AMERICAN BAIL COALITION

Feburary 29, 2019

Uniform Law Commision
Alternatives to Bail Committee
111 N. Wabash Avenue, Suite 1010
Chocago, Illinois 60602

**RE: Pretrial Liberty Act**

Dear Chairmen Barrett and McAvoy,

I am writing to offer some thoughts and concerns of our organization with the "Pretrial Liberty Act" which is going to be considered by the committee this weekend. We believe this draft is riddled with problems from a global perspective and at the granular level that there is little if any chance of any state legislature passing the act for a number of reasons.

The act is designed to implement a system of risk-based preventative detention or release, and yet the act itself does not define the scope of preventative detention, noting instead that "we think the matter is best left to the states." Yet, I think if we look at the remainder of the act, no bail that goes unposted or causes detention could ever be imposed. So, you are then telling the states, get a menu of crimes out and figure it out, otherwise everyone is getting out without having to post bond.

In the first major issue with this act, a minimum of thirty-eight states would have to change their state constitutions to allow for preventative detention.[1] More than likely, if no bail could ever serve to detain anyone ever, then I think there would be greater pressure in the twenty-two states that have preventative detention to expand it. In short, the statutory scheme of bail depends first on what preventative detention is authorized, not the other way around. In addition, one other glaring problem is that there is no explanation for how this act deals with non-monetary holds, such as someone already on probation or parole, and whether those are legal under the act or whether a prosecutor would then have to prove the elements of preventative detention.

Second, states that have taken up this issue (since New Jersey changed their constitution) are in fact choosing not to change their constitutions to expand preventative detention, with the one exception being New Mexico. The no money bail movement was launched by New Jersey putting before the voters the federal system of risk-based preventative detention at the urging of then-Governor Chris Christie. The voters approved the constitutional amendment on November 4, 2014.[2] New Mexico

[1] https://www.ncsc.org/~/media/Microsites/Files/PJCC/Preventive%20Detention%20Brief%20FINAL.ashx
[2] https://ballotpedia.org/New_Jersey_Pretrial_Detention_Amendment,_Public_Question_No._1_(2014)



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voters authorized preventative detention, but limited it to felonies.[3] Since 2016, several states have rejected these very proposals, including Delaware, Idaho, and Texas. Colorado's crime commission rejected recommending the New Jersey plan before it was the New Jersey plan in 2012 and did not pass it in 2013. California passed Senate Bill 10 which purports to expand preventative detention by state statute which is not allowable under the State Constitution, however, that legislation has been put on hold until after the 2020 election due to a referendum drive, and was opposed by 50 civil rights groups including the ACLU, Robert F. Kennedy Foundation, and the Civil Rights Corps.

In short, we think it is not best practices to go to the system of risk-based preventative detention in the first place.[4] We think the goal should be to create more pathways out of jail, not less, and not fundamentally change bail and move to the system of preventative detention that was started first in this country in 1970. No one, including one of the early architects of that system has looked back on it and believed it turned out well. Professor Daniel Freed, who helped design the D.C. system testified against the Federal Bail Reform Act of 1984 and encouraged congress not to pass it and said the expansion of preventative detention to the degree it happened was not intended. The dissent in *Salerno* by Justice Thurgood Marshall is also a worth a read because he predicted that authoring preventative detention was a decision that would "go forth without authority and come back without respect."[5] This also marked the beginning of generational mass incarceration that we are still trying to find answers for. We also know that of those persons released in felonies in the largest 75 jurisdictions in the country, only 48% are required to actually post bail. 52% will be released on their own recognizance.

Instead, what we are seeing on the ground is that there is a need for jail alternatives more so than there is a need to reform bail.[6] Offenders have mental health, substance abuse disorders, and co-occurring disorders in many cases that, when not dealt with, lead to a cycle of incarceration and criminality that is already difficult to overcome – and even more difficult when there are few resources and programs to help address the problem. Further, the costs of going to preventative detention are so great that we believe the money would be better spent on diversion and jail alternatives more than trying to slap ankle monitors on classes of offenders or giving the government expanded, potentially unlimited, and certainly not-defined-by-this-act power to lock them up.

**"Pretrial Libety Act" Draft Issues**

First, the section defining validated risk assessments is inoperable as drafted. No risk assessment provides the "likelihood of a future event in numerical terms." The risk assessments are actuarial, not individualized. They don't actually predict an outcome as to individual defendant, nor

[3] https://ballotpedia.org/New_Mexico_Changes_in_Regulations_Governing_Bail,_Constitutional_Amendment_1_(2016)
[4] https://escholarship.org/uc/item/6p31t6hv
[5] https://www.law.cornell.edu/supremecourt/text/481/739
[6] https://nypost.com/2019/02/26/no-ones-jailed-at-rikers-for-the-crime-of-being-too-poor/



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could they. They group people into pre-set categories.[7] The categories would be static for all defendants, so if this became law you would get sorted as group, based on the factors of between X% and Y% chance of say committing a new crime. Yet, the instruments themselves are not very predictive. One widely used algorithm predicts at 65% accuracy. I have not seen one that predicts accurately better than 70% of the time. Next problem is that no instrument predicts within categories. For example, if risk of a new crime is 20-40%, no instrument can tell us where a person falls on that range or whether we know which 2-4 out of 10 will commit a new crime. Thus, I would assume that all such assessments under this language will have a warming that says "the likelihood cannot be quantified."

Second, five years to complete a risk assessment re-validation is not best practices, with most commentators saying 18-24 months is the standard.

Third, I agree that the data should be made public, although this language simply says "specify the data on which the assessment depends, such that the individual assessed may challenge it." Instead, I would encourage language from the AI Now Institute's 2017 report that requires general transparency of these assessments and stops black-box systems.[8] Of course, some of the leading systems used are not only not transparent, they may also assert trade-secret protections,[9] which is an issue that should be dealt with. Arnold Ventures (the new for-profit version of the Arnold Foundation tool) and the COMPAS tool would be two examples of tools that contractually limit anyone from seeing the data they use to build the tool.

Finally, I think requiring some testing for protected-class bias, even if there is no agreed upon standard, is necessary in light of the concerns of 100 civil rights groups calling for an end to these assessments.[10]

**Non-Appearance**

The section defining non-appearance is too broad. Practically, this is too difficult for courts to sort out. Without actual proof of the reason for a failure, then there is no way to know. This architecture also is a problem with risk assessment tools, which do not distinguish between intentional and accidental failures to appear. All such failures without the "demonstrated purpose of avoiding or delaying adjudication" would be nonappearances. So, for example, "I got drunk and didn't feel up to it, but I didn't want to delay adjudication I just didn't feel well." Plus, a prosecutor would have to prove by clear and convincing evidence, as contained in later sections, the intent of the defendant in not being

[7] Which incidentally are substantive judgements that typically are set in a fashion that does not comply with the open meetings laws of the various states or could be called "due process" in any reasonable definition of that term.

[8] https://ainowinstitute.org/AI_Now_2017_Report.pdf

[9] https://www.stanfordlawreview.org/print/article/life-liberty-and-trade-secrets/

[10] https://civilrights.org/2018/07/30/more-than-100-civil-rights-digital-justice-and-community-based-organizations-raise-concerns-about-pretrial-risk-assessment/



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there under objection by a defendant, which would then trigger a full blown evidentiary hearing. In addition, if the defendant takes the Fifth, then that makes it even more difficult for a prosecutor to prove intent.

**Exxpanding Citation**

On the sections on expanding citation, I would encourage the committee to look at Rule 6 of the Minnesota Rules of Criminal Procedure.[11] I think that rule puts enough onus on police officers to not arrest unless they can make particular findings as spelled out by the rule and creates a reasonable filter to determine whether arrest and booking is warranted. I would make a rule in this section that a person shall not be jailed on an offense for which jail is not a potential penalty. I also don't think allowing courts the power to issue standing orders enumerating specific offenses is good public policy, however, I would limit that to the legislature if it is to remain in. I think having a general procedure as outlined in the Minnesota Court rules that is not offense-specific is the right approach.

**Bond Schedules**

Next, in the comments, the question of bond schedules is embraced. I would point out that despite all of Mike Jones's research being heavily relied upon, the one thing that completely backfired in the jurisdiction he worked in was that there was a 141% increase in the number of persons who were released but spent a night in jail.[12] In other words, without the schedule the administrative delays of not having a schedule left more people in jail. That is reflected in the statistics from the Jefferson County, Colorado bond project that I obtained.[13] While they are "rough-and ready," they are clearly constitutional presuming adequate due process. I think best practices would be to say that all reviews from a schedule should occur within 24 but no more than 48 hours. That has been the gold-standard, and I think the lack of due process, not this equal protection analysis, has been the reason these cases have gone forward. The Fifth Circuit's decision in *ODonnell* and the Eleventh's Circuit's decision in *Walker II* would be worth reviewing on this point. There is no question that bail schedules are constitutional, although I suppose there is a chance the U.S. Supreme Court will take up the case and decide the issue once and for all. The *Walker v. Calhoun, GA* case has a petition for *certiorari* pending.[14]

**Artcile 3, Section 301**

Turning to Article 3, Section 301, I have several comments. First, is it allowable or a good idea to allow a judge to grant a continuance *sua sponte*, thus leaving a defendant in custody. I think not. I think

[11] Page 29: http://www.mncourts.gov/mncourtsgov/media/Appellate/Supreme%20Court/Court%20Rules/Crim-Rules-eff-10-01-2017-(CURRENT).pdf
[12] http://ambailcoalition.org/download/89/colorado/4446/jefferson-county-bail-project-briefing-document.pdf
[13] I live in Jefferson County, Colorado, and I know many of the officials who have been involved in this for the last 15+ years.
[14] https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-814.html



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good cause or some cause should be shown by the parties. I think all defendants in the United States should get in front of a judge within 48 hours, and candidly Florida's rule of 24 hours should be adopted.

Second, I think the penalty for not providing counsel is too harsh—it requires release. Instead, the Government should be sanctioned in some way, but not to simply release a defendant.

On page 9, the act states that "A defendant has a presumptive right to pretrial liberty and against undue wealth-based disparities." Problem – we don't know what an undue wealth-based disparity is. I think it would simply be asserted that any financial condition of bail is undue wealth-based discrimination.

The provision of "practical services" I think is a good idea, starting on page 10, but the question is how much is all of this going to cost and who is going to pay. There is no provision to excuse indigent defendants from having to pay. Again, we agree that providing alternatives to jail is a better approach than spending limited dollars providing reminders, doing calendar checking, or giving defendants a ride to court. The voluntary supportive services we do think are necessary and happen today. But that is not a legal barrier—it is a question of scarce dollars where the actual services are not available, which is a much larger problem than bail reform.

**Bail Setting Process**

Turning now to the actual bail setting process, this model act sets up three outcomes: pretrial release order, pretrial restraint order,[15] or a temporary detention order (leading potentially to preventative detention). First, as to the pretrial release order, no other conditions may be imposed than the defendant appears and must not obstruct justice or commit a new crime. This is contrary to the standard conditions in nearly all states, and also prevents tailoring of any other conditions (except under the section of the pretrial restraint order, which requires a finding by clear and convincing evidence). For example, the Colorado statute has a litany of standard conditions that would now require proof by clear and convincing evidence to impose, such as you waive extradition or you may be required to stop consuming alcohol if you were involved in a DUI offense.[16]

Requiring clear and convincing evidence to put non-monetary conditions on defendants would be a huge departure in the law. I'm not familiar with any state that currently requires that. Also, I would question the constitutionality of some of the conditions allowable, such as requiring employment or requiring mandatory therapeutic services.

**Bench Warrants**

[15] This is the first time I have ever seen the term, "Pretrial Restraint Order."
[16] https://law.justia.com/codes/colorado/2016/title-16/code-of-criminal-procedure/article-4/part-1/section-16-4-105



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Of course, there are issues with bench warrants. On page 15, the standard for violating conditions requires proof by clear and convincing evidence. If the court does not find that the person has absconded, no bench warrant may be issued. Instead, a court will issue a summons. The problem is, how can a prosecutor prove why the defendant did or did not appear if the defendant did not appear and cannot be contacted? Practically, all persons who fail to appear will first be given a summons. This will facilitate their escape across federal and state lines, particularly in felonies, because if they are stopped by law enforcement in another state while on the run, there will be no warrant in the system. In addition, suspects will assume there is a warrant and will present a greater danger to officers in the field who will not know that the suspect may take desperate measures to abscond, including harming law enforcement officers. What if a prosecutor can then not prove by clear and convincing evidence the need for preventative detention, or the person is not detention eligible? These sections allow for violations to occur and a bench warrant to be issued, but there is then no grounds to hold a defendant without bail pending trial without seeking preventative detention.

**Consideration of Dangerousness**

Subsection (2) on page 12 would over-rule the existing law of 46 states which allow for consideration of dangerousness when setting bail. Instead, this section requires that courts could only impose a financial bail when the defendants poses an articulable or substantial risk of absconding or obstructing justice. Line 21 on page 12 creates the right to an affordable bail, which means all persons that a state does not choose to detain via preventative detention will be released. In addition 95% of people don't self bail, meaning it is a third-party surety or compensated surety on behalf of a third-party that is bailing out the defendant. This illustrates that nearly all defendants will not have the ability to "immediately" post a bond using "available personal financial resources." Instead, I would use the procedure outlined at the end of the decision by the Fifth Circuit's decision in *ODonnell*.

**Fees**

Next, I do not think that any fees, as noted on page 13, should be allowable. This is akin to an arrest fee. No fees should be imposed until after conviction, and if they are, they should be returned upon dismissal or acquittal. There has been continuing litigation on this point, and I think these fees should go away.

**Misdeameanor Financial Conditions**

Line 7-8 on page 13 would eliminate all financial conditions of bail in misdemeanor cases. This will mean the release of all misdemeanor defendants. While the law purports to then allow a secured appearance bond on lines 9-11 of page 13, instead there is an irreconcilable conflict with the idea of an affordable bail and no detention on a bail that a defendant cannot immediately afford from his own personal finances. In addition, the comments note that this legislation leaves it to the states to decide



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which misdemeanor defendants to detain, but that such detention should be limited. I would question whether *Salerno* allows for the preventative detention of misdemeanor defendants at all.[17]

**Seeking Detention**

The process seeking detention requires two findings of clear and convincing evidence. The temporary order of detention is temporary detention until the actual detention hearing, and the evidentiary standard is contained on lines 5 of page 14. That will create two mini-trials for preventative detention, one to do it temporarily, one to do it pending trial. The problem is there is no time-frame for the first hearing. If that is to happen immediately, then when will a prosecutor go into court to prove by clear and convincing evidence the need to then have a detention hearing? When will the right to an immediate release overcome the delay of a prosecutor and how quickly will this first hearing have to happen?

**"Validated" Risk Assessment Instruments**

Next, it is asserted on page 18 that "validated risk assessment instruments are far superior to preset bond schedules, which are over-inclusive and meaningfully fail to distinguish between offenders and offenses." To the contrary, there is evidence, from peer-reviewed journals,[18] that suggest just the opposite.[19] There is no citation for this question in the Commission's draft. In addition, at least one commentator has suggested it is more fair to base the system on the conduct that occurred rather than risk assessments, which divorce what this defendant did or is accused of doing.[20] Further, there are questions of baked-in bias in risk assessments, and little to any research demonstrating that they do not actually make the problems of racial disparity in the system worse. We have seen that in practice where the deployment of risk assessments increased racial disparities in the pretrial system.[21]

**Prohibiting the Practice of the Bail Industry**

While we appreciate that it is noted that "the bail bond industry is powerful, and, to date, only four or five states have prohibited their practice," we feel that the committee should recommend best practices. This, however, is completely inconsistent with the position of this subcommittee when it

[17] "Nor are the incidents of pretrial detention excessive in relation to the regulatory goal Congress sought to achieve. The Bail Reform Act **carefully limits the circumstances under which detention may be sought to the most serious of crimes**. See 18 U.S.C. § 3142(f) (detention hearings available if case involves crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders)."

[18] In fact, much of the analysis contained in the Commission's draft comes from sources that have not been peer-reviewed or published in a reputable journal.

[19] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3016088

[20] https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1200&context=law_econ_current

[21] http://ambailcoalition.org/macarthur-safety-justice-challenge-part-ii-saint-louis-increases-pretrial-incarceration-21-1-year-one/



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comes to preventative detention—despite the fact that 38 states would have to change their constitutions to implement this act, and probably more would have to tinker with their existing preventative detention constitutional provisions, that does not seem to be a problem when it comes to preventative detention. Nor is it a problem that, at least in California, 50 civil rights groups opposed the passage of Senate Bill 10, which purported to expand preventative detention. While the drafters say in the comments that the committee decided not to end secured bonds, the comments actually go on to state the aim is "practically eliminating the use of secured bonds in lieu of detention and detention hearings."

On page 20, it is stated: "It is inapproprpiate for a court to set a financial condition of release as a means of addressing a defendant's dangerousness." Of course, 46 states allow for consideration of dangerousness as a factor in the basket of factors of setting an appropriate bail. I do not know how this can be reconciled, and I'm not sure that judges consider bail as a "means of addressing dangerousness" as much as it is but one additional statutory factor in what is typically a list of 10-15 factors. While the drafters note that this the position of the American Bar Association and a "number of jurisdictions," that number is only 4 jurisdictions.

**Review Hearings**

Section 302 regards review hearings. The first problem is that the section says if a "defendant is detained on a condition of release," then the court shall conduct a hearing. Under this scheme, the only grounds for detention are preventative detention. After two full blown evidentiary hearings by clear and convincing evidence, what would be the need for a mandatory review hearing except for changed circumstances or new evidence? This problem appears again on line 21 on page 21, where it is stated that the court shall decide whether to amend or eliminate a "condition of release that results in detention." Well, there are none except preventative detention. If it is posited that the violation of conditions can then result in detention, and this Section 302 is meant to deal with that, what would happen for example if a defendant refuses, provably by clear and convincing evidence, to not seek employment when ordered to do so? Preventative detention? Would the prosecutor then have to prove for preventative detention? This is completely unclear.

Page 22, line 1-3 continues to include the fiction that a secured bond can serve to detain under this language. If that is so, half of this bill will need to be re-written. This proposed bill creates an expanded definition of excessive bail by saying no unposted bail can serve to detain and only bonds that a defendant can afford immediately from his own personal finances can be imposed. This language is an irreconcilable conflict with the heart of this act. You cannot have it both ways. Of course, in the comments, the drafters note on lines 4-5 on page 23 that they intended to largely track the approach of Washington, D.C. to eliminate detention by another name (an unposted bond).



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**Detention Hearings**

Regarding Section 303, the actual detention hearing, I spotted several problems here. First, I don't think judges should have the power to *sua sponte* demand preventative detention, because that removes the discretion of the prosecutor. Plus, what if the prosecutor does not have or believe he can prove the need for detention by clear and convincing evidence and ethically refuses to do so? This burden should be on the prosecutor. States with elected judges may then use this provision as some evidence that a judge has the power to lock people up and didn't, which may then put political pressure to seek detention. We don't think this is a good idea. In addition, the time frames here are too long. 96 hours plus 96 hours is eight days. I would say the time period should be shortened.

**Violations of Conditions**

Turning back to the issue of violations of conditions, Section 303 on page 25 at lines 3-4 offers preventative detention eligibility for three "purposeful" violations of conditions. First, that is not defined. Second, that will mean virtually no one gets detained because getting three purposeful violations is rare. Third, to the extent it does happen, these purposeful violations may vary in severity from saying, hey I am going to drink a single beer when I was told not to or murder. Page 25 lines 19-20 then makes clear the point—there is no grounds to detain someone for violations of conditions of release unless the prosecutor is able to seek and prove by clear and convincing evidence preventative detention. So not only is preventative detention expanded, it is expanded in this case a limitation on revoking bond for violations of conditions of release, and I am not aware of a single state that requires proof by clear and convincing evidence to revoke or increase bond.

**Mini-Trials**

While the expedited trial requirement for preventative detention of 45 days is laudable, I doubt any state could comply with that. In many states, you may not get discovery within 45 days. This would essentially create a scenario where the state has two mini-trials to detain someone within 8 days of arrest, but then a full trial has to occur with 45 days or otherwise the case is dismissed. There is no way in practice that this is going to occur. If the drafters are going to put a "modular component" into this act, they may want to at least borrow from the federal statute, and not that the constitutionality of preventative detention under *Salerno* was based in part on the procedural safeguards including the speedy trial rights of those detained.[22]

"Conceivably, even a misdemeanor defendant could be detained pursuant to the draft act's scheme though the circumstances under which that could happen should be exceedingly rare." One, does *Salerno* allow this? I don't think so. Second, what circumstances? This section does not distinguish between felonies and misdemeanors for purposes of preventative detention.

[22] Federal statute requires the trial to occur within 70 days: https://www.law.cornell.edu/uscode/text/18/3161



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In conclusion, not only do we think this does not represent model policy, it has so many problems with it that I don't think it can be implemented as drafted. I also think it will create constitutional chaos in many states. **The elephant in the room is preventative detention**—and without answering the question of whether states will go to preventative detention and to what degree, this scheme will fail by forcing release and requiring preventative detention as the only backstop. In addition, I will forecast that if this draft passes not a single jurisdiction will adopt it.

Instead, we need to focus on alternatives to incarceration, ending use of the bail system as a collections mechanism, due process, and creating additional pathways out of jail. Toward that end, we have created the Fourth Generation of Bail Reform in America[23] and encourage the committee to evaluate our ideas.

I will be at the meetings commencing tomorrow, although I have a prior engagement in the morning, and expect that I will be there to participate mid-morning. I look forward to seeing you.

Respectfully submitted,

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[23] http://ambailcoalition.org/4th-gen-protecting-the-constitutional-right-to-bail/



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