool’s recommendation in 68 percent of cases in 2015. Judges agreed with 84 percent of the “detain” recommendations, but just 47 percent of “release” recommendations. Concurrence discrepancies of this magnitude defeat the stated purpose of using the tools to decrease pretrial incarceration.”).

151. See Wiggins, *supra* note 11.

152. See NOT IN IT FOR JUSTICE, *supra* note 7 (describing the ways in which risk assessments perpetuate the problems they are intended to solve, and describing comprehensive reforms that would be more effective).

153. See Miller, *supra* note 12.

154. See WALKER, *supra* note 11, at 71–72 (discussing findings that the risk assessments pioneered by the Manhattan Bail Project resulted in racial disparities in pretrial release); Raphling, *supra* note 137 (noting that some jurisdictions that have adopted risk assessments as their lone reform have seen incarceration rates remain steady or increase, and discussing in-depth risk assessments’ propensity for increasing racial inequality in pretrial detention).

155. See NOT IN IT FOR JUSTICE, *supra* note 7; Miller, *supra* note 12.

Laws setting a presumption of release on recognizance can be highly successful in reducing jail populations.¹⁵⁶ Such laws succeeded in dramatically reducing pretrial incarceration in the 1960s.¹⁵⁷ Recently, states have begun to once again pass laws encouraging judges to release defendants on recognizance with some success.¹⁵⁸

Laws creating or strengthening existing pretrial-services agencies can be successful in not just reducing jail populations, but also ensuring that defendants come to court and do not reoffend.¹⁵⁹ Studies have found pretrial-services agencies can reduce missed court dates through simple, inexpensive actions like sending defendants text-message reminders.¹⁶⁰ Research has repeatedly shown that calling or texting defendants to remind them of their court dates significantly increases court attendance.¹⁶¹ Pretrial-services agencies can also reduce recidivism by providing drug treatment and other services to help defendants end harmful behaviors.¹⁶²

However successful these reforms are, though, the last bail-reform movement teaches one invaluable lesson: states must eliminate money bail, and with it the commercial bail industry. Otherwise, the bail industry will continue to fight reform. Research has shown that release on personal recognizance can be as effective as money bail in terms of preventing defendants from reoffending and ensuring they attend all court proceedings.¹⁶³ This reform would thus likely benefit defendants and save states money without substantially increasing the risk of defendants fleeing or reoffending—which is important to the reform’s long-term viability.

Fortunately, the final lesson from the last bail-reform movement is that eliminating commercial bail can succeed.¹⁶⁴ Because none of the states that outlawed commercial bail have reintroduced it, other states could likely also succeed in ending it.¹⁶⁵ But states must also take the next step and end money bail altogether—they cannot repeat the mistakes of states like Illinois that eliminated

156. See Miller, *supra* note 12; AM. CIVIL LIBERTIES UNION CAMPAIGN FOR SMART JUSTICE & COLOR OF CHANGE, *supra* note 88.

157. See Miller, *supra* note 12.

158. See *infra* Part II.b.

159. See Miller, *supra* note 12; AM. CIVIL LIBERTIES UNION CAMPAIGN FOR SMART JUSTICE & COLOR OF CHANGE, *supra* note 88.

160. See AM. CIVIL LIBERTIES UNION CAMPAIGN FOR SMART JUSTICE & COLOR OF CHANGE, *supra* note 88. Another, more controversial, way that pretrial-services agencies can ensure defendants return to court and do not reoffend is by tracking them with ankle monitors. See Crystal Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399 (2017) (arguing that “electronic monitoring holds promise as a welfare-enhancing alternative to pre-trial detention”).

161. See AM. CIVIL LIBERTIES UNION CAMPAIGN FOR SMART JUSTICE & COLOR OF CHANGE, *supra* note 88, at 50 (“A 2005 study in Jefferson County, Colorado, found that simply calling defendants to remind them of their court date brought failure-to-appears down to 8 percent from the county’s usual rate of 21 percent.”).

162. See *Substance Abuse Disorder Treatment*, D.C. PRETRIAL SERVS. AGENCY, https://www.psa.gov/?q=programs/substance_abuse_treatment (last visited Apr. 13, 2018).

163. See MICHAEL R. JONES, PRETRIAL JUSTICE INST., UNSECURED BONDS: THE AS EFFECTIVE AND MOST EFFICIENT PRETRIAL RELEASE OPTION 3, 10 (2013), <http://www.pretrial.org/download/research/Unsecured+Bonds,+The+As+Effective+and+Most+Efficient+Pretrial+Release+Option+-+Jones+2013.pdf>.

164. See McCray, *supra* note 59.

165. See *id.*

commercial bail but allowed for bail payable directly to the state, because that incentivizes states to use bail to raise money, leading to the same problems of incarcerating poor defendants that are unable to pay.¹⁶⁶

States must also narrow the list of crimes for which pretrial incarceration is allowed. Studies show this creates significant fiscal savings for the government and allows defendants to keep their jobs, care for their families, and avoid the trauma of incarceration.¹⁶⁷ Like outlawing commercial bail, eliminating incarceration for all crimes but violent felonies ensures that conservative or risk-averse judges cannot set bail or order detention based on personal preferences.¹⁶⁸ While there is not yet evidence that this reform has the staying power of eliminating cash bail, it is a reform judges cannot choose to ignore and would, thus, create immediate positive change that opponents could not easily set aside.

V. CONCLUSION

The last movement for bail reform offers many lessons for the current movement, but the central message is simple: reformers must accept nothing less than overhauling the pretrial system. Comprehensive reforms eliminating commercial bail and reducing pretrial incarceration are more likely to endure because they achieve superior results, including fewer people incarcerated, fewer taxpayer dollars spent on jailing un-convicted people, low rates of crimes committed by defendants released pretrial, and high court-appearance rates.¹⁶⁹ Comprehensive reforms are also more likely to endure because their success does not hang on judges deciding to adopt them: they require judges to release all but seriously dangerous defendants. If state and local governments embrace small reforms like risk assessments in place of money bail and do not experience positive outcomes, legislators may assume bail reform is not worthwhile and may return to money bail. Comprehensive reforms may take more effort and funding than quick fixes like implementing risk assessments, but they are possible—as Washington, D.C., has shown for decades and as states like Kentucky are demonstrating today.¹⁷⁰ While legislators and others may push for politically expedient reforms like risk assessments, the movement must continue to push for reforms that will create lasting pretrial justice.

166. *See id.*

167. *See* SUBRAMANIAN, *supra* note 18.

168. *See* NOT IN IT FOR JUSTICE, *supra* note 7 (noting that where judges have the decision to detain or release defendants, the “pattern of judges overriding release recommendations is common”; explaining that because judges are often risk-averse, many will needlessly choose to detain defendants if given the option).

169. *See* PRETRIAL JUSTICE INST, *supra* note 148; KATAL CTR. FOR HEALTH, EQUITY, & JUSTICE, *supra* note 5; AM. CIVIL LIBERTIES UNION CAMPAIGN FOR SMART JUSTICE & COLOR OF CHANGE, *supra* note 88; REDCROSS ET AL., *supra* note 148.

170. *See* Flom & Chettiar, *supra* note 79 (noting that in D.C., which has effectively ended cash bail and instead uses comprehensive pretrial services, “88 percent of defendants appear for all their court dates. After Kentucky enacted a similar program [to D.C.’s pretrial services] in 2011, the percent of its jail population awaiting trial fell to 43 percent, well below the national average of 60 percent. These systems aren’t perfect, but they are far better than other states”).