

Pretrial Detention, Release, and Bail Practice in Oregon



A Report of the
Oregon Advisory Committee to the
U.S. Commission on Civil Rights

June 2021

Advisory Committees to the U.S. Commission on Civil Rights

By law, the U.S. Commission on Civil Rights has established an advisory committee in each of the 50 states and the District of Columbia. The committees are composed of state citizens who serve without compensation. The committees advise the Commission of civil rights issues in their states that are within the Commission's jurisdiction. More specifically, they are authorized to advise the Commission in writing of any knowledge or information they have of any alleged deprivation of voting rights and alleged discrimination based on race, color, religion, sex, age, disability, national origin, or in the administration of justice; advise the Commission on matters of their state's concern in the preparation of Commission reports to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public officials, and representatives of public and private organizations to committee inquiries; forward advice and recommendations to the Commission, as requested; and observe any open hearing or conference conducted by the Commission in their states.

**Oregon Advisory Committee to the
U.S. Commission on Civil Rights**

The Oregon Advisory Committee to the U.S. Commission on Civil Rights submits this report on April 30, 2021. The Committee submits pursuant to its responsibility to study and report on civil rights issues in the state of Oregon. The contents of this report are primarily based on testimony the Committee heard during virtual public meetings on September 25, 2020; November 13, 2020; November 20, 2020; December 4, 2020; December 11, 2020; and written statements.

This report details concerns about Pretrial Detention, Release, and Bail Practice in Oregon. Several themes that emerged include the need for comprehensive data collection; the use of risk assessment tools in determining an individual's liberty; the function of bail practices and its impact; and components within pretrial release. The Committee offers the Commission recommendations for addressing these issues within the criminal legal system of national importance.

**Oregon Advisory Committee to the
U.S. Commission on Civil Rights**

Shoshanah Oppenheim, *Chair*, Portland
Carl Green, Jr., *Vice Chair*, Portland

Alison Brody, Portland

Albert Lee, Portland

William Curtis, Portland

James Posey, Portland

Laura Eckstein, La Grande

Alejandro Qeral, Portland

Mark David Hall, Newberg

Andre Wang, Happy Valley

Hannah Holloway, Portland

TABLE OF CONTENTS

Executive Summary3

Introduction.....9

Background.....9

 Bail Practices in Oregon 13

Summary of Legislative Authority14

 Eighth Amendment 14

 Equal Protection Clause of the Fourteenth Amendment 15

 Due Process 16

 Oregon State Statutes on Pretrial Release 16

 Security Release Statutes17

 Releasable Offenses18

Summary of Panel Testimony.....19

 Data Collection 19

 Racial and Ethnic Disparities19

 Gap in Data20

 Failure to Appear Data and Public Safety Rates22

 Best Practices and Recommendations.....23

 Risk Assessments 23

 Pretrial Detention and Release 27

 Lack of Uniformity within Pretrial Release Programs.....27

 Legal Representation and Initial Hearings30

 Discovery Process31

 Monitoring of Special Defendant Populations32

Bail 33

 Judicial Discretion.....35

 Bail Schedules37

 Cost of Legal System Involvement on Defendants37

 Reform Efforts39

Table of Contents

Pretrial Release and Response to Mitigating Spread of COVID-19	40
Findings and Recommendations	42
Findings	42
Recommendations	46
Appendix.....	49
September 25, 2020 Briefing Transcript	49
November 13, 2020 Presentation Slides	49
November 13, 2020 Briefing Transcript	49
November 20, 2020 Presentation Slides	49
November 20, 2020 Briefing Transcript	49
December 4, 2020 Presentation Slides	49
December 4, 2020 Briefing Transcript	49
December 11, 2020 Presentation Slides	49
December 11, 2020 Briefing Transcript	49
Written Testimony	49
Rosemary Brewer, Executive Director, Oregon Crime Victims Law Center	49

EXECUTIVE SUMMARY

The U.S. Commission on Civil Rights (Commission) is an independent, bipartisan agency established by Congress and directed to study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, national origin, or in the administration of justice.¹ The Commission has established advisory committees in each of the 50 states and the District of Columbia. These Advisory Committees advise the Commission on issues in their states that are within the Commission's jurisdiction.

The Committee hosted five web hearings on September 25, 2020; November 13, 2020; November 20, 2020; December 4, 2020; and December 11, 2020 to hear testimony from law enforcement, the legal community, academics, advocacy organizations, and individuals directly impacted by bail practices. Panelists were selected to provide diverse testimony regarding pretrial release, detention, and bail practices. Several themes that emerged include: the need for comprehensive data collection; the use of risk assessment tools in determining an individual's liberty; the function of bail practices and its impact; and components within pretrial release.

On April 30, 2021, the Committee voted unanimously to approve the report. Through this study, the Committee offers a series of findings and recommendations below. Support for these findings and recommendations are found throughout this report. The Committee strongly recognizes that addressing civil rights concerns with bail, pretrial detention, and release is multifaceted and requires collective effort among multiple stakeholders.

The Committee also highlighted that the phrase 'criminal legal system' is used to refer to what is commonly called the 'criminal justice system.' This use of phrase is in an effort to recognize that the current criminal system does not obtain justice for all, regardless of race, ethnicity, religion, gender identity, sexual orientation, or socio-economic class. The use of the word justice carries moral connotations that do not always reflect the current reality of that system for black, indigenous, people of color and other historically underrepresented communities. For this reason, the Committee will utilize the criminal legal system when referring to such in an effort to recognize the realities and respect individual's lived experiences within the current system.

Findings²

1. There are currently 16 different jail management systems utilized in the 31 county jails within Oregon. These different systems make statewide data on pretrial detainees particularly challenging to collect, despite efforts by the Prison Policy Institute, the Marshall Project, and the state Criminal Justice Commission. Depending on the priorities of the jail commander and the staffing available, data can remain out of date or lacking key pieces that would be utilized

¹ Civil Rights Commission Amendments Act of 1994, Pub. L. 103-419, § 2, 108 Stat. 4338 (codified as 42 U.S.C. § 1975(a)).

² Citations are noted in the Findings section later in the report.

for studying pretrial detention in Oregon. Some data collection systems do not code for ethnicity, so individuals that identify as Latinx are coded as white. Other systems do not refer to federally recognized tribes that exist within Oregon. This information is important to fully understand the impact of pretrial detention on different racial and ethnic communities within Oregon and to properly study the civil rights implications of bail.

2. The correlation of increased releases and new criminal charges that occurred during the pandemic is predicted it will take at least one to two years to capture this data. Anecdotally, there was limited discussion of increased crime rates in Oregon. There were conflicting views on whether failure to appear rates remained steady during the pandemic or increased. Many panelists agreed that this data will be important to determine the best practices for pretrial detention, possibly indicating that increased release rates could be helpful for communities.
3. Statistically, longer time spent in pretrial detention results in stricter sentencing and higher rates of conviction. Race and ethnicity could impact pretrial process or how long an individual stays incarcerated due to an inability to provide bail. Defense attorneys expressed a mix of responses to this racial disparity, but they all highlighted the disparate impact for individuals of a lower socioeconomic status. However, there is a gap in this data as Oregon has challenges regarding data collection in pretrial detainees.
4. Failure to appear in court is costly for both the courts and the individuals. The courts must reschedule hearings and issue warrants that will cost the State time and resources that could be spent elsewhere. Also, the individual that does not appear to court will forfeit his/her bail amount. It also impacts public safety, victim safety, and any future interactions with the criminal justice system that the defendant may have. This is why one panelist characterized bail as an insurance policy, to ensure court appearance.
5. Failure to appear data has been collected and improved upon since 2017. The rates range from 10-30 percent in many jurisdictions, with some documenting up to 60 percent failure to appear. It was highlighted that this leap in data uniformity is likely due to a lack of uniformity about what constitutes a failure to appear to court.
6. The use of court reminders is found to increase court appearances in Yamhill County. This is an evidence-based solution that can be implemented at a small charge through a third-party vendor and is largely favored among the state's Public Safety Task Force.
7. In Oregon, there are currently five different risk assessment tools in use and the effort to utilize a statewide tool across jurisdictions may be challenging due to the vastly different populations, funding streams, and resources across counties.
8. Pretrial release programs vary county by county. This lack of uniformity is of concern because when coupled with statutory requirements regarding the issuance of security release and presumptive minimums, release conditions, factors used within risk assessment tools, jail capacity, and use of release assistance officer outcomes produce widely differing sentencing outcomes.

-
9. Testimony indicated that there a range of factors, that can determine if an individual receives a specific sentencing outcome. These factors include current jail capacity, where the arraignment will take place, and the time the attorney has spent with the defendant before the arraignment to learn more about the client in order to advocate for secondary release criteria measures.
 10. The use of release assistance officers may be problematic because they have the discretion to make release decisions on behalf of the court; however, these individuals are also seen as useful resources who may be able to take the pressure off judges as they can track down information that presiding judges may need to determine sentencing outcomes.
 11. The use of diversion programs appears to be both an effective and a popular option for judges to ensure defendants receive the applicable treatment needed to mitigate the charges under consideration and to avoid future harm. Unfortunately, these programs are not widely available or well-funded.
 12. Legal representation makes a difference with respect to sentencing outcomes. Defendants with private legal representation have an advantage over those who do not. This is a stark contrast between a defendant who has a public defender handling his/her case who, in majority of cases, has insufficient amount of time to learn about his/her client. With limited time and access to defendants prior to his/her initial hearing before a judge, there are notable equal access concerns as public defenders cannot meaningfully interview them, explain the process, obtain and confirm background information, and have a meaningful initial appearance so that public defenders can properly represent clients at their first appearance.
 13. Testimony indicated concerns with Oregon's pretrial discovery process. Not all counties in Oregon provide discovery prior to an indictment by the grand jury in felony cases. The defense believes the language is clear that discovery obligations begin at the time of first appearance, but some prosecutors interpret it that they are not obligated to provide discovery in felony cases until after indictment. Also, discovery packets can include important information such as police reports and accompanying documents on a felony case. This is of concern because without an open discovery process, there is a risk of evidence spoliation that could be key to proving an individual's innocence.
 14. Utilizing electronic monitoring is seen as an effective tool for monitoring special defendant populations such as individuals who are perpetrators of domestic violence and viewed to ensure victim safety. Conversely, its usage can be problematic for defendants who have less stable housing. Under such restrictions, these individuals may frequently be in violation and could cycle back into the criminal justice system. In addition, imposing a fee for the very use of the device can be viewed as predatory as these individuals may have challenges with employment due to the legal charges imposed on them.
 15. Determining an individual's pretrial release time is crucial. Individuals who are held in jail beyond 48 hours are likely to experience collateral consequences and experience disruption in their lives. Beyond this period, a defendant may lose his/her job, which makes it harder for defendants to find new employment. Pre-trial detention could also independently lower future

employment prospects through the stigma of a criminal conviction. Individuals who are dependent on income may also miss housing payments which then could affect their housing stability in addition to other necessary living expenses.

16. A panelist asserts that county offices are currently profiting off pretrial programs and even the processes to gain pretrial release. These additional fees compound on poor families to make paying bail less accessible. The bail bond industry was stated to be predatory for individuals of a lower socioeconomic status. The National Association of Pretrial Services establishes a standard of pretrial services that they believe to be achievable goals. One such goal is the elimination of all financial conditions of bail. Money has a negative, detrimental, and disparate impact on communities with a lower socioeconomic background and panelists passionately stated that this impact and oppression are not justice and perpetuate oppression for communities already struggling.
17. Individuals who are held on security release are largely indigent, BIPOC, have physical or intellectual disabilities, experiencing housing issues, and living paycheck to paycheck. Collectively, these individuals are always hit the hardest by the imposition of security release and have a difficult time making bail.
18. Anecdotally, many jails, prisons, and detention centers released pretrial detainees as a result of the pandemic because of the particular conditions within these spaces that makes quarantining effectively impossible. The use of citations, sanctions, risk assessment tools, and conditional release options such as electronic monitoring have helped to decrease the number of individuals entering prisons over the last year. Also risk assessment tools are reported to be in higher use by panelists.

Recommendations

1. Because of inaccurate and/or incomplete racial/ethnic data collected by law enforcement agencies the clear implications of disparate impact throughout pretrial practices cannot be fully assessed. Therefore, the Committee recommends the U.S. Commission on Civil Rights to study this area of concern.
2. The U.S. Commission on Civil Rights should send this report and issue a formal recommendation to the U.S. Department of Justice to:
 - a. Make participation in the Uniform Crime Report data collection and reporting mandatory for all law enforcement agencies across the country. At a minimum utilize a statewide data collection system. Hire staff to ensure this data is collected in a timely and accurate fashion.
 - b. As part of mandatory data collection and reporting requirements, the Department of Justice should require training for all state and local law enforcement to accurately capture and uniformly report race/ethnic demographic data.

-
3. The U.S. Commission on Civil Rights should send this report and issue the following formal recommendation to the U.S. Congress to:
 - a. Provide appropriations for state governments to support data collection and reporting efforts.

 4. The U.S. Commission on Civil Rights should send this report and issue formal recommendations to the Oregon Legislature to:
 - a. Fund jail diversion programs for defendants with behavioral health and housing concerns.
 - b. Appropriate funding to law enforcement agencies to collect data regarding race and ethnicity and failure to appear during the pretrial period.
 - c. Develop standardized data collection requirements for jails and courts; and ensure definitions are uniform especially in the definition of failure to appear.
 - d. Support legislation that reduces reliance on security release.
 - e. Support legislation that funds and requires local validation of risk assessment tools.
 - f. Support legislation to ensure an open discovery for felony cases.
 - g. Increase data collection in prisons and particularly in jails through funding a statewide data management system that collects information on pretrial detention, race of defendants, bail amounts, if individuals can afford said amounts, and other key factors.
 - h. When data becomes more accessible, continue to research the impact of bail on individuals of color, with an eye towards racial disparities in bail amounts and time served in pretrial detention as a result.
 - i. Create funding to research the impact of court reminder systems on the failure to appear rates, particularly in communities of color or other special populations that traditionally have higher rates of failures to appear in court.
 - j. Work towards upholding the National Association of Pretrial Services Agencies standard of eliminating all financial conditions to bail for defendants. At minimum, eliminate all financial profit for corporations or state/local agencies within the pretrial system.
 - k. Designate appropriate funding to support jail diversion programs.
 - l. Evaluate and consider the usefulness and validity of risk assessments.

 5. The U.S. Commission on Civil Rights should send this report and issue formal recommendations to the Oregon Governor to:
 - a. Require law enforcement agencies to be transparent in their use of pretrial risk tools.
 - b. Require trainings for staff, judges, attorneys, and victim service providers on pretrial legal requirements and pretrial program practices.

-
6. The U.S. Commission on Civil Rights should send this report and issue a formal recommendation to the Oregon Law Enforcement Agencies to:
 - a. Consider implementing Yamhill County's data collection methods to improve data collection on race, ethnicity, and failure to appear.

 7. The U.S. Commission on Civil Rights should send this report and issue formal recommendations to the Oregon Courts to:
 - a. Build upon the improvements in court data collection systems, especially with regards to collecting race and ethnicity information to easily notice any disparate impacts on protected classes.
 - b. When data becomes more accessible, continue to research the impact of bail on individuals of color, with an eye towards racial disparities in bail amounts and time served in pretrial detention as a result.
 - c. Increase uniformity across the state on what constitutes a failure to appear in court for the purposes of data collection.
 - d. Ensure broad application of when attorneys can appear for clients, so that the clients do not miss jobs or need to get childcare.
 - e. Utilize a court reminder system statewide, similar to the system used by Yamhill County, to decrease failure to appear rates. Also, support virtual court appearances, and increase technology use in court reminders, as recommended by the Public Safety Task Force.
 - f. Follow the recommendation first set by the Public Safety Task Force and utilize jail diversion programs and the use of citations to appear in court to decrease ethnic and racial disparities in pretrial detention.
 - g. Research and utilize the risk assessment tools, that are proven to have limited racial or disability bias – as a way to ensure objectivity – while maintaining judicial discretion at the heart of pretrial release decisions.
 - h. Create trainings, seminars, or conferences related to the use of judicial discretion to assist in systemic improvements to the use of discretion in pretrial decisions.

INTRODUCTION

The U.S. Commission on Civil Rights (Commission) is an independent, bipartisan agency established by Congress and directed to study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, national origin, or in the administration of justice.³ The Commission has established advisory committees in each of the 50 states and the District of Columbia.⁴ These Advisory Committees advise the Commission on Civil Rights issues occurring in their states that are within the Commission's jurisdiction.⁵

On May 22, 2020, the Oregon Advisory Committee (Committee) to the U.S. Commission on Civil Rights voted to examine pretrial release and bail practices as a civil rights topic of interest and in support of the U.S. Commission on Civil Rights' 2020-2021 study agenda to examine the civil rights implications of cash bail, which is in the Commission and Committee's jurisdiction pursuant to 42 U.S.C. § 1975(a) (noting that the Commission shall study discrimination or denials of equal protection of the laws based on various protected classes or in the administration of justice. The Committee acknowledged the ongoing efforts of the state of Oregon to reform bail practices and the utilization of community bail funds to support detained defendants who cannot pay for bail.

This report begins with background on bail systems and the relationship to race in the United States. A summary of themes based on testimony include data collection, risk assessment tools, pretrial detention and release, the use of bail, and COVID-19 impacts on pretrial release. The report concludes with findings and recommendations issued to the Commission to forward to appropriate federal and state entities and additional considerations directed to employers and the religious community.

BACKGROUND

In 2010, Kaleif Browder, a Bronx teenager, was accused of stealing a backpack. He spent the next three years on Rikers Island because he could not pay \$3,000 for bail. Holding steadfast to his innocence, Browder remained in jail without access to his lawyer and at the mercy of prosecutors who proffered reduction in jail time for admission of guilt. He refused. For two out of the three years he was incarcerated in Rikers, Browder was subjected to solitary confinement and was beaten by prison guards multiple times. Eventually the charges against him were dropped and he was released. His family recounts that his spirit was damaged from the abuses he endured while incarcerated and that he was never able to fully recover. Browder tragically ended his life.⁶

³ 42 U.S.C. § 1975(a).

⁴ 42 C.F.R. § 703.1.

⁵ 42 C.F.R. § 703.2.

⁶ Neil Genzlinger, "Review: A Shameful Story Gets Its Due in 'Time: The Kalief Browder Story.'" *New York Times*, Mar. 29, 2017 <https://www.nytimes.com/2017/03/29/arts/television/review-time-kalief-browder-story.html>.

Browder's story fueled momentum across several states to examine pretrial release and bail practices, which disproportionately impact communities of color and those with limited financial resources. Because the inability to promptly post bail often sets off a chain reaction that impacts subsequent legal proceedings, reformers view improving or eliminating the bail system as key to equal justice under the law. Chief among the cascading negative impacts of the inability to post bail is a willingness by defendants to secure worse plea deals in order to be released from jail.

Several states such as California, New Jersey, and Arizona have adopted changes such as eliminating or curtailing the use of cash bail.⁷ Others are studying the use of cash bail to determine future policy action and replace cash bail with a risk-assessment tool to guide judges' decisions on whether to release or detain a defendant.⁸

The contemporary impact of bail in communities of color has roots in Anglo Saxon/English history.⁹ It developed when the Germanic Anglos and Saxons settled "blood feuds" (family against family) with a system of payments called "wergeld," whereby persons and their property would be assigned a monetary worth based on social rank and wrongs between individuals would be settled by compensation.¹⁰ According to historians, this is the prototypical process recognized as America's current bail system which involves family members who become sureties for the accused and must pledge to pay the wergeld over time until the debt is paid off.¹¹

This system ended when the Normans invaded Britain in 1066. Gradually, they established a criminal legal system¹² resembling the one practiced today. The Normans began by replacing wergeld payments with corporal punishment and prison. It was not until the 1270s that the system of bail came under scrutiny when King Edward I found that sheriffs, or bail settlers, were abusing the system. This led Parliament to enact the Statute of Westminster in 1275 to establish criteria governing bailability based on several criteria.¹³ Laws concerning "bail" as release and "no bail"

⁷ Alex Traub, How Does Bail Work, and Why Do People Want to Get Rid of It?, *New York Times*, Jan. 11, 2019, <https://www.nytimes.com/2019/01/11/nyregion/how-does-bail-work-and-why-do-people-want-to-get-rid-of-it.html>

⁸ Congressional Research Service, "U.S. Constitutional Limits on State Money-Bail Practices for Criminal Defendants," Feb. 26, 2019 <https://crsreports.congress.gov/product/pdf/R/R45533/2>.

⁹ William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 *Alb. L. Rev.* 33 (1977); Note, *Bail: An Ancient Practice Reexamined*, 70 *Yale L.J.* 966, 966-68 (1961).

¹⁰ *Ibid.*

¹¹ Timothy Schnacke et al., *The History of Bail and Pretrial Release*, Pretrial Justice Institute (Sep. 24, 2010), <http://bit.ly/2u5kH4D> (accessed July 11, 2017) at 5.

¹² The phrase 'criminal legal system' will be used to refer to what is commonly called the 'criminal justice system.' This use of phrase is in an effort to recognize that the current criminal system does not obtain justice for all, regardless of race, ethnicity, religion, gender identity, sexual orientation, or socio-economic class. The use of the word justice carries moral connotations that do not always reflect the current reality of that system for black, indigenous, people of color and other historically underrepresented communities. For this reason, the Committee will utilize the criminal legal system when referring to such in an effort to recognize the realities and respect individual's lived experiences within the current system.

¹³ Statute of Westminster in 1275

as detention continued to be debated and reformed over the next 500 years.¹⁴ The English Bill of Rights of 1689 prohibited excessive bail.¹⁵

English colonists in the New World brought their system of law and justice with them. For instance, the Massachusetts Body of Liberties of 1641 included a right to bail.¹⁶ Many colonies, including Connecticut, Delaware, Georgia, Maine, Maryland, and Rhode Island implemented the same legal rights that existed under English law.¹⁷ However some colonies adopted slight variations of bail law.¹⁸

The Eighth Amendment (drafted in 1789, ratified in 1791), states that “Excessive bail shall not be required.”¹⁹ This provision does not grant a right to bail, but it requires that where it is available it may not be excessive.²⁰ The intention of the Eighth Amendment was such that bail cannot purposely be set too high for an individual in an attempt to prevent him or her from bailing out of jail.²¹ In 1789, Congress passed the Judiciary Act, which specified which types of crimes were bailable and regulated how judges set bail.²² The law stated that any non-capital crimes were bailable, while with capital crimes the judge could decide if the defendant was allowed bail.²³

The Eighth Amendment initially applied only against the federal government and not the states. In fact, there is a question as to whether the prohibition against excessive bail has been incorporated. The Eighth Amendment’s prohibition against excessive fines was explicitly applied to state and local governments in *Timbs v. Indiana*, but there is no equivalent case for the prohibition against excessive bail.²⁴ In dicta, the Supreme Court stated in the 1971 case of *Schilb v. Kubel* that, “Bail, of course, is basic to our system of law, and the Eighth Amendment’s proscription of excessive

¹⁴ Timothy Schnacke et al., *The History of Bail and Pretrial Release*, Pretrial Justice Institute (Sep. 24, 2010), <http://bit.ly/2u5kH4Dn> (accessed July 11, 2017) at 5.

¹⁵ “English Bill of Rights.” History.com. A&E Television Networks, March 6, 2018. https://www.history.com/topics/british-history/english-bill-of-rights#section_2.

¹⁶ “The Massachusetts Body of Liberties (1641).” Massachusetts General Court, December 1641. <https://history.hanover.edu/texts/masslib.html>.

¹⁷ William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 Alb. L. Rev. 33, 80 (1977); Note, *Bail: An Ancient Practice Reexamined*, 70 Yale L.J. 966 (1961).

¹⁸ John-Michael Seibler and Jason Snead, “Legal Memorandum: The History of Cash Bail,” The Heritage Foundation, No. 213. Aug. 25, 2017, p. 3 <https://www.heritage.org/sites/default/files/2017-08/LM-213.pdf>.

¹⁹ U.S. Const. amend. XIII.

²⁰ National Archives, *The Bill of Rights: A Transcription*, <https://www.archives.gov/founding-docs/bill-of-rights-transcript>.

²¹ Matthew J. Hegreness, *America’s Fundamental and Vanishing Right to Bail*, 55 Ariz. L. Rev. 909, 952 (2013).

²² Judiciary Act of 1789, <https://usa.usembassy.de/etexts/democrac/8.htm>; Judiciary Act of 1789, 1 Stat. 73 (codified at 28 U.S.C. § 33).

²³ Judiciary Act of 1789, 1 Stat. 73 (codified at 28 U.S.C. § 33).

²⁴ *Timbs v. Indiana*, 139 S. Ct. 682, 686-87 (2019).

bail has been assumed to have application to the States through the Fourteenth Amendment.²⁵ While that language does not necessarily confirm incorporation, in a footnote to the majority decision of *McDonald v. Chicago*, Justice Alito lists the prohibition against excessive bail among the incorporated rights, citing *Schilb v. Kubel*.²⁶ This is as close as the Court has come to stating that the 8th Amendment prohibits states from assigning excessive bail.

Centuries later, Congress passed the Bail Reform Act of 1966²⁷ which provided federal criminal defendants a right to bail. The law required judges to consider the defendant's family and community ties, employment history, and past record of court appearances.²⁸ Congress repealed the Bail Reform Act of 1966 through the Bail Reform Act of 1984.²⁹ Critically, the 1984 Act allows the federal courts to deny bail on the basis of danger to the community, not risk of appearing at trial.³⁰ This practice is known as preventative detention, where judges try to predict the likelihood of future criminal conduct.

Fast forward to present day, the discussion of bail systems, especially impacting indigent criminal defendants, has prompted legislative interest in, and judicial challenges to, such systems primarily in state and local jurisdictions.³¹ Today, typical systems allow defendants to avoid jail time while awaiting trial by posting a bond according to a fee schedule. A judge then sets a defendant's bail based on the criminal offense with which he or she is charged, among other factors. Defendants who cannot pay bail may remain detained pending trial.

These systems have come under criticism because, among other things, bail schedules cause an undue burden on indigent defendants because they are more likely to face difficulty in paying bail than nonindigent defendants accused of similar offenses. Defendants have been shown to more willing to accept plea deals that involve incarceration and longer sentences than if they were released and had the opportunity to appear before the court while not in custody.³² In addition, being detained before trial significantly increases the probability of a conviction, primarily through an increase in guilty pleas³³ and in one study, pretrial detainees plead guilty 2.86 times faster than

²⁵ *McDonald v. Chicago*, No. 08-1521 (U.S. Jan. 25, 2010).561 U.S. 742, 764 n. 12 (2010).

²⁶ *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971).

²⁷ 18 U.S.C. §§ 3146-52 (Supp. IV, 1969).

²⁸ *Id.*

²⁹ Berg, Kenneth Frederick. *The Bail Reform Act of 1984*, 34 Emory L.J. 685 (1985).

³⁰ *Ibid.*; 18 U.S.C. § 3142(g)(4).

³¹ U.S. Constitutional Limits on State Money-Bail Practices for Criminal Defendants at 1.

³² Nick Petersen, "Low-Level, but High Speed? Assessing Pretrial Detention Effects on the Timing and Content of Misdemeanor versus Felony Guilty Pleas," *Justice Quarterly* 36, no. 7 (2019): 1314-1335 DOI: 10.1080/07418825.2019.1639791.

³³ Will Dobbie, Jacob Goldin, and Crystal S. Yang. "The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges." *American Economic Review* 108, no. 2 (2018): 201–240 <https://doi.org/10.1257/aer.20161503>.

released defendants do.³⁴ On the other hand, proponents of bail argue that bail guarantees that defendants will appear in subsequent proceedings³⁵ and promotes public safety.

Bail Practices in Oregon

Oregon is one of four states in the U.S. (Illinois, Kentucky, and Wisconsin being the other three) that prohibits commercial bondsmen, bounty hunters, and the commercial bail bonds business. In 1987, the Oregon Supreme Court abolished the broad common law rights of both bondsmen and bounty hunters; and determined that bounty hunting was considered kidnapping.³⁶ Since the 1970s, Oregon requires a 10 percent deposit for bail paid to the clerk of the court in order to be released from jail before court hearings or an eventual trial. If the defendant does not show for his or her court dates, the court then puts a warrant out for his or her arrest and the defendant is liable for the full bail amount. When the case is closed, the defendant is refunded his/her 10 percent deposit, minus court fees and other obligations such as child support payments. Because each county operates its own pretrial processes, the vast majority of defendants in Oregon are released on conditional release, which means no money is posted for bail and defendants are released but are required to show up to their court dates.

Discussion about bail reform in Oregon has been centered around examining pretrial reform. In 2015, the Criminal Justice Policy Research Institute released a report on the effect of pretrial detention in Oregon. The results of this study, which assessed the impact of pretrial detention on sentencing outcome and the length of sentencing imposed, suggest the use of pretrial detention may unnecessarily be increasing the use of incarceration in Oregon. The implications of these findings suggest that counties should explore options to reduce their use of pretrial detention.³⁷ Two years later, the Oregon Legislature created the Task Force on Public Safety and charged it with answering key questions about Oregon's criminal legal system, including what it would take to move away from cash bail and produced a report in 2018.³⁸ In addition, Multnomah County was awarded \$2 million to implement strategies that address the main drivers of the local jail population including unfair and ineffective practices that take a particularly heavy toll on people of color,

³⁴ Petersen, Nick. "Do Detainees Plead Guilty Faster? A Survival Analysis of Pretrial Detention and the Timing of Guilty Pleas." *Criminal Justice Policy Review* 31, no. 7 (August 2020): 1015–35. <https://doi.org/10.1177/0887403419838020>.

³⁵ We Need More Bail Reform, PRETRIAL SERVS. AGENCY FOR D.C., <https://www.psa.gov/?q=node/390> (last accessed July 3, 2018); The High Cost of Bail: How Maryland's Reliance on Money Bail Jails the Poor and Costs the Community Millions, Md. Office of Pub. Def., at <http://www.opd.state.md.us/Portals/0/Downloads/High%20Cost%20of%20Bail.pdf>. (Nov. 2016) (last accessed July 3, 2018).

³⁶ *State v. Epps*, 585 P.2d 425, 427-29 (1978).

³⁷ Criminal Justice Policy Research Institute and Portland State University. *Final Summary Report on the Effect of Pretrial Detention in Oregon Submitted to Oregon Criminal Justice Commission*, May 23, 2019. <https://www.oregon.gov/cjc/CJC%20Document%20Library/EffectofPretrialDetention.pdf>.

³⁸ State of Oregon, Task Force on Public Safety, *Preliminary Report to the Oregon Legislature*, September 15, 2018, https://www.oregonlegislature.gov/citizen_engagement/Reports/OCJC2018_09_15_PublicSafetyTaskForceReport.pdf.

low-income communities, and people with mental health and substance abuse issues.³⁹ In 2020, Multnomah County was again awarded an additional \$2 million to conduct a pretrial system assessment to identify efficiencies in the pretrial system that could improve the pretrial system in Multnomah County.⁴⁰

SUMMARY OF LEGISLATIVE AUTHORITY

The following section provides a summary of relevant authority governing. While there are several laws that can be linked to this topic, the Committee identified three Amendments in the Constitution that are relevant to pretrial detention and bail. In addition, there are state laws that are particularly related to the scope of their inquiry.

Eighth Amendment

The Eighth Amendment of the U.S. Constitution states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁴¹ Bail is excessive when “set higher than an amount reasonably calculated to...assure presence of an accused.”⁴² While the Eighth Amendment expressly prohibits excessive bail, it does not establish an absolute right to bail.⁴³

In addition, there were several court cases that determined whether a defendant has a right to bail. For instance, in *Stack v. Boyle*, the court declared that determining one’s right to freedom “before conviction permits the unhampered preparation of a defense and serves to prevent the infliction of punishment prior to conviction.... Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”⁴⁴ Also, in *Carlson v. Landon*,⁴⁵ decided in the same term as *Stack*, the Court stated the following:

The bail clause was lifted, with slight changes, from the English Bill of Rights Act. In England, that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried

³⁹ Multnomah County, *Multnomah County Awarded \$2 million by MacArthur Foundation Safety and Justice Challenge to Advance Local Criminal Justice Reforms*, Oct. 3, 2017 <https://multco.us/multnomah-county/news/multnomah-county-awarded-2-million-macarthur-foundation-safety-and-justice> (last accessed on March 10, 2020).

⁴⁰ Max Bernstein, “Multnomah County awarded \$2 Million grant to reduce its jail population, improve pre-trial services.” *Oregonian*, Feb. 4, 2020 <https://www.oregonlive.com/crime/2020/02/multnomah-county-awarded-2-million-grant-to-reduce-its-jail-population-improve-pre-trial-services.html> (last accessed March 10, 2020).

⁴¹ U.S. Const. amend. VIII.

⁴² *Stack v. Boyle*, 342 U.S. 1, 3 (1951).

⁴³ *Id.*

⁴⁴ *Id.* at 2.

⁴⁵ 342 U.S. 524, 545 (1952).

over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases, bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable.⁴⁶

Then, in *United States v. Salerno*,⁴⁷ a court case challenging the Bail Reform Act of 1984, the Supreme Court confirmed the validity of preventive detention and stated that the Act does not inflict punishment prior to an adjudication of guilt and, therefore, does not violate the due process clause of the Fifth Amendment. It also rejected the argument that denial of bail constitutes infinite bail in violation of the excessive bail clause of the Eighth Amendment.⁴⁸

Equal Protection Clause of the Fourteenth Amendment

Equal protection forbids any state from “deny[ing] to any person within its jurisdiction the equal protection of the laws,” and equal protection applies to the federal government through the Fifth Amendment’s Due Process Clause.⁴⁹ Essentially, equal protection forbids the government from classifying without a sufficient reason. When a statute or ordinance discriminates against an individual or a class of individuals, and those individuals sue, the court will apply one of three levels of scrutiny to the law in question: rational basis, intermediate scrutiny, or strict scrutiny.

As it relates to bail and detention, 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.⁵⁰ The lowest level of scrutiny, rational basis, applies to discrimination based on wealth classifications.⁵¹ However, to the extent that current bail laws also discriminate on the basis of race, they would be subject to strict scrutiny.⁵²

⁴⁶ *Id.*

⁴⁷ *United States v. Salerno*, 481 U.S. 739, 742-55 (1987).

⁴⁸ *Id.*

⁴⁹ U.S. Const. amend. XIV.

⁵⁰ See *Tate v. Short*, 401 U.S. 395, 398 (1971); *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970); *Smith v. Bennett*, 365 U.S. 708, 709 (1961).

⁵¹ *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S.C. 1, 29 (1973).

⁵² *Adarand Constructors, Inc. v. Peña*, 515 U.S.C. 200, 227 (1995); “Strict Scrutiny.” Legal Information Institute. Legal Information Institute, n.d.

https://www.law.cornell.edu/wex/strict_scrutiny#:~:text=Strict%20scrutiny%20is%20a%20form,sues%20the%20government%20for%20discrimination.

Due Process

The subject of bail and detention also implicate the due process clauses contained in the Fifth Amendment⁵³ and the Fourteenth Amendment.⁵⁴ The Fifth Amendment applies to actions taken by the federal government, whereas the Fourteenth Amendment applies to actions taken by state governments stating that “No state shall make or enforce any law... nor shall any state deprive any person, of life, liberty, or property, without due process of law....”.⁵⁵

Due process may be considered procedural or substantive. Based on the principle of "fundamental fairness," procedural due process requires notice⁵⁶ and an opportunity to be seen and heard⁵⁷ before a neutral party, often a judge.⁵⁸ Substantive due process "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."⁵⁹

Oregon State Statutes on Pretrial Release

Release means temporary or partial freedom of a defendant from lawful custody before judgment of conviction or after judgment of conviction if defendant has appealed.⁶⁰ Release agreement means a sworn writing by the defendant stating the terms of the release and, if applicable, the amount of security.⁶¹

Release decision means a determination by a magistrate, using primary and secondary release criteria, which establishes the form of the release most likely to ensure the safety of the public and the victim, the defendant’s court appearance and that the defendant does not engage in domestic violence while on release.⁶²

Primary release criteria⁶³ includes the following:

⁵³ U.S. Const. amend. V.

⁵⁴ *Id.* at amend. XIV, cl. 1.

⁵⁵ *Id.* (“No state shall make or enforce any law... nor shall any state deprive any person, of life, liberty, or property, without due process of law”).

⁵⁶ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317-20 (1950); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

⁵⁷ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317-20 (1950); *Goldberg v. Kelly*, 397 U.S. 254, 263-64 (1970).

⁵⁸ *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

⁵⁹ *Reno v. Flores*, 507 U.S. 292, 302 (1993).

⁶⁰ Or. Rev. Stat. § 135.230(8) (2020).

⁶¹ Or. Rev. Stat. § 135.230(9) (2020).

⁶² Or. Rev. Stat. § 135.230(10) (2020).

⁶³ Or. Rev. Stat. § 135.230(7) (2020).

-
- (a) The reasonable protection of the victim or public;
 - (b) The nature of the current charge;
 - (c) The defendant's prior criminal record, if any, and, if the defendant previously has been released pending trial, whether the defendant appeared as required;
 - (d) Any facts indicating the possibility of violations of law if the defendant is released without regulations; and
 - (e) Any other facts tending to indicate that the defendant is likely to appear.

Secondary release criteria⁶⁴ includes the following:

- (a) The defendant's employment status and history and financial condition;
- (b) The nature and extent of the family relationships of the defendant;
- (c) The past and present residences of the defendant;
- (d) Names of persons who agree to assist the defendant in attending court at the proper time; and
- (e) Any facts tending to indicate that the defendant has strong ties to the community.

There are three different types of release agreements: (i) Conditional release means a non-security release, which imposes regulations on the activities and associations of the defendant;⁶⁵ (ii) Personal recognizance means the release of a defendant upon the promise of the defendant to appear in court at all appropriate times;⁶⁶ and (iii) Security release means a release conditioned on a promise to appear in court at all appropriate times which is secured by cash, stocks, bonds or real property.⁶⁷ This is what we typically think of as money bail.

A surety is one who executes a security release and binds oneself to pay the security amount if the defendant fails to comply with the release agreement.⁶⁸

Security Release Statutes

Except as otherwise provided, a person in custody has the right to immediate security release or to be taken before a magistrate "without undue delay."⁶⁹ If a person in custody does not request a security release at the time of arraignment, the magistrate shall make a release decision regarding the person within 48 hours after the arraignment.⁷⁰ The magistrate will set the "least onerous condition reasonably likely to ensure the safety of the public and the victim" or security amount that will "reasonably assure the defendant's appearance."⁷¹

⁶⁴ Or. Rev. Stat. § 135.230(11) (2020).

⁶⁵ Or. Rev. Stat. § 135.230(2) (2020).

⁶⁶ Or. Rev. Stat. § 135.230(6) (2020).

⁶⁷ Or. Rev. Stat. § 135.230(12) (2020).

⁶⁸ Or. Rev. Stat. § 135.230(13) (2020).

⁶⁹ Or. Rev. Stat. § 135.245(1) (2020).

⁷⁰ Or. Rev. Stat. § 135.245(2) (2020).

⁷¹ Or. Rev. Stat. §§ 135.245(3), 135.265(1) (2020).

To be released, 10 percent of the security amount must be deposited (but no less than \$25).⁷² This amount may be paid in cash, stocks, bonds, or real or personal property owned by the defendant, or sureties worth double the amount of security set by the magistrate.⁷³ After submitting the deposit to the clerk, the defendant will be released from custody on the condition that he or she appear before the court, as ordered.⁷⁴ Once this appearance obligation has been met and the defendant is discharged from all other obligations in the case, the clerk shall return 85 percent of the deposit (but not less than \$5 or more than \$750) and retain the remaining 15 percent as administrative costs, to be deposited in the state's funds.⁷⁵

The defendant can request a hearing on the issue of release and the state has the burden of producing evidence.⁷⁶ However, the defendant may be represented by counsel and present evidence, as well. At the release hearing, the district attorney and the victim have the right to raise issues relevant to the release decision.⁷⁷

Releasable Offenses

Except for charges of murder or aggravated murder, a defendant shall be released while waiting judgment of conviction.⁷⁸ When the defendant is charged with a violent felony, release can be denied when the court finds there is probable cause to believe the defendant committed the crime and that, by clear and convincing evidence, there is a danger of physical injury or sexual victimization to the victim or the public.⁷⁹

For certain offenses requiring mandatory minimum sentences, the court must set a security amount of at least \$50,000 unless the court determines that it is unconstitutionally excessive.⁸⁰ The court may also impose any supervisory conditions necessary to protect the victim and the community.⁸¹

For charges related to certain methamphetamine offenses, the security release cannot be less than \$500,000 if the court finds there is probable cause that the defendant committed the crime and by clear and convincing evidence that there is a danger the defendant will (i) fail to appear in court at all appropriate times; (ii) commit a new criminal offences; or (iii) pose a threat to the reasonable protection of the public.⁸²

⁷² Or. Rev. Stat. § 135.265(2) (2020).

⁷³ Or. Rev. Stat. § 135.265(3) (2020).

⁷⁴ Or. Rev. Stat. § 135.265(2) (2020).

⁷⁵ *Id.*

⁷⁶ Or. Rev. Stat. §§ 135.245(4), 135.242(2)-(4) (2020).

⁷⁷ Or. Rev. Stat. § 135.245(5) (2020).

⁷⁸ Or. Rev. Stat. § 135.240(2) (2020).

⁷⁹ Or. Rev. Stat. § 135.240(4) (2020).

⁸⁰ Or. Rev. Stat. § 135.240(5)(a) (2020).

⁸¹ Or. Rev. Stat. § 135.240(5)(b) (2020).

⁸² Or. Rev. Stat. § 135.242(1) (2020).

SUMMARY OF PANEL TESTIMONY

Web hearings held on September 25, 2020; November 13, 2020; November 20, 2020; December 4, 2020; December 11, 2020 included testimony from law enforcement, the legal community, academics, advocacy organizations, and individuals directly impacted by bail practices. Panelists were selected to provide diverse testimony regarding pretrial release, detention, and bail practices. Several themes that emerged include: the need for comprehensive data collection; the use of risk assessment tools in determining an individual's liberty; the function of bail practices and its impact; and components within pretrial release.

Data Collection

Racial and Ethnic Disparities

Racial and ethnic disparities in pretrial practices exist in Oregon, much as they do across the United States.⁸³ Dr. Brian Renauer and Dr. Chris Campbell, researchers and professors of criminology and criminal justice at Portland State University, discuss this in depth throughout their testimony as they have researched the topic for the last few years. They stated that,

research has found that people of color make up a disproportionate number of detained pretrial defendants relative to their U.S. population. Some research has found that bail amounts between people of color and white defendants may be similar, but people of color have a much greater difficulty in posting bail, and therefore, are more likely to remain in custody compared to white defendants.⁸⁴

Findings from this study indicate that race and ethnicity were not predictors of sentencing outcomes, however, Dr. Campbell stipulated that race and ethnicity could impact pretrial process or how long an individual stays incarcerated due to an inability to provide bail. These topics were outside the scope of their first research study but were addressed more within their follow up study released in 2021.⁸⁵

In the second study, Dr. Campbell, Dr. Renauer, and Dr. Kelsey Henderson researched the cause of the connection between pretrial detention and an increased likelihood of incarceration.⁸⁶ This scope allowed them to examine how race and ethnicity may impact pretrial detention. One factor that played a role in the data was that proportionally, Oregon is a very white state according to census data. Dr. Campbell pointed out that there is a growing Hispanic and Latinx community, as

⁸³ Dr. Christopher Campbell, testimony, *Web Hearing Before the Oregon Advisory Committee to the U.S. Commission on Civil Rights*, Nov. 13, 2020, transcript, p. 14 (hereafter cited as *November 13, 2020 Web Hearing*).

⁸⁴ Ibid; Megan T. Stevenson, "Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes," *Journal of Law, Economics, & Organization*, 34, no. 4 (2018): 511-42, DOI: <https://doi.org/10.1093/jleo/ewy019>.

⁸⁵ Campbell Testimony, *November 13, 2020 Web Hearing*, pp. 17-18; Mark Harmon, Christopher M. Campbell, Kris R. Henning, and Brian Renauer. "Effect of Prison Length of Stay in Oregon." (2019).

⁸⁶ Renauer Testimony, *November 13, 2020 Web Hearing*, p. 18.

well as a relatively large Indigenous population; however, Oregon is still approximately 75 percent white overall.⁸⁷ This low base rate means that it can be hard to detect disparities in quantitative outcomes. To ensure this data was captured, Dr. Renauer and Dr. Campbell intentionally gathered qualitative data on the topic.⁸⁸ What they found initially was that many judges recognize that race and ethnicity play a role in interactions with the criminal legal system, and they try to “go out of their way to make it so that it is a fair process.”⁸⁹ Defense attorneys collectively agreed in discussions with the research team that there are financial disparities in bail for those of a lower socioeconomic status.⁹⁰ Some of those attorneys stated that there was potentially an element of racial disparity as well. However, there was disagreement over this statement between attorneys across the state.⁹¹

Panelists noted that gathering effective and accurate data on racial disparities in pretrial release and bail practices is challenging because there is a gap in what is known about the Oregon pretrial population.⁹²

Gap in Data

Several panelists pointed to a lack of relevant data on pretrial populations in Oregon.⁹³ Dr. Laura Appleman, the Van Winkle Melton Professor of Law and University Research Integrity Officer at Willamette University College of Law, stated that gathering specific statistics on state prison populations was nearly impossible.⁹⁴ Although the Prison Policy Institute and the Marshall Project have both examined Oregon’s prison system, the data collection done by the state is minimal.⁹⁵ According to Ms. Appleman, there is no information disaggregating pretrial detainees and the convicted individuals in prison. It is also difficult to isolate for defendants who require bail but cannot afford it.⁹⁶

⁸⁷ U.S. Census Bureau, 2019 American Community Survey, 1 year estimates

⁸⁸ Campbell Testimony, *November 13, 2020 Web Hearing*, p. 21.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*, p. 20.

⁹¹ *Ibid.*

⁹² Budbill Testimony, *November 13, 2020 Web Hearing*, p. 31; Mike Schmidt, testimony, *Web Hearing Before the Oregon Advisory Committee to the U.S. Commission on Civil Rights*, Nov. 20, 2020, transcript, p. 14 (hereafter cited as *November 20, 2020 Web Hearing*).

⁹³ Laura Appleman, testimony, *Web Hearing Before the Oregon Advisory Committee to the U.S. Commission on Civil Rights*, Sept. 25, 2020, transcript, p. 4 (hereafter cited as *September 25, 2020 Web Hearing*); Budbill Testimony, *November 13, 2020 Web Hearing*, pp. 30-31; Schmidt Testimony, *November 20, 2020 Web Hearing*, p. 14.

⁹⁴ Appleman Testimony, *September 25, 2020 Web Hearing*, p. 4.

⁹⁵ Harmon, Mark, Christopher M. Campbell, Kris R. Henning, and Brian Renauer. "Effect of Prison Length of Stay in Oregon." (2019); Prison Policy Initiative. "Oregon Profile." Prison Policy Initiative, n.d. <https://www.prisonpolicy.org/profiles/OR.html>; The Marshall Project. "Oregon: A Curated Collection of Links." ((2021, March 12). <https://www.themarshallproject.org/records/173-oregon>.

⁹⁶ Appleman Testimony, *September 25, 2020 Web Hearing*, p. 4.

Ms. Bridget Budbill, the Legislative Director at the Office of Public Defense Services, stated that race and ethnicity data in both jail and Oregon courts are lacking important factors.⁹⁷ She shared her work with the Criminal Justice Commission, a state commission tasked with improving the legitimacy, efficiency, and effectiveness of state and local criminal justice systems.⁹⁸ Through this group, the state expressed an interest in improving data collection. The Criminal Justice Commission attempted to gather data from Oregon's 31 county jail facilities, but because every jail utilizes a different management system for holding data, the actual data collected is dependent on jail commander priorities and the available staff to collect the information. What the Criminal Justice Commission found was that in some county jails data is missing or was not collected.⁹⁹ Ms. Budbill said:

there are a couple of jail management systems in Oregon jails that actually do not have any notation for Latinx persons. So those persons are currently counted as white, which of course eliminates or really greatly reduces your ability to determine whether there's any sort of disparity if you can't actually know which of your persons are of whatever race or ethnicity that they identify as.¹⁰⁰

In addition, some federally recognized native tribes are not being counted outside Klamath or Douglas counties.¹⁰¹

Mr. Mike Schmidt, the District Attorney for Multnomah County, agreed that there is a lack of data collected by Oregon's county and municipal jails. He shared that there are 16 different jail management systems across the state. It is also easier to collect prison data because individuals stay in prison longer than the jails, who hold individuals presentencing, for other counties that have reached capacity, those wanted on a warrant, and those pretrial.¹⁰² DA Schmidt argued that Yamhill County is a community that cares deeply about their pretrial reform because they track individuals in their jail on an Excel spreadsheet.¹⁰³ Ms. Jessica Beach, the Community Justice Director for Yamhill County, later informed the Committee that Yamhill County is now using a system called Automon, which is used for case management and pretrial information. This was imperative because it made data more easily accessible as opposed to Excel sheets and paper files.¹⁰⁴

⁹⁷ Budbill Testimony, *November 13, 2020 Web Hearing*, p. 11.

⁹⁸ Oregon State Government. "About: Information About the Commission and Agency." Oregon State Government, n.d. <https://www.oregon.gov/cjc/about/Pages/default.aspx>.

⁹⁹ Budbill Testimony, *November 13, 2020 Web Hearing*, pp. 30-31.

¹⁰⁰ *Ibid.*, p. 31.

¹⁰¹ *Ibid.*

¹⁰² Schmidt Testimony, *November 20, 2020 Web Hearing*, p. 14.

¹⁰³ *Ibid.*

¹⁰⁴ Jessica Beach, testimony, *Web Hearing Before the Oregon Advisory Committee to the U.S. Commission on Civil Rights*, Dec. 4, 2020, transcript, p. 11 (hereafter cited as *December 4, 2020 Web Hearing*).

Court data would focus on pretrial decisions, whether an individual is on security release, released on their own, or detained.¹⁰⁵ If individuals want to determine who is receiving different types of pretrial release, Ms. Budbill shared that you must turn to court data. She said that traditionally the courts have not collected this data in relation to ethnicity and race. Due to the transition to a new data collection system, there are currently gaps in court data and improvements to be made within the program according to Ms. Budbill.¹⁰⁶

Failure to Appear Data and Public Safety Rates

Historically, the purpose of a cash bail system is in part to ensure an individual's appearance at trial and to protect public safety through this cash incentive.¹⁰⁷ Mr. Topo Padilla, a bail bondsman with the Greg Padilla Bail Bonds group in California, was invited to speak as an advocate for public safety and as a board member for the Crime Victims United California Chapter. He stated that bail bonds do not pay attention to the merits of the case. The goal of bail is to ensure release from jail and attendance to court according to Mr. Padilla. He argued that it is not a financial punishment.¹⁰⁸ Dr. Campbell shared that failure to appear is costly for the courts as they have to reschedule hearings and issue a warrant. It would also mean that the individual may have to forfeit their bail.¹⁰⁹ On a macro level, Dr. Campbell suggested that it impacts public safety, victim safety, and any future interactions the individual may have with the criminal legal system.¹¹⁰ These factors make failure to appear to court one of the major concerns whenever reforming bail and pretrial release practices.

DA Schmidt testified that State failure to appear data is collected by the Oregon Judicial Department and that they have made great strides in this collection since 2017.¹¹¹ According to Dr. Campbell, failure to appear rates vary between 10 to 30 percent, but can reach as high as 60 percent in some jurisdictions.¹¹² One of the challenges the researchers had previously in collecting this data is the lack of uniformity in what constitutes as a failure to appear. For instance, Mr. Brook Reinhard, the executive director at the Public Defender Services of Lane County, said that Lane County was inconsistent with what constituted a failure to appear. Mr. Reinhard stated,

Lane County's practice of requiring people to sign these release agreements. It lacked a specific phrase that told people, "Oh, you need to appear in person, your attorney can't appear for you". And what that meant is that Lane County had to rewrite all of their release agreements in the meantime.

¹⁰⁵ Budbill Testimony, *November 13, 2020 Web Hearing*, pp. 31-32.

¹⁰⁶ *Ibid.*

¹⁰⁷ Appleman Testimony, *September 25, 2020 Web Hearing*, p. 6.

¹⁰⁸ Topo Padilla, testimony, *Web Hearing Before the Oregon Advisory Committee to the U.S. Commission on Civil Rights*, Dec. 11, 2020, transcript, p. 10 (hereafter cited as *December 11, 2020 Web Hearing*).

¹⁰⁹ Campbell Testimony, *November 13, 2020 Web Hearing*, p. 14.

¹¹⁰ *Ibid.*

¹¹¹ Schmidt Testimony, *November 20, 2020 Web Hearing*, p. 13.

¹¹² Campbell Testimony, *November 13, 2020 Web Hearing*, p. 14.

And so that means that you might've been charged with failure to appear in Lane but not in another county based on doing the same behavior.¹¹³

Increasing uniformity across counties in Oregon on what failure to appear means is crucial to collecting valid data.¹¹⁴

Best Practices and Recommendations

Panelists provided recommendations on how to improve data collection and address the concerns of racial bias that currently exist in the data. Judge John Collins, of Yamhill County, emphasized that one of the greatest weaknesses in Oregon is the lack of data collection and use. In order to make evidence-based improvements, the state and courts must have the evidence and data to support change.¹¹⁵ Ms. Beach added that collecting better pretrial data is vital to better reforms and ensuring new practices are evidence based.¹¹⁶

Judge Collins also shared the Public Safety Task Force recommendation which focuses on reducing ethnic and racial disparities in pretrial detention. The Task Force stated that this can be done through the support of jail diversion programs, use of citations to appear in court, and gathering further data.¹¹⁷

Ms. Beach also suggested to increase the usage of court reminders. She believes increasing the use of court reminders across the state can address court appearances. This is an evidence-based solution and there are a large number of vendors that provide the service at a small charge.¹¹⁸ Judge Collins built on those recommendations to improve failure to appear rates. He shared the Public Safety Task Force recommendation which highlighted reducing failures to appear through court reminders across the state, supporting more virtual court appearances, and increasing the use of technology to better inform and support individuals as they are initially released from jail. This also includes requesting funds to support these measures as well as further data collection measures on how these changes alter court appearance rates.¹¹⁹

Risk Assessments

Risk assessments tools have been widely used throughout the criminal legal system. These tools offer advice to judges, parole officers and other officials as they make decisions about an individual's time spent in the criminal legal system.

¹¹³ Reinhard Testimony, *November 20, 2020 Web Hearing*, p. 19.

¹¹⁴ Campbell Testimony, *November 13, 2020 Web Hearing*, p. 14.

¹¹⁵ Collins Testimony, *December 4, 2020 Web Hearing*, p. 6.

¹¹⁶ Beach Testimony, *December 4, 2020 Web Hearing*, p. 15.

¹¹⁷ Collins Testimony, *December 4, 2020 Web Hearing*, p. 7.

¹¹⁸ Beach Testimony, *December 4, 2020 Web Hearing*, pp. 14-15.

¹¹⁹ Collins Testimony, *December 4, 2020 Web Hearing*, p. 9.

Several pretrial risk assessment tools have been developed for use in jurisdictions across the country. In Oregon, there are currently five different risk assessment tools in use¹²⁰ and the effort to utilize a statewide tool across jurisdictions may be challenging due to the vastly different populations, funding streams, and resources across counties.¹²¹ For instance, Yamhill County and Marion County use the Public Safety Checklist (PSC), which was created by the Criminal Justice Commission (CJC). Although validated by the Criminal Justice Commission statewide for post-conviction populations, the Public Safety Checklist has been found potentially more fitting for use in rural counties.¹²² Increasingly, however, advocates for criminal justice reform have begun to question risk assessments tools. Much of the controversy centers on the fact that the tools, while perhaps capable of facilitating greater pretrial release for some, may increase pretrial detention or still encourage excessive detention in certain populations.

Based on Dr. Campbell and Dr. Renauer’s research on pretrial release programs in Oregon, they found that actuarial risk assessment tools, which are based on statistical models, are used sporadically across counties for emergency releases or by delegated release authorities to release low-risk defendants prior to arraignment and sometimes accompanies a recommendation of release and security (bail).¹²³

Several panelists commented on the use of risk assessment tools and the inclusion of criminal history in algorithms. Ms. Budbill said:

there is pretty good reason or at least some reason for folks out there to be concerned that if you are a member of a community that has seen a different or disparate sort of police interaction, be it for police policy or because your neighbors call police on you more often. Whatever, the reason being that will somehow affect your criminal history.¹²⁴

An individual’s criminal history, at times due to living in an overpoliced community, then becomes part of their “actuarial risk score” and will determine one’s liberty outcome.

The use of algorithms in risk assessments and their potential for bias was at the center of the discussion among panelists.¹²⁵ Amanda Trujillo, cofounder of the Portland Freedom Fund, said that she knows young men who have repeatedly encountered the criminal legal system as early as

¹²⁰ Schmidt Testimony, *November 20, 2020 Web Hearing*, p. 21.

¹²¹ Beach Testimony, *December 4, 2020 Web Hearing*, p. 25.

¹²² *Ibid.*; Myers Testimony, *December 4, 2020 Web Hearing*, p. 17.

¹²³ Chris Campbell, Brian Renauer, and Kelsey Henderson, “Examining Pretrial Practices in Oregon” (Presentation to the Oregon Advisory Committee to the U.S. Commission on Civil Rights, November 12, 2020), Slide 52 (hereinafter cited as *Campbell, Renauer, Henderson Presentation Slides*).

¹²⁴ Budbill Testimony, *November 13, 2020 Web Hearing*, pp. 25-26.

¹²⁵ Trujillo Testimony, *December 11, 2020 Web Hearing*, p. 5; Padilla Testimony, *December 11, 2020 Web Hearing*, pp. 13-14.

the age of 14 and said that they may have a higher risk in denial of pretrial release.¹²⁶ Mr. Padilla added that he understands risk assessments to be racially biased and would not recommend its use.¹²⁷ With much skepticism, Mr. Padilla said,

[t]o say that these tools can predict if somebody is going to fail to appear in court or they're going to go out and commit another crime, I just find that very, very hard to believe.¹²⁸

Focusing on the specific elements within risk assessment tools, Dr. Campbell holds the belief that any risk assessment tool that uses arrest information, rather than a conviction criminal history is “already one step closer to being a biased tool.”¹²⁹

Ms. Budbill noted that even though there is concern about risk assessment tools relying on criminal history, Oregon judges are statutorily obligated to consider a defendant’s criminal history as part of the primary and secondary release criteria.¹³⁰ In fact, the state is also interested in establishing rules for using pretrial risk assessment tools as they would like to make it a requirement for jurisdictions.¹³¹

While panelists hold the belief that risk-assessment tools are problematic due to its likelihood of perpetuating bias, Dr. Campbell noted that there is limited evidence to suggest that a risk-based tool or a risk assessment that is based on criminal histories of convictions is inherently biased. He recommends that this should be studied further.¹³² By doing so would help jurisdictions make baseline decisions to identify low risk individuals who could be released early or onto on recognizance or set to a lower bail.¹³³

Shaun McCrae, Executive Director for the Oregon Criminal Defense Lawyer’s Association and former trial attorney with 30 years of experience litigating cases across Oregon, provided an example of when she attempted to resolve an issue with the Lane County pretrial services office and her encounter with their use of risk assessment tools. She testified that when Lane County utilized their risk assessment tool, her client’s bail had increased from \$200,000 to \$750,000, which her client was unable to pay the 10 percent. In an attempt to resolve the issue, she requested a hearing with the court and contacted the pretrial services office to learn more information about the risk assessment tool. She was told that staff did not have access and was only able to receive the answers to the questions from the risk assessment tool but not the questions. Without the

¹²⁶ Trujillo Testimony, *December 11, 2020 Web Hearing*, pp. 5-6.

¹²⁷ Padilla Testimony, *December 11, 2020 Web Hearing*, pp. 13-14.

¹²⁸ *Ibid.*

¹²⁹ Campbell Testimony, *November 13, 2020 Web Hearing*, p. 27.

¹³⁰ Or. Rev. Stat. § 135.230(10) (2020); Budbill Testimony, *November 13, 2020 Web Hearing*, p. 7.

¹³¹ Budbill Testimony, *November 13, 2020 Web Hearing*, p. 11.

¹³² Campbell Testimony, *November 13, 2020 Web Hearing*, p. 27.

¹³³ *Ibid.*

questions, there was no way she would be able to test the validity of the information they were using to hold her client in jail pretrial.¹³⁴ Ms. McCrae noted due to her client's inability to post bail, he lost his business, had problems with his family, and his ability to help her defend the case was hampered because he was in custody. This example demonstrates the precariousness of relying on risk assessment tools and having no way to challenge, check, or confront uniformity in terms of how the defendant is treated.¹³⁵

Multnomah County District Attorney Mike Schmidt testified that there ought to be transparency about the algorithm that is used in the risk assessment tools.¹³⁶ Factors included in risk assessment tools such as employment and marital status, he argued, may exacerbate racial disparate outcomes. He says that these things are irrelevant because each factor affects communities differently.¹³⁷

Amanda Trujillo argued that when using risk assessments tools to determine pretrial release, the community should assess the risk for that individual. She said,

if they are going back to North Portland, it should not be the woman sitting in her loft in the West Hills deciding that this person is a risk to their communities. [It] should be the community they're going back to and they should be deciding what is the risk and what can we do to mitigate that risk.¹³⁸

When considering recommendations for the criminal legal system to adopt risk assessment tools, former sheriff for Marion County, Jason Myers recommended developing a statewide validated tool for risk assessment.¹³⁹ In doing so would require better data collection and a statewide jail database.¹⁴⁰ Ms. Budbill said that jurisdictions should be transparent about the use of risk assessment tools and that court rules or state statutes should note that the risk assessment score should not “determine the outcome of [a] person's liberty interest” and that “[i]t's a shortcut to information.”¹⁴¹ Additionally, Ms. McCrae recommended that any risk assessment tool utilized by the state should be adequately validated and be transparent. This recommendation is consistent with the Oregon Criminal Justice Commission's recommendation regarding the use of risk assessment tools.¹⁴² Ms. McCrae also praised the risk assessment tools in the Criminal Legal

¹³⁴ McCrae Testimony, *November 20, 2020 Web Hearing*, p. 9.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ Schmidt Testimony, *November 20, 2020 Web Hearing*, pp. 22-23.

¹³⁸ Trujillo Testimony, *December 11, 2020 Web Hearing*, p. 6.

¹³⁹ Myers Testimony, *December 4, 2020 Web Hearing*, p. 18.

¹⁴⁰ *Ibid.*, p. 24.

¹⁴¹ Budbill Testimony, *November 13, 2020 Web Hearing*, p. 26.

¹⁴² Oregon Criminal Justice Commission, Ken Sanchagrin, *Oregon Public Safety Task Force Report Per House Bill 2238 (2017)*, Dec. 4, 2020. <https://digital.osl.state.or.us/islandora/object/osl:960699>; Collins Testimony, *December 4, 2020 Web Hearing*, p. 7.

System Theory and Practice Resource Guide released by the National Criminal Defense Lawyers Association Task Force.¹⁴³

Pretrial Detention and Release

Panelists testified to a range of issues within and understanding of the process of pretrial detention and release.

Lack of Uniformity within Pretrial Release Programs

According to Ms. Budbill, there is no standard pretrial program definition in Oregon.¹⁴⁴ There are roughly 10 out of the 36 counties that operate a pretrial release program that aim for the standards outlined by the National Association of Pretrial Services Agencies. Testimony also suggested that Oregon essentially has 36 different pretrial practices.¹⁴⁵

She testified that some counties have been operating a pretrial program for decades and have more experience than others. For instance, Multnomah has been operating a pretrial program for roughly 40 years, Lane County has been operating for 45 years, Yamhill County for 10 years, and the rest are fairly new. In addition, pretrial programs operate out of different entities such as sheriff's offices, and parole and probation offices.¹⁴⁶

Some pretrial programs also delegate the responsibility to other staff to determine a defendant's pretrial release. According to Ms. Budbill, Oregon currently has 3 judicial districts that rely on release assistance officers employed by the court. These individuals are seen as an extension of the court and have discretion to make some release decisions, such as tracking criminal history information for judges, if the presiding judge allows them.¹⁴⁷ By contrast, Professor Appleman views the practice of utilizing court staff to be a good model as it is employed in Arizona's reform efforts.¹⁴⁸ She argues that this takes pressure off judges.¹⁴⁹

Mr. Reinhard also commented on the use of release assistance officers. He stated that he is not allowed to ask for release at the initial arraignment because in Lane County, pretrial release

¹⁴³ McCrae Testimony, *November 20, 2020 Web Hearing*,

¹⁴⁴ Budbill Testimony, *November 13, 2020 Web Hearing*, p. 8.

¹⁴⁵ Reinhardt Testimony, *November 20, 2020 Web Hearing*, p. 20.

¹⁴⁶ Budbill Testimony, *November 13, 2020 Web Hearing*, p. 8.

¹⁴⁷ *Ibid.*, p. 7.

¹⁴⁸ Ariz. Rev. Stat. Ann. § 13-3967; Appleman Testimony, *9/25/20 Web Hearing*, p. 15.

¹⁴⁹ Appleman Testimony, *9/25/20 Web Hearing*, p. 15.

assistance officers make the initial decision. In contrast, he stated that in other counties such as Douglas County, it is random if whether a defendant can be released as of 2016.¹⁵⁰ He said:

Release is the single biggest factor that changes whether client gets a just result. And that lack of uniformity among counties in Oregon is a huge disparity. And it shouldn't matter what judge you draw or what prosecutor you draw to make a decision on whether your client is getting released and whether their client ultimately achieved a just end.¹⁵¹

In his experience, he views that judges, in most counties, do not hold the presumption that a defendant shall be released, but that they should “convince [the judge] that you should be released depending on the County.”¹⁵²

Recognizing the role of release assistance officers, Oregon’s Criminal Justice Commission recommended to eliminate the practice of unaffordable security amounts, through funding more release assistance officers and advised that they should be employed in the judicial branch or executive branch.¹⁵³

Considering a jurisdiction’s jail capacity, Shaun McCrae argued that defendants have benefited from Oregon’s lack of pretrial programs simply based on jail capacity. She stated that a defendant is more likely to get released in counties like Benton and Corvallis where they do not have big jails to hold people pretrial and that counties such as Lane and Eugene have more capacity.¹⁵⁴ Ms. McCrae recommended that the state have less of an emphasis on cash bail and more releases based on recognizance, and conditional release.¹⁵⁵ District Attorney Mike Schmidt added that when a jail hits capacity and people are held so long that the jail has to release some people to make room for new people coming in, then this is an indication that the criminal legal system is not working:

because we're making decisions not based on anything other than a list that the sheriff has and maintains, and then tries to triage who he can possibly let out first, and that's not a good way to do business.¹⁵⁶

In his opinion, a high number of forced releases suggests poor initial decision making about who should be held in jail and who should not.¹⁵⁷ Offering a similar perspective, Mr. Myers stated that he is not in favor of forced release because decisions should be made quickly after arrest, and the

¹⁵⁰ Reinhard Testimony, *November 20, 2020 Web Hearing*, p. 18.

¹⁵¹ *Ibid.*

¹⁵² Reinhard Testimony, *November 20, 2020 Web Hearing*, p. 16.

¹⁵³ H.B. 2238, 79th Leg., SESSION. (Or. 2017); Oregon Criminal Justice Commission, Ken Sanchagrin, *Oregon Public Safety Task Force Report Per House Bill 2238 (2017)*, Dec. 4, 2020, p.3 <https://digital.osl.state.or.us/islandora/object/osl:960699>; Collins Testimony, *December 4, 2020 Web Hearing*, p. 8.

¹⁵⁴ McCrae Testimony, *November 20, 2020 Web Hearing*, pp. 6-7.

¹⁵⁵ *Ibid.*, p. 7.

¹⁵⁶ Schmidt Testimony, *November 20, 2020 Web Hearing*, p. 13.

¹⁵⁷ *Ibid.*, p. 14.

decisions are not always in the best interest of the community. During his time as sheriff, he implemented reforms the county's jail system.¹⁵⁸

Some pretrial programs also monitor pretrial releases. In Yamhill County, monitoring involves urinalysis, telephone check ins, and issuing travel permits if an individual on pretrial release needs to leave Oregon. Reporting all release violations is based in the position that if a violation is egregious, the officer can request a warrant. Finally, the pretrial release officer tracks data within the county.¹⁵⁹ According to Ms. Beach, pretrial detention should be reserved for those that pose unmanageable risk to the community or remain a high flight risk. This way pretrial detention can be most respectful of the due process rights of individuals.¹⁶⁰

There was also discussion regarding the use of diversion programs, which allow defendants who are eligible to avoid serving jail time as long as they complete treatment and education courses. Mr. Myers, who advocates for the utilization of diversion programs, testified that Marion County had roughly 80 percent capacity in their jails prior to utilizing diversion programs and risk assessment tools.¹⁶¹ He stated that individuals with mental illness should not remain in jail and that community-based services for behavioral health, clinicians in jails and within the community, and developing supportive services with the health department should be incorporated in all pretrial release programs.¹⁶² Focusing on defendants needing help with combatting drug abuse, Mr. Myers highlighted Marion County's use of the Law Enforcement Assisted Diversion program that ensures individuals are in contact with the local health department to receive the help they need and to keep individuals out of jail pretrial.¹⁶³ Judge Collins also testified that referring individuals to diversion programs would "enhance their probability of a successful pretrial period and add to their life improvement generally"¹⁶⁴ Additionally, he cautioned the imposition of conditions on an individual as increasing the conditions for release are often counterproductive for individuals trying to effectively reenter society.¹⁶⁵

Panelists offered a range of recommendations to improve pretrial release practices. Jessica Beach offered the adoption of several standards proposed by the National Association of Pretrial Services Agencies.¹⁶⁶ Judge Collins, who sits on the Public Safety Task Force offered recommendations proposed by the advisory body¹⁶⁷ and emphasized that

¹⁵⁸ Myers Testimony, *December 4, 2020 Web Hearing*, p. 16.

¹⁵⁹ Beach Testimony, *December 4, 2020 Web Hearing*, p. 12.

¹⁶⁰ *Ibid.*, p. 13.

¹⁶¹ Myers Testimony, *December 4, 2020 Web Hearing*, p. 17.

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

¹⁶⁴ Collins Testimony, *December 4, 2020 Web Hearing*, p. 5.

¹⁶⁵ *Ibid.*

¹⁶⁶ See Appendix; Beach Testimony, *December 4, 2020 Web Hearing*, p. 12.

¹⁶⁷ Oregon Criminal Justice Commission, Ken Sanchagrin, *Oregon Public Safety Task Force Report Per House Bill 2238 (2017)*, Dec. 4, 2020. <https://digital.osl.state.or.us/islandora/object/osl:960699>

whatever we do, we need to have funding to implement it, to develop professional development, best practices, standards and implementation guidelines for pretrial staff, judges, district attorneys, defense victims' services, along with community outreach and statewide best practices requirements.¹⁶⁸

Legal Representation and Initial Hearings

Dr. Campbell testified that having representation makes a difference in terms of receiving a certain sentencing outcome. He explained that defendants with private, legal representation have an advantage over those who do not and can determine if whether an individual receives specific sentencing outcomes.¹⁶⁹ In addition, there are other factors involved that influence the outcome such as the jurisdiction where the arraignment is taking place and the time the attorney has spent with the defendant before the arraignment to learn more about the client in order to advocate for secondary release criteria measures.¹⁷⁰ This is a stark contrast between a defendant who has a public defender handling his/her case who has a short amount of time to learn about their client. For jurisdictions with a pretrial release officer, he stated, sometimes there is more information available for the public defender to make these decisions.¹⁷¹

Similarly, Mr. Macpherson testified to concerns regarding equal access to individuals prior to their first appearance. Drawing from his experience as a public defender, he said that he usually does not have the opportunity or access to the client before their first appearance, interview them, explain the process, get background information and confirm background information, and have a meaningful initial appearance so that public defenders can properly represent clients at their first appearance. He recommended that this is one area in which Oregon must make progress on.

At the same time, Mr. Macpherson also raised concerns that judges view initial hearings as “perfunctory appearances.”¹⁷² Highlighting research indicating that when an individual is detained for 48 hours their life starts to unravel, he said,

the inability to have a meaningful initial appearance is extremely problematic that disproportionately impacts people who are poor and people from [the] BIPOC¹⁷³ community, because if you cannot make the argument to have them released at that 48 hour mark in front of the court, they're now being held either on cash bail or otherwise, and so, to wait for a release hearing that could take another week to have heard in a different court, by that point in time, the individual has most likely

¹⁶⁸ Collins Testimony, *December 4, 2020 Web Hearing*, p. 9.

¹⁶⁹ Campbell Testimony, *November 13, 2020 Web Hearing*, p. 24.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Macpherson Testimony, *November 20, 2020 Web Hearing*, p. 4.

¹⁷³ BIPOC is an acronym that stands for Black, Indigenous, and People of Color.

lost their employment just as a starting point, and you can imagine the domino effect that occurs from there.¹⁷⁴

Underscoring the crucial period while an individual is in jail waiting for a release hearing, he stated that Oregon must recognize the disproportionate effect on those who are already disenfranchised, oppressed, and living in the margins of society and address them.¹⁷⁵

Mr. Macpherson and Mr. Reinhard recommended that the state develop meaningful hearings and a structure that allows effective representation which responds to the fact that public defenders cannot ask for their release during initial hearings.¹⁷⁶

Discovery Process

Commenting on the discovery process prior to the initial hearing, Mr. Macpherson testified that Oregon does not abide by a “truly open discovery” process as other states do and is incredibly problematic.¹⁷⁷ Due to a state statute, not all counties in Oregon provide discovery prior to an indictment by the grand jury in felony cases.¹⁷⁸ Defense attorneys believe the language in the statute is clear that discovery obligations begin at the time of first appearance, but some prosecutors interpret it that they are not obligated to provide discovery in felony cases until after indictment.¹⁷⁹ The statute says:

The obligations to disclose shall be performed as soon as practicable following the filing of an indictment or information in the circuit court or the filing of a complaint or information charging a misdemeanor or violation of a city ordinance. The court may supervise the exercise of discovery to the extent necessary to ensure that it proceeds properly and expeditiously.¹⁸⁰

Discovery packets can include important information such as police reports and accompanying documents on a felony case. The issues, he stated, are that defendants, after making an initial appearance before a judge, are then charged with a felony and their liberty is at stake. It is very difficult for defense attorneys to advise their client about whether they should exercise that option, when the defense attorneys do not have important evidence such as police reports and the information underlying their charge. Without an open discovery process, Mr. Macpherson argued, risks evidence spoliation. Such evidence that could be lost while waiting for police reports to be turned are surveillance videos that are likely to be taped over a number of days. He argued that if

¹⁷⁴ Ibid., pp. 4-5.

¹⁷⁵ Ibid., p. 5.

¹⁷⁶ Reinhard Testimony, *November 20, 2020 Web Hearing*, p. 20.

¹⁷⁷ Macpherson Testimony, *November 20, 2020 Web Hearing*, p. 5.

¹⁷⁸ Macpherson Email, 4/26/21; Or. Rev. Stat. § 135.845 (2020).

¹⁷⁹ Or. Rev. Stat. § 135.845(1) (2020).

¹⁸⁰ *Id.*

defense attorneys do not have enough information, they are unable to obtain surveillance footage that could prove their client's innocence.¹⁸¹

Mr. Macpherson advocated for open, early, and mandatory discovery that begins at the initial appearance to allow defense counsel to meaningfully represent their client at initial appearance, and so that defense attorneys "can follow their ethical obligations to advise, counsel, and advocate for their clients."¹⁸²

Monitoring of Special Defendant Populations

There was also testimony regarding the need for effective monitoring of special defendant populations such as individuals who are perpetrators of domestic violence in order to ensure public safety. DA Schmidt testified that while he advocates for eliminating cash bail, he recognizes that there are challenges that involve unique cases such as domestic violence.¹⁸³

Rosemary Brewer, Executive Director for the nonprofit Oregon Crime Victims Law Center testified that the criminal legal system, in addition to monitoring special defendant populations, should involve the input of victims. She noted that the consideration of victims is often not respected within the current pretrial system because defendants are routinely released without notice to the victim or heard during a pretrial release proceeding.¹⁸⁴ She also noted that victims should have a meaningful role in the criminal legal system and by doing so would involve the court engaging with the victim, giving ample notice to appear, and provided the opportunity to speak about the defendant and the impact of release. She recommends a balance when reforming pretrial practices to ensure victim safety and involvement in the system meant to protect them.¹⁸⁵

Judge Collins testified that the Criminal Justice Commission offered a similar recommendation and added that the state should improve systems to better obtain victim input prior to a release decision and that there ought to be domestic violence specific safety assessments conducted before pretrial decisions are made.¹⁸⁶

Other testimony raised concerns with the actual method of monitoring and how electronic monitoring may not work with some populations. Ms. Trujillo testified that when she assists with posting bail, some defendants are given electronic bracelets, but has seen this occur more during

¹⁸¹ Macpherson Testimony, *November 20, 2020 Web Hearing*, p. 6.

¹⁸² *Ibid.*, p. 5.

¹⁸³ Schmidt Testimony, *November 20, 2020 Web Hearing*, p. 13.

¹⁸⁴ Rosemary Brewer, Executive Director, Oregon Crime Victims Law Center, Statement for the Oregon Advisory Committee to the U.S. Commission on Civil Rights, January 11, 2021 at p. 1.

¹⁸⁵ *Ibid.*

¹⁸⁶ Oregon Criminal Justice Commission, Ken Sanchagrin, *Oregon Public Safety Task Force Report Per House Bill 2238 (2017)*, Dec. 4, 2020. <https://digital.osl.state.or.us/islandora/object/osl:960699>; Collins Testimony, *December 4, 2020 Web Hearing*, pp. 7-8.

the pandemic. She stated that in theory, the concept may be effective; however, if the individual does not have stable housing, then those devices set them up for failure.¹⁸⁷

In another example, Ms. Trujillo shared a story about a defendant who experienced physical discomfort with the electronic monitoring bracelet and was penalized for removing it. She shared that a defendant was released on his own recognizance and was required to wear an electronic bracelet that was placed on too tight. The defendant made complaints, but law enforcement did not help him loosen the bracelet. He ultimately cut it off, brought it in, and was faced with jail time.¹⁸⁸

Mr. Padilla, a proponent of the use of bail bondsmen and bail, said added that without a bail system, there may be more individuals who will remain in jail or be monitored or through pretrial probation pre-conviction.¹⁸⁹ He also raised concern that the use of electronic monitoring would be used even if the individual is innocent until proven guilty.¹⁹⁰

Mr. Reinhard recommended the need for robust funding for pretrial services, including electronic monitoring where appropriate, as long as an administrator is not setting that requirement because it should be a judicial function.¹⁹¹ In regard to this issue, Ms. Beach strongly believes that the defendant should not be responsible for procuring the electronic bracelets for monitoring.¹⁹²

Bail

Bail is known as a system for defendants to achieve liberty from incarceration prior to trial. The word “bail” is colloquially used to mean monetary release rather than a system of release and is both a transitive verb and a noun.¹⁹³ Oregon’s bail system is thought to have been abolished; however, the word was stricken from the statutes to try and “divorce the understanding of the system from commercial bail bonds.”¹⁹⁴

While Oregon does not operate commercial bail bonds, the Committee heard testimony from a bail bondsmen who is from California. Mr. Padilla testified to the importance of bail and said that in all aspects of the justice system, the government is involved, whereas bail is the only aspect of the justice system that does not involve the government and cannot be impacted by the government.¹⁹⁵ He added that his company received several calls from defendants living in Oregon to assist them

¹⁸⁷ Trujillo Testimony, *December 11, 2020 Web Hearing*, p. 4.

¹⁸⁸ *Ibid.*

¹⁸⁹ Padilla Testimony, *December 11, 2020 Web Hearing*, p. 10.

¹⁹⁰ *Ibid.*

¹⁹¹ Reinhard Testimony, *November 20, 2020 Web Hearing*, p. 20.

¹⁹² Beach Testimony, *December 4, 2020 Web Hearing*, p. 14.

¹⁹³ Budbill Testimony, *November 13, 2020 Web Hearing*, p. 3.

¹⁹⁴ *Ibid.*, p. 7.

¹⁹⁵ Padilla Testimony, *December 11, 2020 Web Hearing*, p. 10.

with paying the 10 percent security release but had to turn them down because of Oregon's restriction on the bail bonds industry. He said, "I don't find what would be wrong with having that tool in the toolbox of the criminal justice system for people to be able to bail themselves out of jail should a judge say no."¹⁹⁶

Testimony indicated a differing view, arguing that bail bonding agencies are predatory in nature because "a poor person pays money to the bail bonding agency to post their bail, which they do not receive back."¹⁹⁷ The opposition to issuing bail and even end to cash/money bail was echoed among panelists.¹⁹⁸

Those who are largely impacted by the criminal legal system and are more likely to be held on bail are communities of color.¹⁹⁹ In the view of Terrence Hayes, an individual who was formerly incarcerated, the bail system is and has a history of economically oppressing the BIPOC community and has taken wealth out of that community.²⁰⁰ He stated, "[a]ny conversation where you're trying to tell poor people to give up money is pure nonsense."²⁰¹ Finally, he argued that the bail system will continue to force the value system of white supremacy on the community.²⁰²

In observation of reform efforts, Mr. Hayes expressed the importance of including the perspectives of individuals who have been directly affected by the criminal legal system. He said, "even if the constitutional right to bail holds, [there are] recommendations that we can give that can balance the system towards the BIPOC community."²⁰³

Many defendants still struggle to post security release and a growing number of community bail funds have been emerging across the country to respond to those needs. Ms. Trujillo, who manages the Portland Freedom Fund testified to the range of individuals the community bail fund has assisted, namely individuals who are economically vulnerable. These individuals are also at times unhoused and/or may have mental health concerns.²⁰⁴ Some have faced collateral consequences because they were unable to post bail and have lost their job and/or housing.²⁰⁵ Mr. Reinhard seconded this notion and testified that his clients with physical or intellectual disabilities,

¹⁹⁶ Ibid., p. 15.

¹⁹⁷ Macpherson Testimony, *November 20, 2020 Web Hearing*, p. 2.

¹⁹⁸ Ibid., p. 3; Collins Testimony, *December 4, 2020 Web Hearing*, p. 20.

¹⁹⁹ Macpherson Testimony, *November 20, 2020 Web Hearing*, p. 3.

²⁰⁰ Hayes Testimony, *December 11, 2020 Web Hearing*, p. 8.

²⁰¹ Ibid., p. 7.

²⁰² Ibid.

²⁰³ Hayes Testimony, *December 11, 2020 Web Hearing*, p. 19.

²⁰⁴ Trujillo Testimony, *December 11, 2020 Web Hearing*, p. 4.

²⁰⁵ Ibid.

individuals experiencing housing issues, and people living paycheck to paycheck are always hit the hardest.²⁰⁶

In Ms. Trujillo's effort to assist defendants with posting bail, sometimes they need additional services. In the past, the Portland Freedom Fund helped to pay for inpatient beds for individuals who need medical attention, phone bills, rehabilitative housing, and food.²⁰⁷ Ms. Trujillo finds that if an individual is released, there are some conditions such as requirement that the individual receives treatment; however, she has found that rehabilitative resources are not available when drugs or alcohol was a significant reason for them being there in the first place. At the same time, if the individual already encountered the criminal legal system, a parole office would usually make arrangements for treatment; she has seen that option only available to people who are on parole.²⁰⁸

Intimate relationships are also affected by an individual's inability to post bail. An individual who is incarcerated may have a significant other at home with multiple children trying to work full-time, run the household and do it without this other income and this other body to help them run this household, and that can go on for months before release.²⁰⁹

There was also an assertion that bail does not promote public safety. Multnomah District Attorney Schmidt testified that there is a lack of correlation between income and public safety, despite the current cash bail system promoting that belief. It promotes this belief by allowing individuals with the financial means to leave detention pretrial, while continuing to detain those with a lower income.²¹⁰

Judicial Discretion

Panelists discussed the use of judicial discretion and offered opinions regarding its frequency, reliance on bail schedules, and specific outcomes.

When defendants are seen before a judge at their initial hearing, the judge decides on their charges which will determine the terms for their release. Ms. Budbill explained that Oregon judges have "quite a bit of discretion" to go through the primary and secondary release criterion to guide their discretion when they are making a release decision. In fact, Judge Collins testified that judges are close to having "unfettered discretion" and that to reach full judicial discretion in the state, minimum bail requirements would need to be eliminated.²¹¹ Dr. Campbell added that the exercising of that discretion is limited depending on the county as each county has varying amount

²⁰⁶ Reinhard Testimony, *November 20, 2020 Web Hearing*, p. 18.

²⁰⁷ Trujillo Testimony, *December 11, 2020 Web Hearing*, p. 3.

²⁰⁸ *Ibid.*, p. 16.

²⁰⁹ *Ibid.*, p. 4.

²¹⁰ Schmidt Testimony, *November 20, 2020 Web Hearing*, p. 11.

²¹¹ Collins Testimony, *December 4, 2020 Web Hearing*, p. 23.

of information they can rely on such as criminal history (information from prosecution) and primary and secondary release criteria.²¹²

Mr. Reinhard offered an example of the precarious nature of judicial discretion. He said even though bail bondsmen do not operate in Oregon, judges often make a decision that a release is required only if the individual can post security, but additional restrictions are still applied.²¹³ He pointed out that the statute says, “the magistrate shall impose the least onerous condition reasonably likely to ensure the safety of the public and the victim and the persons later appearance.” He noted that this should happen among judges, but hardly does. More specifically, in Douglas County, a county without a pretrial referee, which is an individual whose job was to score and rate the risk of individual defendants, the judge likely determines the security amount during the first hearing. Mr. Reinhard testified that he has seen judges be lenient with issuing bail at the beginning of the day and gradually lose their patience by the end of the day and be more inclined to set bail.²¹⁴

According to the study conducted by Dr. Renauer, Dr. Campbell, and Dr. Henderson, some judges base their decision on the amount of bail on where they think the money for bail will come from. Judges noted that most of the defendants before them were not going to afford bail regardless of their situation, and it was often going to fall on family members. If a judge saw an individual, they would weigh the demeanor of the individual and the circumstances of the individual in relation to where the money was coming from and if they are able to set bail.²¹⁵ In another example from the study, a judge stated that he is usually hypervigilant about setting bail. He said,

I actively try to make sure that we are giving them kind of the extra benefit of the doubt. And erring [...] on the side of releasing because I number one believe that that person has probably already been subjected to a lot of bias and I don't want to retraumatize them. And number two, I want them to feel that I am being fair with them.²¹⁶

Some respondents included in Dr. Renauer and Dr. Campbell's study shared differences in experiences of pretrial for certain races. For instance, a defense attorney said, “the judge tore into him and he was Black and it just felt like the only reason the judge tore into him was because he was Black.”²¹⁷

²¹² Campbell Testimony, *November 13, 2020 Web Hearing*, p. 30.

²¹³ Reinhard Testimony, *November 20, 2020 Web Hearing*, p. 17.

²¹⁴ Ibid.

²¹⁵ Campbell, Renauer, Henderson Presentation Slides at Slide 51; Campbell Testimony, *November 13, 2020 Web Hearing*, p. 20.

²¹⁶ Campbell, Renauer, Henderson Presentation Slides at Slide 54.

²¹⁷ Campbell, Renauer, Henderson Presentation Slides at Slide 53.

Bail Schedules

Judicial districts employ bail schedules and security release schedules that sets a presumptive release amount assigned to various charges. In some counties, there are statutory minimum security releases.²¹⁸ Ms. McCrea testified that a problem with using bail schedules, especially in complex cases, including those that involve allegation of a serious felony, is that the amount of bail is “controlled by the nature of the charges and the number of the charges brought by the arresting officer or by the prosecutor in the charging instruments.”²¹⁹

Dr. Campbell testified that most counties follow some kind of bail schedule. Even though the schedule exists, judges maintain discretion and do not need to follow the schedule. Findings also indicate that the schedule typically captures statutory minimums and that some were created by the presiding judge and others follow no set structure. Counties without a bail schedule at all will often use that judicial discretion and consciously keep in mind the statutory minimum.²²⁰

Cost of Legal System Involvement on Defendants

Panelists highlighted the concept, “prison industrial complex,” and the impact bail has on indigent defendants, communities of color, and other overpoliced communities in Oregon and beyond.²²¹ The “prison industrial complex” as defined here refers to the use of prisons and the criminal legal system to create profit for businesses that interact with the system.²²² Historically this has created a disproportionate impact on communities of color and individuals of a lower socio-economic class.²²³

Ms. Amanda Trujillo testified that she disagrees with any system that involves profiting off another’s hardship.²²⁴ She pointed to her experience paying bails on behalf of individuals who are detained pretrial in Multnomah County, where now all bail must be paid through a kiosk that charges an additional fee that will not be returned to the individual.²²⁵ She highlighted other reasons a bail amount may be withheld, including unpaid child support or any fines or fees that individual may owe. The difficulty to pay for bail compounds for poor families that are desperate to get their loved one released as they also face challenges with paying rent each month .²²⁶

²¹⁸ Buddbill Testimony, *November 13, 2020 Web Hearing*, p. 8.

²¹⁹ McCrae Testimony, *November 20, 2020 Web Hearing* p. 7.

²²⁰ Campbell Testimony, *November 13, 2020 Web Hearing* p. 19.

²²¹ Trujillo Testimony, *December 11, 2020 Web Hearing*, p. 5; Hayes Testimony, *December 11, 2020 Web Hearing*, pp. 7-8.

²²² Selman, Donna, and Paul Leighton. *Punishment for sale: Private prisons, big business, and the incarceration binge*. Rowman & Littlefield Publishers, 2010.

²²³ Alexander, Michelle. *The new Jim Crow: Mass incarceration in the age of colorblindness*. The New Press, 2020.

²²⁴ Trujillo Testimony, *December 11, 2020 Web Hearing*, p. 5.

²²⁵ Ibid.

²²⁶ Ibid.

Mr. Carl Macpherson, executive director of the Metropolitan Public Defender Services, singled out the bail bond industry as a specific harm to individuals involved in the criminal legal system, stating,

The evil of bail bonding agencies is that they're predatory from this perspective, a poor person pays money to the bail bonding agency to post their bail, which they do not receive back.²²⁷

He goes on to argue that whether or not there is a bail bond agency, cash bail is an evil aspect of the criminal legal system. He stated that individuals with the exact same charge, criminal history, and similar facts about life could have separate release realities based solely on wealth and the ability to buy freedom.²²⁸

The National Association of Pretrial Service Agencies establishes standards to be the aspirational and achievable goals of pretrial services. One standard that was highlighted by Ms. Beach is the National Association of Pretrial Service Agencies Standard 1.5 which calls for the prohibition of all financial conditions of bail.²²⁹ She said,

[o]ne can easily argue that attaching money to release decisions, meaning incarcerating innocent persons who don't have the money to post bail, imposes a disparate or a discriminatory outcome based on race, ethnicity, gender, sexual identity, disability, or religious affiliation.²³⁰

Money bail has a negative, detrimental, and disparate impact on individuals of a lower socioeconomic status. It should not be utilized at all if detention does not serve justice or the public interest.²³¹ This also relates to conditions of release that impose financial costs on a pretrial defendant, such as electronic monitoring, drug testing, or assessment for treatment.²³²

Mr. Terrence Hayes is an activist and leader with Liberation Literacy, but he spoke with the Committee as a person with lived experience in the criminal legal system. According to Mr. Hayes the bail system economically oppresses communities of people of color, especially those of a lower socio-economic class, by taking wealth away.²³³ He pointed to the historical impact of economic hardships placed on communities of color to highlight how bail is a method of that oppression. He stated that asking people experiencing poverty to give up their money can only be a means of further oppression.²³⁴ Individuals who are poor often have grandmothers, aunts, or parents post

²²⁷ Macpherson Testimony, *November 20, 2020 Web Hearing*, p. 2.

²²⁸ *Ibid.*, p. 3.

²²⁹ Beach Testimony, *December 4, 2020 Web Hearing*, p. 14; National Association of Pretrial Services Agencies. 2020. "Standards on pretrial release, fourth edition." Washington, D.C.: National Association of Pretrial Services Agencies. <https://drive.google.com/file/d/1edS2bltwfNROicGeu1A6qKIuTfzqop92/view>

²³⁰ Beach Testimony, *December 4, 2020 Web Hearing*, p. 14.

²³¹ *Ibid.*

²³² *Ibid.*

²³³ Hayes Testimony, *December 11, 2020 Web Hearing*, p. 8.

²³⁴ *Ibid.*, p. 7.

bail. These are family members that work each day to afford rent, but also have to help their loved one in jail.²³⁵ Mr. Hayes believes that putting a dollar amount on a person's freedom is counter to the progress the country claims to have made with the history of race relations. He stated that placing a certain financial incentive will not make individuals behave within society's structures.²³⁶ Therefore, placing money over an individual's freedom is harmful to society.²³⁷

Mr. Hayes further argued that the prison industrial complex, economic oppression, and pretrial monitoring disproportionately impact individuals experiencing houselessness.²³⁸ Ms. Trujillo shared that individuals with more chaotic backgrounds run into countless roadblocks in the justice and bail systems. One is the expectation of a permanent address. Most individuals Ms. Trujillo works with do not have stable housing. Some have lived in cars that were towed while the individual was in prison. Many others lose their apartments as well as the belongings in them during this time.²³⁹

Recommendations for addressing pretrial incarceration and the prison industrial complex were emphasized by both Mr. Hayes and Ms. Trujillo. Ms. Trujillo asserted that corporations should not profit from any alternatives to pretrial incarceration.²⁴⁰ Mr. Hayes agreed that corporations should not take wealth from poor communities or communities of color as that enforces white supremacy and the systems of oppression.²⁴¹

Reform Efforts

Panelists recognized various reform efforts occurring throughout the U.S. Professor Appleman explained that the New York legislature eliminated cash bail for a wide range of offenses in 2019 and amended in April 2020 for most misdemeanors and nonviolent felonies.²⁴² Additionally, judges are still required to release people with the least restrictive conditions necessary. For most misdemeanors and all nonviolent felonies, the judge cannot impose cash bail. Judges have discretion to release people with or without pretrial conditions. She also noted that California eliminated money bail. According to California's reform effort, local courts are allowed to decide who to keep in custody and who is released while they wait for trial based on an algorithm which are created by the courts in each jurisdiction.²⁴³

²³⁵ Hayes Testimony, *December 11, 2020 Web Hearing*, p. 7.

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ *Ibid.*, p. 20.

²³⁹ Trujillo Testimony, *December 11, 2020 Web Hearing*, p. 4.

²⁴⁰ *Ibid.*, p. 5.

²⁴¹ Hayes Testimony, *December 11, 2020 Web Hearing*, p. 8.

²⁴² N.Y. Crim. Pro. § 530.40 (2020); Appleman Testimony, *September 25, 2020 Web Hearing*, p. 8.

²⁴³ N.Y. Crim. Pro. § 530.40 (2020); Appleman Testimony, *September 25, 2020 Web Hearing*, p. 9.

Pretrial Release and Response to Mitigating Spread of COVID-19

The COVID-19 pandemic has created an interesting case study on expanding pretrial release in Oregon. Prisons, jails, and detention centers were described by Ms. Appleman as overcrowded and small spaces for a large population of at-risk individuals. She argued that prisons are not well-regulated places for pandemic preparation or quarantine capabilities.²⁴⁴ Based on Ms. Appleman's understanding, not many inmates have been released in Oregon or nationwide.²⁴⁵ Other panelists testified that efforts have been made to decrease pretrial prison populations at this time. These efforts include increased use of citations, sanctions, risk assessment tools, and conditional release options such as electronic monitoring.²⁴⁶

Ms. Budbill noted that it is difficult to gauge how the COVID-19 pandemic has affected pretrial operations in Oregon because pretrial programs and procedures vary so much by jurisdiction. Also, many court proceedings have been delayed.²⁴⁷

Judge Collins shared that Yamhill County has a jail capacity of 259 individuals. At the time of Judge Collins' testimony, the jail population was 79 individuals. He highlighted this difference to demonstrate the efforts to de-incarcerate due to the pandemic.²⁴⁸ The combination of releasing more individuals pre-trial, after sentencing, and with sanctions has resulted in a low prison population, but it was not that way before COVID-19.²⁴⁹ Citations have been utilized more frequently during the pandemic in Yamhill County according to Judge Collins. Most people have been attending court, but if they do not a warrant is served, and they receive another citation to avoid increasing the population in the jail.²⁵⁰ Dr. Campbell shared that anecdotally, there has been a higher rate of failures to appear to court in a few jurisdictions although this is possibly due to the backlog in court.²⁵¹

Ms. Budbill stated that risk assessment tools have been in higher use during the pandemic. This is due to the demand for emergency release and the ability of risk assessment tools to identify low-risk defendants.²⁵² She added that jails are not taking in nearly as many people and she assumes

²⁴⁴ Appleman Testimony, *September 25, 2020 Web Hearing*, p. 4.

²⁴⁵ Ibid.

²⁴⁶ Collins Testimony, *December 4, 2020 Web Hearing*, p. 3; Budbill Testimony, *November 13, 2020 Web Hearing*, p. 23; Campbell Testimony, *November 13, 2020 Web Hearing*, pp. 23-24.

²⁴⁷ Budbill Testimony, *November 13, 2020 Web Hearing*, p. 23.

²⁴⁸ Collins Testimony, *December 4, 2020 Web Hearing*, p. 3.

²⁴⁹ Ibid.

²⁵⁰ Ibid.

²⁵¹ Campbell Testimony, *November 13, 2020 Web Hearing*, p. 24.

²⁵² Appleman Testimony, *September 25, 2020 Web Hearing*, p. 9.

more conditional release options are being used across the state, such as electronic monitoring.²⁵³ Dr. Campbell noted that most jurisdictions are trying to reduce their jail population between 40 and 60 percent capacity.²⁵⁴ He shared that they are keeping defendants who are charged for violent crimes, protection order violations, and/or in violation of crimes under Measure 11 in prisons and jails. Dr. Campbell added that if those individuals were on pretrial release, most jurisdictions would have a monitoring practice.²⁵⁵

Dr. Campbell noted that it is too early to determine if there is a relationship between new crimes, new charges, and new arrests during the pretrial period. There will need to be better administrative data over time to determine this, which was seconded by Mr. Myers.²⁵⁶ Mr. Myers shared that crime trends during COVID-19 pandemic will take approximately one to two years for accurate data. Anecdotally, he stated that he was not aware of any crime spikes due to the lower prison population across the state.²⁵⁷ Judge Collins highlighted that failure to appear rates seem in line with the pre-pandemic numbers. According to him, individuals experiencing homelessness have even been attending court. Judge Collins could not recall any particular instances where increases in crime rates have resulted from fewer pretrial incarcerations.²⁵⁸ Ms. Beach expressed interest in seeing the data released about COVID-19 releases and crime trends. She is hopeful that it will display that the best practices for pretrial detention are releasing individuals when it can be so done safely.²⁵⁹ Ms. Budbill also shared that the pandemic will offer an interesting opportunity to look at how the state operates with more individuals released pretrial.²⁶⁰

Another impact of the pandemic on pretrial practices is the impact on court hearings and proceedings. Ms. Trujillo stated that for all the individuals she had provided bail for in 2020, none had completed a trial at the time of her testimony in December 2020. She said,

[w]e've got probably a couple \$100,000 tied up in the system right now. Because these cases keep getting pushed back... and I understand it's COVID, but we're talking about people's lives trying to get through these cases.²⁶¹

For those not utilizing a bail fund, this money will remain in the system until a trial is complete, potentially impacting the defendant and their family's financial security.

²⁵³ Budbill Testimony, *November 13, 2020 Web Hearing*, p. 23; Campbell Testimony, *November 13, 2020 Web Hearing*, p. 23-24.

²⁵⁴ Campbell Testimony, *November 13, 2020 Web Hearing*, p. 23.

²⁵⁵ *Ibid.*

²⁵⁶ Campbell Testimony, *November 13, 2020 Web Hearing*, p. 23-24; Myers Testimony, *December 4, 2020 Web Hearing*, p. 22.

²⁵⁷ Myers Testimony, *December 4, 2020 Web Hearing*, p. 22.

²⁵⁸ Collins Testimony, *December 4, 2020 Web Hearing*, p. 22.

²⁵⁹ Beach Testimony, *December 4, 2020 Web Hearing*, pp. 22-23.

²⁶⁰ Budbill Testimony, *November 13, 2020 Web Hearing*, p. 23

²⁶¹ Trujillo Testimony, *December 11, 2020 Web Hearing*, p. 5.

FINDINGS AND RECOMMENDATIONS

Among their duties, advisory committees of the U.S. Commission on Civil Rights are authorized to advise the Commission (1) concerning matters related to discrimination or a denial of equal protection of the laws under the Constitution and the effect of the laws and policies of the Federal Government with respect to equal protection of the laws and (2) upon matters of mutual concern in the preparation of reports of the Commission to the President and the Congress.²⁶²

Below, the Committee offers to the Commission a summary of findings identified throughout the Committee's inquiry. Following these findings, the Committee proposes for the Commission to consider several recommendations for federal and state actors.

Findings

1. There are currently 16 different jail management systems utilized in the 31 county jails within Oregon. These different systems make statewide data on pretrial detainees particularly challenging to collect, despite efforts by the Prison Policy Institute, the Marshall Project, and the state Criminal Justice Commission.²⁶³ Depending on the priorities of the jail commander and the staffing available, data can remain out of date or lacking key pieces that would be utilized for studying pretrial detention in Oregon. Some data collection systems do not code for ethnicity, so individuals that identify as Latinx are coded as white. Other systems do not refer to federally recognized tribes that exist within Oregon.²⁶⁴ This information is important to fully understand the impact of pretrial detention on different racial and ethnic communities within Oregon and to properly study the civil rights implications of bail.
2. The correlation of increased releases and new criminal charges that occurred during the pandemic is predicted to will take at least one to two years to capture this data.²⁶⁵ Anecdotally, there was limited discussion of increased crime rates in Oregon. There were conflicting views on whether failure to appear rates remained steady during the pandemic or increased. Panelists agreed that this data will be important to determine the best practices for pretrial detention, possibly indicating that increased release rates could be helpful for communities.²⁶⁶

²⁶² 45 C.F.R. § 703.2(b)-(c) (2021).

²⁶³ Budbill Testimony, *November 13, 2020 Web Hearing*, pp. 30-31.

²⁶⁴ *Ibid.*

²⁶⁵ Myers Testimony, *December 4, 2020 Web Hearing*, p. 22.

²⁶⁶ Beach Testimony, *December 4, 2020 Web Hearing*, pp. 22-23; Budbill Testimony, *November 13, 2020 Web Hearing*, p. 23.

3. Statistically, longer time spent in pretrial detention results in stricter sentencing and higher rates of conviction.²⁶⁷ Race and ethnicity could impact pretrial process or how long an individual stays incarcerated due to an inability to provide bail. Defense attorneys expressed a mix of responses to this racial disparity, but they all highlighted the disparate impact for individuals of a lower socioeconomic status. However, there is a gap in this data as Oregon has challenges regarding data collection in pretrial detainees.²⁶⁸
4. Failure to appear in court is costly for both the courts and the individuals. The courts must reschedule hearings and issue warrants that will cost the State time and resources that could be spent elsewhere.²⁶⁹ If the individual does not appear in court, he or she will forfeit his/her bail amount.²⁷⁰ It also impacts public safety, victim safety, and any future interactions with the criminal justice system that the defendant may have.²⁷¹ This is why one panelist characterized bail as an insurance policy, to ensure court appearance.²⁷²
5. Failure to appear data has been collected and improved upon since 2017. The rates range from 10-30 percent in many jurisdictions, with some documenting up to 60 percent failure to appear. It was highlighted that this leap in data uniformity is likely due to a lack of uniformity about what constitutes a failure to appear to court.²⁷³
6. The use of court reminders is found to increase court appearances in Yamhill County. This is an evidence-based solution that can be implemented at a small charge through a third party vendor and is largely favored among the state's Public Safety Task Force.²⁷⁴
7. In Oregon, there are currently five different risk assessment tools in use²⁷⁵ and the effort to utilize a statewide tool across jurisdictions may be challenging due to the vastly different populations, funding streams, and resources across counties.²⁷⁶

²⁶⁷ Petersen, Nick. "Do Detainees Plead Guilty Faster? A Survival Analysis of Pretrial Detention and the Timing of Guilty Pleas." *Criminal Justice Policy Review* 31, no. 7 (August 2020): 1015–35.
<https://doi.org/10.1177/0887403419838020>.

²⁶⁸ Budbill Testimony, *November 13, 2020 Web Hearing*, p. 31; Schmidt Testimony, *November 20, 2020 Web Hearing*, p. 14.

²⁶⁹ Campbell Testimony, *November 13, 2020 Web Hearing*, p. 14.

²⁷⁰ Ibid.

²⁷¹ Ibid.

²⁷² Padilla Testimony, *December 11, 2020 Web Hearing*, p. 9.

²⁷³ Schmidt Testimony, *November 20, 2020 Web Hearing*, p. 13.

²⁷⁴ Collins Testimony, *December 4, 2020 Web Hearing*, p. 9; Beach Testimony, *December 4, 2020 Web Hearing*, pp. 14-15.

²⁷⁵ Schmidt Testimony, *November 20, 2020 Web Hearing*, p. 21.

²⁷⁶ Beach Testimony, *December 4, 2020 Web Hearing*, p. 25.

-
8. Pretrial release programs vary county by county. This lack of uniformity is of concern because when coupled with statutory requirements regarding the issuance of security release and presumptive minimums, release conditions, factors used within risk assessment tools, jail capacity, and use of release assistance officer outcomes produce widely differing sentencing outcomes.
 9. Testimony indicated that there a range of factors, that can determine if an individual receives a specific sentencing outcome. These factors include current jail capacity, where the arraignment will take place, and the time the attorney has spent with the defendant before the arraignment to learn more about the client in order to advocate for secondary release criteria measures.
 10. The use of release assistance officers may be problematic because they have the discretion to make release decisions on behalf of the court;²⁷⁷ however, these individuals are also seen as useful resources who may be able to take the pressure off judges as they can track down information that presiding judges may need to determine sentencing outcomes.²⁷⁸
 11. The use of diversion programs appears to be both an effective and a popular option for judges to ensure defendants receive the applicable treatment needed to mitigate the charges under consideration and to avoid future harm.²⁷⁹ Unfortunately, these programs are not widely available or well-funded.
 12. Legal representation makes a difference with respect to sentencing outcomes. Defendants with private legal representation have an advantage over those who do not.²⁸⁰ This is a stark contrast between a defendant who has a public defender handling his/her case who, in majority of cases, has insufficient amount of time to learn about his/her client. With limited time and access to defendants prior to his/her initial hearing before a judge, there are notable equal access concerns as public defenders cannot meaningfully interview them, explain the process, obtain and confirm background information, and have a meaningful initial appearance so that public defenders can properly represent clients at their first appearance.²⁸¹
 13. Testimony indicated concerns with Oregon's pretrial discovery process. Not all counties in Oregon provide discovery prior to an indictment by the grand jury in felony cases.²⁸² The defense believes the language is clear that discovery obligations begin at the time of first

²⁷⁷ Reinhard Testimony, *November 20, 2020 Web Hearing*, p. 18.

²⁷⁸ Appleman Testimony, *September 25, 2020 Web Hearing*, p. 15.

²⁷⁹ Myers Testimony, *December 4, 2020 Web Hearing*, p. 17; Collins Testimony, *December 4, 2020 Web Hearing*, p. 5.

²⁸⁰ Campbell Testimony, *November 13, 2020 Web Hearing*, p. 24.

²⁸¹ Macpherson Testimony, *November 20, 2020 Web Hearing*, p. 4.

²⁸² *Ibid.*, p. 5; Macpherson Email, 4/26/21; Or. Rev. Stat. 135.845.

appearance, but some prosecutors interpret it that they are not obligated to provide discovery in felony cases until after indictment. Also, discovery packets can include important information such as police reports and accompanying documents on a felony case. This is of concern because without an open discovery process, there is a risk of evidence spoliation that could be key to proving an individual's innocence.²⁸³

14. Utilizing electronic monitoring is seen as an effective tool for monitoring special defendant populations such as individuals who are perpetrators of domestic violence and viewed to ensure victim safety. Conversely, its usage can be problematic for defendants who have less stable housing.²⁸⁴ Under such restrictions, these individuals may frequently be in violation and could cycle back into the criminal justice system. In addition, imposing a fee for the very use of the device can be viewed as predatory as these individuals may have challenges with employment due to the legal charges imposed on them.
15. Determining an individual's pretrial release time is crucial. Individuals who are held in jail beyond 48 hours are likely to experience collateral consequences and experience disruption in their lives. Beyond this period, a defendant may lose his/her job, which makes it harder for defendants to find new employment. Pre-trial detention could also independently lower future employment prospects through the stigma of a criminal conviction. Individuals who are dependent on income may also miss housing payments which then could affect their housing stability in addition to other necessary living expenses.²⁸⁵
16. A panelist asserts that county offices are currently profiting off pretrial programs and even the processes to gain pretrial release.²⁸⁶ These additional fees compound on poor families to make paying bail less accessible. The bail bond industry was stated to be predatory for individuals of a lower socioeconomic status.²⁸⁷ The National Association of Pretrial Services establishes a standard of pretrial services that they believe to be achievable goals. One such goal is the elimination of all financial conditions of bail. Money has a negative, detrimental, and disparate impact on communities with a lower socioeconomic background²⁸⁸ and panelists passionately

²⁸³ Macpherson Testimony, *November 20, 2020 Web Hearing*, p. 6.

²⁸⁴ Trujillo Testimony, *December 11, 2020 Web Hearing*, p. 4.

²⁸⁵ Macpherson Testimony, *November 20, 2020 Web Hearing*, pp. 4-5.

²⁸⁶ Trujillo Testimony, *December 11, 2020 Web Hearing*, p. 5; Hayes Testimony, *December 11, 2020 Web Hearing*, pp. 7-8.

²⁸⁷ Macpherson Testimony, *November 20, 2020 Web Hearing*, p. 2.

²⁸⁸ Beach Testimony, *December 4, 2020 Web Hearing*, p. 14; National Association of Pretrial Services Agencies. 2020. "Standards on pretrial release, fourth edition." Washington, D.C.: National Association of Pretrial Services Agencies. <https://drive.google.com/file/d/1edS2bltwfNROicGeu1A6qKIuTfzqop92/view>.

stated that this impact and oppression are not justice and perpetuate oppression for communities already struggling.²⁸⁹

17. Individuals who are held on security release are largely indigent, BIPOC, have physical or intellectual disabilities, experiencing housing issues, and living paycheck to paycheck. Collectively, these individuals are always hit the hardest by the imposition of security release and have a difficult time making bail.²⁹⁰
18. Anecdotally, many jails, prisons, and detention centers released pretrial detainees as a result of the pandemic because of the particular conditions within these spaces that makes quarantining effectively impossible.²⁹¹ The use of citations, sanctions, risk assessment tools, and conditional release options such as electronic monitoring have helped to decrease the number of individuals entering prisons over the last year.²⁹² Also risk assessment tools are reported to be in higher use by panelists.²⁹³

Recommendations

1. Because of inaccurate and/or incomplete racial/ethnic data collected by law enforcement agencies the clear implications of disparate impact throughout pretrial practices cannot be fully assessed. Therefore, the Committee recommends the U.S. Commission on Civil Rights to study this area of concern.
2. The U.S. Commission on Civil Rights should send this report and issue a formal recommendation to the U.S. Department of Justice to:
 - a. Make participation in the Uniform Crime Report data collection and reporting mandatory for all law enforcement agencies across the country. At a minimum utilize a statewide data collection system. Hire staff to ensure this data is collected in a timely and accurate fashion.
 - b. As part of mandatory data collection and reporting requirements, the Department of Justice should require training for all state and local law enforcement to accurately capture and uniformly report race/ethnic demographic data.

²⁸⁹ Hayes Testimony, *December 11, 2020 Web Hearing*, p. 8; Macpherson Testimony, *November 20, 2020 Web Hearing*, p. 2.

²⁹⁰ Megan T Stevenson, Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes, *The Journal of Law, Economics, and Organization*, Volume 34, Issue 4, November 2018, Pages 511–542, <https://doi.org/10.1093/jleo/ewy019>.

²⁹¹ Appleman Testimony, *September 25, 2020 Web Hearing*, p. 4.

²⁹² Collins Testimony, *December 4, 2020 Web Hearing*, p. 3; Budbill Testimony, *November 13, 2020 Web Hearing*, p. 23; Campbell Testimony, *November 13, 2020 Web Hearing*, pp. 23-24.

²⁹³ Ibid.

-
3. The U.S. Commission on Civil Rights should send this report and issue the following formal recommendation to the U.S. Congress to:
 - a. Provide appropriations for state governments to support data collection and reporting efforts.

 4. The U.S. Commission on Civil Rights should send this report and issue formal recommendations to the Oregon Legislature to:
 - a. Fund jail diversion programs for defendants with behavioral health and housing concerns.
 - b. Appropriate funding to law enforcement agencies to collect data regarding race and ethnicity and failure to appear during the pretrial period.
 - c. Develop standardized data collection requirements for jails and courts; and ensure definitions are uniform especially in the definition of failure to appear.
 - d. Support legislation that reduces reliance on security release.
 - e. Support legislation that funds and requires local validation of risk assessment tools.
 - f. Support legislation to ensure an open discovery for felony cases.
 - g. Increase data collection in prisons and particularly in jails through funding a statewide data management system that collects information on pretrial detention, race of defendants, bail amounts, if individuals can afford said amounts, and other key factors.
 - h. When data becomes more accessible, continue to research the impact of bail on individuals of color, with an eye towards racial disparities in bail amounts and time served in pretrial detention as a result.
 - i. Create funding to research the impact of court reminder systems on the failure to appear rates, particularly in communities of color or other special populations that traditionally have higher rates of failures to appear in court.
 - j. Work towards upholding the National Association of Pretrial Services Agencies standard of eliminating all financial conditions to bail for defendants. At minimum, eliminate all financial profit for corporations or state/local agencies within the pretrial system.
 - k. Designate appropriate funding to support jail diversion programs.
 - l. Evaluate and consider the usefulness and validity of risk assessments.

 5. The U.S. Commission on Civil Rights should send this report and issue formal recommendations to the Oregon Governor to:

-
- a. Require law enforcement agencies to be transparent in their use of pretrial risk tools.
 - b. Require trainings for staff, judges, attorneys, and victim service providers on pretrial legal requirements and pretrial program practices.
6. The U.S. Commission on Civil Rights should send this report and issue a formal recommendation to the Oregon Law Enforcement Agencies to:
- a. Consider implementing Yamhill County’s data collection methods to improve data collection on race, ethnicity, and failure to appear.
7. The U.S. Commission on Civil Rights should send this report and issue formal recommendations to the Oregon Courts to:
- a. Build upon the improvements in court data collection systems, especially with regards to collecting race and ethnicity information to easily notice any disparate impacts on protected classes.
 - b. When data becomes more accessible, continue to research the impact of bail on individuals of color, with an eye towards racial disparities in bail amounts and time served in pretrial detention as a result.
 - c. Increase uniformity across the state on what constitutes a failure to appear in court for the purposes of data collection.
 - d. Ensure broad application of when attorneys can appear for clients, so that the clients do not miss jobs or need to get childcare.
 - e. Utilize a court reminder system statewide, similar to the system used by Yamhill County, to decrease failure to appear rates. Also, support virtual court appearances, and increase technology use in court reminders, as recommended by the Public Safety Task Force.
 - f. Follow the recommendation first set by the Public Safety Task Force and utilize jail diversion programs and the use of citations to appear in court to decrease ethnic and racial disparities in pretrial detention.
 - g. Research and utilize the risk assessment tools, that are proven to have limited racial or disability bias – as a way to ensure objectivity – while maintaining judicial discretion at the heart of pretrial release decisions.
 - h. Create trainings, seminars, or conferences related to the use of judicial discretion to assist in systemic improvements to the use of discretion in pretrial decisions.

APPENDIX

September 25, 2020 Briefing Transcript

November 13, 2020 Presentation Slides

November 13, 2020 Briefing Transcript

November 20, 2020 Presentation Slides

November 20, 2020 Briefing Transcript

December 4, 2020 Presentation Slides

December 4, 2020 Briefing Transcript

December 11, 2020 Presentation Slides

December 11, 2020 Briefing Transcript

Written Testimony

Rosemary Brewer, Executive Director, Oregon Crime Victims Law Center

Materials can be found here:

https://securisync.intermedia.net/us2/s/folder?public_share=409J0xbKeIQ2vuMJBvQond0011ef58&id=L09SL0JhaWwgUHJhY3RpY2VzIDIwMjA%3D



Oregon Crime Victims Law Center

7412 S.W. Beaverton-Hillsdale Hwy, Suite 209

Portland, OR 97225

(503) 208-8160 • Fax (866) 838-4142

January 11, 2021

Oregon Advisory Committee
U.S. Commission on Civil Rights

To the Advisory Committee:

Thank you for your interest in receiving testimony regarding pretrial release and victims' rights in Oregon. I am the Executive Director of a nonprofit organization that provides free legal representation to victims of crime throughout Oregon. Our attorneys assist victims in asserting their rights in the criminal justice system, ensuring their voices are heard and that victims' rights are upheld. We represent victims of all crimes, though the majority of our clients are victims of domestic violence and/or sexual abuse. We also those who are most vulnerable, including children, the elderly, and those with disabilities.

Crime victims in Oregon have fundamental rights under the Constitution, including the right to be treated with dignity and respect and the right to a meaningful role in the criminal justice system. Additionally victims have the right to be protected from the criminal defendant throughout the criminal justice system and “[t]he right to have decisions by the court regarding the pretrial release of a criminal defendant based upon the principle of reasonable protection of the victim and the public, as well as the likelihood that the criminal defendant will appear for trial.” Or. Const. art I, § 43(1).

Despite these fundamental constitutional rights, defendants are routinely released into the community without a judge hearing from the victim and without notice to the victim. It is critical that victims be notified of a defendant's release into the community so that the victim can take the steps necessary to ensure his or her own protection. A “no contact with the victim” order is not sufficient – victims must be able to plan for their own safety. It is also not enough that a judge is ordered to consider the victim's safety in setting release conditions without first hearing from the victim. A judge is unlikely to know the dynamics of the victim/defendant relationship (if one exists) or the specific concerns a victim may have related to safety.

Victims need to have a say in the conditions of release that are designed to protect them. The Constitution mandates that victim safety must be considered before pretrial release, and that victims are to have a “meaningful role” in the criminal justice process. Victim participation is only meaningful if the victim has notice and the opportunity to be heard, particularly on an issue that is so critical to their safety – pretrial release. There must be a balance in enacting bail reform measures with victim safety to ensure that the rights provided to victims by the Constitution are protected.

Sincerely,

Rosemary W. Brewer

**Oregon Advisory Committee to the
United States Commission on Civil Rights**



U. S. Commission on Civil Rights

Contact: Regional Programs Coordination Unit
U.S. Commission on Civil Rights
300 N. Los Angeles St. Suite 2010
Los Angeles, CA 90012
(213) 894-3437

This report is the work of the Oregon Advisory Committee to the U.S. Commission on Civil Rights. The report, which may rely on studies and data generated by third parties, is not subject to an independent review by Commission staff. State Advisory Committee reports to the Commission are reviewed by Commission staff only for legal and procedural compliance with Commission policies and procedures. State Advisory Committee reports are not subject to Commission approval, fact-checking, or policy changes. The views expressed in this report and the findings and recommendations contained herein are those of a majority of the State Advisory Committee members and do not necessarily represent the views of the Commission or its individual members, nor do they represent the policies of the U.S. Government. For more information, please contact the Regional Programs Coordination Unit.