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EXPLAINER

Navigating Bail Reform from the Prosecutor Perspective

May 2024

Background

In an unprecedented convening by the R Street Institute, 13 prosecutors from across the political spectrum and diverse geographical regions engaged in candid conversation about challenges surrounding the bail system, efforts to change it, and its future trajectory. Attendees spanned rural to urban areas and represented various levels within their organizations. Embracing a commitment to transcend partisan divides, the convening focused on exploring pragmatic policies to improve the bail system, with an emphasis on efficacy and fairness. By setting aside political differences and homing in on universal guiding principles and strong, promising practices, we aim to contribute valuable prosecutorial insights to ongoing discussions on bail reform. Prosecutors often lead positive pretrial changes locally, and as “gatekeepers” to the criminal justice system, it is crucial for them to play a central role in efforts shaping bail policy.

About RSI:



The R Street Institute is a leading think tank focused on solving complex public policy challenges through free markets and limited, effective government. R Street consistently offers pragmatic, real solutions that foster American innovation and safeguard individual liberty—all with an understanding that life in a democratic society sometimes means reaching compromises that do not necessarily represent first solutions.

Expert Facilitators:



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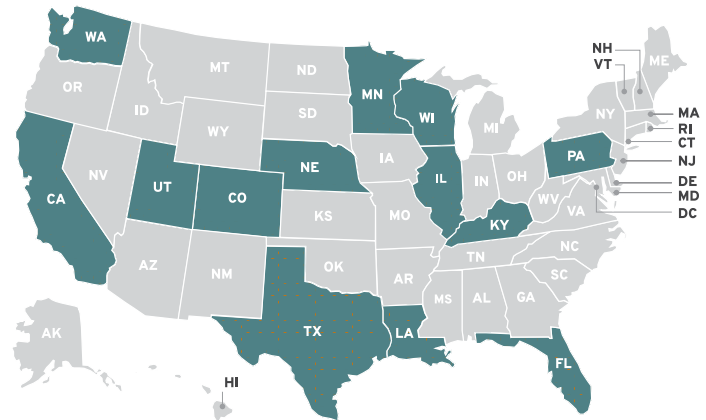
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States Represented by Prosecutors:



- 1. California
- 2. Colorado
- 3. Florida
- 4. Illinois
- 5. Kentucky
- 6. Louisiana
- 7. Minnesota
- 8. Nebraska
- 9. Pennsylvania
- 10. Texas
- 11. Utah
- 12. Washington
- 13. Wisconsin



Current Landscape of the Bail Debate



In a criminal justice system undergoing continuous transformation, pretrial release is a pivotal point of discussion with clear concerns regarding public safety. The bail conversation often follows the loudest voices, which frequently drown out the voices of people who actually do the job. This can leave prosecutors stuck with proposals for unrealistic “reforms” that system stakeholders may perceive to leave communities less safe.

Pressing Bail Issues



Prosecutors discussed several current challenges surrounding the use of bail. Primary challenges include:

- Balancing fairness with public safety
- Striving for consistency in the system as a whole while allowing for individualized bail decisions
- Effectively assessing risk and understanding how best to balance risk assessments with informed discretion
- Addressing root causes (substance abuse, mental health concerns, homelessness) contributing to high rates of court nonappearance and reoffending
- Preserving prosecutorial and court discretion while eliminating the potential for bias
- The need for increased access to and capacity of resources like pretrial support and services (a “safeguard” without resources is ineffective)

Guiding Principles for Improving the Bail System



Prosecutors identified and drew on several core principles to guide their position on bail policies and address systemic shortcomings. There is consensus on the following principles:

- Actively engage in discussions regarding pretrial changes and effective implementation
- Assess both flight and safety risk (with an emphasis on safety) when making pretrial release decisions
- Aim to do no harm: Minimize negative impacts on community safety as well as individuals impacted by the justice system
- Access to money should not be a determinative factor
- Always strive to improve fairness and equity
- Consider ways to address root causes on the front end to alleviate pressure downstream
- Collaborate with other system stakeholders for the best outcomes
- Maintain prosecutorial independence, recognizing that one size does not fit all
- Consistently assess risk tolerance, measure if policies are working as intended, and evaluate funding and resource impacts

Promising Practices



Prosecutors recognized many promising pretrial practices aimed at establishing a safer and fairer system. These practices (and their associated cautions) include:

- Court notifications. Can be effective, especially when provided for all defendants with an opt-in or opt-out provision
- Pretrial risk assessments. Must be validated and used as one of several (not the only) factors to assess risk
- Pretrial services. Must be adequately funded, with proper staff training; centralizing services can facilitate more efficient access
- Electronic monitoring. Most effective when used as active monitoring; only used as a last resort in the most high-risk cases (in lieu of detention)
- Needs-based assessments, supported release. Relies on sufficient access to community services and resources
- Least-restrictive conditions. Could be viable if the community has access to appropriate alternatives to detention
- Presumption of release. Requires sufficient safeguards to carve out individuals who pose a flight or safety risk

Critical Bail Reform Questions



Prosecutors highlighted the unintended consequences of reform efforts in which policymakers fail to pose the right questions or obtain sufficient solutions. The following questions are critical to address in bail reform discussions:

- Are adequate systems and services established and funded to provide viable alternatives to detention?
- Will the change cause additional time or use additional resources for the prosecutor, defense, courts, or other key stakeholders? If so, how will this be paid for and/or how will the additional time required be managed to ensure cases will not be backlogged?
- How will reoffending and repeat offenders be effectively managed?
- If use of cash bail is limited, what tools are available to address flight and safety risk?
- How can the victim's perspective and needs be addressed while balancing timely bail decisions?
- Have safeguards been put in place to ensure the bail process protects victims without causing further trauma?
- Do the potential changes allow for criminal justice professionals to tailor practices to their communities' needs and to individualize decisions based on case or defendant needs in order to protect safety, accountability, and individual rights?
- What are the tradeoffs or unintended consequences, and are we willing to accept those potential outcomes?
- How will success be measured, and how can we ensure the data is collected? How can we ensure key stakeholders representing all aspects of the criminal justice system take part in conversations about data-driven policy adjustments?

More Attention Needed



Prosecutors emphasized several critical areas that warrant attention to better support bail reform discussions. These items include:

- Provide comprehensive case studies. There is a need for detailed case studies from states that have implemented significant bail reforms, showcasing both successes and challenges. Highlighting real-world examples can help prosecutors better understand the implications of reform initiatives and inform their decision-making process.
- Support data collection efforts. Supporting prosecutors in identifying funding and technical assistance resources to enhance data collection capabilities could be helpful. Robust data collection—from all criminal justice stakeholders—is essential to evaluate the impact of bail reforms and inform evidence-based policymaking, though it is often cost-prohibitive.
- Foster understanding of current systems. Bail is complex, and it would be useful for policymakers and the public to understand how their state's bail system currently operates. Grasping the nuances of local systems can better inform discussions around needs for improvement and help tailor reform efforts to address specific needs.
- Recognize prosecutorial contributions. Acknowledge and appreciate the efforts of prosecutors working to improve the bail system in their community or state. Highlighting successful initiatives can inspire others to follow suit, foster a culture of collaboration and innovation within the prosecutorial community, and potentially negate the need for some statewide mandates.

What Success Looks Like



As prosecutors, we aim for a justice system where individuals consistently attend court proceedings, allowing pathways for due process and accountability. Low reoffense rates underscore the effectiveness of our efforts in detaining and releasing the right individuals—a crucial aspect of maintaining public safety. Resources are allocated parsimoniously, ensuring optimal use and avoiding inefficiencies and unnecessary costs. Moreover, we strive to prevent case backlogs, overwhelmed jails, inappropriate charging decisions, and other unintended consequences related to pretrial changes. Similarly, short-term impacts like ensuring the immediate safety of the public must be balanced with long-term impacts like criminogenic effects stemming from unnecessary use of detention. A robust feedback loop is integral to our agencies, enabling continuous improvement and alignment with evolving needs and challenges within the justice system.

How to Use this Document



This document is a valuable resource for coalitions, associations, and policymakers engaged in discussions surrounding bail system changes. While it should not be seen as a substitute for the vital voice of prosecutors at the table, it offers insightful guidance to enhance understanding and inform decision-making on this complex issue. It's essential to recognize that the bail system operates differently across states (and even across counties within a state), underscoring the need for local perspectives. It's also important to understand that although this document does not and cannot represent the views of all prosecutors, it amplifies a diverse range of perspectives that often go unheard in mainstream media discussions. We encourage prosecutors to actively engage in bail policy discussions, urge coalitions to consider prosecutor perspectives and concerns, and call on policymakers to value their input. Embracing differing viewpoints from those with firsthand knowledge and experience will undoubtedly lead to more effective outcomes—even amid disagreements.

Further Resources on Bail



- [Navigating Bail Reform in America: A State-by-State Overview](#)
- [Tools for Safe and Smart Bail System Changes](#)
- [Bail Reform Across the U.S.](#)
- [Behind the Bench: Unveiling the Dynamics of Bail Hearings](#)

For more information, please contact:

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