Testimony regarding Bail modifications within H221 March 18, 2015 Vermonters for Criminal Justice Reform

My name is Juliet Dowling. I am an attorney who has spent the past decade practicing in the criminal justice system. My most prior position was a Deputy District Attorney in Lehigh County PA, supervising two detectives; prior to that I was the Supervisor of the Juvenile Unit in the Office of the Public Defender in Lehigh County, and before that I had practiced criminal defense law for a firm in Bensalem, PA.

I relocated to Vermont on the 20th of September, 2014, and have been I have been focused on the issues surrounding criminal justice reform since then. I was member of the Legislative Task Force of the Vermonters for Criminal Justice Reform.

Today, it is my aim to broadly address bail, specifically, by describing the antecedents to our present system, the evidenced-based analysis of the most recent studies done, and why, upon closer examination, the concept of eliminating monetary bond for non-violent offenders, as proposed in H221, is not only not radical, but is, in fact leading Vermont into the broadening consensus that reforming bail, as it stands, is both legally and ethically required.

Definitions of Bail, for the purposes of this testimony:

Bail- a process of releasing a defendant, from jail or other governmental custody with conditions set to provide reasonable assurances of court appearance or public safety.

Bond- describes an obligation or a promise (also used bail bond)--used to describe the agreement between the defendant and the court or between the defendant, surety (commercial or non commercial) and the court that sets out the agreement.

“Money bail” typical shorthand way to describe bail process or bail bond using secured financial conditions, which necessarily includes money that must be paid up-front prior to release.

The Central issues concerning money bail are:
its tendency to cause unnecessary incarceration of defendant who cannot afford to pay or secure financial condition immediately or even after some period of time, and, its tendency to allow for, and sometimes foster the release of high risk defendants who should more appropriately be detained without bail.
Overview of bail
Bail is, someone counter-intuitively, an extremely complicated 'thing', a full understanding of the nature of it and its distortions in its present form would require me to begin a discussion starting, literally with the Norman Conquest, in 1066. Given the time limits on my testimony and the desire to not subject the members of the Judiciary Committee to have a mini-lecture on the history I've bail, I will try to sum it up very briefly, why the history is essential, and why developing a “legal and evidenced-based” approach is necessary.
Bail has been a legal doctrine since 1066. 1275 is the most specific point to address this issue as the Statute of Westminster was passed due to the abuses of the bail system; it established criteria in determining who was 'bailed' and who was not, thus the right to bail was meant to equal a right to release and a denial of a right to bail was meant to denial a detention. By 1627 King Charles Ist held 5 knights on no charge (circumventing the Statute of Westminster and the Magna Carta,) thus causing

Parliament to pass the Petition of Rights which prohibited detention without charge. This practice led to the Habeas Corpus Act of 1679, but by giving discretion to set financial amounts promulgated abuses which in turn led William and Mary to accede to the English Bill of Rights. In the United States, habeas corpus is in our Constitution Article 1 Section 9 and there is the prohibition on excessive bail in the 8th Amendment, but no express right to bail is set forth, and was then originally addressed in the Judicary Act of 1789.
The overarching importance of this history is to show that bail from 1275 until the 1800 in the United States remained largely unchanged, which was the consistent belief that "release" was the starting point, and that in/out preceded "bail/no bail", and is still held to be our founding premise in American Jurisprudence. As articulated by Learned Hand "If we are to keep our democracy, there must be one commandment: Thous shalt not ration justice"

United States has 3 times world average of pre-trial detention.

Vermont incarceration resource is used 77% for the purposes of imprisonment and 23% jail/detention. This testimony is hampered by the inability for me to obtain data regarding our current pretrial detainees. Therefore the specific effects on defendants, their families, and our tax dollars is not possible to discern. The best figures available indicate that 407 people are detained pretrial (can't account for charge or status), and those detainees are being held at a cost of one hundred and fifty seven dollars a day.

Pretrial Detention Results in Adverse Outcomes:

Those detained while awaiting trial have worse outcomes than those release pretrial. They are more likely to be convicted and receive harsher penalties, even when all other factors are equal. (ACCD 2011). The most recent data comes from a 2013 study by Laura and John Arnold Foundation and it concluded that

1) 4 times more likely to be sentenced to jail
2) 3 times more likely to be sentenced to prison
3) 2 times more likely to receive longer prison sentences
4) 40 percent more likely to recidivate if held for two to three days, and 74 percent more likely if held for 31 days or more, compared to those held 24 hours (LJAF, 2013)

Further studies have determined that while having to pay money up-front led to statistically significantly higher detention rats, whether the judge used secured or unsecured monetary bond did not lead to any differences in court appearance or public safety rate.

Looking at outcomes, 3-5% of the detained population is sentenced to prison. One state study showed that 14% of those defendants detained for the entire duration of their cases were sentenced to prison; 13% of the cases were dismissed; 37% sentenced to noncustodial sanctions, probation, community corrections,or home detention, therefore 50% of the pretrial detainees were released once case was done. The argument that they posed such a risk on the front end of the system, and yet appeared to pose a risk less than incarceration at the conclusion, is something that must be considered seriously.

25% of Felony Pretrial defendants were acquitted or the case dismissed, 20% ultimately sentenced to a non custodial sentence. According to the Bureau of Justice Statistics, New York City

Criminal Justice Agency with 60 years of research controlling all other factors defendants detained pretrial are convicted and plead guilty more often, and are sentenced to prison and receive harsher sentences than those who are released.

Finally, but not insignificant in the least is the Bailbond business model. The level of lobbying and the influence of the Bail Bond industry has led the Bureau of Justice Statistics to conclude that the percentage of cases for which courts have required felony defendants to post money in order to obtain release increased 65% from 1990-2009 (37% to 61%). The notion that there is a business whose sole purpose is, not necessarily to assure the appearance of the defendant, and cannot be conceived to provide supervision over a defendant, to profit from the criminal justice system, is a premise that doesn't comport with the basic jurisprudence of this nation with is justice and liberty; and the presumption of innocence for all those accused of criminal behavior.

Quoting from the Fundamentals of Bail A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform, put out by the National Institute of Corrections and the US Department of Justice, I leave you with the following thoughts to consider:

Finally, the weaving of the law with the research into pretrial application has the potential to itself raise significantly complex issues. For example, if GPS monitoring is deemed by the research to be ineffective, is it not then excessive under the 8th Amendment? If a secured money condition does nothing for public safety or court appearance, is it not then irrational, and thus also a violation of a defendant’s right to due process, for a judge to set it? If certain release conditions actually increase a lower risk defendant’s chance of pretrial misbehavior, can imposing them ever be considered lawful? These questions, and others, will be the sorts of questions ultimately answered by future court opinions.

Given the context and the statistics currently available not taking this opportunity to revisit the current practices around monetary bail would seem to be an enormous loss for the people of Vermont, and the criminal justice system as a whole.