

# ELIMINATION OF CASH BAIL IN ILLINOIS: ACCESSING RISK OF DEFENDANTS USING RISK ASSESSMENT TOOLS

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## I. INTRODUCTION

A fundamental concept within the United States comes from the Eighth Amendment, which commands that “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>1</sup> While many aspects of the Bill of Rights have been challenged and reviewed by the Supreme Court, the Excessive Bail Clause has limited application.<sup>2</sup> The Supreme Court in *United States v. Salerno* has held that the Eighth Amendment does not always require bail, but the Court did not go further to address the minimum requirements for the Eighth Amendment.<sup>3</sup> Therefore, like many Amendments under the Bill of Rights, the Eighth Amendment is a fundamental right, but what that exactly means so far is that someone can be denied bail to ensure their presence at trial and to protect society from further harm.<sup>4</sup> In application, “innocent until proven guilty” has been in a struggle with the public’s concern about maintaining a presence at trial and protecting community safety.<sup>5</sup> Due to a history of discrimination within the United States, the focus has transitioned from prioritizing safety and trial attendance to emphasizing an individual’s financial capacity.<sup>6</sup> This shift frequently results in a disproportionate impact on minority groups.<sup>7</sup>

Cash bail is a system where defendants are detained pretrial unless they can pay cash to get out before their trial.<sup>8</sup> The idea behind cash bail is that by paying in cash, a defendant is making a promise to show back up to court

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<sup>1</sup> U.S. CONST. amend. VIII.

<sup>2</sup> Scott W. Howe, *The Implications of Incorporating the Eighth Amendment Prohibition on Excessive Bail*, 43 HOFSTRA L. REV. 1039, 1039-40 (2015).

<sup>3</sup> *United States v. Salerno*, 481 U.S. 739, 755 (1987).

<sup>4</sup> *See id.*; *see also* *Stack v. Boyle*, 342 U.S. 1, 4-5 (1951) (holding that the Eighth Amendment permits bail to assure presence at trial).

<sup>5</sup> Alexa Van Brunt & Locke E. Bowman, *Toward A Just Model of Pretrial Release: A History of Bail Reform and A Prescription for What's Next*, 108 J. CRIM. L. & CRIMINOLOGY 701, 771 (2018).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 737.

<sup>8</sup> Chloé G. Pedersen & Jessica Schneider, *Let's Get Real About the Safe-T Act*, 110 ILL. BAR J. 46, 47 (2022).

instead of remaining detained prior to trial.<sup>9</sup> In theory, the ability of a person to pay in cash is significant because many are motivated by money, and there are plenty of examples where cash bail has worked; however, there are also many examples where it has been proven unsuccessful.<sup>10</sup> For example, evidence shows that cash bail is often unsuccessful when wealthy individuals commit serious crimes and can be released.<sup>11</sup> In contrast, an indigent defendant who commits a less serious offense faces more significant barriers to being released simply because they cannot meet the cash bail requirements.<sup>12</sup>

It has been argued and empirically validated that the cash bail system of many states often discriminates based on wealth.<sup>13</sup> These arguments suggest that the focus of cash bail places the burden on the defendant's ability to pay and overshadows its objective of increasing the likelihood they will show back up to court proceedings or preventing their release if they pose a real threat to the community.<sup>14</sup> Cash bail releases individuals based on wealth rather than based on whether or not they will show back up to court or even if they are a harm to others in society.<sup>15</sup> In comparison, some states may not require cash bail and might release a defendant on their own recognizance, which allows a defendant to return on his or her own accord to court without any further conditions.<sup>16</sup> Other systems require a set of conditions that a defendant must abide by to remain released pretrial, but which conditions do not have any correlation to money.<sup>17</sup> Defense lawyers and scholars have suggested that many pretrial detainees in cash bail systems are often unnecessarily detained and/or given excessive bail, thus furthering the systematic discrimination that many argue encompasses our criminal justice system.<sup>18</sup>

This Note proceeds in the following parts. Part II introduces the current pretrial system that mainly involves cash bail at the state level. Part III looks at the pretrial systems in New York, New Jersey, and Illinois and highlights

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<sup>9</sup> See, e.g., *How Courts Work*, AM. BAR ASS'N (Sep. 9, 2019), [https://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/bail/](https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/bail/).

<sup>10</sup> See Josefa Velasquez & Rachel Holliday Smith, *Why is New York's Bail Reform So Controversial?* THE CITY (Feb. 21, 2022, 6:03 PM), <https://www.thecity.nyc/2022/2/21/22944871/new-york-bail-reform-controversy-eric-adams>.

<sup>11</sup> See Van Brunt & Bowman, *supra* note 5, at 716-17.

<sup>12</sup> See *id.*

<sup>13</sup> *Id.*

<sup>14</sup> Pedersen & Schneider, *supra* note 8, at 47.

<sup>15</sup> See Lorelei Laird, *Court systems rethink the use of financial bail, which some say penalizes the poor*, AM. BAR ASS'N J. (Apr. 1, 2016, 4:40 AM), [http://home.ubalt.edu/id86mp66/PTJC/SymposiumReadings/ABA\\_Courts\\_Rethink-Featuring\\_Shannan\\_Wise.pdf](http://home.ubalt.edu/id86mp66/PTJC/SymposiumReadings/ABA_Courts_Rethink-Featuring_Shannan_Wise.pdf).

<sup>16</sup> *Own recognizance*, CORNELL L. SCHOOL LEGAL INFO. INST., [https://www.law.cornell.edu/wex/own\\_recognizance\\_\(or\)](https://www.law.cornell.edu/wex/own_recognizance_(or)) (last updated July 2020).

<sup>17</sup> See 725 ILL. COMP. STAT. ANN. 5/110-5 (2023); see also N.J. STAT. ANN. § 2A:162-25(c)(2) (2021) (providing that both statutes give the option to set pretrial release conditions).

<sup>18</sup> Howe, *supra* note 2, at 1039.

the differences in the cash bail systems. It also addresses the risk assessments used in each state, even if not adopted statewide. Part IV makes recommendations to the current Illinois statutory framework by changing statute wording to impose a mandatory risk assessment tool. Along with the statutory change, Part IV proposes a risk assessment tool based on factors that the other systems use.

## II. A LOOK INTO THE CURRENT BAIL SYSTEMS ACROSS THE UNITED STATES

This Section introduces the current bail systems in a few jurisdictions and analyzes the pretrial statutes in Illinois, New York, and New Jersey. The reason for comparing cases among the three states is to highlight that New Jersey stands apart by moving away from cash bail and instead adopting risk assessment tools. In contrast, New York and Illinois have not yet introduced such tools.<sup>19</sup> However, these two states have adopted differing approaches in their bail provisions,<sup>20</sup> which will be elaborated upon in this Note.

It has been suggested that the United States is in a transitional phase of criminal justice.<sup>21</sup> Scholars and criminal justice experts argue that a more general consensus about mass incarceration and disproportionate effects on minorities has led legislators and grassroots efforts to petition for a change in pretrial detention.<sup>22</sup> Many changes have been spurred by recent killings of racial minorities and a renewed backlash against the criminal justice system as it disproportionately affects people of color.<sup>23</sup> Among the changes currently happening to the criminal justice system are bail reform and reforming the pretrial process.<sup>24</sup> Only a few states have moved away from cash bail.<sup>25</sup> Despite being in the minority, many more states have implemented risk assessment tools and reforms to their bail structure.<sup>26</sup> Many commentators have placed the current movement under the “third wave” of bail reform.<sup>27</sup> In petitioning for bail reform, many groups, such as the Illinois

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<sup>19</sup> Christopher Porrino and Elie Honig, *Commentary: Illinois bail reformers: New Jersey’s model works, plain and simple.*, CHICAGO TRIBUNE, (Feb 14, 2020, 5:52 PM), <https://www.chicagotribune.com/opinion/commentary/ct-opinion-bail-reform-new-jersey-model-porrino-honig-20200214-yrho7khot5glvn3mv4u4qxehu-story.html>.

<sup>20</sup> *Id.*

<sup>21</sup> See Van Brunt & Bowman, *supra* note 5, at 742.

<sup>22</sup> *Id.* at 742-43.

<sup>23</sup> See generally 725 ILL. COMP. STAT. ANN. 5/110-5 (2023); N.Y. CRIM. PROC. LAW § 510.10 (McKinney 2023); N.J. STAT. ANN. § 2A:162-25(c)(2) (2021).

<sup>24</sup> Van Brunt & Bowman, *supra* note 5, at 743.

<sup>25</sup> See generally 725 ILL. COMP. STAT. ANN. 5/110-5 (2023); N.Y. CRIM. PROC. LAW § 510.10 (McKinney 2023); N.J. STAT. ANN. § 2A:162-25(c)(2) (2021).

<sup>26</sup> JENS DAVID OHLIN, CRIMINAL PROCEDURE: DOCTRINE, APPLICATION, AND PRACTICE 850 (Rachel E. Barkow et al. eds., 2019).

<sup>27</sup> See Van Brunt & Bowman, *supra* note 5, at 742-43.

Black Caucus, have emphasized the need for a non-monetary basis for pretrial release.<sup>28</sup> Part of the issue among critics is that a significant number of individuals are needlessly detained pending trial simply because they cannot afford bail.<sup>29</sup> They also argue that wealthy individuals who may have committed the same or even worse crimes can get out of jail pending trial simply because they can afford it.<sup>30</sup>

Early into this new movement, several states made legislative movements to change their current systems.<sup>31</sup> For example, Illinois has moved to eliminate cash bail under the Pre-Trial Fairness Act (PFA).<sup>32</sup> Although Illinois is one of the few states that has moved away from cash bail, other states have yet to make such substantial changes.<sup>33</sup> Nationwide, states are moving away from a presumption of cash bail towards what is being considered a more fair system that does not discriminate based on wealth.<sup>34</sup> However, one major criticism regarding the current system and the newly adopted systems is that New York's new bail system only looks at whether the accused will appear in court without any consideration of likelihood to commit a new offense or potential harm to the community.<sup>35</sup> Another criticism is that some newly fashioned pretrial systems, like New Jersey, use algorithms to determine if an individual poses a flight risk or danger to the community.<sup>36</sup> However, this method poses bias concerns because the algorithms use data from historically biased cash bail systems.<sup>37</sup> Even with the concern of bias, the movement across the Nation is moving away from

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<sup>28</sup> Insha Rahman et al., *Black and Grassroots Advocates Help Illinois Make History with Bill to End Money Bail*, VERA (Jan. 29, 2021), <https://www.vera.org/news/black-and-grassroots-advocates-help-illinois-make-history-with-bill-to-end-money-bail>.

<sup>29</sup> *U.S. Commission on Civil Rights Releases Report: The Civil Rights Implications of Cash Bail*, U.S. COMM'N ON C.R. (Jan. 20, 2022), <https://www.usccr.gov/news/2022/us-commission-civil-rights-releases-report-civil-rights-implications-cash-bail>.

<sup>30</sup> See Liza Batkin, *Wealth-Based Equal Process and Cash Bail*, 96 N.Y.U. L. REV. 1549, 1571-73 (2021).

<sup>31</sup> See 725 ILL. COMP. STAT. ANN. 5/110-5 (2023); N.Y. CRIM. PROC. LAW § 510.10 (McKinney 2023); N.J. STAT. ANN. § 2A:162-25(c)(2) (2021).

<sup>32</sup> See Bail Reform Act of 2017, Pub. Act 100-1, 2017 Ill. Laws 1.

<sup>33</sup> See N.Y. CRIM. PROC. LAW § 510.10 (McKinney 2023) (stating New York statute that can still have cash bail "authorized"); see also N.J. STAT. ANN. § 2A:162-25(c)(2) (2021) (providing that New Jersey statute allows for a defendant to be "released on monetary bail").

<sup>34</sup> See Stuart Rabner, Opinion, *Chief justice: Bail reform puts N.J. at the forefront of fairness*, STAR-LEDGER GUEST COLUMNIST (Jan. 9, 2017, 9:33 AM), [https://www.nj.com/opinion/2017/01/nj\\_chief\\_justice\\_bail\\_reform\\_puts\\_nj\\_at\\_the\\_forefr.html](https://www.nj.com/opinion/2017/01/nj_chief_justice_bail_reform_puts_nj_at_the_forefr.html).

<sup>35</sup> See Sonia M. Gipson Rankin, *Technological Tethereds: Potential Impact of Untrustworthy Artificial Intelligence in Criminal Justice Risk Assessment Instruments*, 78 WASH. & LEE L. REV. 647, 685 (2021); see also Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT'G. REP. 237, 237 (2015) (arguing that risk is based on prior criminal history and that criminal history has been often based on race).

<sup>36</sup> N.J. STAT. ANN. § 2A:162-16 (2017).

<sup>37</sup> See Sonia M. Gipson Rankin, *Technological Tethereds: Potential Impact of Untrustworthy Artificial Intelligence in Criminal Justice Risk Assessment Instruments*, 78 WASH. & LEE L. REV. 647, 685 (2021).

cash bail, and many states are testing out different systems to try and find out what works best.<sup>38</sup>

#### A. Illinois

Prior to January 1, 2023, Illinois traditionally implemented a cash bail system.<sup>39</sup> The reconfiguration of bail and pretrial release in Illinois came in a series of bills and legislation titled the Illinois Safety, Accountability, Fairness and Equity-Today, otherwise known as the “SAFE-T Act,”<sup>40</sup> which was enacted to improve Illinois’ current criminal justice system by lessening the effects on racial minorities.<sup>41</sup> Encompassed within the SAFE-T Act is a Section called the “Pretrial Fairness Act,” which is devoted entirely to pretrial procedures.<sup>42</sup> In an attempt to make sweeping changes, Illinois reconfigured its bail system by moving away from a focus on a person’s wealth and ability to pay to a system that instead evaluates pretrial release based on the defendant’s threat to public safety or risk of failure to appear at future proceedings.<sup>43</sup> However, with recent amendments to the bail and pretrial release statutes, the original SAFE-T Act was incomplete.<sup>44</sup> The 2017 Act was incomplete because it only allowed for a presumption against setting money bail based on an individual’s ability to pay instead of eliminating cash bail.<sup>45</sup> Following the enactment of the 2017 Act, the Illinois Legislative Black Caucus pushed for further reform, which many contributed to the Black Lives Matter Movement following the recent line of killings and discriminatory practices against minorities.<sup>46</sup> The Illinois legislature subsequently contributed its decision to act, in a grand attempt to address the deeply-rooted problems in Illinois’ criminal justice system, to the pretrial phase, which disproportionately affected the poor and persons of color.<sup>47</sup>

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<sup>38</sup> See Lorelei Laird, *Court systems rethink the use of financial bail, which some say penalizes the poor*, AM. BAR ASS’N J. (Apr. 1, 2016, 4:40 AM), [http://home.ubalt.edu/id86mp66/PTJC/SymposiumReadings/ABA\\_Courts\\_Rethink-Featuring\\_Shannan\\_Wise.pdf](http://home.ubalt.edu/id86mp66/PTJC/SymposiumReadings/ABA_Courts_Rethink-Featuring_Shannan_Wise.pdf).

<sup>39</sup> 725 ILL. COMP. STAT. ANN. 5/110-5 (2023).

<sup>40</sup> Jessica Reichert et al., *The 2021 SAFE-T Act: ICJIA Roles and Responsibilities*, ILL. CRIM. JUST. INFO. AUTH. (July 15, 2021), <https://icjia.illinois.gov/researchhub/articles/the-2021-safe-t-act-icjia-roles-and-responsibilities>.

<sup>41</sup> See Bail Reform Act of 2017, Pub. Act 100-1, 2017 Ill. Laws 1.

<sup>42</sup> See *id.*

<sup>43</sup> See *id.*

<sup>44</sup> See Safety, Accountability, Fairness and Equity-Today Act, Pub. Act 101-652, § 10-255, 2019 Ill. Laws 652.

<sup>45</sup> “There shall be a presumption that any conditions of release imposed shall be non-monetary in nature and the court shall impose the least restrictive conditions...” Bail Reform Act of 2017, Pub. Act 100-1, ch. 5, sec. 110-5, 2017 Ill. Laws 1.

<sup>46</sup> Raymon Troncoso, *Lame Duck Look Back: How the Black Caucus passed criminal justice reform*, CAPITOL.NEWS ILL. (Jan. 21, 2021), <https://www.capitolnewsillinois.com/NEWS/lame-duck-look-back-how-the-black-caucus-passed-criminal-justice-reform>.

<sup>47</sup> See Van Brunt & Bowman, *supra* note 5, at 709.

During a “lame duck” session,<sup>48</sup> the Illinois Legislative Black Caucus, aided by member and State Representative Justin Slaughter, pushed the current pretrial release program through the Illinois General Assembly (IGA).<sup>49</sup> In 2021, the IGA signed the “SAFE-T Act” into law.<sup>50</sup> With a focus on racial equity in the criminal justice system, the Supreme Court Commission on Pretrial Practices analyzed many methods across the United States to create a report that would guide legislators in creating reform.<sup>51</sup>

Although enacted in 2021, the Illinois Democrats and bill sponsor, Representative Justin Slaughter, allowed for a two-year period before the law became operational.<sup>52</sup> However, on January 1, 2023, the execution of abolishing the option for cash bail was put on hold.<sup>53</sup> During the two-year waiting period before the Act went into effect, sixty-three counties filed suit against the State, arguing that the legislation was unconstitutional as it allegedly violated the Separation of Powers Clause found in Article II of the Constitution of the State of Illinois.<sup>54</sup> On December 28, 2022, the Kankakee County Court ruled, finding that the Act was unconstitutional because setting bail is within the power of the courts and, thus, violates the Separation of powers and the Illinois Constitution.<sup>55</sup> Because of this ruling, the provisions of the SAFE-T Act dealing with pretrial release would not go into effect in those counties that filed suit.<sup>56</sup> Fearing chaos and differing treatment across the state, the Illinois Supreme Court issued a stay in implementing the Act.<sup>57</sup> The Illinois Supreme Court heard arguments on the SAFE-T Act on March 14, 2023.<sup>58</sup> On July 18, 2023, the Illinois Supreme Court released its decision

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<sup>48</sup> A lame duck session is the time period after an election and before the newly elected take office. *Lame Duck Session*, POL. DICTIONARY, <https://politicaldictionary.com/words/lame-duck-session/> (last visited Sep. 4, 2023).

<sup>49</sup> Grace Kinnicutt, *What's in the SAFE-T Act? A look at the 2021 criminal justice reform and how it has evolved*, CAPITOL NEWS. ILL. (May 18, 2022), <https://www.capitolnewsillinois.com/NEWS/whats-in-the-safe-t-act-a-look-at-the-2021-criminal-justice-reform-and-how-it-has-evolved>.

<sup>50</sup> See Safety, Accountability, Fairness and Equity-Today Act, Pub. Act 101-652, 2019 Ill. Laws 652.

<sup>51</sup> Pedersen & Schneider, *supra* note 8, at 46.

<sup>52</sup> Transcript of Debates, HB 3653, Illinois House of Rep. 101st Gen. Assemb., Reg. Sess., Jan 13, 2021, at 9, <https://www.ilga.gov/house/transcripts/htrans101/10100104.pdf>.

<sup>53</sup> See Safety, Accountability, Fairness and Equity-Today Act, Pub. Act 101-652, 2019 Ill. Laws 652 (providing the act reforms a variety of aspects of the criminal justice system, with the major source of contention coming to the section specifically on bail reform).

<sup>54</sup> Clarissa Cowley & Ryan Henson, *Illinois Supreme Court puts SAFE-T Act on hold, cash bail still in effect: The Illinois Supreme Court announced that the new SAFE-T act would not go into effect on Jan. 1.*, 5 ON YOUR SIDE (Dec. 31, 2022, 7:02 PM), <https://www.ksdk.com/article/news/politics/illinois-safe-t-act-ruled-unconstitutional-headed-to-illinois-supreme-court/63-f33fa8ed-ff30-4f25-b00c-7613f5a307a6>.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Order at 1, *In re People ex rel. Berlin v. Raoul*, 2022 IL 129249.

<sup>58</sup> Patrick Keck, *Illinois Supreme Court justices hear debate over the constitutionality of SAFE-T Act*, STATE J. REG. (March 15, 2023, 12:33 PM), <https://www.sj-r.com/story/news/politics/state/2023/03/14/illinois-supreme-court-hears-arguments-for-and-against-end-of-cash-bail/70004376007/>.

upholding the Statute with a finding that it did not facially violate any part of the State Constitution.<sup>59</sup> The Act would then go into effect on September 18, 2023, after the Supreme Court granted sixty additional days before its implementation.<sup>60</sup>

Because the new law is early into its implementation, what it means for pretrial detention has yet to be determined.<sup>61</sup> The General Assembly proposed one option where the Illinois Supreme Court could adopt a risk-assessment tool to determine bail for a defendant by considering the likelihood of appearance in court and if the defendant poses a threat to persons.<sup>62</sup> However, as of September 2023, the Supreme Court has not yet created such a tool.<sup>63</sup> Alternatively, it is argued that the judge is the fact-finder and ultimately decides whether an individual should be detained.<sup>64</sup> This likely leaves some of the same problems as highlighted in the previous bail system because the bias of an individual judge can still be a factor; however, now, individuals will be detained without the option of money bail.<sup>65</sup> Without the money bail option,<sup>66</sup> it might be necessary for the State to alter its approach by adopting a tool or set of resources that can help evaluate and decide these risks that have traditionally been decided on a monetary basis.<sup>67</sup>

## B. New York

Like many states, New York changed its bail laws in light of movements to end racial and wealth disparities of those released on cash bail.<sup>68</sup> In large metropolitan areas, like New York City, the movement gained popularity due to the concentrated minority groups that bail laws primarily affect.<sup>69</sup> In 2019, the New York legislature passed a bill that eliminated cash bail for certain crimes.<sup>70</sup> One example that impacted those pushing for bail

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<sup>59</sup> Rowe v. Raoul, 2023 IL 129248.

<sup>60</sup> *Id.* at ¶ 52.

<sup>61</sup> Grace Kinnicutt, *What's in the SAFE-T Act? A look at the 2021 criminal justice reform and how it has evolved*, CAPITOL NEWS ILL. (May 18, 2022), <https://www.capitolnewsillinois.com/NEWS/whats-in-the-safe-t-act-a-look-at-the-2021-criminal-justice-reform-and-how-it-has-evolved>.

<sup>62</sup> 725 ILL. COMP. STAT. ANN. 5/110-6.4 (2023).

<sup>63</sup> *Id.* (authorizing statute); see also *Supreme Court*, ILL. CTS., <https://www.illinoiscourts.gov/courts/supreme-court/> (last visited Sep. 9, 2023) (showing Illinois Supreme Court website has no guidance on pretrial risk assessment tools).

<sup>64</sup> 725 ILL. COMP. STAT. ANN. 5/110-6.4 (2023).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Josefa Velasquez & Rachel Holliday Smith, *Why is New York's Bail Reform So Controversial?* THE CITY (Feb. 21, 2022, 6:03 PM), <https://www.thecity.nyc/2022/2/21/22944871/new-york-bail-reform-controversy-eric-adams>.

<sup>69</sup> *Id.*

<sup>70</sup> N.Y. CRIM. PROC. LAW § 510.10 (McKinney 2023).

reform in New York was the detainment of Kalief Browder, a young Black man who was arrested for stealing a backpack and later charged with robbery, grand larceny, and assault.<sup>71</sup> The significance of Browder's case in New York pertains to the location where Browder was held.<sup>72</sup> Browder was detained at Riker's Island, known for being one of America's most notorious and brutal jails.<sup>73</sup> For example, from 2000 to 2022, 445 detainees died in New York City Jails, with many coming from Rikers.<sup>74</sup> Browder, who came from a low-income family, did not have the funds to pay for his release pending trial and spent three years at Rikers until his case was dismissed.<sup>75</sup> A few years later, Browder committed suicide due to the lasting effects from his experience with the criminal justice system.<sup>76</sup>

Unlike Illinois, the legislature has taken a different approach to bail reform in New York.<sup>77</sup> Instead of eliminating cash bail, New York has eliminated cash bail for only "non-qualifying offenses."<sup>78</sup> However, in every case, the court starts with a presumption that all defendants are to be released on their own recognizance unless the court finds that the defendant poses a flight risk that would cause a non-appearance at the court proceedings.<sup>79</sup> Release on a defendant's own recognizance allows one to be released without any formal conditions or posting of a bond in exchange for a written promise that the defendant will show up to future court proceedings.<sup>80</sup> Besides the apparent benefit to the defendant by not having to pay to be released or pay for some other form of supervision, a release on one's own recognizance saves government resources and taxpayer dollars.<sup>81</sup> However, absent from

<sup>71</sup> Benjamin Weiser, *Kalief Browder's Suicide Brought Changes to Rikers. Now It Has Led to a \$3 Million Settlement*, N.Y. TIMES (Jan. 24, 2019), <https://www.nytimes.com/2019/01/24/nyregion/kalief-browder-settlement-lawsuit.html>.

<sup>72</sup> *Id.*

<sup>73</sup> John J. Lennon, *The Brutal Reality of Life in America's Most Notorious Jail*, ATL. (Jan. 23, 2023), <https://www.theatlantic.com/books/archive/2023/01/rikers-island-oral-history-book-review/672795/>.

<sup>74</sup> Daphne Ho, *Death Rates on Rikers Island Raises Concerns about Incarcerated Prisoners, Particularly Black and Brown*, THE DAVIS VANGUARD (Mar. 5, 2023), <https://www.davisvanguard.org/2023/03/death-rates-on-rikers-island-raises-concerns-about-incarcerated-prisoners-particularly-black-and-brown/>.

<sup>75</sup> Benjamin Weiser, *Kalief Browder's Suicide Brought Changes to Rikers. Now It Has Led to a \$3 Million Settlement*, N.Y. TIMES (Jan. 24, 2019), <https://www.nytimes.com/2019/01/24/nyregion/kalief-browder-settlement-lawsuit.html>.

<sup>76</sup> *Id.*

<sup>77</sup> N.Y. CRIM. PROC. LAW § 510.10 (McKinney 2023).

<sup>78</sup> N.Y. CRIM. PROC. LAW § 510.10(3) (McKinney 2023) (citing "In cases other than described in subdivision four... the court shall release the principle pending trial on the principal's own recognizance... [or] the court shall release the principal under non-monetary conditions."); *see also* N.Y. CRIM. PROC. LAW § 510.10(4) (McKinney 2023) (citing "a qualifying offense is a felony.").

<sup>79</sup> N.Y. CRIM. PROC. LAW § 510.10 (McKinney 2023).

<sup>80</sup> *Own recognizance*, CORNELL L. SCHOOL LEGAL INFO. INST., [https://www.law.cornell.edu/wex/own\\_recognizance\\_\(or\)](https://www.law.cornell.edu/wex/own_recognizance_(or)) (last updated July 2020).

<sup>81</sup> Kerrie Webb, *Chapter 520: Limiting Release on Own Recognizance*, 30 MCGEORGE L. REV. 579, 582 (1999).



the New York pretrial release law is the ability for a court to detain an individual for the threat of physical harm to a person or persons in the community.<sup>82</sup>

Under New York law, the pretrial service agencies may use an “instrument or tool” to determine pretrial release.<sup>83</sup> However, the authorizing statute does not mandate that courts use such a tool to guide their decision-making in pretrial release.<sup>84</sup> Because the statute does not mandate or even strongly suggest using a tool, New York courts have not adopted a statewide tool, nor is there likely to be funding to do so.<sup>85</sup> Like other states, the statute limits the risk assessment tool from discriminating based on “race, national origin, sex, or any other protected class.”<sup>86</sup> Moreover, the statute emphasizes the empirical validation and revalidation of a risk assessment tool or instrument.<sup>87</sup> This indicates that the legislature recognized the potential benefits of incorporating such a tool, even though they lacked a clear understanding of the process for its adoption and its essential components.<sup>88</sup> Although the state has not yet adopted a risk assessment tool for the entire state to use,<sup>89</sup> New York City, through its Criminal Justice Agency (CJA), has adopted a risk assessment tool that CJA employees utilize to interview detainees and provide the information to the judge at the next court date.<sup>90</sup>

### C. New Jersey

New Jersey’s Statute provides that a defendant can be detained with a “complaint-warrant” by standards governing crimes that the Attorney General sets forth.<sup>91</sup> Once an eligible defendant is detained with a complaint-warrant, the defendant is held for a brief period, not longer than 48 hours, to allow pretrial services to evaluate the defendant’s risk using a risk-assessment tool and for a court to make a decision.<sup>92</sup> The trial court then can set monetary bond, nonmonetary conditions of release, release on the

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<sup>82</sup> N.Y. CRIM. PROC. LAW § 510.10 (McKinney 2023) (stating Sub section (1) of lists a series of factors to hold an individual and future threat of harm to an individual is not listed).

<sup>83</sup> *Id.* at § 510.45.

<sup>84</sup> *Id.* (providing that the absence of language such as “shall” or “must” lends an inference that it gives courts broad discretion in choosing whether they implement such a tool).

<sup>85</sup> *Pretrial Release: Risk Assessment Tools*, NAT’L CONF. STATE LEG. (June 30, 2022), <https://www.ncsl.org/civil-and-criminal-justice/pretrial-release-risk-assessment-tools#:~:text=Idaho%20and%20New%20York%20are,any%20jurisdiction%20that%20uses%20one>.

<sup>86</sup> N.Y. CRIM. PROC. LAW § 510.45 (McKinney 2023).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Vincent M. Southerland, *The Intersection of Race and Algorithmic Tools in the Criminal Legal System*, 80 MD. L. REV. 487, 543 (2021).

<sup>90</sup> *Release Assessment Forms*, N.Y.C. CRIM. JUST. AGENCY, <https://www.nycja.org/ra-court-forms> (last visited Aug. 22, 2023).

<sup>91</sup> N.J. STAT. ANN. § 2A:162-16 (2017).

<sup>92</sup> *Id.*

defendant's own recognizance, or if the court does not find any of the above means compelling, the court can order the defendant detained pending trial.<sup>93</sup> The key distinction between New Jersey and other states is that New Jersey requires a risk assessment tool and that it be used for each defendant.<sup>94</sup>

Although many states have some risk assessment tools, a few have utilized risk assessments more than others in assessing pre-trial release under new bail reform legislation.<sup>95</sup> For example, under New Jersey law, "the Administrative Director of the Courts shall establish and maintain a Statewide Pretrial Services Program which shall provide pretrial services to effectuate the purposes [of pretrial release]."<sup>96</sup> The risk assessment is to be completed "in no case later than 48 hours" after arrest.<sup>97</sup> New Jersey requires that the risk assessment be "objective, standardized, and developed based on analysis of empirical data and risk factors relevant to the risk of failure to appear in court when required and the danger to the community while on pretrial release."<sup>98</sup>

Currently, these tools are fairly new in across-the-board implementation; therefore, there needs to be more data to know whether these tools are truly objective.<sup>99</sup> However, research continues to evaluate and improve these measures as time progresses.<sup>100</sup> Along with the Administrative Director of the Court's decision on how the risk assessment tool is structured, New Jersey also requires that the risk assessment include demographic data "including, but not limited to, race, ethnicity, gender, financial resources, and socio-economic status."<sup>101</sup> Although demographic information is to be included, discrimination based on such information is prohibited.<sup>102</sup>

Since adopting the new law in 2017, New Jersey adopted a risk assessment tool to enforce it.<sup>103</sup> To accomplish the objectives of the law, the state enacted the Public Safety Assessment (PSA),<sup>104</sup> developed by Arnold

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at § 2A:162-25.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at § 2A:162-25(a).

<sup>97</sup> N.J. STAT. ANN. § 2A:162-25(b) (2021).

<sup>98</sup> *Id.* at § 2A:162-25 (stating the statute does not define what empirical data is, but the suggestion is that it is based on experience and research of factors and other risk assessments, specifically by Arnold Ventures).

<sup>99</sup> *Strengthening data-driven pretrial release in New Jersey* NAT'L INST. OF JUST. (Oct. 21, 2021), <https://nij.ojp.gov/funding/awards/15pnij-21-gg-02806-ress>.

<sup>100</sup> *Id.*

<sup>101</sup> N.J. STAT. ANN. § 2A:162-25(c)(2) (2021).

<sup>102</sup> *Id.*

<sup>103</sup> Laura & John Arnold Found., *Public Safety Assessment New Jersey Risk Factor Definitions - December 2018*, N.J. CTS., Dec. 2018, at 1.

<sup>104</sup> The PSA is a "actuarial assessment that estimates failure to appear in court pretrial, new criminal arrest while on pretrial release, and new violent criminal arrest while on pretrial release." *About the Public Safety Assessment*, ADVANCING PRETRIAL POL'Y & RSCH, <https://advancingpretrial.org/psa/about/> (last visited Aug. 22, 2023).

Ventures.<sup>105</sup> Although developed by an outside source, the PSA has been modified to reflect the requirements of New Jersey law.<sup>106</sup> The PSA looks at three categories: new criminal activity, new violent criminal activity, and failure to appear.<sup>107</sup> Of these three categories, the Assessment uses nine risk factors, including (1) age at current arrest; (2) current violent offense; (3) pending charge at the time of offense; (4) prior disorderly persons conviction; (5) prior indictable conviction; (6) prior violent conviction; (7) prior failure to appear pretrial in past two years; (8) prior failure to appear pretrial older than two years; and (9) prior sentence to incarceration.<sup>108</sup> Once the information is gathered on an individual, the PSA weights each factor and assigns different point values to the specific defendant and circumstance.<sup>109</sup> These calculations are, then, arranged on a scale of one to six in the three separate categories, a lower score signaling that a defendant is less likely to re-offend and should be released pending trial.<sup>110</sup>

### III. A CASE COMPARISON BETWEEN NEW JERSEY, NEW YORK, AND ILLINOIS.

This Section will take a closer look at the impacts of bail reform in certain jurisdictions, including New Jersey, New York, and Illinois, while also considering risk assessment tools and factors. This Note aims to determine the empirical risk assessment factors and tools that have been successful in other jurisdictions that could guide Illinois in adopting a risk assessment and works to create a more fair and just pretrial procedure. To determine the success of these tools and factors, this Note evaluates the impacts on specific states' jails and criminal justice systems. While Illinois eliminated cash bail and New York has partially eliminated cash bail for qualifying offenses, New Jersey has not yet implemented such measures; instead, it modified its bail system to offer a more "just" pretrial detention service.<sup>111</sup>

Risk assessment tools are state-adopted algorithms that determine a defendant's risk.<sup>112</sup> The idea behind these assessments is that instead of

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<sup>105</sup> *Pretrial Risk Assessment Now Available to All Interested Jurisdictions; Research Advisory Board Announced* ARNOLD VENTURES (July 11, 2018), <https://www.arnoldventures.org/newsroom/laura-and-john-arnold-foundation-makes-pretrial-risk-assessment-available-to-all-jurisdictions-announces-expert-panel-to-serve-as-pretrial-research-advisory-board>.

<sup>106</sup> Laura & John Arnold Found., *supra* note 103, at 1.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *About the Public Safety Assessment*, ADVANCING PRETRIAL POL'Y & RSCH, <https://advancingpretrial.org/psa/factors/> (last visited Aug. 22, 2023).

<sup>110</sup> *Id.*

<sup>111</sup> N.J. STAT. ANN. § 2A:162-16 (2017).

<sup>112</sup> Rankin, *supra* note 37, at 685.

having a judge decide whether to allow release, which is likely subject to bias, these objective algorithms can provide a more equitable outcome across all individuals regardless of their subjective attributes, such as the ability to pay.<sup>113</sup> Therefore, along with determining whether someone will appear in court, these risk assessment tools can help determine whether or not someone is likely to recommit a crime.<sup>114</sup>

Although it seems good on its face, opponents argue that the algorithm used to create these assessments might contain implicit bias that affects society without recognizing such bias.<sup>115</sup> The idea of this bias is quite simple in that the creators of the algorithms need to start somewhere and create a baseline for their new tool.<sup>116</sup> In doing so, the algorithms' creators use the information they already have.<sup>117</sup> This information is rooted in historical data and reflects the typical behavior of offenders and society's desire to maintain control.<sup>118</sup> This issue, as it is being argued, is that the criminal justice system disproportionately affects people of color and those of lower socio-economic class.<sup>119</sup> With many criticizing the tool's use, the focus on the prevention of crime has shifted to how the creation of these risk-assessment tools has resulted in a discriminatory impact on society's social and implicit bias.<sup>120</sup> Although there is potential for a discriminatory effect, it is also possible that the creation of risk-assessment tools in Illinois would not be burdened with implicit bias.<sup>121</sup> This is because the legislature and courts already recognize these biases by eliminating cash bail.<sup>122</sup>

#### A. New Jersey and the Arnold Tool

While not perfect, the PSA used in New Jersey can decrease pretrial detention for individuals who may not pose a serious or dangerous threat to the community.<sup>123</sup> Before New Jersey adopted the PSA, a study found that 17.6% of individuals in jails were held pretrial for drug-related offenses, the

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<sup>113</sup> *Id.*

<sup>114</sup> Pamela Cravez, *Pretrial Risk Assessment Tool Developed for Alaska*, 34 ALASKA JUST. F. 1, 1 (2018).

<sup>115</sup> Kia Rahnama, *Science and Ethics of Algorithms in the Courtroom*, 2019 J.L. TECH. & POL'Y 169, 175 (2019).

<sup>116</sup> *Id.* at 176.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 177.

<sup>120</sup> See generally N.J. STAT. ANN. § 2A:162-25(c)(2) (2017) (stating New Jersey Statute recognizing that there may be bias and accounting for it).

<sup>121</sup> Transcript of Debates, HB 3653, Illinois House of Rep. 101st Gen. Assemb., Reg. Sess., Jan 13, 2021, at 9. (statement of Rep. Slaughter).

<sup>122</sup> *Id.*

<sup>123</sup> Andrea Coppola, *RE: The Pretrial Risk Assessment—How New Jersey's Bail Overhaul is Shaping Bail Reform Across the Country*, 27 CARDOZO J. EQUAL RTS. & SOC. JUST. 87, 99 (2020).

highest category of offenses individuals were held for.<sup>124</sup> The same study found that 38.5% of New Jersey's jail population had the option to post bail but could not due to financial circumstances.<sup>125</sup> Thus, prior to the adoption of bail reform in New Jersey in 2012, the jail population was around 15,000 persons.<sup>126</sup>

After the adoption of the Act in 2017, the jail population continued to decrease to around 8,500 persons.<sup>127</sup> The jail population continued to decline until the COVID-19 pandemic began and caused the progress on the implementation of bail reform in New Jersey to slow.<sup>128</sup> However, as the pandemic becomes less problematic, the jail population has continued to decrease, and in late 2021, the population was around 8,600 persons.<sup>129</sup> While the bail reform and implementation of the PSA in New Jersey have undoubtedly reduced the jail populations, the majority of those who are still detained are charged with what is deemed the most significant of charges, including crimes that involve murder and firearms.<sup>130</sup>

Along with the decrease in jail populations that helped alleviate New Jersey's costs, including housing and resources, court appearance rates have not decreased.<sup>131</sup> According to the annual report, at the start of implementing the new bail system and the PSA, New Jersey saw around 90% of court appearance rates.<sup>132</sup> In 2020, however, part of the 97% increase may be attributed to COVID-19 and the adoption of many virtual sessions, defeating many fears that defendants would not appear in court if they did not pay bail.<sup>133</sup>

Moreover, nationwide concerns about new bail reform laws are rooted in lack of access to funding and the inability to "process"<sup>134</sup> defendants in the typical timeframe mandated by statutes.<sup>135</sup> The concern about inability to

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<sup>124</sup> MARIE VANNOSTRAND, *NEW JERSEY JAIL POPULATION ANALYSIS: IDENTIFYING OPPORTUNITIES TO SAFELY AND RESPONSIBLY REDUCE THE JAIL POPULATION* 12 (U.S. Dep't of Just. Off. of Just. Programs ed., 2013).

<sup>125</sup> *Id.* at 13.

<sup>126</sup> *Id.* at 2.

<sup>127</sup> GLENN A. GRANT, *ANNUAL REPORT TO THE GOVERNOR AND LEGISLATURE* 25 (N.J. Courts ed., Crim. Just. Reform ed. 2021).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 51.

<sup>131</sup> *Id.* at 18.

<sup>132</sup> *Id.*

<sup>133</sup> GLENN A. GRANT, *ANNUAL REPORT TO THE GOVERNOR AND LEGISLATURE* 3 (N.J. Courts ed., Crim. Just. Reform ed. 2021).

<sup>134</sup> Sarah Williams, *Police Booking Procedure*, FINDLAW, <https://www.findlaw.com/criminal/criminal-procedure/booking.html> (last visited Aug. 18, 2023) (stating a person arrested is processed to obtain "vital information" which includes the "suspect's name, contact information, the nature of the alleged crime (including the code section), and other vital statistics.").

<sup>135</sup> *What Does the Elimination of Cash Bail Mean for Illinois Jurisdictions?*, THE CIVIC FED'N., (Oct. 21, 2022), <https://www.civiced.org/civic-federation/blog/what-does-elimination-cash-bail-mean->

meet the “processing” deadlines is mostly unfounded as New Jersey’s findings suggest that 98.8% of defendants had their first appearance within the mandated forty-eight-hour period.<sup>136</sup> Even if a statute were to require the stricter twenty-four-hour period, which Illinois imposes in a very limited amount of offenses, New Jersey shows that it successfully processed 76.8% of defendants through the initial hearing within twenty-four hours.<sup>137</sup> The idea behind a stricter time period is to ensure that the person arrested keeps as much personal freedom intact while upholding the rule of law.<sup>138</sup> Thus, it is apparent from the reports and data that the PSA New Jersey has implemented decreased jail populations while maintaining court appearance rates, which is the goal of many of these bail reform and risk assessment agendas.<sup>139</sup>

Lastly, New Jersey has not eliminated cash bail but has instead created a presumption against it.<sup>140</sup> The legislatively created presumption encourages a judge to release a defendant unless the prosecutor can show that the case involves a defendant who may threaten the community or pose a flight risk.<sup>141</sup> While having a presumption against cash bail, New Jersey courts have ordered cash bail in twenty-three cases, thus showing that the presumption against using cash bail is powerful.<sup>142</sup> Even within the cases where cash bail was used, nineteen were ordered after a defendant violated his or her pretrial release based on one of the other release conditions.<sup>143</sup> Thus, while many states, including New Jersey, intentionally move away from cash bail, the better option may be to create a strong presumption as evidenced in New Jersey because it maintains the option for those rare cases in which cash bail may achieve the results of getting defendants back into court and preventing them from being a threat to the community.<sup>144</sup>

Notwithstanding all the data and statistics showing the PSA’s benefit in New Jersey, the PSA is admittedly imperfect in some cases.<sup>145</sup> Early in 2017, a New Jersey judge released a defendant charged with gun crimes who killed

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Illinois-jurisdictions (stating in Illinois, courts are statutory allowed to keep 10% of fees, but usually the rest (90%) goes to fines and fees, accounting for nearly \$83 million per year).

<sup>136</sup> Grant, *supra* note 127, at 35.

<sup>137</sup> *Id.*

<sup>138</sup> *Urging the Recognition of Right to Counsel at Initial Appearance*, NAT’L ASS’N OF CRIM. DEF. LAWYERS, (Feb. 19, 2012), <https://www.nacdl.org/Content/Urging-the-Recognition-of-Right-to-Counsel-at-Init>.

<sup>139</sup> Grant, *supra* note 127, at 37.

<sup>140</sup> N.J. STAT. ANN. § 2A:162-25 (2021).

<sup>141</sup> *Id.*

<sup>142</sup> Grant, *supra* note 127, at 37.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> Joseph P. Smith, *Case advances against Vineland man in drive-by shooting*, DAILY J. (Dec. 21, 2017, 2:33 PM), <https://www.thedailyjournal.com/story/news/2017/12/21/case-advances-against-vineland-man-drive-shooting/971777001/>.

an individual the following day.<sup>146</sup> In *Rodgers v. Laura & John Arnold Found.*, the mother of the victim sued the Arnold Foundation under product liability, suggesting that the Public Safety Assessment that the Foundation created was a product that failed to meet the safety standard of preventing those who threaten the community out on release under New Jersey law.<sup>147</sup> The court dismissed the lawsuit as the PSA “constitutes information, guidance, ideas, and recommendations.”<sup>148</sup> After *Rodgers*, the PSA and pretrial services received criticism that the risk assessment tools interfere with the judge’s role in the courtroom.<sup>149</sup>

### B. New York and the Abolishment of Bail for Certain Crimes

Since adopting the Bail Reform Act of 2019, New York has seen increased crime.<sup>150</sup> Some argue that the state’s new bail reform, suggesting that releasing individuals and not allowing the judge to evaluate the defendant’s risk to the community, has allowed defendants the opportunity to commit additional crimes while waiting for trial.<sup>151</sup> However, a recent study conducted and provided by the State of New York has not found any correlation between the increased crime rates and the new law.<sup>152</sup> In another study by Jim Quinn, it was found that crime increased in the time frame before the enactment of the new law and when the pandemic started, roughly in the spring of 2020.<sup>153</sup> Crime has also increased in New York since the new law’s passage by more than 20% for all crimes, and other crimes have increased significantly more, such as burglary at a 26.5% increase and car theft at a 68% increase.<sup>154</sup> Although not necessarily correlated to the new law, the bail reform has not successfully decreased crime.<sup>155</sup> On the other hand, it has also been found that crime was decreasing before adopting bail reform in New York.<sup>156</sup> Even after the decline of the COVID-19 pandemic, crime was still on the rise and jumped higher than the crime rates during the

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<sup>146</sup> *Id.*

<sup>147</sup> *Rodgers v. Laura & John Arnold Found.*, Civil Action No. 17-5556, WL at 1 (D.N.J. June 11, 2019).

<sup>148</sup> *Id.* at 7.

<sup>149</sup> Rankin, *supra* note 37, at 705.

<sup>150</sup> Ames Grawert & Noah Kim, *The Facts on Bail Reform and Crime Rates in New York State*, BRENNEN CTR. FOR JUST. (May 9, 2023), <https://www.brennancenter.org/our-work/research-reports/facts-bail-reform-and-crime-rates-new-york-state>.

<sup>151</sup> *Id.*

<sup>152</sup> Joshua Solomon, *GOP questions state’s bail data; updated data show 2% of bail offenses led to rearrests on violent felonies*, TIMES UNION (Jan.12, 2022), <https://www.timesunion.com/state/article/GOP-calls-into-question-state-s-actions-on-bail-16768206.php>.

<sup>153</sup> Jim Quinn, *More Criminals, More Crime: Measuring the Public Safety Impact of New York’s 2019 Bail Law*, THE MANHATTAN INST., July 2022, at 1, 7.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 1, 10.

pandemic.<sup>157</sup> Because of the increased crime and a lack of decrease in jail populations, it suggests that the way New York went about bail reform was not a success.<sup>158</sup>

Due to the increases in crime and the cash bail reform failure to address the more significant issues, New York has implemented several amendments to the original 2019 bill to address the bill's failures.<sup>159</sup> These changes primarily include adding more qualifying offenses.<sup>160</sup> Compared to other states, New York is unique in that its judges must not consider the potential effect of a detainee's release on public safety, nor should they consider the defendant's risk of re-offending.<sup>161</sup> It is still too early to tell if these amendments will succeed, but creating more qualifying offenses will likely increase the jail population, an outcome that bail reform was trying to prevent.<sup>162</sup>

The Division of Criminal Justice Services data finds that New York's bail system is not achieving the results of appearance and decreased jail populations compared to New Jersey.<sup>163</sup> In the past few years, New York's failure to appear percentage has been 9% in New York City and 18% across the rest of the state.<sup>164</sup> However, policymakers should be careful in relying heavily on this data, considering New York officials prepare it.<sup>165</sup> This might be deceptive, as the overall percentage of defendants who were rearrested while their cases were pending stands at 20%, and this particular figure is not factored into the calculation of the reported 9% and 18%.<sup>166</sup> Since one in five defendants will be rearrested pending trial, there could likely be a connection between that high percentage and the bail statute since it excludes consideration of the likelihood of committing more offenses and public safety.<sup>167</sup> It is apparent from these numbers, commentary, and new legislative enactments that New York's bail reform has not achieved its desired goals.<sup>168</sup> The crime rate is up, the jail populations have not decreased significantly, and the failure to appear is between 9-18% or higher if those who are

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<sup>157</sup> *Id.* at 1, 7.

<sup>158</sup> *Id.* at 1, 10.

<sup>159</sup> Jim Quinn, *More Criminals, More Crime: Measuring the Public Safety Impact of New York's 2019 Bail Law*, THE MANHATTAN INST., July 2022, at 1, 11.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> N.Y. STATE DIV. OF CRIM. JUST. SERVS., SUPPLEMENTAL PRETRIAL RELEASE SUMMARY TABLES 2019-2021 16 (Off. of Just. Rsch. And Performance ed., 2022).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> Quinn, *supra* note 153, at 1, 15; DIV. OF CRIM. JUST. SERVS., SUPPLEMENTAL PRETRIAL RELEASE SUMMARY TABLES 2019-2021 16 (N.Y. State, 2022).

<sup>167</sup> Quinn, *supra* note 153, at 1, 15-17.

<sup>168</sup> *Id.* at 1, 7-15.



rearrested are concluded in the data.<sup>169</sup> All this suggests that New York’s bail reform is not successful, and it might be due to a lack of focus on other aspects, such as the risk of future crime and evaluating the defendant for more than just the likelihood of appearing.<sup>170</sup>

### C. Illinois and Various Risk Assessment Tools

Currently, Illinois does not have a universal risk assessment tool.<sup>171</sup> Illinois counties have adopted different risk assessment tools (explained briefly below), but only four counties, like New Jersey, use the PSA.<sup>172</sup> Only twelve other counties in the state have a listed risk assessment tool that courts currently use.<sup>173</sup> The twelve counties that use a risk assessment tool use a form of the Virginia Risk Assessment Tool, including the original or a variance of that tool.<sup>174</sup>

The Virginia Pretrial Risk Assessment Instrument (VPRAI), derived from the State of Virginia, requires the Virginia Department of Criminal Justice to “develop risk assessment and other instruments to be used by pretrial services agencies in assisting judicial officers” in accessing bond and pretrial release.<sup>175</sup> The VPRAI utilizes eight risk factors, including (1) active Community Criminal Justice Supervision, which looks to see if the individual is under official supervision such as parole or supervision; (2) if the current charge is a felony drug, theft or fraud; (3) if the defendant has any pending charges; (4) convictions of prior criminal history; (5) if the defendant has two or more failure to appears for a court date in prior proceedings; (6) if the defendant has two or more violent convictions which are described as an act that “causes or is intended to cause physical injury to another person”; (7) if the defendant is employed at the time of arrest; and (8) history of drug abuse.<sup>176</sup> Although the factors are generally similar to other risk assessments, the VPRAI does not look at the age of the individual involved, history of prior convictions, the likelihood of increased sentences, all failures to appear in recent years compared to older years, and the specifics of the convictions.<sup>177</sup>

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<sup>169</sup> *Id.*

<sup>170</sup> N.Y. CRIM. PROC. LAW § 510.10 (McKinney 2023).

<sup>171</sup> *Illinois*, RISK ASSESSMENT TOOL DATABASE AT BERKMAN KLEIN CTR., <https://criminaljustice.tooltrack.org/state/IL> (last visited Aug. 21, 2023).

<sup>172</sup> *About the Public Safety Assessment*, ADVANCING PRETRIAL POL’Y AND RSCH. <https://advancingpretrial.org/psa/psa-map/> (last visited Aug. 21, 2023).

<sup>173</sup> *Illinois*, RISK ASSESSMENT TOOL DATABASE AT BERKMAN KLEIN CTR., <https://criminaljustice.tooltrack.org/state/IL> (last visited Aug. 21, 2023).

<sup>174</sup> *Id.*

<sup>175</sup> VA. CODE ANN. § 19.2-152.3 (2007).

<sup>176</sup> VA. DEP’T OF CRIM. JUST. SERVICES, VIRGINIA PRETRIAL RISK ASSESSMENT INSTRUMENT – (VPRAI) 9-11 (2018).

<sup>177</sup> *See, e.g.*, Laura & John Arnold Found., *supra* note 103, at 1.

Once the points are entered based on the factors, the defendant is scored based on a risk level of one to six, with one being the lowest risk.<sup>178</sup> The VPRAI weights the factors according to what they have determined to have a higher risk of pretrial failure.<sup>179</sup> The lowest risk factors are two or more failures to appear, two or more violent convictions, and if the defendant is unemployed at the time of arrest.<sup>180</sup> In contrast, the VPRAI places a high risk on if the charge is a felony drug, felony theft, or felony fraud case.<sup>181</sup> Based on these risk factors, it appears that the VPRAI emphasizes safety to the community and preventing future crime over ensuring the defendant returns to court, as that factor is weighted the lowest.<sup>182</sup> This is also apparent in the conditions of release given to the defendant.<sup>183</sup> There are no conditions that maintain contact with the courts or any pretrial services except for drug and alcohol testing.<sup>184</sup>

#### D. Takeaways from Different Risk Assessment Tools

In comparing Illinois, New York and New Jersey and the difference in their pretrial detainment systems, it is essential to remember that New York has a vastly different legislative intent than that of New Jersey and Illinois.<sup>185</sup> New York's pretrial detainment system primarily focuses on detaining those who are a flight risk or likely not to appear in court, besides the statutory exceptions for the most serious crimes.<sup>186</sup> Whereas both New Jersey and Illinois focus on the risk of failure to appear and the risk of danger to the community and/or public safety.<sup>187</sup> However, it is likely that there is also a focus on reducing crimes, particularly with individuals recommitting crime

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<sup>178</sup> VA. DEP'T OF CRIM. JUST. SERVICES, VIRGINIA PRETRIAL RISK ASSESSMENT INSTRUMENT – (VPRAI) 12-13 (2018).

<sup>179</sup> *Id.* at 12.

<sup>180</sup> *Id.* at 13.

<sup>181</sup> *Id.* at 12.

<sup>182</sup> *Id.* at 6-13.

<sup>183</sup> (1) refrain from excessive use of alcohol or drugs; (2) submit to alcohol and drug testing; (3) refrain from possessing dangerous weapons; (4) refraining from contact with the victims and witnesses; (5) maintain and seek employment; (6) maintain or seek education; and (7) comply with curfew. *Id.* at 16.

<sup>184</sup> VA. DEP'T OF CRIM. JUST. SERVICES, VIRGINIA PRETRIAL RISK ASSESSMENT INSTRUMENT – (VPRAI) 16 (2018).

<sup>185</sup> See generally N.Y. CRIM. PROC. LAW § 510.10 (McKinney 2023); Bail Reform Act of 2017, Pub. Act No. 100-1, 2017 Ill. Laws 1; N.J. STAT. ANN. § 2A:162-25 (2021).

<sup>186</sup> N.Y. CRIM. PROC. LAW § 510.10 (McKinney, 2023).

<sup>187</sup> Bail Reform Act of 2017, Pub. Act No. 100-1, 2017 Ill. Laws 1; N.J. STAT. ANN. § 2A:162-25 (2021).

while on release.<sup>188</sup> Thus, in comparing the risk assessment tools between the states, there are different objectives and factors to achieve the state's goal.<sup>189</sup>

Based on the factors that New York City uses (not the entire state), the focus is clearly on flight risk.<sup>190</sup> Particularly, factors seven and eight focus on the reachability of the defendant and if there is a steady means to reach the defendant.<sup>191</sup> This is compared to the first six factors that look to the defendant's recent prior convictions and warrants, possibly to determine if a defendant is likely to be a flight risk for avoiding severe punishment based on enhanced sentencing structures, particularly with persons who re-offend.<sup>192</sup>

While the New Jersey and Illinois legislative objectives include the focus on flight risk, they also consider community safety and the threat the defendant poses to the community.<sup>193</sup> The Virginia tool, which several Illinois counties use, evaluates the current charge and if the defendant has violent convictions, including injury to other persons.<sup>194</sup> The PSA from New Jersey takes into account the current offense, including if it is violent and if there are prior disorderly conducts, to determine if the defendant has a history of being disorderly in the community.<sup>195</sup> The two tools differ in language and factors when looking at the factors directed toward flight risk.<sup>196</sup> In addition to considering prior and current charges and sentences, the VPRAI evaluates whether the defendant is employed and if they have a history of drug use.<sup>197</sup> This endeavor suggests stability likely for a defendant to stay out of trouble and appear in court.<sup>198</sup> However, the PSA does not include any separate factors concerning possible stability in the defendant's home life but instead looks to prior failure to appear history.<sup>199</sup>

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<sup>188</sup> *Id.*

<sup>189</sup> N.Y. CRIM. PROC. LAW § 510.10 (McKinney 2023); Bail Reform Act of 2017, Pub. Act No. 100-1, 2017 Ill. Laws 1; N.J. STAT. ANN. § 2A:162-25 (2021).

<sup>190</sup> *Release Assessment*, N.Y.C. CRIM. JUST. AGENCY, <https://www.nycja.org/release-assessment/3704> (last visited Sept. 12, 2023).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Bail Reform Act of 2017, Pub. Act No. 100-1, 2017 Ill. Laws 1; N.J. STAT. ANN. § 2A:162-25 (2021).

<sup>194</sup> VA. DEP'T OF CRIM. JUST. SERVICES, VIRGINIA PRETRIAL RISK ASSESSMENT INSTRUMENT – (VPRAI) 7-8 (2018).

<sup>195</sup> Laura & John Arnold Found., *supra* note 103, at 1-2.

<sup>196</sup> *Id.*; VA. DEP'T OF CRIM. JUST. SERVICES, VIRGINIA PRETRIAL RISK ASSESSMENT INSTRUMENT – *passim* (VPRAI) (2018).

<sup>197</sup> VA. DEP'T OF CRIM. JUST. SERVICES, VIRGINIA PRETRIAL RISK ASSESSMENT INSTRUMENT – (VPRAI) 1 (2018).

<sup>198</sup> *Id.*

<sup>199</sup> Laura & John Arnold Found., *supra* note 103, at 3-4.

Lastly, there is no history or research on the different tools in Illinois or New York, mainly due to a lack of a uniform risk assessment.<sup>200</sup> There are research and certified results of the PSA and results in New Jersey.<sup>201</sup> While this is still an early movement and perhaps the “third wave” of bail reform, there is likely to be more research and data that will develop in the coming years.<sup>202</sup> However, as of now, the PSA in New Jersey is achieving the goals of the legislature and proponents of bail reform while also satisfying the needs of justice.<sup>203</sup> The bail reform with the PSA has reduced the number of detainees prior to trial and has maintained court appearance rates into the high nineties.<sup>204</sup> However, in New York, the crime rate is higher than before adopting bail reform, and the goal of decreasing jail populations and pre-trial incarceration has not been achieved.<sup>205</sup> Therefore, New Jersey has proved to be a successful testing ground for risk assessments, specifically the PSA, which the State has adopted as its tool.<sup>206</sup>

#### IV. RECOMMENDATIONS TO THE ILLINOIS BAIL STATUTES

Based on the pretrial release systems implemented in other states and the successes and failures of these systems based on the data shown above, this Note recommends several changes to the Illinois scheme. First, this Section will address the need for a statutory change in the risk-assessment subsection. In light of the legislative modification, this Section suggests that Illinois consider implementing a risk assessment tool akin to the PSA utilized in New Jersey. The rationale behind this proposal stems from the data indicating its efficacy, coupled with the fact that Illinois and New Jersey share comparable legislative objectives in contrast to those of New York.

##### A. Change in Language of Statute

Section II mentions that the current Illinois pretrial release statute does not mandate nor specify a risk assessment tool.<sup>207</sup> This is a problem because the Illinois Supreme Court does not have to create one or provide funding to do so.<sup>208</sup> To address that issue, a simple change in the statutory language

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<sup>200</sup> See generally 725 ILL. COMP. STAT. ANN. 5/110-5 (2023); see also N.J. STAT. ANN. § 2A:162-25(c)(2) (2021).

<sup>201</sup> Grant, *supra* note 127, at 37.

<sup>202</sup> Brunt & Bowman, *supra* note 5, at 743.

<sup>203</sup> Grant, *supra* note 127, at 37.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> 725 ILL. COMP. STAT. ANN. 5/110-6.4 (2023) (citing “The Supreme Court may establish a statewide risk-assessment tool”).

<sup>208</sup> *Id.*

would allow for a better objective test to assess pretrial release by requiring a risk assessment tool to be created and used.<sup>209</sup> Similar to the New Jersey statute,<sup>210</sup> the objective would include statutory language that specifies that a risk-assessment tool must be utilized and set out the basic parameters. For example, effective statutory language could read:

(a) The Supreme Court shall establish a statewide risk-assessment tool to be used in proceedings to assist the court in establishing conditions of pretrial release for a defendant.

(b) The risk-assessment tool shall be objective, standardized, and developed based on analysis of empirical data and risk factors relevant to the risk of failure to appear in court when required and the risk of real and present threat to the physical safety of any person or persons.

(c) The risk-assessment tool shall gather demographic information about the defendant, including but not limited to race, ethnicity, gender, financial resources, and socio-economic status. Recommendations shall be made that do not discriminate based on race, gender, educational level, socio-economic status, or neighborhood.

This statutory framework is not substantially different from the legislative intent when enacting the Pretrial Fairness Act.<sup>211</sup> When adopting the Pretrial Fairness Act, the legislators recognized the need for risk assessment tools.<sup>212</sup> Importantly, State Representative Justin Slaughter mentioned that the elimination of cash bonds moves the system to one that “relies on verified risk assessment tools to determine if an individual is a threat to the community or a concern to not return for their hearing.”<sup>213</sup> The legislature, in adopting the Pretrial Fairness Act, previously used the two-year window as a safety valve<sup>214</sup> to fix all the flaws the Act might have.<sup>215</sup> It

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<sup>209</sup> *Id.*

<sup>210</sup> N.J. STAT. ANN. § 2A:162-25 (2021).

<sup>211</sup> Transcript of Debates, HB 3653, Illinois House of Rep. 101st Gen. Assemb., Reg. Sess., Jan 13, 2021, at 9. (statement of Rep. Slaughter) (depending on the Supreme Court’s ruling, it would likely be Constitutional if the current statute is upheld).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> The “safety valve” is the time period the legislature allotted before implementation of the SAFE-T Act to receive criticism and further refine the Act to make it in conformance with their intended goals.

<sup>215</sup> Transcript of Debates, HB 3653, Illinois House of Rep. 101st Gen. Assemb., Reg. Sess., Jan 13, 2021, at 9. (statement of Rep. Slaughter).

was further suggested that the Illinois Supreme Court could adopt and implement a risk assessment tool in the two-year window.<sup>216</sup>

Further, based upon the above analysis of different statutory schemes on bail and other tools, New Jersey's bail reform has been the most successful by decreasing the amount and time individuals spend in pretrial confinement and having high court appearance rates.<sup>217</sup> A probable criticism of this proposition is that Illinois and New Jersey exhibit geographic and cultural distinctions. New Jersey is located on the East Coast, whereas Illinois occupies the central United States, with Chicago as its sole major city and the remainder of the state predominately rural.<sup>218</sup>

Another reason for the proposed change to the statute is funding.<sup>219</sup> As the statute currently allows for a risk assessment, like that in New York, it is not mandated.<sup>220</sup> By mandating that a risk assessment be required, it is likely that the State will have to allocate funds for such a program.<sup>221</sup> Whereas, if the statute remains the same and only allows the Illinois Supreme Court to create a risk assessment tool, it will likely come from funding already allocated for other court uses.<sup>222</sup> This is problematic because court resources are likely limited, and if the Supreme Court has to direct resources to the creation and continuing implementation and evaluation of a program, other court services could decline, such as technology in the courtroom which was brought to the Illinois Supreme Court's attention during the pandemic and the years following.<sup>223</sup> However, if the statute is changed, it will mandate and further require the funding to be provided to maintain compliance with the law.<sup>224</sup>

## B. The Proposed Test

Next, this Note addresses the type of risk assessment tool Illinois should adopt. Based on the data provided by the State of New Jersey, it would be

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<sup>216</sup> *Id.* (stating when answering a question Representative Slaughter suggests that the risk assessment tool will be developed before January 1, 2023) (providing that as of the implementation date (January 1, 2023), the Illinois Supreme Court has not yet adopted a risk assessment tool).

<sup>217</sup> Grant, *supra* note 127, at 37.

<sup>218</sup> *Pretrial Reform Efforts in Illinois and Outcomes from Other States*, THE CIVIC FED'N (Feb. 22, 2021), <https://www.civiced.org/iifs/blog/pretrial-reform-efforts-illinois-and-outcomes-other-states>.

<sup>219</sup> *What Does the Elimination of Cash Bail Mean for Illinois Jurisdictions?*, THE CIVIC FED'N (Oct. 21, 2022), <https://www.civiced.org/civic-federation/blog/what-does-elimination-cash-bail-mean-illinois-jurisdictions>.

<sup>220</sup> N.Y. CRIM. PROC. LAW § 510.10 (McKinney 2023).

<sup>221</sup> *Id.*

<sup>222</sup> Although this Note does not attempt to address the issues with funding surrounding bail and the court system, there have been suggestions that removing cash bail will decrease funds at the local courts and implementing a system will be costly. *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

best to follow its pretrial risk assessment system.<sup>225</sup> Although, as stated above, there is likely to be criticism as New Jersey and Illinois are not the same and that Illinois should adopt a completely different tool. Regardless, the PSA in New Jersey shows its success.<sup>226</sup> Until proven otherwise, it is likely to be the best option and fix the flaws after research into the factors following the implementation in Illinois.<sup>227</sup> Studies have further suggested that almost all risk assessment tools are close in evaluating the focused risks, and therefore, not one is better.<sup>228</sup> The research was conducted in 2020, during which the researchers examined and compiled a comprehensive overview of various studies and research on risk assessment tools.<sup>229</sup> In conclusion, the group found that the particular risk assessment tool does not significantly matter as the predictability between the different tools is shown to be similar.<sup>230</sup> Because of this, the focus and extent of this Note are not simply on what risk factors and tools work but what has worked in practical application by combining the risk assessments with a form of bail reform. By examining three separate bail systems in the United States, including Illinois, New York, and New Jersey, one stood out as achieving what pretrial bail is meant to achieve.<sup>231</sup> New Jersey is a national testing ground for this new movement.<sup>232</sup> New Jersey has achieved high court appearance rates while decreasing jail populations, which will positively impact defendants' lives while maintaining the presumption of innocence.<sup>233</sup>

Since the New Jersey model has proven to be successful, it is the recommendation of this Note that Illinois, in changing its bail system, also adopt a risk assessment that has proven to achieve goals that are very similar to that of Illinois: specifically decrease jail populations to maintain the lives of those arrested, protect the community by assessing the risk of defendants, and maintain court appearance rates.<sup>234</sup> Although the PSA and risk assessment may be adapted to fit future needs and empirical data as required by statute, this would allow for quick and easy adoption of a risk assessment tool that would be less burdensome than starting from scratch.<sup>235</sup> This would also help fulfill the promise and legislative intent of adopting the SAFE-T

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<sup>225</sup> N.J. STAT. ANN. § 2A:162-25 (2021).

<sup>226</sup> Grant, *supra* note 127, at 37.

<sup>227</sup> N.J. STAT. ANN. § 2A:162-25 (2021).

<sup>228</sup> Sarah L. Desmarais et al., *Predictive Validity of Pretrial Risk Assessments: A Systematic Review of the Literature*, 48 CRIM. JUST. & BEHAV. 398, 415 (2020).

<sup>229</sup> *Id.* at 402.

<sup>230</sup> *Id.* at 416.

<sup>231</sup> See generally 725 ILL. COMP. STAT. ANN. 5/110-5 (2023); see also N.J. Stat. Ann. § 2A:162-25(c)(2) (2021).

<sup>232</sup> Grant, *supra* note 127, at 37.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

Act as adopted.<sup>236</sup> As mentioned above in statements by Representative Slaughter, the view looking forward is that a risk assessment tool be adopted.<sup>237</sup> Although the two-year window has closed in which a risk assessment tool was intended to be created, it is of utmost importance now to get one adopted and change as necessary in the future.<sup>238</sup> The following tool and risk assessment factors are derived from the PSA and New Jersey's system and are repeated here for clarification.

Risk Factors:

1. Age at Current Arrest
  - a. If the individual is twenty-two years old or younger, the weight given to the score should be two. If the individual is twenty-three or older, the score does not matter and should be given zero. This is due to research that shows an “age-crime curve,” which holds that individuals in their mid-teens to early twenties to mid-twenties are more likely to commit violent crimes.<sup>239</sup>
2. Current Violent Offense or Forcible Felony
  - a. A violent offense causes or is intended to cause physical harm to another person.
  - b. Forcible Felonies include first-degree murder, second-degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, armed robbery, aggravated robbery, robbery, burglary where there is the use of force against another person, residential burglary, home invasion, vehicular invasion, aggravated arson, arson, aggravated kidnapping, kidnapping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement or any other felony which involves the threat of or infliction of great bodily harm or permanent disability or disfigurement.<sup>240</sup>
3. Pending Charge at the Time of the Offense
  - a. A pending charge is a charge that has a future pre-disposition-related court date or is pending presentation to the grand jury.
  - b. A pending charge includes indictable or disorderly conduct offenses.
    - i. A pending charge shall not include any traffic violations unless otherwise set forth by law.

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<sup>236</sup> See generally Transcript of Debates, HB 3653, Illinois House of Rep. 101st Gen. Assemb., Reg. Sess., Jan 13, 2021, at 9. (statement of Rep. Slaughter).

<sup>237</sup> *Id.*

<sup>238</sup> See generally *id.*

<sup>239</sup> Michael Rocque et al., *Age and Crime*, in *ENCYCLOPEDIA OF CRIME AND PUNISHMENT 2* (Wesley G. Jennings ed., 2015).

<sup>240</sup> 725 ILL. COMP. STAT. ANN. 5/110-6.1 (2023) (stating the legislature in enacting the bail reform act decided what they thought were dangerous crimes by naming them “forcible felonies.” This is different than the New Jersey Statute that just uses the violent offense definition as provided above in the proposed risk assessment tool.).



4. Prior Disorderly Persons Conviction<sup>241</sup>
  - a. Prior Disorderly Persons Convictions are defined by Illinois Statutes defining criminal offenses and disorderly person offenses.
5. Prior Violent Conviction<sup>242</sup>
  - a. Violent Conviction is determined by the Illinois Statutes defining criminal offenses.
6. Prior Failure to Appear in the Last 2 Years<sup>243</sup>
  - a. A failure to appear pretrial includes any pre-disposition court appearance for which the defendant failed to appear, and the Court took action, such as issuing an FTA notice or a bench warrant for arrest. A pre-disposition court appearance is any court appearance after arrest and prior to and including sentencing. The court appearance must have been for a pending (pre-disposition) Indictable or Disorderly Persons offense. Post-disposition court appearances are not counted, such as hearings for nonpayment/failure to pay, violations of supervision, and violations of other court-ordered obligations. A failure to appear for a single court appearance is counted once, regardless of the number of charges or FTA notices/bench warrants issued related to the single court appearance.
  - b. A failure to appear pretrial is not counted if there is confirmation that the defendant was in custody (jail or prison) when the failure to appear occurred. In addition, a failure to appear pretrial is not counted if the FTA notice/bench warrant was issued and vacated the same day. The two-year time frame includes the two years prior to the date of the current arrest. The number of failures to appear pretrial in the past two years determines if the defendant had none, one, or two or more prior failures to appear.
7. Prior Failure to Appear in Cases Older Than Two Years<sup>244</sup>
  - a. A failure to appear pretrial includes any pre-disposition court appearance for which the defendant failed to appear, and the Court took action, such as issuing an FTA notice or a bench warrant for arrest. A pre-disposition court appearance is any court appearance after arrest and prior to and including sentencing. The court appearance must have been for a pending (pre-disposition) Indictable or Disorderly Persons offense. Post-disposition court appearances, such as hearings for nonpayment/failure to pay, supervision violations, and violations of other court-ordered obligations, are not counted. A failure to

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<sup>241</sup> Prior disorderly persons convictions like that of New Jersey would be in line with the legislative intent to focus on the threat to public safety.

<sup>242</sup> Prior violent convictions will depend on what the legislature and courts determine to be violent. This Note does not attempt to go through the entire Illinois bail system or criminal justice system and determine what is to be considered violent. However, for purposes here, violent convictions would often include aggravated batteries and gun crimes.

<sup>243</sup> This risk factor focuses on the defendant's risk of failure to appear.

<sup>244</sup> This risk factor focuses on the defendant's risk of failure to appear.

appear for a single court appearance is counted once, regardless of the number of charges or FTA notices/bench warrants issued related to the single court appearance.

- b. A failure to appear pretrial is not counted if there is confirmation that the defendant was in custody (jail or prison) when the failure to appear occurred. In addition, a failure to appear pretrial is not counted if the FTA notice/bench warrant was issued and vacated on the same day. If the defendant failed to appear for a court pretrial and an FTA notice/bench warrant for arrest was issued more than two years from the date of the current arrest, the answer to this risk factor is yes. Otherwise, the answer is no.

8. Prior Sentence to Incarceration

- a. A sentence to incarceration includes any sentence to jail or prison of 14 days or more for an Indictable or Disorderly Persons offense imposed by a judge at the time of sentencing or re-sentencing (e.g., supervision violation hearing, revocation of suspended sentence). A sentence of 14 days or more that is “credit for time served” is counted. A sentence of fourteen days or more is included only if imposed as a single sentence, not a combination of multiple lesser sentences. If the Court suspends the imposition of the sentence, it is not considered a sentence to incarceration. Incarceration in lieu of payment of fines or costs and a sanction imposed by non-judges (e.g., probation officers) are also not considered incarceration sentences. If the defendant previously received a sentence of incarceration to jail or prison of fourteen days or more as a single sentence imposed by a judge, the answer to this risk factor is yes. Otherwise, the answer is no.<sup>245</sup>

## V. CONCLUSION

As the Nation progresses in the third wave of criminal justice reform, the ending of cash bail is a topic all across the Country.<sup>246</sup> Although not the first state to move away from cash bail, Illinois is one of the leaders in eliminating cash bail with other criminal justice reforms.<sup>247</sup> While Illinois legislators succeeded in eliminating cash bail, they did not act to thoroughly implement a functioning system, which has resulted in criticism and even challenges in the courts.<sup>248</sup> In the near future, the legislators and the Illinois

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<sup>245</sup> This risk factor focuses on the defendant’s risk based on previous incarceration.

<sup>246</sup> Brunt & Bowman, *supra* note 5, at 743.

<sup>247</sup> Claire Savage and Corey Williams, *Cash bail disproportionately impacts communities of color. Illinois is the first state to abolish it*, THE ASSOC. PRESS (Sept. 12, 2023, 9:23 AM), <https://apnews.com/article/illinois-criminal-justice-cash-bail-reform-b8aac667b7d3016e12ea64a70964bf55>.

<sup>248</sup> Michael Friedrich, *Illinois Prepares for Historic Abolition of Cash Bail*, ARNOLD VENTURES (Oct. 3, 2022), <https://www.arnoldventures.org/stories/illinois-prepares-for-historic-abolition-of-cash-bail>.

Supreme Court should develop a risk assessment tool to help create a better criminal justice system in Illinois.



