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ALTERNATIVES TO PRETRIAL INCARCERATION:
CREATING A MORE JUST JUSTICE SYSTEM THROUGH BAIL REFORM IN MASSACHUSETTS

WHITE PAPER BY
JESSICA MORRIS
SENIOR FELLOW FOR EQUAL JUSTICE
MOUNT HOLYOKE COLLEGE
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Six out of ten people in prison are awaiting trials across the United States, having been neither convicted nor found innocent. This rate has not changed in the last decade. Pretrial incarceration costs U.S. taxpayers $9 billion annually, and in Massachusetts, the costs associated with hosting each inmate amount to approximately $47,000 per year. Massachusetts is one of many states across the country in which the bail system is not determined by the risk of the defendant’s release and is instead reliant on who can pay the price of their freedom in the bail system. In order to address the social and economic issues associated with pretrial incarceration in Massachusetts, pretrial detainees of low and medium risk should be enrolled in an electronic monitoring program (EMP) and a social services unit, if advised by a judge. In a number of states, bail reform has been shown to be cost-effective and socially responsible. Some courts in Massachusetts have already chosen to take this approach, while others offer the program, but at a high cost to defendants that makes it as out-of-reach as bail. An alternative to pretrial incarceration not only ensures that the people who should be incarcerated will be, but also that those who need support will have the access to services needed to make transformative progress in their lives.
Alternatives to Pretrial Incarceration: Creating a More Just Justice System Through Bail Reform in Massachusetts
By Jessica Morris, January 31, 2015

INTRODUCTION
The Bail Reform Act of 1984 allows federal courts to detain defendants prior to their trial, as long as a motion from the prosecutor or the judicial officer’s own motion in a case can prove that the defendant is potentially dangerous or if there is risk of flight. For defendants who are neither dangerous nor a flight risk, the bail system allows them to provide cash, bond, or property in order to ensure their appearance in court. When defendants are unable to afford bail, they may request that their judges lower the amount, but if refused, the defendants remain incarcerated until the date of their trial. Those who cannot afford bail often remain imprisoned until their trial, in some cases for as long as a year.

The bail system aggravates social stratification by privileging those who can afford their freedom. Then U.S. Attorney General Robert F. Kennedy’s frank words at the 1964 National Bail Symposium about how this system based on money has failed can unfortunately be applied to the current state of the bail system today:

“Usually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. That factor is, simply, money.”

Bail is not an effective way to assess a defendant’s risk of flight or to their community. A more effective procedure would assess defendants comprehensively, considering whether they are in need of social services outside of incarceration. For example, someone who is charged with a minor crime may be at more risk and require social services or incarceration. A risk assessment tool analyzes the risk of the defendant. Courts in states and districts that do not assess defendants comprehensively through a risk assessment are not as careful in their pretrial orders as those in places that do abide by such tools.

In this white paper, I will contextualize the issue of pretrial incarceration in the United States today and more specifically the unique challenges of the prison system in Massachusetts. Then, I will provide a three-step solution that will address these issues and an action plan for implementation, and show how similar policy changes have benefited various states across the country.

RISE AND EFFECTS OF PRETRIAL INCARCERATION
The U.S. – which comprises only five percent of the world’s population – incarcerates almost a quarter of the world’s prisoners. Over the past forty years, the number of people incarcerated in the United States has escalated by 700 percent, due in large part to privatization and expansion of prisons and racially biased campaigns, such as the War on Drugs and Stop and Frisk. In 2012, there were more than 1.5 million drug arrests in the United States with more than 80 percent associated with possession only. These campaigns, while on one hand lauded by many for ridding urban streets of crime, strongly target people of color, specifically Black people and Latinos. 31 percent of people arrested for drug law violations are Black, though they are documented by the U.S. government to use drugs at similar rates to people of other races. A study by the Justice Policy Institute

1 https://www.aclu.org/files/assets/smartreformispossible.pdf
3 http://www.drugpolicy.org/resource/drug-war-mass-incarceration-and-race
shows that lack of financial support disadvantages opportunities for education, job, and home security for pretrial detainees. The study reveals harsher treatment for African Americans for pretrial outcomes; they are less likely to be released than their white counterparts, and African Americans ages 18 to 29 receive higher bail amounts than all other types of defendants.²

The rise of pretrial incarceration is a product of an unjust criminal justice system. Pretrial incarceration costs the United States over $9 billion annually. The current bail system has made pretrial detention pervasive: today, 60 percent of individuals in jail have not been convicted and are still awaiting trial.⁶ The Pretrial Justice Institute shows that judges are inclined to order harsher punishments for pretrial detainees than for those who are released on bail. Therefore, a defendant’s credibility is determined by money, no matter the verdict. A case study in Kentucky found that in 2009 and 2010, defendants detained pretrial were three times more likely to be sentenced to prison and twice as likely to have longer prison sentences.

Those who can afford to pay their bail are able to continue working, supporting their families, or continuing their education. This is not the case for individuals who are detained. Normal Wassel, founder of Bail Fund, an organization in Massachusetts that advocates for a reformed bail system, told Boston Magazine these detainees are at risk of losing public housing, “custody of children, even if it’s temporary, public benefits, treatment slots in drug programs, and jobs.”⁷ In a March 2014 article in Truthout, Wassel described one Bail Fund member’s experience defending a homeless teenager:

Wassel recounted the experience of one member, who, during her first week as an attorney, defended a 19-year-old. The judge set the teenager’s bail at $200. “He was homeless. He had no family. So $200 could have been $2,000,” Wassel said. The evidence pointed to the teen’s innocence, but, after several days in jail, he decided to plead guilty rather than spend additional time in jail while his case wound through the trial process.

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⁶ http://www.bjs.gov/content/pub/pdf/jim13st.pdf


"But you didn’t do it,’ the attorney argued. He took the papers, signed them and said, ’I did it now,’" Wassel told Truthout. "She saw this over and over again. Bail is a very flawed system that perpetuates inequality. Poor people are punished for their inability to pay."

Recidivism rates are six times higher for those incarcerated during the pretrial period, thanks in large part to the challenges low-income people experience after incarceration. Even when defendants are held for only two or three days, they are nearly 40 percent more likely to commit new crimes before their trial compared to those held for just one day. Defendants who were incarcerated during the pretrial period for a month or more reoffended 74 percent more frequently. Similar results exist for medium risk defendants.

The inadequacies of the bail system reflect the failure of the U.S. prison system as a whole. Prisons should serve to punish and treat criminals, while protecting citizens from their potential to commit the crime again. But under that assumption, the U.S. prison system today is failing.

**MASSACHUSETTS’ PRISON SYSTEM**

The prison system in Massachusetts faces unique challenges with pretrial incarceration. Massachusetts, which is one of the five states in the United States with the lowest incarceration rates, still has a higher incarceration rate than countries that have experienced political and social conflicts such as Iran and Colombia. Facilities in Massachusetts are overcrowded by up to 144 percent and the state has experienced a recent growth in pretrial incarceration. From 2005 to 2014, pretrial detainees in Massachusetts Department of Correction (DOC) custody increased by 23 percent.

The state spends significant amounts of money on inmates. The average annual cost to house an inmate in the Massachusetts DOC is $47,102.03, or more than 200 percent higher than the total cost of enrolling in a four-year degree program at the University of Massachusetts, Amherst.

This growth of pretrial detention significantly impacts women in Massachusetts. 34 percent of the women under the jurisdiction of the DOC this year are awaiting trial, compared to only 3 percent of men. From the first quarter of 2012 to the second quarter of 2014, the cumulative difference between pretrial admissions and releases resulted in an increase of 94 female pretrial inmates and a decrease of 25 male pretrial inmates. On January 1, 2014, there were 425 male pretrial detainees and 278 female pretrial detainees, totaling 703 pretrial detainees under the Massachusetts jurisdiction. In comparison, on January 1, 2002, there were 220 male pretrial detainees.

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10 http://www.pretrial.org/the-problem/
12 http://www.prisonpolicy.org/global/
15 https://www.umass.edu/admissions/facts-and-figures/tuition-and-fees
and 156 female pretrial detainees, totaling 376 pretrial detainees.

Most women currently detained while awaiting trial in Massachusetts are there because they are not able to make bail. 80 percent cannot make bail of $2,000 or less and 33 percent cannot make $500 or less.¹⁷ Two-thirds of the women in Massachusetts’ state prisons have a diagnosed mental illness and half of them use psychotropic drugs. The majority of women in prison are survivors of domestic violence; three-quarters of them have experienced severe physical abuse by a partner during adulthood and 82 percent suffered abuse (physical or sexual) as children.¹⁸ Prisons can exacerbate mental illness for women, as they have most likely endured trauma. They need access to proper substance abuse and mental health treatments beyond the prison system.

In 2013, Massachusetts began an attempt to shortcut the issue of overcrowding, caused by the rise of female pretrial detainees. Led by Representative Kay Khan (D-Newton), State Bill H.1434 proposes creating a new facility in Middlesex County for women charged of a crime and awaiting trial.¹⁹ The bill is currently pending in the Massachusetts House Committee on Ways and Means. This jail is not for convicted prisoners, but for women who are charged with violent and nonviolent crimes who cannot afford bail. Jails specific for defendants who cannot afford their bail are the wrong way to solve the issue of overcrowding: they use money and resources to expand infrastructure, instead of attacking the issue at its root through reform. Expansion of prisons does not reduce the number of female pretrial detainees nor will it alleviate the issue of overcrowding in the long term.

Low risk defendants in Massachusetts should not await their trials in jail. Their release can solve overcrowding and is a more humanizing and responsible approach. Instead, those who need the support should have the opportunity to enroll in an electronic monitoring program (EMP), which tracks their location, instead of being forced into incarceration.

THREE-STEP SOLUTION
These three steps will bring a comprehensive bail reform to Massachusetts.

1. Introduce a Risk Assessment Instrument, modeled after the Federal Pretrial Risk Assessment Instrument.²⁰ This will help Massachusetts judges categorize defendants with low, medium, and high risk and will decide whether a defendant needs electronic monitoring and/or social services.

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¹⁸ Correctional Association of New York
¹⁹ https://malegislature.gov/Bills/188/House/H1434
2. Make the EMP free and accessible to any medium risk defendant that could benefit from it.
3. Build a social services unit through Medicaid that can support defendants on release with any mental and behavioral issues, as well as drug addiction.

In Massachusetts, pretrial incarceration is a serious problem, but by implementing better pretrial programs like risk assessment, social services and, EMPs, we can reduce costs, improve peoples' lives and guarantee fairer trials. Fewer than 10 percent of courts use any risk assessment during the pretrial period, which means they do not have an unbiased and methodical process to making orders.\(^1\) The Federal Pretrial Risk Assessment Instrument\(^2\) categorizes three types of defendants depending on their risk to themselves and their communities: low, medium, and high-risk defendants. Characteristics that determine one’s risk of flight or being rearrested are age, employment status, substance abuse, and mental health.

Pretrial detainees of medium risk, whose needs and risk factors can be more adequately addressed by social services, should be enrolled in an EMP and advised to a social services unit if necessary. Low risk pretrial defendants should only receive a reminder to return to court, and high risk defendants will need to be incarcerated, due to risk of flight from trial and potential harm to their communities.

Mike Jones of the Pretrial Justice Institute suggests that about 45 percent of detainees are of low risk, 45 percent of medium risk, and the remaining 10 percent of high risk. If these predicted estimates are valid, about 633 inmates (of the total 703 pretrial detainees under the Massachusetts jurisdiction) could be alleviated and released. The average cost to house an inmate in the Massachusetts DOC is $47,102.03,\(^3\) so releasing these pretrial detainees would save about $30 million, minus the cost of associated social services.

Massachusetts’ EMP, first established in April 2001, has two types of electronic bracelets, the Radio Frequency Bracelet and the GPS Bracelet. The Radio Frequency Bracelet limits offenders to the home and if an offender leaves his or her home, an auditory or visual alert will indicate that they are out of range. The GPS bracelet is not limited to house arrest and uses 24 satellites orbiting the earth. The GPS Bracelet receives information on the location of the offenders 24/7, and if they enter a restricted area, the alert will go off and a probation officer will contact them. The GPS unit is more suitable for a defendant of medium risk, who should still be able to interact with their community.

The GPS unit costs $4.30 to $5.50 per day, depending on whether two-way voice communication is included.\(^4\) This is inexpensive compared to the roughly $129 per day it costs to house an inmate in the Massachusetts DOC.\(^5\) Additional costs of the EMP include social services to help people with substance abuse, finding jobs, or leaving abusive and domestic violent relationships. Since there has been no use of risk assessment in Massachusetts state courts, there is no sure way to determine how many current inmates are at low, medium, or high risk. Therefore, the cost calculations can only be determined by the aforementioned standard estimate from the Pretrial Justice Institute.

The Pretrial Justice Institute wrote in the State of the Science of Pretrial Risk Assessment about the difficulty of researching pretrial risk assessment due to data limitations. A major factor of the difficulty in measuring outcomes derives from how “pretrial arrest can look very different in different jurisdictions” and how failure to

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\(^{4}\) http://www.mass.gov/courts/docs/probation/elmofactsheet.pdf

\(^{5}\) http://www.mass.gov/eopss/agencies/doc/faqs-about-the-doc.html
appear in court is calculated. The Pretrial Justice Institute states, "In 2001, about 62 percent of programs used a defendant-based measure [of calculating failure to appear] and 32 percent used an event-based measure. In 2009, the percent using a defendant-based measure fell to 45 percent, while the percent using an event based-methodology increased to 56 percent." These differences in measurements make it difficult to compare between states.

STATE CASE STUDIES
Several states have effectively reformed their bail systems with alternatives to pretrial incarceration including Kentucky, Virginia, and most recently New Jersey.

On July 1, 2013, the Commonwealth of Kentucky implemented a “Public Safety Assessment,” a risk assessment-based model by the Laura and John Arnold Foundation, for all 120 counties. Since the implementation of this pretrial reform legislation, Kentucky has been able to reduce crime by about 15 percent. New criminal activity has dropped as well. The average arrest rate for released defendants has declined from 10 percent to 8.5 percent.

Circuit Court Judge David Tapp of Rockcastle, Pulaski, and Lincoln counties of Kentucky also saw a benefit to this reform:

Thanks in large part to the risk assessment tool, Kentucky judges have a pretty good grasp on making appropriate release decisions. When used correctly and in conjunction with other factors which may appear, the instrument is extremely helpful in aiding courts with making good release decisions.

Kentucky avoided spending a predicted $161 million to cover future prison growth by 2020 and $50 per day to host each low risk offender. The Kentucky legislature then spent $172,000 on a social services unit to assist in pretrial treatment and rehabilitation for low risk offenders.

In August 2014, Governor Chris Christie of New Jersey signed a bail reform package that included EMP as an alternative to pretrial detention. At the midterm election a few months later, 61.58 percent of voters voted yes on Ballot Question Number 1, which proposed that dangerous suspects can be held in jail without bail, while non-dangerous suspects can be released through alternatives to bail. New Jersey also plans to build a social services unit, modeled after Kentucky’s. New Jersey’s legislation will alleviate this issue through a long-term solution, unlike Massachusetts’s proposal to build a bail jail. New Jersey, which has a Republican governor and a Democratic-controlled legislature, has shown that bail reform is a bipartisan issue that can be solved through intentional policy.

CONCLUSION
With a three-step solution combining an electronic monitoring program and a social services unit as an alternative to pretrial incarceration for defendants of medium risk, the bail system will no longer revolve around how much money a person has to pay bail, but risks of flight prior to trial and of harm to their communities. Having electronic monitoring as an alternative to pretrial incarceration for medium risk defendants is a

progressive policy and is responsible, intentional, and will be transformative for years to come for comprehensive prison reform.

Legislation in Massachusetts should follow the same steps as New Jersey’s path: interest groups should lobby for this legislation with the governor and seek to have it appear on the following state election ballot. A ballot initiative will allow for Massachusetts residents to democratically vote on this decision. Massachusetts’s Governor Baker, like Governor Christie, is a conservative politician, but both individuals approach prison reform in a progressive manner. Governor Baker spoke about providing drug treatment instead of incarceration for nonviolent offenders in his election platform. If this legislation is spearheaded by Governor Baker, the state legislature can vote to place a referendum on the ballot for the 2016 elections, where Massachusetts voters can take the opportunity to implement fair bail reform for the betterment of the state. A swift resolution on this issue will save money and be more fair and just for the citizens of Massachusetts.