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## RETHINKING BAIL REFORM

*Wendy R. Calaway* \*

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## INTRODUCTION

The issue of pretrial detention is part of a larger, national conversation on criminal justice reform. However, no single issue permeates the landscape of criminal justice like the treatment of pretrial defendants. The policies and practices around pretrial detention have contributed to the country's mass incarceration numbers; created a crisis for local jail management; generated unsustainable budgets; and raised important questions about race, class, and the constitutional implications of incarcerating people because they are too poor to pay a money bond. Legal scholars have written about the issue, highlighting the inequities and constitutional difficulties with such a system.<sup>1</sup> Much of the discussion has surrounded solutions involving the implementation of and reliance on evidence-based practices to determine pretrial detention, rather than solutions involving reliance on money.<sup>2</sup> These evidence-based practices usually take the form of pretrial assessment tools and pretrial supervision systems. Because the politics involved in criminal justice reform often paralyze reform attempts, the method by which these practices are implemented is often litigation. However, due to procedural impediments in federal court and the political realities of state courts, litigation often results in incomplete remedies that do not fully address, rectify, or prevent the range of harms inflicted by the money bail system.

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1. See, e.g., Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. REV. 837, 839–40 (2016).

2. See, e.g., *id.*

This article will address the limitations of litigation in achieving bail reform and will suggest alternative avenues for modification of these practices. Part I of this article reviews the inequities of the current money bail system in the context of the reform movement. This part discusses the historical structure of bail with a focus on the specific policies and practices that have arisen in the context of the modern American criminal justice system. Part II of this article examines the concept of predictive risk, both as it pertains to pre-trial bail and in the larger contexts of sentencing and recidivism. The contributions of social science research to this discussion have led to the creation of tools to assist in making determinations about when and how to set bail. Part II also reviews these findings and discusses the implications for litigation and extrajudicial bail reform. Part III of this article discusses the primary methodology for attaining reforms—litigation—and reviews the limitations of litigation in accomplishing reform. For example, class action lawsuits attacking local bail practices have been effective in drawing attention to systemic inequalities and in driving debate about bail reform, but to what end?<sup>3</sup> This article questions the impact of litigation and its effect on bail reform outside the specific jurisdictions affected and emphasizes the myriad procedural and political hurdles to mounting an effective constitutional challenge to a state or local bail system. Finally, Part IV considers extrajudicial opportunities for accomplishing bail reform, including coalition building, holistic implementation models, community bail funds, and legislative amendments. It also focuses on the ways in which these alternatives can be both superior to and complementary of bail reform litigation. Building from these extrajudicial alternatives, this article ultimately concludes that, because litigation may prove to be costly, cumbersome, and ultimately unworkable, lawyers seeking systemic reform of modern bail practices should employ a hybrid approach of both litigation and extrajudicial strategies to obtain the broadest and most meaningful results.

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3. See, e.g., *Civil Rights Groups Sue Dallas County, Texas, Over Discriminatory, Wealth-Based Bail Practices*, ACLU (Jan. 20, 2018), <https://www.aclu.org/news/civil-rights-groups-sue-dallas-county-texas-over-discriminatory-wealth-based-bail-practices> (discussing class actions that “successfully challenged wealth-based detention, resulting in reform and judicial orders condemning these practices in Alabama, Georgia, Louisiana, Mississippi, Missouri, Tennessee, and Texas”).

## I. BAIL SYSTEMS AND THE NEED FOR REFORM

Monetary bail is an ancient criminal justice tradition rooted in Anglo-Saxon history.<sup>4</sup> Although the precise origins of bail are unknown, most agree that it originated at some point in medieval England.<sup>5</sup> Some have traced it as far back as the time of Charlemagne in the eighth century.<sup>6</sup> Bail is defined as the temporary release of an arrested individual that is secured by a monetary payment and is contingent upon appearance at future court hearings.<sup>7</sup> It is based upon both the long-standing practice of using monetary sureties as an alternative to pretrial detention and the fact that criminal defendants enjoy the presumption of innocence between arrest and case resolution.<sup>8</sup> The notion of monetary bail was devised to serve two purposes: to protect the public and to ensure the defendant's appearance in court.<sup>9</sup> However, pretrial incarceration is inconsistent with the notions of innocence. Although not traditionally viewed as a function of corrections, a bail system that requires arrestees to remain incarcerated pending trial is punitive for those who are denied bail or cannot afford it.<sup>10</sup> In practice, this means that individuals who are denied bail are instantly placed into the correctional system despite not having been convicted of a crime.<sup>11</sup> Furthermore, indigent defendants are penalized for their

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4. Kurt X. Metzmeier, *Preventive Detention: A Comparison of Bail Refusal Practices in the United States, England, Canada and Other Common Law Nations*, 8 PACE INT'L L. REV. 399, 399 (1996).

5. Amanda L. Russell & Robert G. Morris, *History of Bail*, in ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 2087–89 (Gerben Bruinsma et al. eds., 2014).

6. *Id.*

7. *Id.* at 2088.

8. *Id.*; see *Coffin v. United States*, 156 U.S. 432, 433 (1895). While the presumption of innocence is not explicitly enunciated in the Constitution, it has become a foundational principle of American jurisprudence and is referenced by commentators and jurists alike to be among the Constitution's guarantees to due process of law. See *Coffin*, 156 U.S. at 453; see also *United States v. Salerno*, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."); Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 746–54 (2011) (arguing that many current bail practices violate the Due Process Clause's presumption of innocence and that historical notions of the presumption ensured that defendants would be released pending trial); John S. Goldkamp & Michael R. Gottfredson, *Bail Decision Making and Pretrial Detention*, LAW & HUM. BEHAV. 227, 228–29 (1979).

9. Goldkamp & Gottfredson, *supra* note 8, at 228–29.

10. See, e.g., Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1321–23 (2012) (arguing that pretrial detention constitutes punishment).

11. Russell & Morris, *supra* note 5, at 2088.

inability to pay the required bail amount.<sup>12</sup> In both cases, punishment and detention in jail occur before guilt has even been determined.

Current monetary bail policies and practices are among the primary reasons for growth in United States jail populations. On any given day, more than sixty percent of the United States jail population is composed of people who are not convicted but are being held in detention as they await the resolution of their charge.<sup>13</sup> The era of mass incarceration puts the United States far ahead of other countries in the number of its residents behind bars, and pretrial detention is one of the contributing causes.<sup>14</sup> The practice of conditioning pretrial release from incarceration on financial ability not only unfairly affects the poor, but also has a disparate impact on racial minorities. Estimates show that the rate of African Americans being detained in jail is nearly five times higher than white people and three times higher than Hispanic people.<sup>15</sup> Although these practices affect minorities and the poor disproportionately, the practices have deleterious effects across the board. Time in detention prevents people from taking care of their families, jobs, and communities; contributes to the overcrowding of jails; and creates unsustainable corrections budgets.<sup>16</sup> Numerous reports have detailed how pretrial confinement essentially forces the poor to plead guilty to offenses—regardless of factual guilt—simply so they will be released from incarceration.<sup>17</sup> Despite these realities, the issues surrounding bail and pretrial detention are some of the least studied aspects of the mass incarceration movement.<sup>18</sup> To the extent that researchers, journalists, and academics have attempted to

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12. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, ALLEVIATING JAIL CROWDING: A SYSTEMS PERSPECTIVE 3 (stating that overcrowded jails create budgetary problems); Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG. (Aug. 13, 2015), <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html> (“Disappearing into the machinery of the justice system separates family members, interrupts work and jeopardizes housing.”).

13. See NATALIE ORTIZ, NAT'L ASS'N OF COUNTIES, COUNTY JAILS AT A CROSSROADS: AN EXAMINATION OF THE JAIL POPULATION AND PRETRIAL RELEASE (2015), [www.naco.org/resources/county-jails-crossroads#full-report](http://www.naco.org/resources/county-jails-crossroads#full-report).

14. See, e.g., *Highest to Lowest—Prison Population Total*, WORLD PRISON BRIEF, [http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field\\_region\\_taxonomy\\_tid=All](http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All) (last visited Mar. 28, 2018); *United States of America: World Prison Brief Data*, WORLD PRISON BRIEF, <http://www.prisonstudies.org/country/united-states-america> (last visited Mar. 28, 2018).

15. See LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2010, at 8 (2011), [www.bjs.gov/content/pub/pdf/cpus10.pdf](http://www.bjs.gov/content/pub/pdf/cpus10.pdf).

16. Pinto, *supra* note 12.

17. *Id.*

18. See Baradaran, *supra* note 8, at 725–26.

study or bring attention to the problem, little has changed. There are very few recent cases from the United States Supreme Court discussing the monetary bail system. Until recently, it was a “topic that lawyers, and thus federal and state trial and appellate courts . . . largely avoided. This avoidance, in turn, potentially stands in the way of jurisdictions looking for the bright line of the law to guide them through the process of improving the administration of bail.”<sup>19</sup>

The story of Kalief Browder received nationwide attention in 2015 when Mr. Browder committed suicide after a prolonged period of pretrial detention.<sup>20</sup> Mr. Browder, a juvenile, was incarcerated in Rikers Island where he was held in pretrial detention for three years.<sup>21</sup> Much of this time was spent in solitary confinement.<sup>22</sup> The State was unable to prosecute the case against Mr. Browder, and the charges were eventually dismissed.<sup>23</sup> The Criminal Justice Policy Program at Harvard Law School used New York to examine an example of what is happening nationwide:<sup>24</sup>

[A] 2013 review of New York City’s jail system showed that “more than 50% of jail inmates held until case disposition remained in jail because they couldn’t afford bail of \$2,500 or less.” Most of these people were charged with misdemeanors. Of these non-felony defendants, thirty-one percent remained incarcerated on monetary bail amounts of \$500 or less.<sup>25</sup>

Despite these numbers and reports from researchers, journalists, and news outlets highlighting anecdotal accounts, little has changed. Reforms in the monetary bail system have been difficult to achieve because “magistrates and judges under little scrutiny in

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19. TIMOTHY R. SCHNACKE, U.S. DEP’T OF JUSTICE, FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM 42 (2014), <https://s3.amazonaws.com/static.nicic.gov/Library/028360.pdf>.

20. Jennifer Gonnerman, *Before the Law*, NEW YORKER (Oct. 6, 2014), <http://www.newyorker.com/magazine/2014/10/06/before-the-law>; Peter Holley, *Kalief Browder Hanged Himself After Jail Destroyed Him. Then ‘a Broken Heart’ Killed His Mother*, WASH. POST (Oct. 18, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/10/18/kalief-browder-hanged-himself-after-jail-destroyed-him-then-a-broken-heart-killed-his-mother>.

21. Holley, *supra* note 20.

22. *Id.*

23. *Id.*

24. CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCH., MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 6 (2016) [hereinafter BAIL PRIMER], <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>.

25. *Id.* (quoting RAM SUBRAMANIAN ET AL., VERA INST. OF JUSTICE, INCARCERATION’S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 23 (2015), <http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/01/incarcerations-front-door-report.pdf>).

thousands of local courtrooms, each with its own rules and customs,” are responsible for setting bail.<sup>26</sup>

### A. *The Legal Framework of Bail*

While the United States Constitution does not guarantee a right to bail, the Eighth Amendment prohibits “[e]xcessive” bail.<sup>27</sup> In *Stack v. Boyle*, the Supreme Court addressed the issue of what “excessive” bail means.<sup>28</sup> The defendants in *Stack* were members of the Communist Party and were charged with conspiring to violate the Smith Act.<sup>29</sup> The district court set a \$50,000 bond for each defendant, an amount that was far in excess of bonds for other serious crimes.<sup>30</sup> The Supreme Court held that there was no factual evidence to suggest that the defendants were a flight risk, and therefore, the bond violated the Eighth Amendment’s directives.<sup>31</sup> The Court defined excessive bail as bail that was set at a figure higher than an amount reasonably calculated to “assur[e] . . . the presence of an accused.”<sup>32</sup> For the first time, the Court explicitly connected the purpose of bail to the determination of excessiveness. “Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.”<sup>33</sup>

Following the Supreme Court’s decision in *Boyle*, the United States Congress took up the issue, and enacted the Bail Reform Act of 1966.<sup>34</sup> This legislation provided that all persons accused of violating federal law would be released from custody without having to post any bond with the court unless the government could demonstrate that the defendant was likely to flee the jurisdiction

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26. Shaila Dewan, *When Bail Is Out of Defendant’s Reach, Other Costs Mount*, N.Y. TIMES (June 10, 2015), <http://www.nytimes.com/2015/06/11/us/when-bail-is-out-of-defendants-reach-other-costs-mount.html>.

27. U.S. CONST. amend. VIII.

28. 342 U.S. 1, 5 (1951).

29. *Id.* at 5, 10. The Smith Act was enacted to prescribe criminal penalties for advocating the overthrow of the United States government. Smith Act of 1940, Pub. L. No. 76-670, 54 Stat. 670 (repealed 1952).

30. *Stack*, 342 U.S. at 3, 5.

31. *See id.* at 5–6.

32. *Id.* at 5.

33. *Id.*

34. Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214, *repealed by* Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1976–87 (codified as amended at 18 U.S.C. §§ 3141–3150 (2012)).

of the court to avoid prosecution.<sup>35</sup> The magistrate could not consider the fact that a given defendant might pose a danger to the community in determining whether a defendant should be released from custody.<sup>36</sup> Indeed, under the Bail Reform Act of 1966, magistrates were required to release those accused of violating federal law without requiring any financial bond unless it was determined from the facts of a given case that additional conditions of release were necessary.<sup>37</sup>

The Reagan era ushered in a series of more punitive criminal justice legislation. With the enactment of the Bail Reform Act of 1984, new bail criteria were enacted.<sup>38</sup> Under this Act, federal magistrates are free to consider whether a given defendant might pose a danger to the community should he or she be released on bail.<sup>39</sup> Additionally, certain defendants are presumed to be a danger to the community and consequently not entitled to presumptive release.<sup>40</sup>

In *United States v. Salerno*, the Supreme Court reviewed a challenge to the constitutionality of the Bail Reform Act of 1984.<sup>41</sup> Two defendants were arrested on allegations that they were members of the La Cosa Nostra crime family and faced thirty-five counts of racketeering activity, including fraud, extortion, gambling, and conspiracy to commit murder.<sup>42</sup> At the detention hearing, the government moved that the defendants be denied pretrial release, providing the district court with evidence of the defendants' backgrounds and proffering information of criminal activities obtained from wiretaps.<sup>43</sup> The court determined that the activities of the crime family would not cease with the arrest of the defendants if they were released on bail and that there was a strong incentive for the defendants to continue the illegal activities.<sup>44</sup> The court found that release of the defendants created a "present danger" to

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35. Bail Reform Act of 1966 § 3, 80 Stat. at 214.

36. *See id.*

37. *See id.* § 3, 80 Stat. at 214–15.

38. *See* Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended at 18 U.S.C. § 3141 (2012)).

39. *See id.* § 203, 98 Stat. at 1978–79.

40. *Id.*

41. 481 U.S. 739, 744 (1987).

42. *Id.* at 743.

43. *Id.*

44. *Id.* at 744 (citing *United States v. Salerno*, 631 F. Supp. 1364, 1375 (S.D.N.Y. 1986)).



the community.<sup>45</sup> The Supreme Court rejected the defendants' challenge that the Bail Reform Act of 1984 violated the Due Process Clause of the Fifth Amendment and the Excessive Bail Clause of the Eighth Amendment.<sup>46</sup> The Court's holding expanded the purpose of bail from simply assuring the presence of the defendant at trial to include protection of the community.<sup>47</sup> All but nine state constitutions provide far more robust guarantees of bail, with most indicating that every defendant shall be entitled to bail except those charged with capital offenses.<sup>48</sup>

There is no uniform approach to pretrial release among the states; however, state constitutions often contain language acknowledging the right to bail. State courts have interpreted their respective state constitutions in varied ways. A typical right to bail provision states: "[A]ll persons shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident, or the presumption great . . . ."<sup>49</sup> This common language, however, has been subject to varied interpretations.<sup>50</sup> In states where courts have interpreted the word "shall" to require an absolute right to bail, all defendants (except in capital cases) are eligible for release, and defendants are only detained in practice if they are unable to pay the monetary bond amount set.<sup>51</sup> In other states, despite employing the same or substantially similar language, the words "bailable" and "sufficient sureties" have been interpreted to preserve the court's discretion in extending bail.<sup>52</sup> In these states, non-

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45. *Id.*

46. *Id.* at 748, 752.

47. *See id.* at 748 (stating that the government's interest in community safety can outweigh individual liberty in certain circumstances).

48. BAIL PRIMER, *supra* note 24, at 9 (listing Georgia, Hawaii, Maryland, Massachusetts, New Hampshire, New York, North Carolina, Virginia, and West Virginia as states that "mirror the language of the U.S. Constitution and only prohibit the use of excessive bail"); *see also* GA. CONST. art. I, § 1, para. XVII; HAW. CONST. art. I, § 12; MD. CONST., Declaration of Rights, art. 25; MASS. CONST. pt. I, art. XXVI; N.H. CONST. pt. I, art. 33; N.Y. CONST. art. I, § 5; N.C. CONST. art. I, § 27; VA. CONST. art. I, § 9; W. VA. CONST. art. III, § 5. For an example of a typical right-to-bail provision, see CAL. CONST. art. I, § 12 (providing release on bail except for incidents of "[c]apital crimes when the facts are evident or the presumption great").

49. Ariana Lindermayer, Note, *What the Right Hand Gives: Prohibitive Interpretations of the State Constitutional Right to Bail*, 78 FORDHAM L. REV. 267, 274–75 (2009) (quoting Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 970 (1965)).

50. *Id.* at 276.

51. *Id.*

52. *See, e.g.,* Rendel v. Mummer, 474 P.2d 824, 828 (Ariz. 1970) (en banc) (holding that the Arizona "Constitution does not guarantee bail as a matter of absolute right but is conditioned upon the giving of 'sufficient sureties,'" which means, at a minimum, "that there is reasonable assurance to the court that if the accused" is released, "he will return" to court);

capital defendants are eligible for bail, but the court may always deny bail if it determines that no amount of surety can prevent a defendant's flight or dangerousness to the community. In a few states, this interpretation has been codified in the states' constitutions.<sup>53</sup> Additionally, in at least one state, the state supreme court has interpreted its constitution to mean that a court can revoke the right to bail if a defendant violates a condition of release.<sup>54</sup> While states do not have uniform practices in the criteria for implementation or management of pretrial populations, virtually all states engage in practices which have led to the unsustainable jail populations with all the adverse effects noted here.<sup>55</sup> The current research regarding pretrial detention has focused on state courts.

### B. *The Problem of a Money-Based Bail System*

In 1965, Caleb Foote anticipated a "Coming Constitutional Crisis" in money bail and the pretrial detention practices in the United States.<sup>56</sup> While the 1960s was a time of progress for many criminal justice issues, the issue of bail was largely ignored.<sup>57</sup> Foote addressed many of the negative consequences associated with pretrial detention, which, as this part demonstrates, have been confirmed in social science research decades later.<sup>58</sup> In 1964,

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People *ex rel.* Hemingway v. Elrod, 322 N.E.2d 837, 840–41 (Ill. 1975) (concluding that the Illinois "constitutional right to bail must be qualified by the authority of the courts, as an incident of their power . . . to preserve the orderly process of criminal procedure"); *see also* Lindermayer, *supra* note 49, at 276.

53. *See, e.g.*, ARIZ. CONST. art. II, § 22 (public safety exception for felony offenses); CAL. CONST. art. I, § 12 (public safety exception for sexual assault and violent felonies); MO. CONST. art. I, § 32.2 ("Notwithstanding section 20 of article I of this Constitution, upon a showing that the defendant poses a danger to a crime victim, the community, or any other person, the court may deny bail or may impose special conditions which the defendant and surety must guarantee."); *see also* MO. CONST. art. I, § 20 ("[A]ll persons shall be bailable by sufficient sureties . . .").

54. *State v. Cardinal*, 520 A.2d 984, 986 (Vt. 1986).

55. *See* Nick Wing, *Report Grades Bail System Across the U.S., and Only One State Gets an A*, HUFFINGTON POST (Nov. 1, 2017, 12:01 AM ET), [https://www.huffingtonpost.com/entry/state-bail-system-grades\\_us\\_59f78f90e4b0aec1467a2708](https://www.huffingtonpost.com/entry/state-bail-system-grades_us_59f78f90e4b0aec1467a2708).

56. Foote, *supra* note 49, at 959.

57. *See id.* (comparing the passive role played by the courts in deciding bail issues to the active role of "forc[ing] major change down the throats of the states" in issues such as search and seizure and the right to counsel during the 1960s).

58. *See id.* at 960 (noting that the bail system operates to "effectively deny rather than facilitate liberty pending trial" for poor defendants in pretrial detention, in which those defendants are consequently faced with more severe sentences after conviction or would have never otherwise suffered imprisonment at all). "The Court's initiative in these areas has precipitated a storm of controversy and created constitutional crises both in police operations and in the court practices of those states which had previously failed to make provision

United States Attorney General Robert F. Kennedy drew attention to the issue of money bail by testifying before the Senate Judiciary Committee regarding the disparate treatment between rich and poor that results from the institution of money bail in the context of pretrial detention.<sup>59</sup> Despite these warnings and predictions, the number of people incarcerated because they are unable to post a money bond has increased dramatically.<sup>60</sup> During the 1980s, the United States made a significant shift from a rehabilitation-focused approach to criminal justice to a punitive one.<sup>61</sup> Pretrial detention decisions were not immune from this approach. As calls to get “tough on crime” came from both the Reagan Administration and the public, judges responded by setting high financial bonds for pretrial defendants.<sup>62</sup> As Keith Swisher notes, elected judges face incentives to set high bonds.<sup>63</sup> Judges do not want to appear soft on crime and are acutely aware that they may be held responsible if crimes are committed during the pretrial period.<sup>64</sup> Further, unlike other public officials, judges are not responsible for the cost of pretrial detention and receive no reward for releasing pretrial defendants.<sup>65</sup> Thus, the default position of courts became detention rather than risking release.

The consequence of this posture on pretrial release was as Foote predicted. The adverse impact of holding people in jail because they cannot afford to post a bond can be seen in several areas. First, when a defendant is held in jail because he cannot post a money bond, his employment, housing, and financial stability are jeopardized. Detention, even for a short period of time, causes job loss for many, setting in motion a domino effect leading to loss of housing,

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for assigning counsel to indigents in all cases.” *Id.*

59. *Bail Legislation: Hearing on S. 2838, S. 2839, and S. 2840 Before the Subcomms. on Constitutional Rights & Improvements in Judicial Mach. of the S. Comm. on the Judiciary*, 88th Cong. 1–2 (1964) (statement of Robert F. Kennedy, Att’y Gen. of the United States).

60. Over the last fourteen years, the number of people detained pretrial has increased by twenty-two percent. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004, at 1 (2006), <https://bjs.gov/content/pub/pdf/cfjs04.pdf> (describing federal release statistics as an example).

61. ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* 165–66 (2016).

62. Keith Swisher, *Pro-Prosecution Judges: “Tough on Crime,” Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317, 364–66 (2010).

63. *Id.*

64. *Id.*

65. See Andrew C. Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the “Interests of Finality,”* 2013 UTAH L. REV. 561, 612–13 (2013); Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 1975–76 (2005).

transportation, and other necessities for the defendant and his family.<sup>66</sup> Second, pretrial detention resulting from an inability to post a money bond is correlated with an increase in failure-to-appear rates.<sup>67</sup> Third, research shows a correlation between new criminal activity and pretrial detention.<sup>68</sup> A recent study showed that detention for as short a time as three or four days, compared to similarly situated defendants who were released within one day, correlated to a thirty-nine percent increase in pretrial criminal activity.<sup>69</sup>

The negative consequences of the money bail system extend beyond the defendant and his family. Increased populations in local jails create both housing and personnel challenges for jail administration officials.<sup>70</sup> Increased jail populations stretch the capacity of jail personnel, making it difficult to properly classify and treat inmates.<sup>71</sup> Overcrowded jail facilities create deteriorating housing facilities, lack of access to appropriate services, a shortage of properly trained staff, and increases in victimization for both staff and inmates.<sup>72</sup> These realities have led local jail officials to join reform efforts in a number of jurisdictions.<sup>73</sup>

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66. See Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1356–57 (2014) [hereinafter Wiseman, *Pretrial Detention*]; see also Laura Sullivan, *Inmates Who Can't Make Bail Face Stark Options*, NPR (Jan. 22, 2010, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=122725819>.

67. CHRISTOPHER T. LOWENKAMP ET AL., LAURA & JOHN ARNOLD FOUND., *THE HIDDEN COSTS OF PRETRIAL DETENTION* 10–12 (2013), [http://arnoldfoundation.org/wp-content/uploads/2014/02/LJAF\\_Report\\_hidden-costs\\_FNL.pdf](http://arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf).

68. *Id.* at 17–18.

69. *Id.*

70. Marian R. Williams, *From Bail to Jail: The Effect of Jail Capacity on Bail Decisions*, 41 AM. J. CRIM. JUST. 484, 486 (2016).

71. Joan Mullen, *Prison Crowding and the Evolution of Public Policy*, 478 ANNALS AM. ACAD. POL. & SOC. SCI. 31, 35–36 (1985).

72. MICHAEL BRASWELL ET AL., *PRISON VIOLENCE IN AMERICA* 42–47 (Gail Eccleston & Kelly Humble eds., 2d ed. 1994); James Bonta & Paul Gendreau, *Reexamining the Cruel and Unusual Punishment of Prison Life*, 14 LAW & HUM. BEHAV. 347, 350, 352 (1990); Christine Tartaro, *The Impact of Density on Jail Violence*, 30 J. CRIM. JUST. 499, 507–09 (2002).

73. See, e.g., Sara Dorn, *Ohio Sheriffs, County Commissioners Calling for Bail Reform*, CLEVELAND.COM (Feb. 17, 2017), [http://www.cleveland.com/metro/index.ssf/2017/02/ohio\\_sheriffs\\_county\\_commissio.html](http://www.cleveland.com/metro/index.ssf/2017/02/ohio_sheriffs_county_commissio.html); Michael Hardy, *In Fight Over Bail's Fairness, a Sheriff Joins the Critics*, N.Y. TIMES (Mar. 9, 2017), <https://www.nytimes.com/2017/03/09/us/houston-bail-reform-sheriff-gonzalez.html>.

### C. *The Case for Bail Reform*

#### 1. Possibilities for Reform

The ultimate reform sought by those highlighting the inequities of a pretrial detention system based on ability to pay is a reduction or elimination of the use of monetary bail. A number of reforms have been proposed as substitution for the use of money. For example, the American Bar Association (“ABA”) standards on pretrial release direct jurisdictions to reduce the number of arrests.<sup>74</sup> If cities increase the use of citation rather than arrest and authorize direct release from the police station, there will be fewer bail decisions required.<sup>75</sup> Reform advocates have also suggested legislation that mandates judicial consideration of a defendant’s ability to pay in bail-setting criteria.<sup>76</sup> A number of jurisdictions have voluntarily implemented such policies, and some have gone even further by mandating presumptive, non-monetary release for certain categories of offenders.<sup>77</sup>

Robust social science research has emerged on the efficacy of monetary bonds. This research provides an opportunity for courts to make decisions based on evidence. For example, studies have demonstrated that unsecured bonds offer better or the same likelihood of a court appearance as secured money bonds.<sup>78</sup> A Colorado study looked at 1970 defendants over a sixteen-month period and assessed whether secured money bonds led to higher rates of court appearances.<sup>79</sup> The study found that those defendants with unsecured money bonds appeared in court more consistently than those

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74. See STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE § 10-1.3 (AM. BAR ASS’N 3d ed. 2007) [hereinafter ABA PRETRIAL RELEASE STANDARDS] (encouraging the “[u]se of citations and summonses”); *id.* §§ 10-2.1 to -3.3 (encouraging jurisdictions to employ citations and summonses broadly in lieu of arrest for minor offenses and providing specific guidelines).

75. *Id.* § 10-2.1 cmt. at 63–65.

76. COUNCIL OF ECON. ADVISERS, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONALLY IMPACT THE POOR 8 (2015), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215\\_cea\\_fine\\_fee\\_bail\\_issue\\_brief.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf); see BAIL PRIMER, *supra* note 24, at 10.

77. See ODonnell v. Harris County, 251 F. Supp. 3d 1052, 1059–60 (S.D. Tex. 2017); Cook Cty. Cir. Ct. G.O. 18.8A (Ill. July 27, 2017).

78. MICHAEL R. JONES, PRETRIAL JUSTICE INST., UNSECURED BONDS: THE AS EFFECTIVE AND MOST EFFICIENT PRETRIAL RELEASE OPTION 11 (2013), <http://www.pretrial.org/download/research/Unsecured+Bonds,+The+As+Effective+and+Most+Efficient+Pretrial+Release+Option+-+Jones+2013.pdf>.

79. *Id.* at 6.

with secured money bonds.<sup>80</sup> Similarly, as part of a comprehensive reform to pretrial detention, Kentucky increased the number of defendants released on unsecured bonds from 50% to 66%.<sup>81</sup> During that same time period, court appearance rates rose from 89% to 91%.<sup>82</sup> Reform advocates argue that if attaching a monetary condition to pretrial release has no bearing on whether a defendant returns to court then secured money bonds should not be used, especially when the monetary condition leaves so many individuals incarcerated prior to conviction.<sup>83</sup>

Pretrial release with conditions, referred to as pretrial supervision or supervised pretrial release, has been proposed to monitor a defendant's behavior while awaiting resolution of the criminal case.<sup>84</sup> Pretrial service schemes use a variety of tools to accomplish the goals of protecting the public and ensuring the defendant's appearance in court.<sup>85</sup> These include court pretrial services departments sending a defendant text messages, emails, and regular mail reminders of that defendant's court dates, as well as more formalized contact with pretrial defendants.<sup>86</sup> The intervention utilized is tailored to address the needs of the individual offender.<sup>87</sup> One of the simplest versions of pretrial services is telephone calls or text messages to remind a defendant of the time and location of the defendant's court dates.<sup>88</sup> Research has revealed that calling a

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80. *Id.* at 11.

81. PRETRIAL SERVS., KY. COURT OF JUSTICE, PRETRIAL REFORM IN KENTUCKY 13, 16 (2013), [www.pretrial.org/download/infostop/Pretrial%20Reform%20in%20Kentucky%20Implementation%20Guide%202013.pdf](http://www.pretrial.org/download/infostop/Pretrial%20Reform%20in%20Kentucky%20Implementation%20Guide%202013.pdf).

82. *Id.* at 16–17.

83. See ABA PRETRIAL RELEASE STANDARDS, *supra* note 74, at 30–31.

84. See MARIE VANNOSTRAND & CHRISTOPHER LOWENKAMP, LAURA & JOHN ARNOLD FOUND., EXPLORING THE IMPACT OF SUPERVISION ON PRETRIAL OUTCOMES 3 (2013).

85. See, e.g., Timothy R. Schnacke et al., *Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Pilot Project and Resulting Court Date Notification Program*, 48 CT. REV. 86, 89 (2012) (discussing the telephone live-caller experiment). See generally Brian H. Bornstein et al., *Reducing Courts' Failure-to-Appear Rate by Written Reminders*, 19 PSYCHOL. PUB. POL'Y & L. 70 (2013) (describing a pretrial service experiment notifying defendants of upcoming trials through written message).

86. PRETRIAL JUSTICE INST., USING TECHNOLOGY TO ENHANCE PRETRIAL SERVICES: CURRENT APPLICATIONS AND FUTURE POSSIBILITIES 14–16 (2012) [hereinafter TECHNOLOGY TO ENHANCE PRETRIAL SERVICES], <https://www.pretrial.org/download/pji-reports/PJI%20USING%20TECHNOLOGY%20TO%20ENHANCE%20PRE%20TRIAL%20SERVICES.pdf>.

87. See, e.g., NAT'L ASS'N OF CTYS., COUNTY JAILS AT A CROSSROADS—MESA COUNTY, CO (2015), [http://www.naco.org/sites/default/files/documents/06.30.15\\_FINAL\\_Pretrial%20Release\\_Mesa.v3.pdf](http://www.naco.org/sites/default/files/documents/06.30.15_FINAL_Pretrial%20Release_Mesa.v3.pdf).

88. See TECHNOLOGY TO ENHANCE PRETRIAL SERVICES, *supra* note 86, at 16; Schnacke et al., *supra* note 85, at 88.

defendant to remind them of their court dates improves appearance rates.<sup>89</sup> One study found that automated call reminders reduced failure to appear rates by forty-one percent.<sup>90</sup> Another version of pretrial services involves more in-person contact, including periodic meetings with a pretrial services officer, in-home check-ups, telephone reporting, and monitoring of a defendant's criminal contacts.<sup>91</sup> Studies have shown that increased pretrial contact reduces failure to appear rates and rates of re-arrest.<sup>92</sup>

Electronic monitoring has also been discussed as a potential alternative to pretrial detention. Electronic monitoring allows for real-time observation of a defendant's whereabouts and deters a defendant from neglecting to appear for a court date.<sup>93</sup> However, the research on electronic monitoring indicates this tool will not increase court appearance rates.<sup>94</sup> Concerns have also been raised about the constitutionality of widespread use of electronic monitoring and, specifically, concomitant privacy and due process concerns inherent with its use.<sup>95</sup> Indeed, electronic monitoring has the potential to be equally as invasive as pretrial detention, given that it is typically coupled with curfew and travel restrictions.<sup>96</sup>

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89. MATT O'KEEFE, LOCAL PUB. SAFETY COORDINATING COUNCIL, COURT APPEARANCE NOTIFICATION SYSTEM: 2007 ANALYSIS HIGHLIGHTS (2007), <http://www.pretrial.org/download/research/Multnomah%20County%20Oregon%20-%20CANS%20Highlights%202007.pdf>.

90. *Id.*

91. MARIE VANNOSTRAND ET AL., PRETRIAL JUSTICE INST., STATE OF THE SCIENCE OF PRETRIAL RELEASE RECOMMENDATIONS AND SUPERVISION 29 (2011), <http://www.pretrial.org/download/research/PJI%20State%20of%20the%20Science%20Pretrial%20Recommendations%20and%20Supervision%20%282011%29.pdf>.

92. John S. Goldkamp & Michael D. White, *Restoring Accountability in Pretrial Release: The Philadelphia Pretrial Release Supervision Experiments*, 2 J. EXPERIMENTAL CRIMINOLOGY 143, 167, 172 (2006).

93. Wiseman, *Pretrial Detention*, *supra* note 66, at 1368; see Eric Markowitz, *Electronic Monitoring Has Become the New Debtors Prison*, NEWSWEEK (Nov. 23, 2015, 12:23 PM), <http://www.newsweek.com/2015/12/04/electronic-monitoring-has-become-new-debtors-prison-397225.html>.

94. See P'SHIP FOR CMTY. EXCELLENCE, CAL. FORWARD, PRETRIAL DETENTION AND COMMUNITY SUPERVISION: BEST PRACTICES AND RESOURCES FOR CALIFORNIA COUNTIES 13 (2012), [http://caforward.3cdn.net/7a60c47c7329a4abd7\\_2am6iyh9s.pdf](http://caforward.3cdn.net/7a60c47c7329a4abd7_2am6iyh9s.pdf).

95. See, e.g., Karin Drucker, *Electronic Monitoring: Punishment and Liberty in the Age of GPS*, HARV. C.R.-C.L. L. REV. (Oct. 23, 2017), <http://harvardcrel.org/electronic-monitoring-punishment-and-liberty-in-the-age-of-gps-2/>; see also M.M., *Living with an Ankle Bracelet: Freedom with Conditions*, MARSHALL PROJECT (July 16, 2015), <https://www.themarshallproject.org/2015/07/16/living-with-an-ankle-bracelet>.

96. Wiseman, *Pretrial Detention*, *supra* note 66, at 1363.

By far the most discussed reform effort to replace monetary bail is the use of actuarial risk assessment tools.<sup>97</sup> Actuarial risk assessment instruments generate risk scores based on statistical analysis.<sup>98</sup> These tools assess the risk that a defendant presents on the basis of risk factors incorporated into a statistical formula that uses existing data to estimate future outcomes.<sup>99</sup> A number of different tools have been created, and a body of social science research has developed around predictive risk assessment.<sup>100</sup> Some factors may rely on information that is immediately available from a defendant's criminal history and the current charge.<sup>101</sup> Other factors requiring an interview with the defendant include employment, history of drug and alcohol abuse, and residency status.<sup>102</sup> One such tool, the Ohio Risk Assessment System, was created based on research conducted at the University of Cincinnati as part of a comprehensive initiative to predict recidivism at multiple points along the criminal justice process, including pretrial.<sup>103</sup> Research suggested that seven indicators were correlative of recidivism, including criminal history, employment, residential stability, and substance abuse.<sup>104</sup> A number of different risk assessment tools have

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97. See, e.g., BAIL PRIMER, *supra* note 24, at 18–20 (describing a statistical model used to assess pretrial flight and safety risk); CHARLES SUMMERS & TIM WILLIS, BUREAU OF JUSTICE ASSISTANCE, PRETRIAL RISK ASSESSMENT: RESEARCH SUMMARY 1–2 (2010), <https://www.bja.gov/Publications/Pretrial-RiskAssessmentResearchSummary.pdf>; William M. Grove, *Clinical Versus Statistical Prediction: The Contribution of Paul E. Meehl*, 61 J. CLINICAL PSYCHOL. 1233, 1242 (2005); Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, in 3 ACAD. FOR JUSTICE, REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 21, 34–39 (Erik Luna ed., 2017).

98. See SUMMERS & WILLIS, *supra* note 97, at 1.

99. See CYNTHIA A. MAMALIAN, PRETRIAL JUSTICE INST., STATE OF THE SCIENCE OF PRETRIAL RISK ASSESSMENT 7 (2011), [https://www.bja.gov/publications/pji\\_pretrialriskassessment.pdf](https://www.bja.gov/publications/pji_pretrialriskassessment.pdf).

100. See *Pretrial Risk Assessment*, PRETRIAL JUST. INST., <http://www.pretrial.org/solutions/risk-assessment/> (lasted visited Mar. 28, 2018).

101. See Christopher T. Lowenkamp & Jay Whetzel, *The Development of an Actuarial Risk Assessment Instrument for U.S. Pretrial Services*, 73 FED. PROB. 33, 34 (2009).

102. See MARIE VANNOSTRAND & CHRISTOPHER LOWENKAMP, LAURA & JOHN ARNOLD FOUND., ASSESSING PRETRIAL RISK WITHOUT A DEFENDANT INTERVIEW 5 (2013).

103. EDWARD J. LATESSA ET AL., THE OHIO RISK ASSESSMENT SYSTEM MISDEMEANOR ASSESSMENT TOOL (ORAS-MAT) AND MISDEMEANOR SCREENING TOOL (ORAS-MST) 3 (2014), <http://www.drc.ohio.gov/oras> (detailing the Ohio Department of Rehabilitation and Correction's partnership with the University of Cincinnati Center for Criminal Justice Research to develop a universal Ohio-based assessment system); Edward J. Latessa et al., *The Creation and Validation of the Ohio Risk Assessment System (ORAS)*, 74 FED. PROB. 16, 16 (2010) [hereinafter Latessa et al., *Creation and Validation*] (discussing the development of Ohio Risk Assessment System and its utilization within Ohio's criminal justice system).

104. Latessa et al., *Creation and Validation*, *supra* note 103, at 18.



been studied and utilized in numerous other jurisdictions, including Virginia, Colorado, Minnesota, Texas, Pennsylvania, New York, and the federal system.<sup>105</sup>

Another risk assessment tool, the Public Safety Assessment, measures nine factors that predict recidivism and risk of flight.<sup>106</sup> Public Safety Assessment researchers contend that interview-dependent factors, such as employment, drug use, and residency do not improve the predictive accuracy of the tool.<sup>107</sup> The research behind the development of this risk assessment tool allows courts to rely on the predictive validity of the instrument in making decisions about pretrial release.<sup>108</sup> The use of these systems removes the more subjective criteria, including economic status, from decision-making and instead allows the court to make pretrial detention decisions using the evidence-based mechanism.<sup>109</sup> In a pilot study conducted in Kentucky, where the Public Safety Assessment was employed, researchers found that seventy percent of defendants were released and the rate of pretrial re-arrest was reduced by fifteen percent.<sup>110</sup> The study reported that the risk assessment tool that was used predicted risk with a “high degree of accuracy.”<sup>111</sup> The Public Safety Assessment is used in several jurisdictions across the United States.<sup>112</sup>

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105. SUMMERS & WILLIS, *supra* note 97, at 2 (noting various actuarial pretrial risk assessment instruments that have been implemented in Virginia, Ohio, Minnesota, Texas, Pennsylvania, New York, and the federal system); *see, e.g.*, PRETRIAL JUSTICE INST., THE COLORADO PRETRIAL ASSESSMENT TOOL (CPAT) 5 (2012), <http://www.pretrial.org/download/risk-assessment/CO%20Pretrial%20Assessment%20Tool%20Report%20Rev%20-%20PJ%202012.pdf> (discussing an ongoing twelve-county initiative in Colorado to develop research-based policies and practices for the criminal justice professionals who have a role in pretrial decision-making and case processing); MARIE VANNOSTRAND & KENNETH J. ROSE, VA. DEPT' OF CRIMINAL JUSTICE SERVS., PRETRIAL RISK ASSESSMENT IN VIRGINIA 1 (2009) (discussing pretrial risk assessment in Virginia).

106. *Public Safety Assessment*, LAURA & JOHN ARNOLD FOUND., [www.arnoldfoundation.org/initiative/criminaljustice/crime-prevention/public-safety-assessment/](http://www.arnoldfoundation.org/initiative/criminaljustice/crime-prevention/public-safety-assessment/) (last visited Mar. 28, 2018).

107. LAURA & JOHN ARNOLD FOUND., DEVELOPING A NATIONAL MODEL FOR PRETRIAL RISK ASSESSMENT 4 (2013), [http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary\\_PSA-Court\\_4\\_1.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary_PSA-Court_4_1.pdf).

108. LAURA & JOHN ARNOLD FOUND., PUBLIC SAFETY ASSESSMENT: RISK FACTORS AND FORMULA 1 (2016), <http://www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf>.

109. *See id.*

110. LAURA & JOHN ARNOLD FOUND., RESULTS FROM THE FIRST SIX MONTHS OF THE PUBLIC SAFETY ASSESSMENT-COURT™ IN KENTUCKY 2 (2014), <http://www.arnoldfoundation.org/wp-content/uploads/2014/02/PSA-Court-Kentucky-6-Month-Report.pdf>.

111. *Id.*

112. Press Release, Laura & John Arnold Found., More Than 20 Cities and States Adopt

Initially these tools were treated as the panacea for pretrial detention determinations; however, recent scholarship on the issue has suggested reasons for caution in the use of these assessments.<sup>113</sup> Potential concerns include tool validation, reliable data collection methodologies, and the tendency of certain assessments to measure data points with implicit bias toward minorities and socioeconomic groups.<sup>114</sup> Most scholars advocate for the use of a valid pretrial assessment tool in conjunction with other guidelines.<sup>115</sup>

## 2. Bail Reform Litigation

Several recent lawsuits have been filed challenging the use of monetary bail.<sup>116</sup> The litigation challenges to the use of money bail started in local jurisdictions that use bail schedules.<sup>117</sup> Bail schedules set a presumption for fixed bail that is required based on the charge filed.<sup>118</sup> The lawsuits were filed in federal court on the basis of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>119</sup>

These efforts to strike down bail schedules have been largely successful. For example, a lawsuit filed in Alabama alleging the unconstitutionality of fixed bail schedules without individualized hearings resulted in a finding that such practices violated the Due Process Clause.<sup>120</sup> Temporary restraining orders against such practices have been issued in Alabama, Louisiana, Tennessee, and

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Risk Assessment Tool to Help Judges Decide Which Defendants to Detain Prior to Trial (June 26, 2015), <http://www.arnoldfoundation.org/more-than-20-cities-and-states-adopt-risk-assessment-tool-to-help-judges-decide-which-defendants-to-detain-prior-to-trial/>.

113. Christopher Slobogin, *Risk Assessment and Risk Management in Juvenile Justice*, 27 CRIM. JUST. 10, 16–17 (2012).

114. See, e.g., ANGÈLE CHRISTIN ET AL., COURTS AND PREDICTIVE ALGORITHMS 5 (2015); Michael Tonry, *Legal and Ethical Issues in the Prediction of Recidivism*, 26 FED. SENT'G REP. 167, 173 (2014).

115. E.g., Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 425 (2016).

116. See Mel Gonzalez, *Litigating Money Bail Away: A Dim Future for the Status of the Poor Under the 14 Amendment* (Mar. 3, 2017) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2927170](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2927170) (discussing pending litigation and analyzing potential Supreme Court review).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Jones v. City of Clanton*, No. 2:15cv34-MHT, 2015 U.S. Dist. LEXIS 121879, at \*1–8 (M.D. Ala. Sept. 14, 2015).

Texas.<sup>121</sup> Petitioners have also been successful in securing declaratory judgments that find the use of a bail schedule in detaining a defendant based upon the inability to afford bail is unconstitutional.<sup>122</sup> For example, in *Pierce v. City of Velda City*, the court announced the following declaratory judgment:

The use of a secured bail schedule to set the conditions for release of a person in custody after arrest for an offense that may be prosecuted by Velda City implicates the protections of the Equal Protection Clause when such a schedule is applied to the indigent. No person may, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond.<sup>123</sup>

In addition to these suits regarding bail schedules, two cases have been filed attacking the use of money bail generally under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Excessive Bail Clause of the Eighth Amendment.<sup>124</sup> In one such class action lawsuit originating from Harris County, Texas, the petitioner filed a claim based not on a bail schedule, but on the inequity of using money to hold people in pre-trial detention.<sup>125</sup> This case originated in Houston, the fourth most populous city in the nation.<sup>126</sup> The Fifth Circuit affirmed the lower court's conclusion that the county's bail system violated the Due Process and Equal Protection Clauses.<sup>127</sup> Unlike other cases initiated regarding the use of money bail, this case covered a substantial number of people.<sup>128</sup> After an eight-day hearing involving many witnesses and exhibits, the judge issued a 193-page decision granting petitioner's request for a preliminary injunction and held

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121. See *O'Donnell v. Harris County*, 251 F. Supp. 3d 1052, 1168 (S.D. Tex. 2017); *Rodriguez v. Providence Cmty. Corr., Inc.*, 155 F. Supp. 3d 758, 768, 772 (M.D. Tenn. 2015) (mem.); *Snow v. Lambert*, No. 15-567-SDD-RLB, 2015 U.S. Dist. LEXIS 113746, at \*3 (M.D. La. Aug. 27, 2015); *Cooper v. City of Dothan*, No. 1:15-CV-425-WKW, 2015 U.S. Dist. LEXIS 78813, at \*1-2 (M.D. Ala. June 18, 2015).

122. See, e.g., *Martinez v. City of Dodge City*, No. 15-cv-9344, 2016 U.S. Dist. LEXIS 190884, at \*1 (D. Kan. Apr. 26, 2016); *Thompson v. Moss Point*, No. 1:15cv182LG-RHW, 2015 U.S. Dist. LEXIS 176442, at \*1 (S.D. Miss. Nov. 6, 2015); *Pierce v. City of Velda City*, No. 4:15-cv-570-HEA, 2015 U.S. Dist. LEXIS 176261, at \*1 (E.D. Mo. June 3, 2015).

123. *Pierce*, 2015 U.S. Dist. LEXIS 176261, at \*1.

124. *O'Donnell v. Harris County*, 227 F. Supp. 3d 706, 714 (S.D. Tex. 2016); *Complaint at 2, Robinson v. Martin*, No. 2016-CH-13587 (Ill. Cir. Ct. Oct. 14, 2016).

125. *O'Donnell*, 227 F. Supp. 3d at 734.

126. *Id.* at 739; see *The 50 Largest Cities in the United States*, POLITIFACT, <http://www.politifact.com/largestcities/> (last visited Mar. 28, 2018).

127. *O'Donnell v. Harris County*, 882 F.3d 528, 540 (5th Cir. 2018).

128. *Id.* at 542.

that the Harris County bail system was unconstitutional.<sup>129</sup> A similar lawsuit remains pending in state court in Chicago, Illinois.<sup>130</sup>

Examination of the efficacy of litigation as a method for improving the money bail crisis has been limited due to limited precedent and the evolving nature of the issue. However several constitutional provisions are implicated, the first of which is the Eighth Amendment, which prohibits excessive bail.<sup>131</sup> This seems to be the obvious starting point for judicial intervention to correct the bail problem. However, as Samuel Wiseman notes, the courts have not expanded Eighth Amendment jurisprudence to include meaningful application to the realities of bail.<sup>132</sup> Wiseman argues that litigation is necessary to create “a new jurisprudence of excessiveness” under the Eighth Amendment’s provision prohibiting excessive bail.<sup>133</sup> Wiseman contends that the Excessive Bail Clause of the Eighth Amendment prescribes “what restrictions on pretrial liberty must be measured against, but not how they are to be measured.”<sup>134</sup> The Eighth Amendment provides an obvious opportunity to expand criminal justice jurisprudence to provide meaningful limitations on money bail.

Another avenue for litigation is under the Fourth Amendment, which provides limitations on when a person can be deprived of their liberty.<sup>135</sup> The Supreme Court construed the Fourth Amendment to apply to pretrial detention.<sup>136</sup> *Gerstein v. Pugh* involved the arrest of the defendants on a number of charges based upon a prosecutor’s information.<sup>137</sup> Because one of the charges carried a potential life sentence, one of the defendants was denied bond.<sup>138</sup> The law of the state foreclosed a defendant’s right to a preliminary hearing where the prosecutor’s information initiated the

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129. *Id.* at 535.

130. *See* Complaint, *supra* note 124.

131. U.S. CONST. amend. VIII.

132. *See* Wiseman, *Pretrial Detention*, *supra* note 66, at 1385.

133. *Id.* at 1349.

134. *Id.* at 1384.

135. U.S. CONST. amend. XIV, § 1.

136. *See* *County of Riverside v. McLaughlin*, 500 U.S. 44, 55–56 (1991) (requiring that probable cause determinations for arrestees occur within forty-eight hours of arrest); *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (holding that “the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest”).

137. *Gerstein*, 420 U.S. at 105 n.1.

138. *Id.* at 105.

charges.<sup>139</sup> The Court rejected this scheme and found that, to be consistent with the dictates of the Fourth Amendment, a court must make a determination of probable cause independent of the prosecutor.<sup>140</sup> Thus, Fourth Amendment protections against “unfounded invasions of liberty and privacy” apply to a suspect’s pretrial detention.<sup>141</sup> This jurisprudence could be used in litigation to expand protections for defendants incarcerated pretrial based on an inability to pay a money bond.

In addition, constitutional due process concerns provide an avenue for expanded jurisprudence in the context of pretrial detention. The Supreme Court has emphatically stated that “liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”<sup>142</sup> Substantive due process limits the government’s right to infringe on a fundamental right unless it is narrowly tailored to an important government interest.<sup>143</sup> In addition, procedural due process guarantees that even when the government meets the test for substantive due process, the mechanism that creates an infringement on liberty must meet constitutional standards.<sup>144</sup> Much of the social science research can be used to support reform based on due process violations.<sup>145</sup> To the extent that pretrial detention decisions are not evidence-based, arbitrary mechanisms for pretrial detention are a basis for bail reform in the courts.<sup>146</sup>

The Equal Protection Clause of the Fourteenth Amendment is another avenue for relief in the courts. The notion that a pretrial

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139. *See id.*

140. *Id.* at 112.

141. *See id.* at 111–12.

142. *United States v. Salerno*, 481 U.S. 739, 755 (1987).

143. *Reno v. Flores*, 507 U.S. 292, 301–02 (1993); *see Salerno*, 481 U.S. at 749–51 (using the narrowly tailored analysis to examine the Bail Reform Act).

144. *See Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

145. *See Cynthia E. Jones, “Give Us Free”: Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 919, 944 (2013); Eric T. Washington, *State Courts and the Promise of Pretrial Justice in Criminal Cases*, 91 N.Y.U. L. REV. 1087, 1093 (2016).

146. *See Esmond Harmsworth, Bail and Detention: An Assessment and Critique of the Federal and Massachusetts Systems*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 213, 230 (1960); Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 379 (1990) (“The imprecise standards governing predictions under the Federal Bail Reform Act of 1984 give detention decisions the character of clinical decisions. A judge’s finding that a defendant ‘will endanger the safety of any other person or the community’ cannot be called a scientific determination.” (citations omitted)).

detention system based on ability to pay raises serious equal protection concerns is nothing new.<sup>147</sup> While not directly addressing the issue of bail, the Supreme Court has struck down detention based on inability to pay.<sup>148</sup> In *Bearden v. Georgia*, a defendant's probation was revoked because he was unable to pay a fine.<sup>149</sup> The Court held that incarceration of the defendant on that basis violated the fundamental protections of the Fourteenth Amendment.<sup>150</sup> While the Supreme Court has not revisited this issue in the context of bail, lower courts have done so.<sup>151</sup>

Acknowledging the limitations of judicial will and judicially crafted remedies, some scholars suggest that judicial intervention in creating bail standards is preferable to the "near certainty of legislative inaction."<sup>152</sup> However, questions about the ultimate utility of litigation to solve this problem have been aptly raised. Mel Gonzalez has noted important issues regarding Fourteenth Amendment jurisprudence and the treatment of the indigent.<sup>153</sup> Gonzalez argues that historical treatment of the indigent under the Fourteenth Amendment does not suggest a profound transformation is forthcoming.<sup>154</sup> The current political makeup of the Supreme Court does nothing to dispel that position. Noting these doctrinal concerns, there are additional difficulties with litigation as a primary driver of reform.

## II. POTENTIAL IMPEDIMENTS TO BAIL REFORM LITIGATION

While bail reform litigation has been effective at achieving incremental improvements to the flawed monetary bail system in certain jurisdictions, it is not without its limitations. Thus far, bail

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147. See, e.g., Richard A. Cohen, *Wealth, Bail and the Equal Protection of the Laws*, 23 VILL. L. REV. 977, 979 (1977); Patrick J. Duffy, III, Note, *The Bail System and Equal Protection*, 2 LOY. L.A. L. REV. 71, 74–75 (1969).

148. *Bearden v. Georgia*, 461 U.S. 660, 672–74 (1983).

149. *Id.*

150. *Id.* at 673.

151. *Jones v. City of Clanton*, No. 2:15cv34-MHT, 2015 U.S. Dist. LEXIS 121879, at \*9 (M.D. Ala. Sept. 14, 2015) ("Criminal defendants, presumed innocent, must not be confined in jail merely because they are poor."); *Pierce v. City of Velda City*, No. 4:15-cv-570-HEA, 2015 U.S. Dist. LEXIS 176261, at \*1–2 (E.D. Mo. June 3, 2015) (citing the Equal Protection Clause).

152. See, e.g., Wiseman, *Pretrial Detention*, *supra* note 66, at 1401.

153. See generally Gonzalez, *supra* note 116 (discussing how bail reform efforts are framed in discriminatory terms as Fourteenth Amendment violations).

154. See *id.*

reform litigation has primarily focused on eliminating bail for individuals charged with non-violent misdemeanors and has not addressed the notion of monetary bonds in felony cases or cases of violence.<sup>155</sup> In addition, class action lawsuits have focused on a two-step remedy that first involves enjoining the imposition of monetary bonds in specific cases and then implementing an evidence-based, validated risk assessment tool to predict release eligibility.<sup>156</sup> But mounting these cases takes extraordinary resources and a confluence of the right defendants with the right circumstances, lawyers with manpower and availability to litigate, and jurisdictional receptiveness to bail reform. In some locations, litigation may simply not be an option or afford only piecemeal opportunities for relief. Moreover, given the newness of the bail reform litigation phenomenon, inadequate time has passed to study whether removing bail schedules and implementing risk assessment tools would improve bail conditions.<sup>157</sup> For these reasons, scholars would be wise to turn a critical eye toward litigation as an exclusive method of achieving bail reform.

A. *Lack of Access to Records, Data, and Management Systems, and the Role of Public Records Shield Statutes*

The decision to file a bail reform lawsuit is a difficult one, made even more difficult by the lack of appropriate data collection and management in court systems. Most courts do not maintain statistics on average daily bonds and do not segregate their pretrial detention data based on whether a defendant is being held pre- or post-trial.<sup>158</sup> In order to determine how many defendants were being held on bond and how high those bonds were, one law school

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155. See, e.g., *ODonnell v. Harris County*, 251 F. Supp. 3d 1052, 1060 (S.D. Tex. 2017) (noting the court is only considering bail reform for misdemeanor bail policies and not felony crimes); LAUREN SUDEALL LUCAS ET AL., GA. STATE UNIV. CTR. FOR ACCESS TO JUSTICE, MISDEMEANOR BAIL REFORM AND LITIGATION: AN OVERVIEW 9–10 (2017), <http://law.gsu.edu/files/2017/08/9.13-Final-Bail-Reform-Report-Center-for-A2J.pdf> (discussing elements of bail reform common to multiple jurisdictions with certain low- or moderate-risk cases to which violent crimes and felonies would not apply).

156. See, e.g., *ODonnell*, 251 F. Supp. 3d at 1061, 1124 (analyzing the enjoining of monetary bonds and then discussing use of an individualized risk assessment tool); LUCAS ET AL., *supra* note 155, at 1–10 (providing a summary of class action misdemeanor bail reform cases across the United States).

157. See *Gonzalez*, *supra* note 116 (discussing how bail reform litigation is in its early stages).

158. See, e.g., HAMILTON CTY., OHIO MUNICIPAL COURT ANNUAL REPORT 2015 (on file with author); HAMILTON CTY., OHIO SHERIFF'S OFFICE ANNUAL REPORT 2015 (on file with author).

clinic reportedly sent law students to observe court and track individual outcomes for more than a year.<sup>159</sup> Other efforts have involved pulling individual case files in sufficient numbers to create an adequate data set around bail amounts and type of offense.<sup>160</sup> As such, the mere task of determining bail statistics can be daunting.

An additional impediment to litigation lies in the fact that certain state and local governments exempt records relating to pretrial bail practices from public records disclosure.<sup>161</sup> This practice inhibits the investigation and empirical research necessary to mount a compelling class action lawsuit. One such example can be found in Ohio. Ohio employs a state-mandated pretrial risk assessment tool—the Ohio Risk Assessment System (“ORAS”)—to inform, but not dictate, a trial court’s assessment of a defendant’s eligibility for bail.<sup>162</sup> The state conditions funding for county court systems on ORAS implementation and usage via legislative enactment.<sup>163</sup> But the same statutory scheme that designates ORAS as the required pretrial risk assessment tool also exempts all data related to ORAS from Ohio’s public records system.<sup>164</sup> While authorized users of the risk assessment system (judges, probation officers, and the like) are permitted to access ORAS records on an individual basis, no other persons—not even the criminal justice researchers who created the tool—may review data or other records generated from the implementation and administration of ORAS.<sup>165</sup>

Shielding risk assessment data from public disclosure creates a number of unique difficulties in the pursuit of bail reform litigation. Most obviously, it can be difficult to determine, at the outset,

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159. See Telephone Interview with Nikki Baszynski, Co-Chair, Ohio Pub. Def.’s Racial Justice Initiative (Mar. 10, 2017) (on file with author).

160. See E-mails from Ohio Justice and Policy Ctr. Attorneys (on file with author).

161. See OHIO REV. CODE ANN. § 5120.115(B) (2014) (“No person shall disclose any report generated by or data collected in the risk assessment tool . . .”).

162. See *id.* § 5120.114(A) (mandating that Ohio’s Department of Rehabilitation and Correction select a single risk assessment tool to be utilized throughout the state’s felony and misdemeanor courts, as well as by other rehabilitative and punitive agencies); OHIO ADMIN. CODE 5120-13-01 (2013) (selecting ORAS as the state-wide mandated risk assessment tool).

163. See OHIO JUDICIAL CONFERENCE, POLICY STATEMENT ON THE OHIO RISK ASSESSMENT SYSTEM AND RISK AND NEEDS ASSESSMENT TOOLS 2 (2015), <http://ohiojudges.org/Document.ashx?DocGuid=9e4c2814-6ffa-4018-9156-88fea13bf95e>.

164. OHIO REV. CODE ANN. § 5120.115(B) (“All reports generated by or data collected in the risk assessment tool are confidential information and are not a public record. No person shall disclose any report generated by or data collected in the risk assessment tool . . .”).

165. *Id.* § 5120.115.



whether a particular jurisdiction suffers from pretrial over incarceration and then to pinpoint the precise scope and origin of the problem. But the lack of available data also creates political impediments to reform. The fact that courts do not generally track average money bail amounts or the number of individuals detained pretrial because they cannot afford to post bail presents political as well as logistical challenges. Court systems that are willfully blind to the flaws in their bail systems may be less likely to engage in voluntary bail reform and more likely to challenge the concept that their systems are broken.

### B. *Political Realities and Outside Stakeholders*

Bail reform litigation has the potential to garner opposition from stakeholders in the criminal justice system who might not otherwise be adversarial. For example, a reduction in detention populations might threaten jail budgets and jobs typically staffed by unionized corrections workers. The employees who work in pretrial detention centers may lack training necessary to shift into other employment within the pretrial services arena.<sup>166</sup>

In larger jurisdictions, bail reform also has the potential to impact the maintenance and use of public buildings. Many cities in the United States have constructed larger detention facilities, often in or adjacent to central business districts, intended to house high numbers of pre- and post-trial detainees.<sup>167</sup> Cities often resist sending these buildings into disuse and disrepair.<sup>168</sup> These logistical concerns serve to impede grassroots bail reform.

### C. *Procedural Hurdles*

Federal civil rights litigation has served an important role in bringing about systemic change in state criminal justice systems

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166. For example, it is difficult to imagine that a prison guard would make an effective pretrial supervision officer whose function is to ensure a defendant's return to court rather than to oversee a defendant's highly restricted jail environment.

167. See SUBRAMANIAN ET AL., *supra* note 25, at 12 (stating that constructing and operating detention centers significantly contributed to the 235 percent increase in local expenditures on corrections facilities between 1981 and 2011); see also SHEILA VENNEL O'ROURKE, PRISON POL'Y INITIATIVE, NEW AND EXPANDED FEDERAL AND STATE PRISONS SINCE 2000 (2000), <https://www.prisonersofthecensus.org/50states/newprisons.html>.

168. See Emily Badger, *America Is Finally Closing Prisons. Now What Do We Do with Them?*, CITYLAB (Dec. 6, 2012), <https://www.citylab.com/design/2012/12/america-finally-closing-prisons-now-what-do-them/4083/>.

over the years.<sup>169</sup> However, parties challenging a state or local court's bail practices can face unique procedural challenges that could slow judicial review or impede it altogether. This is particularly the case when criminal defendants seek to assert their right to bail by filing federal class action or civil rights lawsuits.<sup>170</sup> Indeed, federal comity doctrine contains numerous pitfalls that could eliminate or significantly restrict a criminal defendant's opportunity to mount a system-wide bail challenge in federal court.<sup>171</sup> These obstacles create difficult and unsatisfying options for lawyers, litigants, and organizations seeking to reform the patchwork of state and local bail systems through litigation.

For example, a criminal defendant likely would be unable to challenge whether the state court's bail system afforded him constitutionally adequate bail while his criminal case is pending. This is because of the Supreme Court's *Younger* abstention doctrine.<sup>172</sup> Under *Younger*, federal courts will not address constitutional questions related to pending state criminal proceedings, but instead will offer the state courts the first opportunity to address a defendant's constitutional concerns.<sup>173</sup> Numerous federal courts have employed *Younger* to stay federal bail reform lawsuits on the grounds that criminal defendants have an opportunity to challenge bail in the course of their criminal cases, arguing that state courts should play the primary role in resolving criminal justice disputes.<sup>174</sup>

While there are exceptions to the doctrine—in cases of bad faith or where the federal plaintiff cannot assert his constitutional

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169. See William Yeomans, *Federal Law Provides a Backstop for Civil Rights Violations*, N.Y. TIMES (July 16, 2013), <https://www.nytimes.com/roomfordebate/2013/07/15/should-zimmerman-face-federal-charges/federal-law-provides-a-backstop-for-civil-rights-violations>.

170. See, e.g., *Younger v. Harris*, 401 U.S. 37, 53 (1971) (holding that availability of “injunctive relief against state criminal prosecutions” has always been “confined very narrowly”).

171. See, e.g., Matthew J. Cron et al., *Municipal Liability: Strategies, Critiques, and a Pathway Toward Effective Enforcement of Civil Rights*, 91 DENV. U. L. REV. 583, 604–05 (2014) (discussing the procedural hurdles a civil rights victim faces in seeking monetary recovery from municipal entities and officials).

172. See *Younger*, 401 U.S. at 53–54.

173. See *id.* at 43–44.

174. See, e.g., *Hernandez v. Carbone*, 567 F. Supp. 2d 320, 333 (D. Conn. 2008) (abstaining under *Younger*, noting that “the relief [plaintiff] seeks—prohibiting state courts to impose money bail or a surety bond whenever the defendant is indigent and monitoring the state courts to ensure that minorities are not disfavored in the setting of bail—would intrude substantially into pending and future criminal cases”); *Mounkes v. Conklin*, 922 F. Supp. 1501, 1511–13 (D. Kan. 1996) (holding that a § 1983 challenge to state bail bond was barred by *Younger*); *Mudd v. Busse*, 437 F. Supp. 505, 509–14 (N.D. Ind. 1977) (holding that a class action challenge to state bail process under § 1983 was barred by *Younger*).

rights in the course of his state criminal prosecution—these do not seemingly apply to bail reform lawsuits.<sup>175</sup> And while *Younger* abstention may be avoided in states where a defendant can be arrested and detained before facing formal charges—California, for example—a defendant may also be able to petition the federal court for relief in the narrow time window between the arrest and formal charge.<sup>176</sup> As such, given the application of the *Younger* doctrine, it would be advisable, in theory, for a defendant to wait until the conclusion of his criminal case to file a federal challenge to the state court's bail practices, either in his particular case or as a class representative questioning the state's bail practices as a whole.

But waiting to mount a federal lawsuit until the state criminal case has concluded also presents frustrating procedural challenges. In that instance, the federal court may determine that the criminal defendant's state claims—particularly as to prospective injunctive relief—are moot or unripe, and therefore nonjusticiable. In such an instance, the criminal defendant may have backward-looking claims for money damages and could conceivably sue as a representative of a class. However, the defendant may not be able to mount forward-looking claims for injunctive relief since he is no longer facing the broken bail system about which he complains.<sup>177</sup> And while suits for money damages may place a disincentive on state courts to continue with constitutionally suspect bail practices, they do not amount to a court order requiring reform. A prospective bail reform plaintiff therefore faces difficulty, on the one hand, in filing a federal civil rights lawsuit while he is in custody

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175. For a comprehensive empirical analysis of *Younger* and its categorical impact on civil rights lawsuits, see Joshua G. Urquhart, *Younger Abstention and Its Aftermath: An Empirical Perspective*, 12 NEV. L.J. 4 (2011).

176. See, e.g., *Buffin v. City & County of San Francisco*, No. 15-cv-04959-YGR, 2016 U.S. Dist. LEXIS 12411, at \*3–6, \*12 (N.D. Cal. Feb. 1, 2016) (holding that *Younger* did not apply where the plaintiffs filed their bail reform lawsuit after being detained on suspicion of criminal charges but before they were ever formally charged with crimes). Absent a pending state criminal case, these plaintiffs otherwise lack a forum within which to raise their constitutional bail arguments. But this begs the question why the state court prosecutor did not simply indict the plaintiffs in order to defeat their class action lawsuit on *Younger* grounds.

177. In theory, such a person might be able to argue that his claims for injunctive relief are subject to the “capable of repetition, yet evading review” exception to mootness, but to do so, he would have to assert that he was likely to be arrested again on a new offense and subject anew to flawed state court bail practices. See *Roe v. Wade*, 410 U.S. 113, 125 (1973) (quoting *S. Pac. Terminal Co. v. Interstate Commerce Comm’n*, 219 U.S. 498, 515 (1991) (holding that claims which, because of their unique facts, are capable of being repeated, but would evade judicial review due to timing are not moot and may be decided on their merits)). It is difficult to imagine a person willing to claim that he has a likelihood of committing future crimes or being accused of committing future crimes.

awaiting trial, but equal difficulty, on the other hand, in seeking injunctive relief once he has been released and his state criminal trial is over.

Savvy federal court practitioners will suggest other options. A state criminal defendant could perhaps challenge an excessive or burdensome bond by filing a writ of habeas corpus in federal court or by bypassing the state trial court by filing a similar writ in a state appellate court.<sup>178</sup> But raising constitutional challenges to a state court's bail practices in the context of a single criminal case is unlikely to lead to systemic reform or to create the kind of external pressure necessary to persuade elected judges to change their practices. A defendant might also be able to sue his own lawyer for failing to seek appropriate bail alternatives, but the high standard utilized to measure legal malpractice in most states, particularly in criminal cases, may prove too difficult for an indigent defendant to meet; additionally, this avenue provides little incentive for state court systems to engage in systemic reform.<sup>179</sup>

Plaintiffs in civil challenges to a state court's bail practices also face obstacles in suing a proper defendant. Under prevailing Supreme Court authority, municipal and state agencies may only be sued for civil rights violations if they are the policymakers responsible for the challenged practice or custom.<sup>180</sup> This makes it difficult to hold the full range of governmental actors accountable for bail reform.<sup>181</sup> Eleventh Amendment immunity also likely bars court accountability, at least on a financial level.<sup>182</sup>

These procedural hurdles may force bail reform litigants into state court rather than seeking the federal courts' review of a state

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178. It may be possible for a group of state court criminal defendants to challenge their bonds via a multiparty federal habeas petition or a class action habeas proceeding, although these types of lawsuits are filed with decreasing frequency and face tremendous procedural challenges that render them unlikely to succeed. See Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CALIF. L. REV. 383, 408–09 (2007).

179. See Susan M. Treyz, Note, *Criminal Malpractice Privilege of the Innocent Plaintiff?*, 59 FORDHAM L. REV. 719, 727–29 (1991).

180. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694, 698 (1978) (“We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible . . .”).

181. See, e.g., *Buffin v. City & County of San Francisco*, No. 15-cv-04959-YGR, 2016 U.S. Dist. LEXIS 12411, at \*15–17 (N.D. Cal. Feb. 1, 2016) (stating that because the City did not decide terms of bail, it did not have the requisite decision-making authority for liability).

182. See U.S. CONST. amend. XI.

or local court's bail practices. Indeed, at least one high-profile bail reform lawsuit—*Robinson v. Martin*—was filed in state court, ostensibly to avoid the procedural morass of federal court.<sup>183</sup> But state court, due to its politicized nature and local governmental control, is not an option in certain jurisdictions. Under the judicial structures in place in many states, lawsuits seeking to enjoin unconstitutional money bail practices would be filed with the very same judges who also set bail, thus decreasing the likelihood of meaningful relief.<sup>184</sup>

These obstacles may prove too difficult to overcome, particularly given the likely limitations on resources discussed in Part II.B. Moreover, the effort necessary to litigate these procedural issues detracts from the core civil rights issues surrounding monetary bail and can delay progress toward reform.<sup>185</sup> For every day a court spends resolving *Younger* abstention and immunity issues, more and more people are detained while they are presumed innocent because they are unable to pay the monetary bonds that are unfairly and unjustly imposed upon them.

#### D. *Limited Remedial Scope*

Perhaps the most serious drawback to bail reform litigation is its inability to fashion court-crafted relief that addresses the full range of flaws with today's money bail system. To date, bail reform lawsuits have focused primarily on two forms of relief: (1) prohibitory injunctive relief barring the use of standard bail schedules and the imposition of money bail for low-level, non-violent offenses; and (2) prospective injunctive relief substituting risk assessment tools,

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183. See Complaint, *supra* note 124.

184. See, e.g., *Fletcher v. Burns*, No. 07-3279-SAC, 2008 U.S. Dist. LEXIS 4348, at \*2 (D. Kan. Jan. 18, 2008).

185. For example, in *Buffin v. City & County of San Francisco*, the court has spent over a year litigating the procedural issues in this case. The matter has yet to be resolved on its merits. See *Buffin v. City & County of San Francisco*, No. 15-CV-04959-YGR, 2018 U.S. Dist. LEXIS 6853, at \*29–30 (N.D. Cal. Jan. 16, 2018) (denying motions for summary judgment); *Buffin v. City & County of San Francisco*, No. 15-CV-04959-YGR, 2017 U.S. Dist. LEXIS 31501, at \*13 (N.D. Cal. Mar. 6, 2017) (denying motion to intervene as of right and granting motion for permissive intervention subject to conditions); *Buffin v. City & County of San Francisco*, No. 15-CV-04959-YGR, 2016 U.S. Dist. LEXIS 142734, at \*45 (N.D. Cal. Oct. 14, 2016) (granting defendants' motion to dismiss in part and denying motion to intervene); *Buffin v. City & County of San Francisco*, No. 15-CV-04959-YGR, 2016 U.S. Dist. LEXIS 63812, at \*4 (N.D. Cal. May 6, 2016) (denying defendants' motion to dismiss and motion for more definite statement); *Buffin v. City & County of San Francisco*, No. 15-CV-04959-YGR, 2016 U.S. Dist. LEXIS 12411, at \*19 (N.D. Cal. Feb. 1, 2016).

coupled with supervised pretrial release, for judicial discretion in determining pretrial release eligibility.<sup>186</sup> While these outcomes have tremendous upsides in terms of dismantling the existing pay-for-release bail system, they also carry serious risks that, if not managed, could result in increased pretrial incarceration and heightened invasions of personal liberty.

One potential downside to enjoining the use of standard bail schedules is that it eliminates a rapid-release option for defendants who are able to pay a reasonable bond. Rather than being able to quickly post bond and be released from custody, certain defendants might instead be forced into lengthy assessment processes that require judicial oversight before the person can be released. These individuals could then wind up spending additional time in detention while awaiting a bond eligibility hearing. As such, these remedies, while improving conditions for indigent defendants, may unfortunately make matters worse for defendants of means.<sup>187</sup> In addition, injunctions that eliminate monetary bail for certain offenses may also create an incentive for prosecutors to overcharge defendants in order to defeat presumptive release. Furthermore, state court judges disgruntled by the removal of their discretion in bond-setting procedures may be more aggressive, either intentionally or unintentionally, in determining bail in felony cases and cases of violence. Thus, merely enjoining the use of standard bail schedules in misdemeanor cases only partially solves the problem of mass over incarceration for pretrial defendants.

Mandating that courts consider risk assessment scores as a measure of either eligibility for release without a money consequence or for determining when a presumption in favor of release can be overcome is also dangerous. As an initial observation, risk assessment outcomes can be wrong in individual cases,<sup>188</sup> and lawyers should be able to argue that the risk assessment is wrong as

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186. See *supra* Part I.C.2.

187. We point out this inequity without regard to its normative value. In other words, we take no position as to whether defendants of means should be treated equally or disparately from defendants who are indigent. We merely highlight that certain litigation outcomes may favor the poor while disfavoring the middle and upper classes.

188. In one high-profile and chilling example, an error by a pretrial services officer in inputting a defendant's information into the risk assessment tool led to the improper release of a defendant who subsequently committed murder. Eric Westervelt, *Did a Bail Reform Algorithm Contribute to This San Francisco Man's Murder?*, NPR (Aug. 18, 2017, 2:00 PM), <https://www.npr.org/2017/08/18/543976003/did-a-bail-reform-algorithm-contribute-to-this-san-francisco-man-s-murder>. In this unfortunate example, human error led to the improper release of a defendant, but it is equally possible that human error could also lead to the improper detention of a defendant. The point is that risk assessment tools are not infallible

to a particular client. Moreover, risk assessment tools typically drive larger numbers of defendants into supervised pretrial release programs as an alternative to detention and in lieu of bond. Without appropriate oversight and constraint of judicial discretion, pretrial release conditions can burden a defendant's liberty so significantly that they are almost tantamount to incarceration.<sup>189</sup> This may be particularly true in jurisdictions where the judiciary favors stringent bonds or where supervised release programs have been outsourced to law enforcement or other investigatory agencies.

As such, litigation—while an important tool in combatting systemic bail abuses—is merely a tool in a lawyer's toolbox and should not be used as the sole or superior mechanism for seeking bail reform.

### III. EXTRAJUDICIAL ALTERNATIVES TO BAIL REFORM

In the rush to litigate class action cases focusing on standard bail schedules, non-violent misdemeanors, and standardized risk assessment practices, little attention has been focused on extrajudicial remedies or grassroots bail reform. But incremental policy changes and pragmatic solutions have much to offer in the way of reform, without some of the drawbacks and obstacles that arise in an adversarial litigation environment. That is not to say that litigation cannot be an effective or important mechanism for achieving bail reform. But lawyers, courts, and social activists would be wise to supplement litigation with extrajudicial alternatives as well to achieve more holistic and complete reform.

#### A. *Range of Alternatives*

##### 1. Legislative Amendments

Most states' bail practices are dictated by state statutes, state-wide criminal or local court rules, or both.<sup>190</sup> These statutes range from general to specific in terms of driving trial courts' bail determination processes.<sup>191</sup> Precisely because these statutes and rules

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and should, therefore, not be used as the exclusive measure of a defendant's eligibility for pretrial release.

189. See Defendants/Appellants' Brief at 4–5, *Smith v. Leis*, 407 F. App'x 918 (6th Cir. 2011) (No. 09-3735) (describing conditions of Hamilton County pretrial release system, including consent to warrantless searches, curfew, required continuous employment, bans on alcohol consumption, and the like).

190. See, e.g., OHIO REV. CODE ANN. §§ 2937.22–.35 (2014); OHIO R. CRIM. PRO. 46 (2018).

191. See, e.g., OHIO REV. CODE ANN. §§ 2937.22–.35; OHIO R. CRIM. PRO. 46.

govern bail decision-making, amending them offers a comprehensive opportunity to alter bail outcomes in a systemic and overarching way. Potentially to avoid costly litigation, certain jurisdictions have commissioned committees to review existing bail legislation and to make recommendations for change.<sup>192</sup> Similar efforts are also underway in Lucas County and Cleveland, Ohio, and elsewhere on a more localized level.<sup>193</sup> For example, the Ohio Criminal Sentencing Commission created a bail reform subcommittee to study the state's bail practices, solicit comments and suggestions from outside stakeholders, and propose amendments to the Ohio Supreme Court's criminal rules on bail.<sup>194</sup> The subcommittee issued a lengthy report in June 2017 and proposed a substantial overhaul of the rules allowing trial court judges to set bail.<sup>195</sup> Although the legislative process is still ongoing, the report and recommendations give bail reform advocates reason for optimism.

To be sure, there are possible downsides to the legislative approach. One is the time it takes to study existing legislative conditions, make recommendations for change, and build broad support for a statutory overhaul.<sup>196</sup> As such, it is essential to create coalitions from the outset of any legislative amendment effort and to involve any potential adversarial stakeholders as soon as possible in the dialogue.<sup>197</sup> Public education is also an essential component of any attempt to amend legislation, and it is key that nonprofit organizations, with the resources and manpower to influence public opinion, take the lead in public relations.<sup>198</sup> Another potential

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192. J.B. Wogan, *Delaware Strengthens Bail Reform Movement*, GOVERNING (Jan. 29, 2018), <http://www.governing.com/topics/public-justice-safety/gov-delaware-states-cash-bail-bill-carney.html> (noting that over forty states have task force commissions set up to consider reforms to bail and pretrial detention).

193. See OHIO CRIMINAL SENTENCING COMM'N, AD HOC COMMITTEE ON BAIL AND PRETRIAL SERVICES REPORT AND RECOMMENDATIONS 2–4, 6 (2017).

194. *Id.* at 3.

195. See *id.*

196. See *id.*; Peter Krouse, *Bipartisan Support Bodes Well for Ohio Bail Reforms*, CLEVELAND.COM (Feb. 2, 2018), [http://www.cleveland.com/metro/index.ssf/2018/02/bipartisan\\_support\\_bodes\\_well\\_1.html](http://www.cleveland.com/metro/index.ssf/2018/02/bipartisan_support_bodes_well_1.html).

197. For example, the Ohio committee included representatives from local pretrial services offices, whose job duties and responsibilities would be impacted under the reform effort. OHIO CRIMINAL SENTENCING COMM'N, *supra* note 193, at 4, 7.

198. See, e.g., Jazmine Ulloa, *This Group Is Putting Women at the Center of the Battle to Fix California's Bail System*, L.A. TIMES (Sept. 4, 2017, 12:05 AM), <http://www.latimes.com/politics/la-pol-ca-essie-sisters-california-bail-legislation-20170904-htlstory.html>.



issue with legislative reform is that political composition may change during the period of time it takes to create draft legislation—legislators inclined to support reform may leave office and less friendly lawmakers may take their place.

However, legislative amendments have the power to create system-wide reform, where litigation—due to its limitations—must necessarily occur in a piecemeal fashion, from one jurisdiction to the next.<sup>199</sup> Legislative amendments can also address gaps in data collection and maintenance, and increase public access to information about bail-setting practices, making litigation a more fruitful and less difficult option should bail issues persist over time. Moreover, court monitoring, as part of either a consent decree or injunctive order, can last for only a finite period of time,<sup>200</sup> whereas legislation remains on the books until it is amended or repealed, making legislative amendments a more lasting option for permanent reform.

## 2. Community and Governmental Bail Funds

Consistent with the modern-day phenomenon of crowdsourcing,<sup>201</sup> industrious community organizations and certain progressive local governments have developed separate bail funds, in which the fund posts the stated monetary bail for a particular defendant and then, in some cases, assumes responsibility for the defendant's supervision and return to court.<sup>202</sup> Several private funds exist in New York, with one boasting a ninety-six percent return-to-court rate.<sup>203</sup> This success is derived in part from the fact that the bail funds connect defendants awaiting trial to both needed social services and localized support, which also reduces recidivism

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199. Jonathan Zweig, *Extraordinary Conditions of Release Under the Bail Reform Act*, 47 HARV. J. ON LEGIS. 555, 584 (2010).

200. See *ODonnell v. Harris County*, 251 F. Supp. 3d 1052, 1057 (S.D. Tex. 2017).

201. Crowdsourcing is “the practice of obtaining needed services, ideas, or content by soliciting contributions from a large group of people and especially from the online community rather than from traditional employees or suppliers.” *Crowdsourcing*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/crowdsourcing> (last visited Mar. 28, 2018).

202. *E.g.*, Laura I. Appleman, *Nickel and Dime into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483, 1535–36 (2016).

203. *Id.* at 1535 (discussing the structure and successes of The Bronx Freedom Fund, which was established in 2007 in partnership with the public defender's office and has assisted over 400 individuals since its inception).

rates and flight risk long term.<sup>204</sup> In addition, the New York City Council has created and funded a “city-wide bail fund for low-level offenders.”<sup>205</sup> Defendants whose bails are posted by the fund are subject to minimal supervisory check-ins and are offered voluntary services for drug and alcohol treatment and other needs.<sup>206</sup>

Community bail funds offer a valuable check and balance to the broad judicial power to set money bonds.<sup>207</sup> Community bail funds also have the potential to remedy individual risk assessment outcomes that are flawed or faulty in some way.

### 3. Holistic Detention Reduction Programs

While the severity, concerns, and effects of bloated pretrial detention in the juvenile context differ from those of the adult criminal justice system, detention reduction initiatives in juvenile courts provide a useful model for holistic bail reform. One such program, the Juvenile Detention Alternatives Initiative (“JDAI”), employs a multi-faceted approach to ensure that children charged with delinquency offenses are not unnecessarily detained pretrial.<sup>208</sup> As a starting point, JDAI makes use of a validated risk assessment tool to predict public safety risks, but the program also engages in robust system improvements, data collection, and alternative placement development, allowing juvenile detainees to be safely released while awaiting trial.<sup>209</sup> To ensure that juveniles are not detained out of necessity in cases where a parent may not be available to house the child, JDAI works with existing foster care and group home systems so that juvenile detention centers are not used as placement alternatives.<sup>210</sup> The program also rigorously reviews local court policies and data to ensure that young detainees of color are not disadvantaged in the pretrial-detention process by virtue of their race or ethnicity.<sup>211</sup>

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204. *Id.* at 1536.

205. *Id.* at 1535.

206. *Id.*

207. Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 599 (2017).

208. *Juvenile Detention Alternatives Initiative*, ANNIE E. CASEY FOUND., <http://www.aecf.org/work/juvenile-justice/jdai/> (last visited Mar. 28, 2018).

209. *Id.*

210. *See id.*

211. *Id.*

Another key component of the program is public defender training on risk assessment and available detention alternatives, which allows attorneys to more vigorously advocate for release without a money consequence.<sup>212</sup> Jurisdictions that have enrolled as JDAI target sites have experienced significant reductions in the juvenile pretrial-detention population without sacrificing public safety.<sup>213</sup>

This model offers distinct advantages over the commonly advanced risk-assessment and pretrial-supervision approaches to bail reform litigation. On an individual level, the JDAI program ensures that individuals are effectively represented by counsel at the detention stage and have a safe, non-confining residential placement pending trial.<sup>214</sup> On a systemic level, the program holds juvenile courts accountable by collecting and monitoring data and paying special attention to disproportionate minority contact and other forms of discrimination.<sup>215</sup> Bail reform initiatives applicable to adults would be wise to employ similar holistic approaches, enabling individual defendants to be safely released pretrial while also ensuring system-wide tracking, monitoring, and improvement.

#### 4. Court Return Assistance Programs

While bail reform tends to be highly theoretical and data-driven, more pragmatic approaches exist to address the government's legitimate concerns at the bail stage. Judges' fears that defendants will leave the jurisdiction or not return to court drives money bonds higher and higher.<sup>216</sup> But simple, proactive interventions, like providing text message reminders of court dates and supplying defendants released from pretrial detention with return bus tickets to court, might prove less costly and more effective at ensuring that

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212. RICHARD A. MENDEL, ANNIE E. CASEY FOUND., JUVENILE DETENTION ALTERNATIVES INITIATIVE PROGRESS REPORT 2014, at 24 (2014), <http://www.aecf.org/m/resourcedoc/aecf-2014JDAIPROGRESSREPORT-2014.pdf>.

213. *See id.* at 3; *see also* Edgar Cahn & Cynthia Robbins, *An Offer They Can't Refuse: Racial Disparity in Juvenile Justice and Deliberate Indifference Meet Alternatives That Work*, 13 UDC/DCSL L. REV. 71, 94 (2010) (describing successes of juvenile detention reduction programs).

214. *See Juvenile Detention Alternatives Initiative*, *supra* note 208.

215. *Id.*

216. *See* Aditi Mukherji, *7 Key Factors in Setting Bail*, FINDLAW BLOTTER (Feb. 4, 2014, 10:35 AM), <http://blogs.findlaw.com/blotter/2014/02/7-key-factors-in-setting-bail.html>.

defendants appear for future court dates.<sup>217</sup> Many of these programs are too new to have been determined efficacious, but preliminary results indicate that providing assistance to defendants with returning to court reduces the number of instances in which the defendant fails to appear in court.<sup>218</sup> In addition, these programs are cost-effective and require little human capital to execute, making them easy alternatives to more invasive forms of supervised release.

### B. *Overlap with Litigation*

Given the range of alternatives to approaching bail reform, litigation is not the only solution. Surely, litigation can be used to strategically incentivize court agencies and government officials to come to the table and to have meaningful discussions about reform. In the absence of the threat of federal court oversight, state court systems may have little reason to reform their bail practices internally. And once state court officials are at the table, voluntary settlements to lawsuits can employ the full range of holistic bail reform alternatives, from injunctive relief and elimination of standard bail schedules, to text reminder systems, community bail overrides, and local rule changes. In this way, litigation and extrajudicial forces can work together to achieve more complete reform.

However, in some cases, state court actors will be reluctant to discuss settlement and will instead dispute that there are difficulties in their bail practices.<sup>219</sup> In these instances, it is critical that bail reform advocates also employ extrajudicial reform alternatives, in addition to pursuing lawsuits, to ensure that already faulty bail practices are not replaced with even worse abuses of discretion. Done correctly, litigation and extrajudicial remedies should work in concert toward a system in which no person, rich or poor, stays in jail awaiting trial unnecessarily.

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217. See, e.g., Abigail Becker, *Court Date Reminder Text Messages May Be Reducing Failure to Appear Rates*, CAP. TIMES (Sept. 16, 2016), [http://host.madison.com/ct/news/local/govt-and-politics/court-date-reminder-text-messages-may-be-reducing-failure-to/article\\_af2e9a9f-d77f-57c6-a793-9aa37cb2c9a6.html](http://host.madison.com/ct/news/local/govt-and-politics/court-date-reminder-text-messages-may-be-reducing-failure-to/article_af2e9a9f-d77f-57c6-a793-9aa37cb2c9a6.html) (noting an almost twenty-nine percent reduction rate in bench warrants issued for missed court appearances following implementation of voluntary text notification system).

218. *Id.*

219. See, e.g., Motion to Dismiss All Claims, *O'Donnell v. Harris County*, 227 F. Supp. 3d 706 (S.D. Tex. 2016) (No. 4:16-cv-01414) (denying plaintiff's claims and challenging difficulties in bail procedures).

## CONCLUSION

America's money bail system is in need of serious reform. On any given day, thousands of people sit in jail, at taxpayer expense, awaiting trial simply because they cannot afford to buy their way out. Bail reform advocates are right to call attention to these systemic problems by filing high-profile, targeted lawsuits documenting the extent of the money bail crisis. However, litigation is of limited utility in achieving the complete overhaul that is required to ensure that the lives of criminal defendants are not further destabilized by improper bail practices. Litigation must be supplemented with extrajudicial alternatives in order to achieve systemic reform.