TESTIMONY OF PROFESSOR PAUL G. CASSELL
S.J. QUINNEY COLLEGE OF LAW, UNIVERSITY OF UTAH*
IN SUPPORT OF HOUSE BILL 206 – BAIL AND PRETRIAL RELEASE
Submitted to Utah House Judiciary Committee - February 26, 2020

I write to submit testimony in support of H.B. 206, which proposes amendments to Utah's law governing bail and pretrial release. This bipartisan bill has just been called to my attention. I teach criminal law and criminal procedure at the S.J. Quinney College of Law at the University of Utah and have recently been researching public safety issues associated with bail reform in other parts of the country. I support H.B. 206, which avoids problems with other bail reform efforts in other states and should give Utah's judges more options to address public safety issues associated with releasing defendants accused of crimes. The bill has also been endorsed by several important organizations focusing on protecting the public, including the Statewide Association of Prosecutors (SWAP) and the Utah Sheriff's Association.

H.B. 206 changes Utah law to ask the right question about pretrial release. Previously Utah law focused some pretrial release decisions on a defendant's ability to post money bail. The more salient question is whether releasing a defendant will jeopardize public safety or fail to assure the defendant's appearance at trial. H.B. 206 usefully updates current law and focuses on this central issue. Indeed, the changes made by H.B. 206 appear to be relatively modest.

I submit testimony on this point because I understand that recently some of my legal writings have been circulated to the Committee to criticize H.B. 206. As you may know, along with Economics Professor Fowles at the University of Utah, last week I released a new empirical study of Chicago's bail reform efforts. *See* Cassell & Fowles, *Does Bail Reform Increase Crime? An Empirical Assessment of the Public Safety Implications of Bail Reform in Cook County, Illinois*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3541091 (released Feb. 19, 2020). Our study found that, as implemented in Cook County, Illinois, bail reform led an increase in violent crimes and total crimes committed by pretrial releases.

It is important to understand, however, that the main purpose of the Cook County bail reforms measures was to expand pretrial release of defendants. Thus, unlike H.B. 206, the Cook County changes permitted a defendant to be detained only if a judge could

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* The views expressed in this testimony are my own and do not reflect an official institutional position of the S.J. Quinney College of Law at the University of Utah. No state resources were used in drafting or distributing this testimony.

find that a defendant posed "a real and present threat to any person or persons." *See* Cook County General Order No. 18.8A (Procedures for Bail Hearings and Pretrial Release), ¶ 4, available at http://www.cookcountycourt.org/Portals/0/Orders/General%20Order%20No.%2018.8a.pdf. Under Cook County's new "real and present danger" standard, the number of felony defendants released before trial dramatically increased, from 20,435 defendants in the fifteen months before the new procedures to 24,504 defendants in the fifteen months after their adoption. *See* Cassell & Fowles, *supra*, at 7. Our study found, perhaps unsurprisingly, that as Cook County released many more felony defendants (above an already very high pretrial release rate), those additionally released defendants committed additional crimes.

The focus of H.B. 206 is not to single-mindedly released more defendants regardless of public safety consequences. The bill does not use the stark and restrictive "real and present danger" language found in Cook County. Instead, H.B. 206 provides a clearer framework for making those release decisions—a framework that considers risk to the community from any pretrial release. Against that backdrop, comparisons of H.B. 206 to the Chicago changes appear to be inapt.

I also understand that some persons have been concerned about this bill in light of recent New York bail reform measures—measures that appear to have increased crime there. H.B. 206, however, avoids the problems that have plagued New York. The flaw with the New York law was that judges had limited ability to consider public safety as part of setting pretrial release conditions. Predictably, then, as recent changes in New York's pretrial procedures led to the release of more defendants, crimes increased as more dangerous defendants were released—a consequence that New York judges were powerless to stop.

In contrast to the New York law, H.B. 206 requires a Utah judge considering pretrial release of a defendant to set conditions that "will reasonably ensure … the safety of any witnesses or victims of the offense allegedly committed by the individual; the safety and welfare of the public; and that the individual will not obstruct or attempt to obstruct the criminal justice process." H.B. 206 at lines 311-19. H.B. 206 goes on to provide detailed provisions that permit a defendant to be detained before trial to protect public safety. The bill thus gives effect to Utah Const., article I, § 8, which permits the Legislature to authorize pretrial detention a defendant "if there is substantial evidence to support the charge and the court finds by clear and convincing evidence that the person would constitute a substantial danger to any other person or to the community or is likely to flee the jurisdiction of the court if released on bail."

Of course, if H.B. 206 is adopted, it will be important for the Legislature to carefully examine its effects on release (and detention) decisions. In other words, as with many other laws, how the law is implemented will be important. In this area as in many others, empirically based criminal justice decision-making is a wise approach for the Legislature to follow and studying the relevant issues is very important.

In that connection, I understand that Utah's Judicial Council has been researching pretrial release issues since 2014 and in 2016 created a Standing Committee on Pretrial Release and Supervision that is working on these issues. I hope to make a presentation to the Standing Committee on Professor Fowles' and my research shortly. One area that deserves particularly close attention is how to implement a Public Safety Assessment (PSA). While H.B. 206 does not mandate use of a PSA, our research on Cook County suggests that the PSA used there was not successful in effectively identifying how many defendants could be safely released. We plan to provide the results of our research to the Standing Committee so that it may have that information while further developing any PSA instruments to be used in counties in this state.

I hope that this information clarifies my views on the pretrial release issues and Professor Fowles' and my recent study—as well as how H.B. 206 differs from other bail reform measures passed elsewhere.