

**Guiding Points and Pitfalls for Reducing Reliance on Cash Bail<sup>1</sup>**

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**I. Steps for Reducing Reliance on Money Bail**

- a. *Eliminate or reduce use of money bail*
  - i. Eliminate money bail for misdemeanors and low-level offenses and rely on release on recognizance (except for domestic violence cases).<sup>2</sup>
  - ii. Replace money bail with a pretrial release program,<sup>3</sup> release on recognizance (ROR) or electronic monitoring.<sup>4</sup> This is best accomplished by setting a goal of only 20% cash bail reliance (or something tangible for the jurisdiction)
- b. *When money bail is used, it should be for specific purposes and only to the extent necessary*
  - i. If cash must be used, rely on deposit bail (sometimes called cash bail) where the defendant gets their money back upon appearing before trial.<sup>5</sup>
  - ii. Bail amounts should reflect the purpose of bail: “to ensure that the accused will appear in court for trial” not any punitive goals.<sup>6</sup>
  - iii. Judge must ensure that money bail does not discriminate based on race or socioeconomic status.
- c. *Implementation in other jurisdictions:*
  - i. Kentucky “creates a presumption of release for low- and moderate-risk defendants and requires judges to justify in writing any decision to set financial bond on such a defendant.”<sup>7</sup>

**II. Release on Recognizance (ROR) As an Alternative to Money Bail**

- a. *Establish a presumption in favor of ROR.*<sup>8</sup>

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<sup>1</sup> Please feel free to send me any questions about these recommendations at shima.baughman@law.utah.edu

<sup>2</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 182 (2018) (Noting that Connecticut’s governor recently proposed this change) (citing Christine Stuart, *Malloy Pitches Bail Reform as Part of Connecticut’s Second Chance Society 2.0*, NEW HAVEN REGISTER (Jan. 28, 2016), [www.nhregister.com/article/NH/20160128/NEWS/160129552](http://www.nhregister.com/article/NH/20160128/NEWS/160129552).); Freethink, *Cash Bail Keeps Poor People in Jail. Here’s How We Fix It* (Aug. 8, 2020), <https://www.freethink.com/videos/bail-reform>.

<sup>3</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 181 (2018) (examples of elimination of money bail in Wisconsin, Illinois, Kentucky, and Oregon).

<sup>4</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 207 (2018).

<sup>5</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 46 (2018).

<sup>6</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 32 (2018) (Identifying the purpose of bail to ensure appearance at trial and arguing that “‘Excessive bail’ under the Eighth Amendment is not merely bail that is beyond one’s means, rather, it is bail greater than necessary to achieve purposes for which bail is imposed.”).

<sup>7</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 182 (2018).

<sup>8</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 43 (2018) (“Release on recognizance provides an assurance to judges that certain defendants will not be held in pretrial detention. This assurance cannot be guaranteed with any other form of release because of the economic standing of many defendants.”).

- i. “When pursuing charges is necessary, prosecutors should presume that they should recommend people are released before trial without conditions and alternative-to-prison sentencing options upon conviction, such as community service or probation.”<sup>9</sup>
- ii. Rely on unsecured bond in situations where ROR is not appropriate.<sup>10</sup>
- b. *Implementation in other jurisdictions:*
  - i. Texas provides a strong example of successfully reducing jail numbers through ROR.<sup>11</sup>
  - ii. Kentucky had a goal of general release on ROR but did not set a specific numerical goal (for example, 80-90% ROR release) and judges did not follow release recommendations.<sup>12</sup>

### III. Steps for Implementing Pretrial Release

- a. *Make it clear the default is release.*<sup>13</sup>
  - i. Only detain individuals “who are statistically most likely to pose a danger to society.”<sup>14</sup>
  - ii. “[P]retrial restraints of liberty should be limited to only what is necessary and only where there is a proper legal basis” such as “ensuring a person’s attendance at trial and protecting the judicial process from interference by defendant.”<sup>15</sup>
- b. *Conditional release should be considered to retain a presumption of pretrial release*
  - i. If ROR, unsecured bond, or deposit bail are inappropriate, conditional release may be an additional “low-cost option for releasing individuals pretrial, with tailored precautions to ensure the safety of the public.”<sup>16</sup>
- c. *Electronic monitoring as a form of pretrial release*

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<sup>9</sup> Nicole Zayas Fortier, *Unfettered, Unchecked, Unopposed: The Need for Accountability and Limits*, in CAN THEY DO THAT? UNDERSTANDING PROSECUTORIAL DISCRETION 25, 38 (Melba V. Pearson ed., 2020).

<sup>10</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 43 (2018) (“An unsecured bond is where a defendant is released after he contracts to appear before the court on a specified date and promises to pay a set bail amount later if he fails to appear. The defendant pays nothing and puts no deposit or property down in order to obtain release, and only pays the bond if he does not appear in court.”).

<sup>11</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 44 (2018).

<sup>12</sup> Shima Baradaran Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 1015 (2020), <https://ilr.law.uiowa.edu/assets/Uploads/ILR-105-3-Baughman-1-v5.pdf>.

<sup>13</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 188 (2018).

<sup>14</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 92 (2018).

<sup>15</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 188 (2018).

<sup>16</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 52 (2018) (Nothing that risk assessment programs may guide the conditions that are applied in any particular situation. Conditions may include “mandatory drug testing or substance abuse programs, counseling, or admittance to a rehabilitation facility.”).

- i. Electronic monitoring “may be an extremely effective low-cost pretrial alternative as it allows officials to closely monitor defendants while allowing them freedom to work, meet with attorneys, and remain with family.”<sup>17</sup>
- ii. When conditions are imposed, they should be relevant to the perceived risks and consideration should be given to monetary and other costs associated with those conditions.<sup>18</sup>
  1. Substantial monetary costs to a defendant can be incurred through “attendance requirements” that require the accused to return to court on a regular basis<sup>19</sup> or electric home monitoring that require a “hook up” fee” and regular internet service<sup>20</sup>. Restrictions on a defendant’s physical liberty can also place a substantial burden on a defendant, potentially restricting their ability to find housing or work.<sup>21</sup>
- d. *Pretrial services can make pretrial release less of a risk*
  - i. Increasing access to pretrial services can lower the risk of failure to appear in court by “providing monitoring of a defendant to comply with release conditions and assistance in locating and returning defendants who fail to appear in court.”<sup>22</sup>
  - ii. For example, Utah’s recent reform efforts are flawed because their reliance on past failure to appear disregards the research that “has made clear that a failure to appear is not cause for pretrial detention, and that simple reminders (postcards, calls and texts) can dramatically reduce failure to appear.”<sup>23</sup>
    1. New York City found that “defendants who reported a phone number and address were more likely to show up for court appointments.”<sup>24</sup>
- e. *Diversion programs may be effective alternatives to detention*
  - i. Misdemeanor diversion programs “assist in reducing overall costs by minimizing trial docket caseloads” while reducing recidivism rates.<sup>25</sup>
  - ii. Judicial diversion programs, such as drug court or mental health court are expensive, but “they may result in a net benefit to taxpayers.”<sup>26</sup> Sometimes drug or mental health court can create a bottleneck so providing the drug/mental health services is the key part of this.

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<sup>17</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 52–53 (2018).

<sup>18</sup> Jenny E. Carroll, *Beyond Bail*, FL. L. REV. 39–40 (forthcoming), [https://sol3/papers.cfm?abstract\\_id=3678992](https://sol3/papers.cfm?abstract_id=3678992).

<sup>19</sup> Jenny E. Carroll, *Beyond Bail*, FL. L. REV. 45 (forthcoming), [https://sol3/papers.cfm?abstract\\_id=3678992](https://sol3/papers.cfm?abstract_id=3678992).

<sup>20</sup> Jenny E. Carroll, *Beyond Bail*, FL. L. REV. 45–46 (forthcoming), [https://sol3/papers.cfm?abstract\\_id=3678992](https://sol3/papers.cfm?abstract_id=3678992).

<sup>21</sup> Jenny E. Carroll, *Beyond Bail*, FL. L. REV. 46–47 (forthcoming), [https://sol3/papers.cfm?abstract\\_id=3678992](https://sol3/papers.cfm?abstract_id=3678992).

<sup>22</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 53 (2018) (citing Thomas H. Cohen & Brian A. Reaves, *Pretrial Release of Felony Defendants in State Courts*, BUREAU OF JUST. STAT. SPECIAL REP. 5 (2007), [www.bjs.gov/content/pub/pdf/prfdsc.pdf](http://www.bjs.gov/content/pub/pdf/prfdsc.pdf)).

<sup>23</sup> Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 731–32 (2018).

<sup>24</sup> Corrine Ramey, *Algorithm Helps New York Decide Who Goes Free Before Trial*, WALL ST. J. (Sept. 20, 2020, 10:00 AM), <https://www.wsj.com/articles/algorithm-helps-new-york-decide-who-goes-free-before-trial-11600610400>.

<sup>25</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 56–57 (2018).

<sup>26</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 56 (2018).

- f. *When pretrial detention is necessary, limit the detention period to 24 hours or less.*<sup>27</sup>
- g. *Set a defined benchmark for release*
  - i. A 90% release benchmark would be a reasonable goal given empirical data on risk of release.<sup>28</sup>
  - ii. Set aggressive release goals to only detain those who are unable to be released safely.<sup>29</sup>
  - iii. Risk assessments do not guarantee a release rate, this is a separate reform—setting a goal of less than 10% detention would be helpful.<sup>30</sup>

#### IV. **Using Risk Assessment and Pretrial Reports As Tools**

- a. *Risk assessments and pretrial reports are important tools*
  - i. Prosecutors should utilize pretrial risk assessment tools “to help aid them in their decision-making” prior to a defendant’s initial court appearance.<sup>31</sup>
  - ii. Pretrial reports can be a helpful tool in assessing “how likely a prisoner is to flee or commit a crime if released” on bail.<sup>32</sup>
  - iii. While there are many risk assessment tools available, the best risk assessment tools are tailored to the specific jurisdiction and should rely on local data for their creation and validation.<sup>33</sup>
- b. *Use a cost-benefit analysis in pretrial-detention decisions*
  - i. A cost-benefit analysis could result in significant cost savings “without statistical risk to the public.”<sup>34</sup>
- c. *Evaluate and consider flight risk and dangerousness separately, rather than merged into one analysis.*<sup>35</sup>
- d. *Base risk assessments on objective factors*
  - i. Risk assessments should be primarily based on objective factors that consider risk of violent crime.<sup>36</sup>

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<sup>27</sup> Freethink, *Cash Bail Keeps Poor People in Jail. Here’s How We Fix It* (Aug. 8, 2020), <https://www.freethink.com/videos/bail-reform>.

<sup>28</sup> Freethink, *Cash Bail Keeps Poor People in Jail. Here’s How We Fix It* (Aug. 8, 2020), <https://www.freethink.com/videos/bail-reform>.

<sup>29</sup> Freethink, *Cash Bail Keeps Poor People in Jail. Here’s How We Fix It* (Aug. 8, 2020), <https://www.freethink.com/videos/bail-reform>.

<sup>30</sup> Shima Baradaran Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 1014 (2020), <https://ilr.law.uiowa.edu/assets/Uploads/ILR-105-3-Baughman-1-v5.pdf>.

<sup>31</sup> SHIMA BARADARAN BAUGHMAN, *THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM* 195 (2018).

<sup>32</sup> SHIMA BARADARAN BAUGHMAN, *THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM* 41 (2018) (“Pretrial reports are extremely helpful to provide an independent assessment to evaluate how likely a prisoner is to flee or commit a crime if released. In the District of Columbia, these reports have been considered quite successful at predicting the risk of releasing any given defendant.”).

<sup>33</sup> SHIMA BARADARAN BAUGHMAN, *THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM* 195 (2018).

<sup>34</sup> Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. REV. 1, 30 (2017).

<sup>35</sup> SHIMA BARADARAN BAUGHMAN, *THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM* 198 (2018) (citing Lauryn Gouldin, *Disentangling Flight Risk from Dangerousness*, 3 BYU L. REV. 837, 871 (2016).)

<sup>36</sup> JOHN CLARK & D. ALAN HENRY, *PRETRIAL SERVICES PROGRAMMING AT THE START OF THE 21ST CENTURY: A SURVEY OF PRETRIAL SERVICES PROGRAMS* 46 (U.S. Dep’t of Justice 2003) (“[T]he best practice for release officials

- ii. Judges relying on “intuition” or “gut instinct” is typically wrong when it comes to pretrial crime prediction.<sup>37</sup>
- iii. Factors that should be considered:
  1. “A factor that highly predicts rearrest is a defendant’s criminal justice status at the time of arrest.”<sup>38</sup>
  2. The risk of rearrest, especially for violent crime, should be a consideration.<sup>39</sup>
  3. “[C]onsidering the crime charged and previous convictions are predictive of future crime.”<sup>40</sup>
    - a. If potential for future crimes is considered, “this determination should be done using sound empirical methods and a validated risk assessment.”<sup>41</sup>
    - b. Individuals charged with public order offenses, white-collar crime, drug offenses (both trafficking and possession), and older defendants (over forty) are very unlikely to commit a violent crime. Women are also at a lower risk for pretrial crime.<sup>42</sup>
  4. “[P]rior flight risk is predictive of future flight risk” but this is more of a reason for a text reminder, not detention.<sup>43</sup>
  5. Individuals with prior jail time are generally at a higher risk for committing crimes if released.<sup>44</sup>
  6. Factors that have the greatest influence on costs of releasing an individual include (1) original arrest for a violent crime, (2) four or more prior convictions, (3) prior incarceration, (4) a prior failure to appear, (5) an active criminal justice status, and (6) aged nineteen or younger.<sup>45</sup>
- e. *Risk assessment tools should avoid discrimination based on race or income.*<sup>46</sup>

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is to combine an objective, actuarial risk assessment with a limited subjective assessment”); SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 72–73 (2018) (consider factors relevant to future dangerousness—which is criminal history of 3 or more violent felonies).

<sup>37</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 70 (2018).

<sup>38</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 62 (2018).

<sup>39</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 63 (2018) (“[D]efendants charged with fraud, public order offenses and drug defendants have extremely low rearrest rates for violent crimes.”).

<sup>40</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 69 (2018).

<sup>41</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 188 (2018).

<sup>42</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 192 (2018).

<sup>43</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 69 (2018).

<sup>44</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 76 (2018).

<sup>45</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 90 (2018).

<sup>46</sup> Freethink, *Cash Bail Keeps Poor People in Jail. Here’s How We Fix It* (Aug. 8, 2020), <https://www.freethink.com/videos/bail-reform>.

- i. “[R]isk assessments can be racially inequitable by giving more weight to certain factors that . . . are racially disparate.”<sup>47</sup>
- ii. Race-correlated factors in risk assessment tools (such as criminal record, socioeconomic factors, and neighborhood-related factors) should be carefully assessed “to ensure that they are not cementing racial bias.”<sup>48</sup>
- iii. Racially inequitable factors may include living in certain zip codes, education levels, job history, income, marriage status, and owning a home or cell phone.<sup>49</sup>
- f. *Increase transparency in the risk assessment process by making the instrument available to the public.*<sup>50</sup>
- g. *Risk assessment tools should not replace efforts to increase the amount of time courts dedicate to making individual bail decisions.*<sup>51</sup>
- h. *Implementation in other jurisdictions:*
  - i. The Public Safety Assessment from the Arnold Foundation is a popular tool, but fails to distinguish between felonies and misdemeanors in criminal history, which is a big difference as far as safety to release.<sup>52</sup>
  - ii. An effective risk assessment tool is found in Washington D.C.<sup>53</sup> Washington, DC relies on risk assessment rather than cash bail and courts release 94% of defendants before their trial.<sup>54</sup>
  - iii. A 2014 New Jersey law moved the state “toward a risk-based system from a money-based system.”<sup>55</sup> That law requires an evaluation of risk within 48 hours of arrest.<sup>56</sup> “Low-risk, nonviolent offenders are released on recognizance; high-

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<sup>47</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 72 (2018).

<sup>48</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 199 (2018).

<sup>49</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 72 (2018); For instance, see Colorado’s risk assessment that improperly considers factors taking into account the socioeconomic status of a defendant—including owning a house, making residential payments, paying rent. COLO. REV. STAT. §§ 16-1-103, 16-1-104, 4-103(3)(b) (2013).

<sup>50</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 71 (2018).

<sup>51</sup> Jenny E. Carroll, *Beyond Bail*, FL. L. REV. 39 (forthcoming), [https://sol3/papers.cfm?abstract\\_id=3678992](https://sol3/papers.cfm?abstract_id=3678992).

<sup>52</sup> Shima Baradaran Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 1014 (2020), <https://ilr.law.uiowa.edu/assets/Uploads/ILR-105-3-Baughman-1-v5.pdf>.

<sup>53</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 45 (2018) (“Under the DC system, defendants are classified as high, medium, or low risk according to points on a thirty-eight-factor instrument.”).

<sup>54</sup> Freethink, *Cash Bail Keeps Poor People in Jail. Here’s How We Fix It* (Aug. 8, 2020), <https://www.freethink.com/videos/bail-reform>.

<sup>55</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 182 (2018) (citing NEW JERSEY PUB. L. 2014, Ch. 31, §§ 1–20; ACLU, *ACLU-NJ Hails Passage of NJ Bail Reform as Historic Day for Civil Rights* (Aug. 4, 2014), <https://www.aclu.org/press-releases/aclu-nj-hails-passage-nj-bail-reform-historic-day-civil-rights?redirect=criminal-law-reform/aclu-nj-hails-passage-nj-bail-reform-historic-day-civil-rights>).

<sup>56</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 182 (2018) (citing NEW JERSEY PUB. L. 2014, Ch. 31, §§ 1–20; Lisa W. Foderaro, *New Jersey Alters Its Bail System and Upends Legal Landscape*, N.Y. TIMES (Feb. 6, 2017), [www.nytimes.com/2017/02/06/nyregion/new-jersey-bail-system.html](http://www.nytimes.com/2017/02/06/nyregion/new-jersey-bail-system.html)).

risk offenders are released subject to conditions, and only defendants who pose the greatest risk will be detained without bail.”<sup>57</sup>

- iv. A well-designed risk assessment is only as effective as its implementation. Reform efforts in both Kentucky and Virginia have demonstrated that there is variation in how judges use or rely on risk assessments.<sup>58</sup> In those states, this has resulted in much lower release rates than those recommended by the risk assessments themselves.<sup>59</sup>

## V. Differentiating Between Felonies and Misdemeanors

- a. *Ensure a presumption of ROR for misdemeanors*
- b. *“Misdemeanors are less serious crimes and should be treated as such.”*<sup>60</sup>
  - i. Eliminating or decreasing the use of misdemeanor detention is especially important because such detention “discriminates against the poor and minorities, especially against African Americans, who often have less options to pay for release.”<sup>61</sup>
  - ii. Currently, “[m]isdemeanor defendants are detained before trial almost as often as felony defendants because they cannot afford bail.”<sup>62</sup>
- c. *Create misdemeanor diversion programs*
  - i. Misdemeanor diversion programs “assist in reducing overall costs by minimizing trial docket caseloads” while reducing recidivism rates.<sup>63</sup> (also discussed in release goals section)
- d. *Reconsider whether prior misdemeanor convictions are relevant to release on bail unless the conviction was for a violent crime and the current charge is for a violent crime*
  - i. Risk assessments should distinguish between felony and misdemeanor charges,<sup>64</sup> but rarely do.<sup>65</sup>

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<sup>57</sup> SHIMA BARADARAN BAUGHMAN, *THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM* 182 (2018) (citing Lisa W. Foderaro, *New Jersey Alters Its Bail System and Upends Legal Landscape*, N.Y. TIMES (Feb. 6, 2017), [www.nytimes.com/2017/02/06/nyregion/new-jersey-bail-system.html](http://www.nytimes.com/2017/02/06/nyregion/new-jersey-bail-system.html)).

<sup>58</sup> Shima Baradaran Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 1016 (2020), <https://ilr.law.uiowa.edu/assets/Uploads/ILR-105-3-Baughman-1-v5.pdf>.

<sup>59</sup> Shima Baradaran Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 1016 (2020), <https://ilr.law.uiowa.edu/assets/Uploads/ILR-105-3-Baughman-1-v5.pdf>.

<sup>60</sup> Shima Baradaran Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 984 (2020), <https://ilr.law.uiowa.edu/assets/Uploads/ILR-105-3-Baughman-1-v5.pdf>; *Ex parte Smith*, 493 S.W.2d 958, 959 (Tex. Crim. App. 1973).

<sup>61</sup> Shima Baradaran Baughman, *The History of Misdemeanor Bail*, 98 B.U. L. REV. 837, 882 (2018); Shima Baradaran Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 977 (2020), <https://ilr.law.uiowa.edu/assets/Uploads/ILR-105-3-Baughman-1-v5.pdf>.

<sup>62</sup> Shima Baradaran Baughman, *The History of Misdemeanor Bail*, 98 B.U. L. REV. 837, 871–72 (2018) (noting that data on a Kentucky jail between July 1, 2009, and June 30, 2010, found that 33.75% of felony defendants were detained pretrial while 22.08% of misdemeanor defendants were detained pretrial).

<sup>63</sup> SHIMA BARADARAN BAUGHMAN, *THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM* 56–57 (2018).

<sup>64</sup> See Shima Baradaran Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 1013 (2020), <https://ilr.law.uiowa.edu/assets/Uploads/ILR-105-3-Baughman-1-v5.pdf>.

<sup>65</sup> Freethink, *Cash Bail Keeps Poor People in Jail. Here’s How We Fix It* (Aug. 8, 2020), <https://www.freethink.com/videos/bail-reform>.

- ii. Consider limiting the number of “violent” crimes that increase likelihood of detention.<sup>66</sup>
- e. *Decrease reliance on bail schedules for misdemeanors*
  - i. Bail schedules “remove judicial discretion to determine bail,” “are relied on extensively” in cases where judges have flexibility; and increase pretrial detention “due to defendants’ inability to pay.”<sup>67</sup>
- f. *Implementation in other jurisdictions:*
  - i. There are a number of examples of jurisdictions that do not differentiate between felonies and misdemeanors in risk assessment.<sup>68</sup>

## VI. Eliminating Reliance on Bail Schedules

- a. *Decrease reliance on a “uniform bail schedule” matrix or other guidelines for determining how much money bail to set in a particular case.*<sup>69</sup>
- b. *Eliminate bail schedules that assign a dollar amount for specific charges.*<sup>70</sup>
  - i. These do not take into account an individual’s ability to pay and can result in release based on financial situation rather than risk.<sup>71</sup>
- c. *Consider what individuals can afford when setting cash bail amounts.*<sup>72</sup>

## VII. Important Internal Office Functions

- a. *Ensure defendants have legal representation in bail hearings.*<sup>73</sup>
- b. *Conduct regular investigations to uncover bias*

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<sup>66</sup> Shima Baradaran Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 1918 (2020), <https://ilr.law.uiowa.edu/assets/Uploads/ILR-105-3-Baughman-1-v5.pdf> (for instance New Jersey limits the number of “violent crimes” subject to pretrial detention).

<sup>67</sup> Shima Baradaran Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 1004 (2020), <https://ilr.law.uiowa.edu/assets/Uploads/ILR-105-3-Baughman-1-v5.pdf>.

<sup>68</sup> Shima Baradaran Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 1016, 1018 (2020), <https://ilr.law.uiowa.edu/assets/Uploads/ILR-105-3-Baughman-1-v5.pdf> (noting that Kentucky’s risk assessment fails to differentiate between prior felonies and prior misdemeanors while reforms in Utah, New Jersey, and Colorado had the same issue).

<sup>69</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 47 (2018) (Arguing that this practice “is highly criticized because when there is a set dollar amount of bail assigned to a certain crime money bail arguably becomes the default method (and easiest method) of pretrial release[.]”).

<sup>70</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 206 (2018).

<sup>71</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 206 (2018).

<sup>72</sup> Freethink, *Cash Bail Keeps Poor People in Jail. Here’s How We Fix It* (Aug. 8, 2020), <https://www.freethink.com/videos/bail-reform>.

<sup>73</sup> SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 109 (2018) (Noting that “defendants who have representation at their bail hearings are two and a half times more likely to be released on their own recognizance” and that “defendants who are represented by attorneys are over *four times* more likely to have their bail reduced.”) (citing Douglas L. Colbert, Raymond Paternoster & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1753 (2002)).



- i. Regular independent review of prosecutorial charging practices could help with uniformity, racial bias, and severity between prosecutors in an office or within a particular region.<sup>74</sup>
  - ii. “Prosecutors should ensure that their offices are regularly assessing whether they exacerbate racial disparities in the system and reverse course. . . . One model prosecutors should replicate to identify where they exacerbate racial disparities is the Vera Institute of Justice’s Prosecution and Racial Justice Program, which partners with prosecutors’ office to collect and analyze statistical data on how their discretion at every point in a case results in racially disparate outcomes.”<sup>75</sup>
  - iii. Consider blinding prosecutors to the race of defendants, wherever feasible and when race is not relevant to the merits of a criminal prosecution.<sup>76</sup>
- c. *Increase transparency and public engagement*
- i. Prosecutors can collect and publish data on how they use their discretion in charging and plea bargaining, bail and sentence recommendations on a bi-yearly basis.<sup>77</sup>
  - ii. Prosecutors’ offices can form community advisory boards and “work with community members to better understand their points of view on how their discretion should be used,<sup>78</sup> and how to prioritize crimes and charging (violent crimes vs. property vs. drugs)
- d. *Prioritize education about the office’s impacts on individuals and the community*
- i. Prosecutors can track impact of charging decisions and compare to arrest and crime rates to ensure that they are not overcharging.<sup>79</sup>
  - ii. Prosecutors can provide trainings to educate their offices on systemic collateral consequences as well as best practices to avoid pitfalls that drive people back into the system,<sup>80</sup> as well as the office impact on local incarceration rates.<sup>81</sup>

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<sup>74</sup> Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration* 63, 94 U. S. CAL. L. REV. (forthcoming 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3689242](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3689242).

<sup>75</sup> Nicole Zayas Fortier, *Unfettered, Unchecked, Unopposed: The Need for Accountability and Limits*, in CAN THEY DO THAT? UNDERSTANDING PROSECUTORIAL DISCRETION 25, 38 (Melba V. Pearson ed., 2020).; See VERA INST. OF JUSTICE, A PROSECUTOR’S GUIDE FOR ADVANCING RACIAL EQUITY (2014), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/a-prosecutors-guide-for-advancing-racial-equity/legacy\\_downloads/prosecutors-advancing-racial-equity\\_0.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/a-prosecutors-guide-for-advancing-racial-equity/legacy_downloads/prosecutors-advancing-racial-equity_0.pdf).

<sup>76</sup> See Sunita Sah, Christopher T. Robertson, & Shima B. Baughman, *Blinding Prosecutors to Defendants’ Race: A Policy Proposal to Reduce Unconscious Bias in the Criminal Justice System*, 1(2) BEHAV. SCI. & POL’Y 69 (2015).

<sup>77</sup> Nicole Zayas Fortier, *Unfettered, Unchecked, Unopposed: The Need for Accountability and Limits*, in CAN THEY DO THAT? UNDERSTANDING PROSECUTORIAL DISCRETION 25, 40 (Melba V. Pearson ed., 2020).

<sup>78</sup> Nicole Zayas Fortier, *Unfettered, Unchecked, Unopposed: The Need for Accountability and Limits*, in CAN THEY DO THAT? UNDERSTANDING PROSECUTORIAL DISCRETION 25, 42 (Melba V. Pearson ed., 2020).

<sup>79</sup> Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration* 63, 94 U. S. CAL. L. REV. (forthcoming 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3689242](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3689242).

<sup>80</sup> Nicole Zayas Fortier, *Unfettered, Unchecked, Unopposed: The Need for Accountability and Limits*, in CAN THEY DO THAT? UNDERSTANDING PROSECUTORIAL DISCRETION 25, 40 (Melba V. Pearson ed., 2020).

<sup>81</sup> Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration* 63, 94 U. S. CAL. L. REV. (forthcoming 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3689242](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3689242).

VIII. **Consider How Policies Incentivize Convictions and Charges**

- a. *Lead prosecutors can consider whether policies incentivize increased charges and convictions.*
  - i. For example, promotion decisions should not hinge on conviction or trial rates—instead, offices should redefine success as progress toward decarceration and racial equity goals.<sup>82</sup>
- b. *National and local guidelines can explicitly advise prosecutors not to charge the most serious crime possible and to consider the effects of their charging decisions on mass incarceration.*<sup>83</sup>
- c. *Consider decreasing how frequently charges are brought*
  - i. Since 2003, prosecutor charging per arrest has actually gone up every year, even though crime rates and arrest rates have both gone down.<sup>84</sup>
  - ii. Prosecutors should consider restorative justice alternatives rather than pursuing charges in cases where there is a potential for resolution without criminal justice intervention.<sup>85</sup>

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<sup>82</sup> Nicole Zayas Fortier, *Unfettered, Unchecked, Unopposed: The Need for Accountability and Limits*, in *CAN THEY DO THAT? UNDERSTANDING PROSECUTORIAL DISCRETION* 25, 39 (Melba V. Pearson ed., 2020).

<sup>83</sup> Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration* 61, 94 U. S. CAL. L. REV. (forthcoming 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3689242](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3689242).

<sup>84</sup> Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration* 6, 94 U. S. CAL. L. REV. (forthcoming 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3689242](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3689242).

<sup>85</sup> Nicole Zayas Fortier, *Unfettered, Unchecked, Unopposed: The Need for Accountability and Limits*, in *CAN THEY DO THAT? UNDERSTANDING PROSECUTORIAL DISCRETION* 25, 37–38 (Melba V. Pearson ed., 2020).