THE THIRD GENERATION OF BAIL REFORM IN AMERICA:

IS THIRD TIME THE CHARM?

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Those not paying close attention may have missed what has been the relatively recent groundswell of activity on the issue of bail reform. In fact, Cherise Fanno Burdeen, CEO of the Pretrial Justice Institute, recently termed the current push as the "third generation of bail reform in America," while likening the movement to that of a "runaway train."

Whether that is true is debatable, but the question before us is, what is this so-called third generation and will it deliver on what it promises?

The central argument of bail reform proponents is that the size of someone's wallet should not determine whether or not they get bail. Instead, they contend, whether someone is released should be decided by either the risk of their failing to appear in court as required or committing a new crime.

They posit that measuring this risk can be accomplished by using computer algorithms that can help us sort people into all the right categories. Theoretically, these computers will efficiently assign not only bail, but non-monetary conditions of release. They argue that if done correctly, people will show up for court, we will reduce racial disparities in the system and crimes will be reduced while they are out on bail.

Because reformers want to move away entirely from monetary conditions of bail, they are suggesting two options. The first presumes innocence from the time of arrest and releases everyone arrested on a promise to appear. This option is the least popular among policy makers and law enforcement because no weight is given to existing charges, which are based on the very premise of the presumption of innocence.

The second, and more popular, approach, is to advocate for the expansion of preventative detention—detention without the possibility of bail. In order to accomplish this, the constitutions of many states would have to be changed to eliminate the right to bail and replaced with a bi-polar system. If implemented, a person would automatically be released upon delivery to a jail, unless a prosecutor files a motion for preventative detention. That is, if he or she can prove by clear and convincing evidence that the individual is a flight risk or danger to the community. This would be the procedure in every single case.

Bail reformers are also pushing for government-run programs to supervise criminal defendants, rather than subjecting them to the need to post a financial bail. They argue that supervision is an effective way to compel defendants to show up to court, while mitigating the risk of their committing new crimes while out on bail. The American Bar Association has encouraged this since the 1970s, by creating a standard that says any non-financial conditions of bail are per se more restrictive than posting a financial condition of bail, whether it be a cash, property, or surety bond. Unfortunately, while correctional technology has improved leaps and bounds in the criminal justice system over the years, the standard has not been revised accordingly. Indeed, it can be reasonably argued that monitoring someone's blood chemistry is more restrictive than a posting of a financial condition of bail, which in most cases is provided for free by a third party.

The third generation really began in Colorado in 2012. A panel of the Colorado Commission of Criminal and Juvenile Justice considered the latest incarnation of bail reform, which was presented by its architect, Timothy Schnake. Ultimately, the panel rejected the bi-polar system. Instead, they recommended non-financial alternatives, including a statewide pretrial supervision program intended to offer judges alternatives to financial conditions of bail. The legislature eventually rejected it due to budget constraints—it was simply too expensive to create a government-run bail system.

In 2014, the third generation moved onto New Jersey. Then-governor Chris Christie, a former federal prosecutor, liked the idea of going to a no-money bail system similar to the one used by the federal government. With his support, legislation was passed to change the state's constitution to eliminate the right to bail and instead allow prosecutors to file motions for detention. If they

failed to prove a danger or flight risk by clear and convincing evidence, defendants would then be released. This constitutional amendment became operational on January 1, 2017. During this same period, New Jersey contracted with the Laura and John Arnold Foundation to employ what is known as the Public Safety Assessment, a risk algorithm used to determine whether an individual gets detained, and, if not, what conditions of bail they would face upon release.

New Mexico decided to follow the lead of New Jersey in 2016. It changed its constitution and moved to what was intended to be a hybrid version of the current system and the New Jersey system. There would still be some financial conditions of bail set, but the actual use of such bails would be dramatically reduced. In the summer of 2017, Justice Charles Daniels of the New Mexico Supreme Court drafted court rules that implemented the no-money bail system in the state.

Throughout this past year, we saw numerous states, including Arizona, California, Connecticut, Ohio, and Texas, informed by the same third generation of bail reformers, issue reports that read exactly the same as one another. Each one called for a move to the federal or New Jersey systems.

So now, with several years to reflect upon what has transpired, the time has come to ask the question: did it work? The answer is, we do not yet know. But there are significant reasons to suspect that the new system is too costly and will fail to deliver on the promises made.

In New Jersey, Acting Administrative Judge Glenn Grant has said that bail reform in his state will run a deficit by the summer of 2018. Because the program faces a structural deficit moving forward, he is calling on the legislature for a comprehensive overhaul of the funding of bail reform. Compounding the problem, county governments within the state have had to shoulder the massive burden of attempting to supervise defendants.

The real problem in New Jersey is no one knows what the reforms will wind up costing. Christopher Porrino, the state Attorney General under Governor Christie, was ordered to conduct a study of the costs of the program and was unable to arrive at a figure. Rather, he attempted to shift away responsibility by stating that there was no way to know what the program would cost until it was fully implemented.

Reformers point to the reduction in New Jersey's jail population as evidence that reforms have delivered. The problem with this argument is that the jail population dropped more on a percentage basis in the year prior to bail reform compared to what occurred in the first full year after its implementation. During that same time frame, there was a significant drop in the number of crimes for which individuals would have been arrested. Finally, New Jersey state courts, after a full year of bail reform, have absolutely no data on whether the system actually reduced failures to appear in court or whether it had any impact on new crimes committed while defendants were out on bail.

Opponents of bail reform have pointed to the federal system's thirst for incarceration as a big reason not to crack open the door of preventative detention. Doing so, it has been argued would lead to abuse of the practice. Of course, that has already occurred. Since enactment of the Bail Reform Act of 1984, there has been a 303 percent increase in pretrial incarceration in the federal system.

So what's going on in New Jersey? Prosecutors are now filing motions for preventative detention in 44 percent of all criminal cases. That is a staggering number. In one jurisdiction in the state, prosecutors are filing motions to detain in 87 percent of cases!

As for the Public Safety Assessment recommendations, numerous horror stories are emerging that boggle the mind. In one instance, a criminal defendant named Jules Black was stopped for a traffic violation. He was a prior convicted felon with a rap sheet a mile long and was in possession of a firearm, which, of course, is prohibited for those with felony convictions. The Public Safety Assessment was run on Black and the result was…he was deemed not high enough risk to file a motion for preventative detention. Accordingly, he was released on a promise to appear. Two days later, he discharged 22 rounds into his neighbor, fatally wounding him.

Then there was the case of Brittan Holland, who got into a bar fight over a pro football game. Unlike Black, the Public Safety Assessment recommended preventative detention of Holland, who ultimately managed

to dodge incarceration. He asked to be allowed to post bail but was denied the opportunity. He wound up facing such restrictions on his liberty that he was unable to take his son to baseball practice.

Former U.S. Solicitor General Paul Clement sued New Jersey on Holland's behalf, arguing that the federal Constitution guarantees the right to bail. Further, he contended that consideration of a financial condition of bail must be on a level playing field with all other conditions and cannot be placed "behind an emergency glass." The U.S. Court of Appeals for the Third Circuit recently heard oral arguments in that case and a ruling is pending.

Meanwhile, New Mexico's new bail system is a total abysmal failure. The reason boils down to one simple thing: money. The state did not allocate a single dollar to its bail reforms because they were all driven by rules from the New Mexico Supreme Court. To illustrate the problem, while New Jersey is filing preventative detention motions in 44 percent of all cases, New Mexico is doing so in only 15 percent. New laws in New Mexico have meant that requiring security for release is no longer an option. Because of that, jails have turned into a revolving door for all but the worst of the worst. Practically speaking, this amounts to 5 percent of all those arrested being held in jail pending trial. This has caused community outrage, including calls by Governor Susana Martinez to repeal the new system due to the wave of crime it is causing in her state.

On the issue of reducing racial disparities in the system, there is no evidence whatsoever that it has worked in either New Jersey or New Mexico. New Jersey has no data on whether preventative detention is functioning in a race-neutral fashion.

Prior to implementation of the New Jersey reforms, the Laura and John Arnold Foundation released its own study, arguing that its Public Safety Assessment tool is race and gender neutral. Yet, because the tool is proprietary, that evaluation was conducted behind a curtain and, therefore, of questionable value.

George Mason School of Law professor Megan Stevenson conducted her own independent analysis of the Public Safety Assessment in Kentucky, which is also posited as a reformed jurisdiction. She reached the conclusion that after five years of using the tool, it did nothing to reduce racial disparities in the system. Instead, its use resulted in only a "trivial" decrease in jail populations. Crime while out on bail actually increased, as did failures to appear in court.

New Mexico has not released any evidence, other than the continuing proclamations by its state Supreme Court that their new system is entirely better than the old system. Architects are typically the last group of people to argue that their designs are flawed and the same is true when it comes to reforms advocated by government agencies.

As 2018 began, the forces behind the bail reform movement have continued their efforts, using the same basic arguments in a number of states, including California, New York, Ohio and Florida. However, not since New Mexico and New Jersey implemented their controversial new laws has any other state chosen to follow their lead.

Ms. Burdeen and the Pretrial Justice Institute have likened the third generation of bail reform to a runaway train—and they may not actually be far off with that assessment. However, the problem is that without delivering on the promises that have been made for the last half decade, it is highly likely that many jurisdictions in 2018 will take a very careful look at the situation as they go careening down a very bumpy track. They may choose to simply get off this runaway train before it derails and crashes into a ravine.

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Jeff Clayton joined the American Bail Coalition as Policy Director in May 2015. He has worked in various capacities as a public policy and government relations professional for fifteen years and also as a licensed attorney for the past twelve years. Most recently, he worked as the General Counsel for the Professional Bail Agents of Colorado, in addition to serving other clients in legal, legislative, and policy matters. Jeff spent six years in government service, representing the Colorado State Courts and Probation Department, the Colorado Department of Labor and Employment, and the United States Secretary of Transportation. He is also a prior Presidential Management Fellow and Finalist for the U.S. Supreme Court fellows program. Mr. Clayton holds a B.B.A. from Baylor University, a M.S. (Public Policy) from the University of Rochester, N.Y., and a J.D. from the Sturm College of Law, University of Denver.