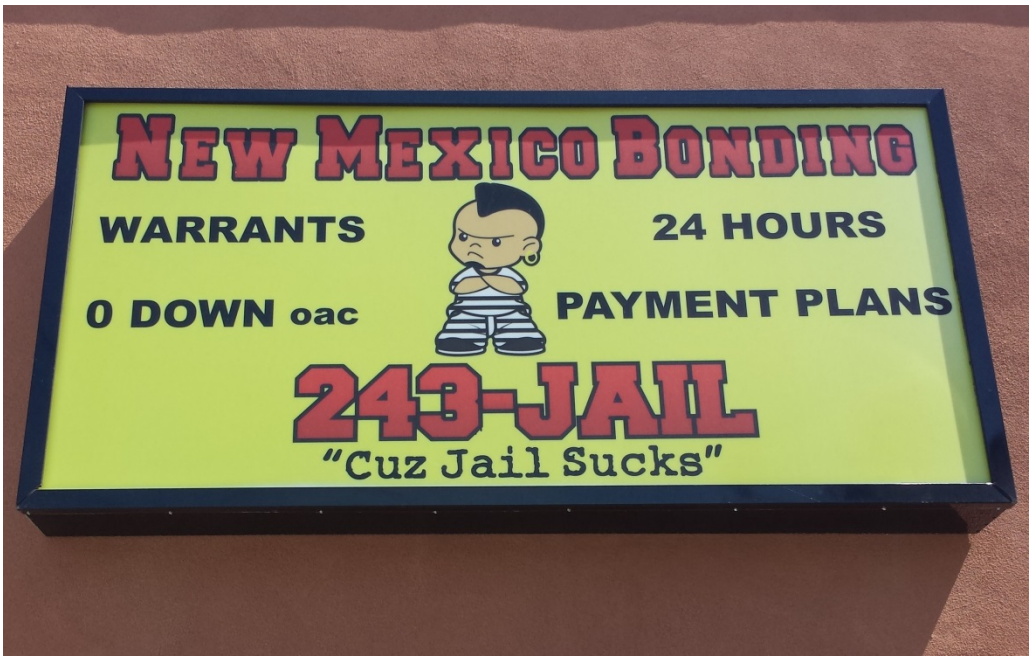
Pretrial Justice Reform in New Mexico

Justice Charles W. Daniels, New Mexico Supreme Court



I. Overview

In New Mexico and throughout most of the United States courts have relied heavily on a wealth-based, instead of a risk-based, system to determine whether accused defendants will be held in jail or released before the trials that will determine their guilt or innocence with constitutional guarantees of fair adjudication and the bedrock principle that the accused is innocent until proven guilty. The result has been a lack of any rational justice in our pretrial justice system, where clearly dangerous defendants or those who pose substantial flight risks can buy their way out of jail if they have access to the money required to secure their presumption of innocence, while large numbers of poorer defendants who are neither dangerous nor flight risks are held in jail simply for lack of money, with substantial harm done to them, their families, and the taxpayers who must pay for housing, feeding, guarding, medicating, and caring for them.

With the leadership of the New Mexico Supreme Court, the state is now engaged in a comprehensive reform effort that to date has resulted in (1) the November 2016 passage, by a vote of 87-13% of a state constitutional amendment that provides legitimate judicial authority to deny release to proven dangerous defendants and that guarantees that low-risk defendants shall not be denied release simply for inability to pay for secured release; (2) the July 2017 promulgation of procedural rules governing all aspects of pretrial detention and release, following through on the constitutional amendment and minimizing the role of money in pretrial justice; ongoing judicial training and monitoring to turn all those words on paper into operational realities.

In order to understand where we are going, it is important to understand how we got to where we are now. The story goes back many centuries.

II. How Did We End up With a Money-For-Freedom System of Pretrial Justice?

The answers go back to origins before the founding of the United States, and even before the English Magna Carta of 1215 or the Norman Conquest of 1066. In *State v. Brown*, 2014-NMSC-038), the New Mexico Supreme Court explored how we got to where we are now, both in New Mexico and in most of the rest of the country. That history, as explained in *Brown*, has roots that extend back to medieval England, where bail originated "as a device to free untried prisoners." Daniel J. Freed & Patricia M. Wald, Bail in the United States: 1964 1 (1964); see IV William Blackstone, Commentaries on the Laws of England in Four Books 1690 (Rees Welsh & Co. 1902) (1769) ("By the ancient common law, before and since the [Norman] conquest, all felonies were bailable, till murder was excepted by statute; so that persons might be admitted to bail before conviction almost in every case." (footnotes omitted)). See generally William F. Duker, The Right to Bail: A Historical Inquiry, 42 Alb. L. Rev. 33, 34-66 (1977) (describing the origins and history of bail in England); Elsa de Haas, Antiquities of Bail 128 (1940) (concluding that the "root idea of the modern right to bail" came from "tribal custom on the continent of Europe").

During the Anglo-Saxon period in England before the Norman Conquest, the penalty for most crimes was a monetary fine paid as compensation to the victim. See June Carbone, Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail, 34 Syracuse L. Rev. 517, 519-20 (1983). Under this system of justice, the sheriff often required the accused to secure a third party, or surety, to guarantee the appearance of the accused for trial and the payment of the fine upon conviction. See id. at 520; see also Bail: An Ancient Practice Reexamined, 70 Yale L.J. 966, 966 (1961). The amount of money pledged as bail was identical to the penalty prospect upon a conviction, and the surety was required to pay the fine if the accused failed to appear for trial. Carbone, supra, at 520. This system of bail ensured victim compensation and deterred pretrial flight because the surety bore financial responsibility for payment of the penalty and had an incentive to produce the accused for trial. Id.

Following the Norman Conquest of 1066, capital and corporal punishment began gradually to replace monetary fines as the penalty for most offenses, and accused persons faced longer delays between accusation and trial as they waited for traveling judges to arrive and dispense local justice. See id. at 519, 521; see also Freed & Wald, supra, at 1 ("Disease-ridden jails and delayed trials by traveling justices necessitated an alternative to holding accused persons in pretrial custody."). The development of corporal and capital punishment complicated the use of bail because the amount of money pledged no longer correlated directly to the potential punishment. Carbone, supra, at 522. The endowment of local sheriffs with discretion in setting bail led to rampant corruption and abuse. See United States v. Edwards, 430 A.2d 1321, 1326 (D.C. Cir. 1981) (en banc) (explaining that sheriffs "exercised a broad and ill-defined discretionary power to bail" prisoners and that this "power was widely abused by sheriffs who extorted money from individuals entitled to release without charge" and who "accepted bribes from those who were not otherwise entitled to bail").

In response to historical abuses, the common law right to bail was codified into written English law. In 1215, the principles that an accused is presumed innocent and entitled to personal liberty pending trial were incorporated into the Magna Carta, which proclaimed that "no freeman shall be taken or imprisoned . . . [except by] the judgment of his peers or by the law of the land." Kennedy v. Mendoza-Martinez, 372 U.S. 144, 186 (1963) (internal quotation marks and citation omitted). In 1275, the English Parliament enacted the Statute of Westminster, which defined bailable offenses and provided criteria for determining whether a particular person should be released, including the strength of the evidence against the accused and the accused's criminal history. See Bail: An Ancient Practice Reexamined, supra, at 966; Carbone, supra, at 523-26. In 1679, Parliament adopted the Habeas Corpus Act to ensure that an accused could obtain a timely bail hearing; and in 1689, Parliament enacted an English Bill of Rights that prohibited excessive bail. See Carbone, supra, at 528. In crossing the Atlantic, American colonists carried concepts embedded in these documents that became the foundation for our current system of bail. See id. at 529.

The principle that defendants should be released pending trial became widely adopted throughout the United States in both the state and federal systems. See Bail: An Ancient Practice Reexamined, supra, at 967. One commentator who surveyed the bail laws in each of the states found that forty-eight states have protected, by constitution or statute, a right to bail "by sufficient sureties, except for capital offenses when the proof is evident or the presumption great." Matthew J. Hegreness, America's Fundamental and Vanishing Right to Bail, 55 Ariz. L. Rev. 909, 916 (2013). States modeled these provisions on the Pennsylvania Constitution of 1682, which provided that "'all Prisoners shall be Bailable by Sufficient Sureties, unless for capital Offenses, where proof is evident or the presumption great.'" See Carbone, supra, at 531-32 ("[T]he Pennsylvania provision became the model for almost every state constitution adopted after 1776.").

At the federal level, the first United States Congress established a statutory right to bail by enacting the Judiciary Act of 1789, which provided an absolute right to bail in noncapital cases and bail at the discretion of the judge in capital cases. See Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91; see also Caleb Foote, The Coming Constitutional Crisis in Bail: I, 113 U. Pa. L. Rev. 959, 971 (1965) (explaining that the "bail problem" was before the first Congress in the spring and summer of 1789). The first Congress also proposed that the states adopt the Eighth Amendment to the United States Constitution, which, like the New Mexico Constitution and English Bill of Rights, prohibits excessive bail. See U.S. Const. amend. VIII; N.M. Const. art. II, § 13; see also Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 294 (1989) (O'Connor, J., concurring in part and dissenting in part) (explaining that the first Congress based the Eighth Amendment "on Article I, § 9, of the Virginia Declaration of Rights of 1776, which had in turn adopted verbatim the language of § 10 of the English Bill of Rights"). But unlike the New Mexico Constitution, the United States Constitution does not contain an explicit right to bail clause and guarantees only that "[e]xcessive bail shall not be required." U.S. Const. amend. VIII; see Carlson v. Landon, 342 U.S. 524, 545-46 (1952) (explaining that the United States Constitution can be construed only as a prohibition against excessive bail in those cases in which it is proper to grant bail because the Eighth Amendment does not provide a "right to bail"). The United States Supreme Court has held that "[b]ail set at a figure higher than an amount reasonably calculated to fulfill [the] purpose [of adequately assuring the presence of the accused] is 'excessive' under the Eighth Amendment." Stack v. Boyle, 342 U.S. 1, 5 (1951). As the Court explained,

> Beginning with the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. See Hudson v. Parker, 1895, 156 U.S. 277, 285 . . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

Id. at 4.

Despite the ancient origins and broad recognition of the right to bail in this country, studies of the administration of bail in the twentieth century raised a number of concerns about its widespread misuse. See Field Study, A Study of the Administration of Bail in New York City, 106 U. Pa. L. Rev. 693 (1958); Note, Compelling Appearance in Court: The Administration of Bail in Philadelphia, 102 U. Pa. L. Rev. 1031 (1954); Arthur L. Beeley, The Bail System in Chicago (1927). See generally Wayne H. Thomas, Jr., Bail Reform in America 3-19 (1976); Ronald Goldfarb, Ransom (1965); Foote, supra; Freed & Wald, supra, at 9-21. The studies all concluded that the system of money bail in the United States discriminates against indigent defendants who lack the financial resources to post bail. See, e.g., Thomas, supra, at 11, 19 ("The American system of bail allows a person arrested for a criminal offense the right to purchase his release pending trial. Those who can afford the price are released; those who cannot remain in jail. . . . The requirement that virtually every defendant must post bail causes discrimination against defendants who are poor."). Researchers also found that defendants incarcerated pending trial were held "under harsher conditions than those applied to convicted prisoners," even though many of those defendants ultimately were either acquitted or given no sentence of imprisonment upon the disposition of their cases. Foote, supra, at 960.

These concerns were accompanied by criticism of the growing role commercial bail bond agents played in determining whether defendants would be released pending trial. See Notes, Preventive Detention Before Trial, 79 Harv. L. Rev. 1489, 1490 (1966). No commercial bail bond industry existed in medieval England, where pretrial release was conditioned upon the accused securing a reputable friend or relative to personally assure the accused's appearance for trial. See Thomas, supra, at 11-12; see also F.E. Devine, Commercial Bail Bonding 5 (1991) (explaining that sureties in eighteenth-century England "were viewed as actively exercising a friendly custody of the accused"). To the contrary, the English judicial system has always found the concept of commercial sureties repugnant. See generally Devine, supra, at 37 (explaining that, in the nineteenth century, the English common law treated an agreement to pay a surety for bail as an "unenforceable illegal contract contrary to the public interest" and, in the twentieth century, as a "crime of conspiracy to effect a public mischief" or a crime of "conspiracy to obstruct the court of justice"); id. at 45 (explaining that the English Bail Act of 1976 sets forth criminal penalties for agreeing to indemnify a surety in a criminal proceeding, effectively barring any commercial bail bond industry). England is not alone in its rejection of the commercial bail bond industry. "Viewed from an international perspective, the commercial bail bonding system has provoked an almost universally unfavorable reaction" in common law judicial systems, and "only one country, the Philippines, has adopted a commercial bail bonding system similar to the American system." Id. at 15.

Contrary to this international trend, a commercial bail bond industry emerged in the United States. Contributing factors included the near-absolute right to bail set forth in the Judiciary Act of 1789 and in most state constitutions, the unavailability of friends and relatives

who might serve as personal sureties, and the ability of defendants to flee into the vast American frontier. See Thomas, supra, at 11-12. By the middle of the twentieth century in the United States, commercial bail bond companies who charged defendants a nonrefundable fee for their services, typically ten percent of the bond amount, frequently posted money bail. See id. at 11; Freed & Wald, supra, at 22-24.

A commercial bail bond may enable a defendant to post money bail required by the court as additional assurance that the defendant will appear for trial. See Stack v. Boyle, 342 U.S. at 5 ("Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused."). But critics argued that the commercial bail bond industry inappropriately delegated to private agents the power to determine which defendants get released. See Preventive Detention Before Trial, supra, at 1490. As one federal judge observed, the effect of the commercial bail bond industry

> is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety—who in their judgment is a good risk. The bad risks, in the bondsmen's judgment, and the ones who are unable to pay the bondsmen's fees, remain in jail. The court [is] relegated to the relatively unimportant chore of fixing the amount of bail.

Pannell v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963) (Wright, J., concurring).

Some fifty years ago, widespread concerns about problems and inequities in bail practices sparked national interest in establishing new bail procedures and pretrial programs that would treat the rich and the poor more equitably by facilitating pretrial release without the requirement of monetary bonds. The modern bail reform movement began with the Manhattan Bail Project, conducted in the 1960s by the Vera Foundation in New York City. See Thomas, supra, at 3, 20-27; Goldfarb, supra, at 150-72. Through the Manhattan Bail Project, defendants were interviewed prior to their first appearance in court to evaluate whether they were good candidates for pretrial release on recognizance; that is, release "on one's honor pending trial." Goldfarb, supra, at 153-54. The standard interview questions included an inquiry into a defendant's personal background, community ties, and criminal history. Id. The interviewer scored a defendant's answers using a point-weighing system and verified answers for accuracy, usually over the telephone with references the defendant provided. Id. at 154-55, 174-75. The interviewers gave the resulting information to the court and made recommendations regarding which defendants should be released on recognizance. Id. at 155. The Manhattan Bail Project proved successful. During the first three years of the experiment, defendants released on recognizance at the recommendation of the Vera Foundation were about three times more likely to appear for trial than defendants in control groups deemed eligible for release on recognizance who instead were released on money bail. Id. at 155, 157. The Manhattan Bail Project "showed that defendants could be successfully released pretrial without the financial guarantee of a surety

bail agent if verified information concerning their stability and community ties were presented to the court." Thomas H. Cohen & Brian A. Reaves, Pretrial Release of Felony Defendants in State Courts 4 (U.S. Dep't of Justice Nov. 2007). The success of the Manhattan Bail Project increased national interest in bail reform and triggered the creation of pretrial services programs across the country. See Timothy R. Schnacke et al., Pretrial Justice Inst., The History of Bail and Pretrial Release 10 (2010); see also Marie VanNostrand et al., Our Journey Toward Pretrial Justice, 71 Fed. Probation, no. 2, 2007, 20, 20 (discussing pretrial services agencies "as providers of the information necessary for judicial officers to make the most appropriate bail decision" and to "provide monitoring and supervision of defendants released with conditions pending trial").

Driven by the same concerns that inspired the Manhattan Bail Project, Congress enacted the Bail Reform Act of 1966, the first major reform of the federal bail system since the Judiciary Act of 1789. See Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (repealed 1984). The stated purpose of the Bail Reform Act of 1966 was "to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges . . . when detention serves neither the ends of justice nor the public interest." Id. Sec. 2. The Act included the following key provisions to govern pretrial release in noncapital criminal cases in federal court: (1) a presumption of release on personal recognizance unless the court determined that such release would not reasonably assure the defendant's appearance in court, (2) the option of conditional pretrial release under supervision or other terms designed to decrease the risk of flight, and (3) a prohibition on the use of money bail in cases where nonfinancial release options such as supervisory custody or restrictions on "travel . . . or place of abode" are sufficient to reasonably assure the defendant's appearance. See id. Sec. 3, § 3146(a); see also VanNostrand et al., supra, at 20 (explaining that the 1966 Act "established a presumption of release by the least restrictive conditions, with an emphasis on non-monetary terms of bail"). By emphasizing nonmonetary terms of bail, Congress attempted to remediate the array of negative impacts experienced by defendants who were unable to pay for their pretrial release, including the adverse effect on defendants' ability to consult with counsel and prepare a defense, the financial impacts on their families, a statistically less-favorable outcome at trial and sentencing, and the fiscal burden that pretrial incarceration imposes on society at large. See H.R. Rep. No. 89-1541 (1966), reprinted in 1966 U.S.C.C.A.N. 2293, 2299.

Congress again revised federal bail procedures with the Bail Reform Act of 1984, enacted as part of the Comprehensive Crime Control Act of 1984. See Bail Reform Act of 1984, Pub. L. No. 98-473, § 202, 98 Stat. 1837, 1976 (codified at 18 U.S.C. §§ 3141-3150 (2012)). The legislative history of the 1984 Act explains that Congress wanted to "address the alarming problem of crimes committed by persons on release" and to "give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released." S. Rep. 98-225, at 3 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3185. The 1984 Act, as amended, retains many of the key provisions of the 1966 Act but "allows a federal court to detain an arrestee pending trial if the Government demonstrates by clear and convincing

evidence after an adversary hearing that no release conditions 'will reasonably assure . . . the safety of any other person and the community.'" United States v. Salerno, 481 U.S. 739, 741 (1987) (omission in original) (quoting the Bail Reform Act of 1984) (upholding the preventive detention provisions in the 1984 Act); see also 18 U.S.C. § 3142(a) (providing generally the current federal procedure for ordering either release or detention of a defendant pending trial), held unconstitutional on other grounds by, e.g., United States v. Karper, 847 F. Supp. 2d 350 (N.D.N.Y. 2011).

Despite sporadic reform efforts at the federal level and in some state jurisdictions, the administration of bail in the United States today is a subject of substantial concern. See John S. Goldkamp, Judicial Responsibility for Pretrial Release Decisionmaking and the Information Role of Pretrial Services, 57 Fed. Probation 28, 30 (1993) ("Even after decades of bail reform, serious questions about the fairness and effectiveness of pretrial release in the United States have not been resolved."). A recent United States Department of Justice report, which provides statistics about state court felony defendants in the nation's seventy-five largest counties between 1990 and 2004, reflects some of the enduring inequalities in our nation's system of bail. See Cohen & Reaves, supra. The report demonstrates that, in the last two decades, states have again increased their reliance on commercial surety bonds while decreasing the use of personal recognizance releases. See id. at 1-2 ("Beginning in 1998, financial pretrial releases, requiring the posting of bail, were more prevalent than non-financial releases."). As a result, the number of pretrial inmates in jail populations has grown "at a much faster pace than sentenced inmates, despite falling crime rates." Kristin Bechtel et al., Pretrial Justice Inst., Dispelling the Myths: What Policy Makers Need to Know About Pretrial Research 1-2 (Nov. 2012). Most of the defendants who remain in custody pending trial stay in jail because they cannot afford the bail set by the court, not because they have been denied bail altogether. See Cohen & Reaves, supra, at 1 ("Among [felony] defendants detained until case disposition, 1 in 6 had been denied bail and 5 in 6 had bail set with financial conditions required for release that were not met."). "Hispanics were less likely than non-Hispanic defendants to be released, and males were less likely than females to be released." Id. Twenty percent of these detained defendants "eventually had their case dismissed or were acquitted," so many of them could have avoided imprisonment altogether if only they had the resources to post bail. Id. at 7.

To address the persistent inequities and inefficiencies in our current administration of bail, a number of national entities have promulgated standards and best practices for pretrial release programs. See, e.g., Am. Bar Ass'n, ABA Standards for Criminal Justice: Pretrial Release (3d ed. 2007) (hereinafter ABA Standards); Nat'l Ass'n of Pretrial Servs. Agencies, Standards on Pretrial Release (3d ed. 2004); Nat'l Dist. Attorneys Ass'n, National Prosecution Standards, Standards 4-4.1 to 4-4.5, at 56-57 (3d ed. 2009). Renewed interest in pretrial justice has led some commentators to suggest that the criminal justice system in the United States has begun to experience a new wave of bail reform in the twenty-first century. See Bechtel et al., supra, at 2 n.1; Schnacke et al., supra, at 21-27 (noting that "jurisdictions across the United

States have become significantly more interested in the topic of bail and pretrial release"). But reform efforts have met a number of significant challenges, including the organized resistance of the bail-bonding industry that has grown up around our justice systems, and the inertia and resistance to change that results from having lived with a system for so long that people find it difficult to look at it with fresh and critical eyes.

III. Reform Efforts in New Mexico

Following the 2014 decision in *State v. Brown*, a case that created no new law but merely described the development of current law, the New Mexico Supreme Court realized that the New Mexico justice system had become overly dependent on money-based release and detention decisions. The court created a broad-based task force, the Supreme Court's Ad Hoc Pretrial Release Committee, to assess the pretrial justice system in New Mexico and make recommendations to the court on measures needed both to bring the system into compliance with existing law and to recommend needed changes in practices, rules, statutes, and state constitutional provisions. With the assistance of the Committee's two years of work, the Supreme Court has undertaken the following actions:

A. Successfully seeking a constitutional amendment to address the worst consequences of the wealth-based release and detention system.

One of the most important recommendations of the Committee was to reform antiquated bail provisions in our state constitution that, like the majority of state constitutions, textually guaranteed the right to get out of jail before trial to virtually all defendants, except those in capital cases "where the proof is evident or the presumption great." But the ability of a dangerous defendant to post a bail bond does nothing to protect victims, witnesses, police officers, or anyone else from injury or death. Not only does the existence of a bond not deter a defendant from dangerous conduct, neither the released defendant nor a bondsman can lose a penny if the defendant commits new crimes, no matter how violent, while out on bond. And the reoffending defendant often is able to get out of jail again simply by posting a new bond on the new crimes.

The old money-for-freedom guarantee in our law, which dates back to archaic language in a seventeenth-century Pennsylvania constitution, not only endangered our communities, it resulted in packing our jails with low-risk defendants who posed no real threat to community safety but who did not have enough money to pay whatever price tag was set on their constitutional right to be presumed innocent until proven guilty. In addition to the unfair impact on low-risk defendants and their families, this imposed enormous costs on taxpayers who had to pay for housing, guarding, feeding, and caring for people who do not need to be locked up.

The antiquated bail provisions of the old constitution made it impossible for our judges to lawfully protect our communities against dangerous defendants. And the resulting culture of money for freedom/lack of money for detention, instead of a purely risk-based/evidence-based

system made it less likely that we honored existing constitutional rights of the accused. Judges who enforced the previous constitutional guarantee had to permit release on bail for defendants who predictably would prey on others – and incurred the wrath of those who did not understand that judges must honor the law even when they believe the law should be changed. Judges who misused bond setting to try to insure detention instead of to insure return to court after release, as was often the case in New Mexico and in courtrooms throughout the country, were violating both the rights of the defendant and their own judicial oaths to uphold the law as it was written, all without the procedural safeguards that should be required for outright denial of pretrial release.

The Supreme Court drafted a constitutional amendment to replace the near-absolute (theoretically) constitutional right to bail with new provisions empowering judges to deny release on a clear and convincing showing of dangerousness or flight risk and guaranteeing that no person should be jailed pretrial simply for lack of money. With the support of a broad base of diverse interests, a legislatively-amended version of the amendment was approved by unanimous votes of both chambers of the Legislature, despite enormous oppositional efforts of the commercial bail industry (see editorial at end of this paper), and by New Mexico voters in the November 2016 general election by a margin of 87% to 13%.

The new operative language in the final approved constitutional amendment, after several amendments during the legislative process, reads as follows:

> [*Previously existing language*] All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great and in situations in which bail is specifically prohibited by this section. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.
>
> *[New language]* <u>Bail may be denied by a court of record pending trial for a defendant charged with a felony if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community. An appeal from an order denying bail shall be given preference over all other matters.</u>
>
> <u>A person who is not detainable on the grounds of dangerousness nor a flight risk in the absence of bond and is otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond. A defendant who is neither a danger nor a flight risk and who has a financial inability to post a money or property bond may file a motion with the court requesting relief from the requirement to post bond. The court shall rule on the motion in an expedited manner.</u>

B. Amending court rules to move toward an individual risk-based system of release and detention.

Constitutional language, of course, paints with broad strokes and sets forth basic concepts that must be given effect by more particularized statutes, court rules, and judicial precedents. Under the New Mexico Constitution, it is the Supreme Court, rather than the Legislature, that has the ultimate authority and responsibility for promulgating rules relating to bail and other judicial procedures. *In re Matter of Death Penalty Sentencing Jury Instructions*, 2009-NMSC-053; *Albuquerque Rape Crisis Center v. Blackmer*, 2005-NMSC-032. The court has recently promulgated comprehensive new procedural rules addressing all aspects of pretrial release and detention, effective for all New Mexico courts beginning July 1, 2017. The rules can be accessed at http://www.nmcompcomm.us/nmrules/NMRuleSets.aspx

Among the changes incorporated in the rules are:

1) Abolition of fixed monetary bail schedules currently used in a number of state judicial districts in favor of individual determinations, including risk assessments using standardized and validated risk assessment instruments. The Legislature has appropriated funding for the Department of Public Safety to staff and coordinate a centralized offender database that will collect and quickly make available to courts, law enforcement, and detention centers data regarding arrestee criminal histories compiled from national and local databases, a resource that will facilitate more effective individual risk assessments and early release of low-risk offenders, including releases by detention facilities before initial court appearances. Districts that have the resources to provide other non-money-based early release programs will be able to do so, as well.

2) Adopting measures to minimize the requirement of financial security and to assure that defendants are not detained for lack of resources to post any financial security. While we have not abolished all money bail in New Mexico, the new rules are written to help assure that we minimize its worst effects, providing a presumption of releasibility on nonfinancial conditions, requiring written findings when any financial security at all is required ,and providing procedures for assessing and reviewing an individual's ability to meet financial conditions.

3) Providing deadlines for expeditious decision-making in appellate review of release and detention matters.

4) Providing more robust release and revocation procedures for defendants who refuse to abide by conditions of release.

C. Educating judges, criminal justice partners, and the community at large about our new processes.

Our court is taking the lead in preparing robust new judicial education programs to educate our judges on our new rules, new ways of doing business, and new ways of thinking, through a combination of seminars, webcasts, video-on-demand, and written materials.

We are also engaged in education efforts for criminal justice partners, the media, and the citizens of the state, to help them understand both the whats and the whys of the transition from a

money-based to an evidence-based release and detention system. It is not an easy task, both because our society, within and without the justice system, has grown accustomed to the notion that a person charged with a crime should have to pay somebody a significant sum of money in order not to be jailed while awaiting trial and because the commercial bail bond industry continues to engage in a misinformation campaign that implies public safety will be imperiled if an accused does not give money to a bondsman before being released.

Frankly, it will all take time to accomplish. Human beings are resistant to change, and old habits and old ways of thinking die hard, even those that are logically unsupportable and demonstrably harmful.

IV. The Future

All those who have tried to tackle pretrial justice reform have learned from experience that the task is not an easy one.

One obvious obstacle to reform efforts is the opposition to reform efforts on the part of the lucrative commercial bonding industry that has become a significant growth around our pretrial justice system. The industry takes the position that it is a benign growth rather than a malignant one, and part of its opposition to reform is based on that theory. Our court has not taken a position on the national debate over the accuracy of that view, aiming more narrowly at working with the bonding industry where it makes sense to do so and trying to reform specific money-for-freedom practices where they are not in the interests of the fair and efficient administration of justice. Some of those reforms, such as denial of bond to provably dangerous defendants, will have a financial impact on the industry and inevitably can be expected to result in industry opposition, as has happened in New Mexico. The state and national commercial bail industry also mounted vigorous, though unsuccessful, opposition in our legislative process to the language in the constitutional amendment guaranteeing that no person should be jailed simply for lack of money to buy release. Even though in theory the latter defendants would not be a revenue source for commercial bondsmen, there are many bondsmen who hope that having a family member or friend in jail will motivate those on the outside to find a way, no matter how difficult or unlawful, to raise the money for a bond premium that the defendant does not have and could not raise himself. And many who hope that a defendant who has no lawful means of paying a bond premium today will find a way, lawful or unlawful, to make payments on a bondsman's credit plan after release. The industry has also engaged in lawsuits, such as those filed in federal courts in New Jersey and New Mexico, in an attempt to block pretrial justice reforms. They have not ever secured a favorable court ruling in those actions, but while the cases are pending they point to the suits as support for their PR arguments. One of the ironies of the suits is that the features of the state reforms they are challenging as violative of the federal constitution were taken directly from provisions of federal bail statutes in existence for decades and that have never been successfully challenged in any federal or state court, requiring release on nonfinancial conditions unless a finding is made that no nonfinancial conditions will

reasonably assure appearance in court and permitting denial of release to proven dangerous defendants.

But perhaps the most serious obstacle to reform is the existing culture—the inertia and resistance to change that results from the familiarity of the money-for-freedom system, both in the justice system and in the community at large. Over time, our society has unthinkingly accepted the practice of releasing accused defendants from jail before their trials if they can come up with bond money and detaining them if they cannot. Challenges to the underlying theoretical justification of such practices are met with resistance and with difficulty in looking at the system with fresh eyes. When a dangerous defendant is released pretrial and predictably preys upon victims, witnesses, and others, the question too often is not how we can protect similar victims in the future, it is how much more money the judge should have required the defendant to pay a bondsman before he was released to commit those crimes. And when a low-risk poor person is kept in jail, to the detriment of himself, his family, and the taxpayers who pay for the jails, it seems to be accepted as a given that if he cannot pay his bond, it is just that he should not be released pending trial.

V. Concluding Thoughts

It is long past time that we have the intellectual honesty to reexamine bail practices that make no sense and the moral courage to correct what is wrong. In a society that really believes that the kind of justice our courts provide should not depend on a party's wealth or poverty and that all should stand equally before the bar of justice, it is critically important that we be willing to reexamine whether what we are doing lives up to those ideals. If justice is not available to all, it is axiomatic that true justice cannot be provided to anyone. I firmly believe that there is no greater advancement our courts and our society can make in the pursuit of justice in America than the clear path that lies before us toward reforming our antiquated, unprincipled, and dangerous money bail system.

REFERENCES

1. *Clear and Convincing Evidence Standard.* Laws denying pretrial release to defendants who have been shown by clear and convincing evidence in a due process hearing to be dangerous to others have been held to be lawful under the federal constitution. In *United States v. Salerno,* 481 U.S. 739, 741 (1987), the United States Supreme Court cited procedural safeguards that included an evidentiary hearing where the government had to prove dangerousness by clear and convincing evidence and the availability of an expedited appeal as grounds for upholding the constitutionality of the federal detention statute.

The clear and convincing evidence hearing requirement for denial of pretrial release is prescribed by national standards such as the ABA Standards for Criminal Justice: Pretrial Release § 10-5.8 and the National Association of Pretrial Services Agencies, Standards on Pretrial Release § 2.10, federal law such as D.C. Code, § 23-1321 [applicable to courts in the District of Columbia] and 18 United States Code 18 U.S.C. § 3142(f)(2)(a)(b) [applicable to federal courts in the rest of the United States] States courts, and in the laws of other states permitting denial of pretrial release for dangerousness, such as Arizona [Ariz. Rev. Stat. § 13-3961], California [Cal. Const. Art. 1, § 12], Illinois [Ill. Rev. Stat. § 110-6.3] Louisiana [La. Const. Art. 1, ¶ 18], Massachusetts [Mass. Gen. Laws 276 § 58A], New Jersey [N.J. Stat. Ann. § 2A:162-18], Oregon [Or. Rev. Stat. § 135.240], Utah [Ut. Const. Art. 1, § 8], Vermont [Vt. Const. Art II, § 40], and Wisconsin [Wis. Stat. § 969.035].

2. *Denial of Release Based on Dangerousness Rather Than Lack of Money*. Prohibiting detention solely because of financial inability to post a money or property bond is based on federal constitutional and statutory law, and is recognized by national standards and by the law of other states. 18 United States Code 18 U.S.C. § 3142 (a judge "may not impose a financial condition that results in the pretrial detention of the person"); D.C. Code, §. 23-1321 (a judge may impose a financial condition only if it "does not result in the preventive detention of the person"); ABA Criminal Justice Standards, Pretrial Release, § 10-1.4(e) (a judge "should not impose a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay"); Mass. Gen Laws Ch. 276, § 58A ("The judicial officer may not impose a financial condition that results in the pretrial detention of the person"). *See O'Donnell v. Harris County*, 2017 WL 1735456 (S.D. TX 4/28/17) (in class action, enjoining detention of indigents solely because they are unable to pay a secured financial condition of release); position statement filed by the United States Department of Justice in *Varden v. City of Clanton*, 2:15-cv-34-MHT-WC (M.D. AL 2015) ("Incarcerating individuals solely because of their inability to pay for their release, whether through the payment of fines, fees, or a cash bond, violates the Equal Protection Clause of the Fourteenth Amendment" of the United States Constitution); *Pierce v. Velda City*, No. 4:15-cv-570-HEA (E.D. Mo. June 3, 2015) (federal court judgment enjoining as unconstitutional detention of indigents for inability to post money bonds); *Cooper v. City of Dothan, No.* 1:1 5-CV-425-WKW (M.D. Al. June 18, 2015) (federal court order barring detention of indigents for inability to post money bonds); *Jones v. City of Clanton*, 2:15-cv-34-MHT-WC (M.D. Ala. 2015) (federal court declaratory judgment and opinion holding that "[c]riminal defendants, presumed innocent, must not be confined in jail merely because they

are poor"); *Thompson v. Moss City*, 1:15-cv-00182-LG-RHW (S.D. Miss. Nov. 6, 2015) (federal court declaratory judgment holding that "[n]o person may, consistent with the Equal Protection Clause of the Fourteenth Amendment Clause to the United States Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond."); *Rodriguez v. Providence Community Corrections, Inc.,* 3:15-cv-01048 (M.D. Tenn. Dec. 17, 2015) (federal court injunction against jailing defendants for inability to afford money bail on federal constitutional grounds). *See also* **http://www.pretrial.org/the-problem/**

3. *Research Materials.* For further reading on pretrial release issues, both in New Mexico and in the United States generally, see the following resources available readily from internet sources:

a. *State v. Brown*, 2014-NMSC-038 (2014) (The New Mexico Supreme Court opinion that traces the history, legal underpinnings, and practice of bail from its origins in medieval England to the United States and New Mexico. Contrary to some inaccurate public statements, Brown created no new law in any respect, but simply repeated the mandates of existing constitutional law, statutory law, court rules, and case law)

b. Report of the National Symposium on Pretrial Justice, http://www.pretrial.org/download/infostop/NSPJ%20Report%202011.pdf (2011 symposium under the auspices of the United States Justice Department documenting a "deeply flawed" national money bond system where "defendants who have access to money are able to purchase their release, regardless of the risks they may pose to the safety of the community; those defendants who do not, many of whom are low risk, must sit in jail until trial—at enormous public expense")

c. Report of the Joint Committee on Criminal Justice, http://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf (the report of the study committee created by the New Jersey Supreme Court with membership including prosecutors, defense lawyers, and representatives of all three branches of government that recommended amending the bail provisions of New Jersey's constitution, which was approved by voters in November 2014)

d. Reports and other resources from the Pretrial Justice Institute, http://www.pretrial.org/solutions/ (aided with funding from the United States Department of Justice, the PJI studies and shares information about needed pretrial justice reforms)

e. Money as a Criminal Justice Stakeholder: The Judge's Decision to Release or Detain a Defendant Pretrial, http://www.pretrial.org/download/research/Money%20as%20a%20Criminal%20Justice%20Stakeholder.pdf (National Institute of Corrections study tracing the history and failings of the money bond system in most of the United States, and detailing why "states that do not allow detention based on risk are putting judges at a disadvantage" in making pretrial release decisions)

f. Resources from the Pretrial Justice Center, a project of the National Center for State Courts, http://www.ncsc.org/Microsites/PJCC/Home/Issues.aspx (provides links to resources and analyzes the comparative effectiveness of the payment of money as the primary pretrial release condition versus evidence-based assessments of the risk of flight or threat to public safety)

g. Conference of State Court Administrators Policy Paper on Pretrial Release,

http://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/Evidence%20Based%20Pre-Trial%20Release%20-Final.ashx (study supports use of non-financial release conditions to the greatest degree consistent with evidence-based assessment of flight risk and threat to public safety)

h. Pretrial Justice Institute, Unsecured Bonds: The as Effective and Most Efficient Pretrial release Option,
http://www.pretrial.org/download/research/Unsecured%20Bonds,%20The%20As%20Effective%20and%20Most%20Efficient%20Pretrial%20Release%20Option%20-%20Jones%202013.pdf (study concluding that secured bonds, requiring advance posting of money or security, are no more effective at achieving public safety or court appearance as unsecured bonds)

4. "Journalistic Roto-Rooter" editorial:

Editorial: Bail bond reform measure deserves full House vote

Albuquerque Journal Editorial Board, Wednesday, February 10th, 2016

New Mexico lawmakers have an opportunity to approve and send to voters a proposed constitutional amendment that makes historic and needed changes in the state's bail bond system, which now allows dangerous defendants to bond out and terrorize the community while keeping poor, but nonviolent, defendants locked up at taxpayer expense while awaiting trial. Whether voters get that chance is now up to the Republican-controlled House of Representatives.

While the GOP often accuses Senate Majority Leader Michael Sanchez, D-Belen, of trying to derail important legislation by giving it multiple committee referrals, Republican House Speaker Don Tripp of Socorro has taken a page from that playbook with this legislation. After the proposal – supported by prosecutors, defense lawyers, the ACLU and unanimously endorsed by the board of the Greater Albuquerque Chamber of Commerce – cleared the Senate 29-9, Tripp referred it to three committees. It has cleared House Judiciary 7-2, but faces two more.

The highly profitable bail bond industry, with a fury reminiscent of the old liquor lobby, is fighting this important reform. It is worth noting that it kicked in $2,500 to Tripp's political committee.

Another recipient of the industry's largesse is Rep. Yvette Harrell, R-Alamogordo, who prior to the session received $1,000 from a bail bond company hoping to set up shop in New

Mexico. Harrell, who chairs the Regulatory and Public Affairs Committee, told Journal investigative reporter Thom Cole on Tuesday that she is hoping for an agreement between supporters and opponents, but absent that "then we may not have a hearing."

Why is this change needed? The state's Constitution guarantees reasonable bail for virtually all defendants. This amendment gives judges new authority to hold dangerous ones behind bars. As for non-violent poor people charged with minor crimes – who don't pose a flight risk – it says only that they cannot be held in jail "solely" because they can't afford to post bond. Or get grandma to put up her mobile home, or uncle Joe to offer up his car title as security to a commercial bondsman. It does not do away with bail.

The Legislative Finance Committee says passage would result in more dangerous offenders in custody and fewer non-dangerous ones in jail at a savings of about $18 million a year to counties. Attorney Lisa Simpson testified Monday that as of Nov. 25, the Metropolitan Detention Center had 513 inmates who had bond set but had not posted it. Those prisoners run up a daily tab of about $60,000.

This is a common sense fix that deals both with so-called "boomerang thugs" and poor, nonviolent defendants who are costing the taxpayers big money. It deserves a vote first on the House floor and then by New Mexico voters.