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PROBABLE CAUSE REFORM AS BAIL REFORM

WENDY R. CALAWAY*

ABSTRACT

Efforts to bring reform to policies and practices around pretrial detention have captured the attention of scholars, the media, activists, and lawmakers. Robust research has demonstrated the deleterious effects of pretrial detention both to individuals and the communities, including negative impacts to employment, housing, finances, family destabilization, community budgets and crime rates. Constitutional amendments, legislative enactments, criminal rule changes, and policy directives have been implemented in many places to address the problems presented by current pretrial detention practices. Accompanying these reform measures has been a correspondingly vociferous opposition to the reform movement. While criminal justice actors grapple with the implementation of the reforms, and data is collected to measure its impact, bail reform has become a popular and easy foil for politicians resulting in the roll back of reforms in many places.

It is into this context that this paper introduces new research showing that criminal case arrests end in dismissal over fifty percent of the time. In a case study of bail hearings, research was collected revealing that after an arrest and bail decision, criminal cases are more likely to be dismissed either by the grand jury or for want of prosecution than to be resolved in the adjudicative process on the merits. Archival research shows that this data is consistent with dismissal rates across the country. The research also revealed that the majority of those whose cases are dismissed are unable to post bail and are detained until the time of the case dismissal. The high rate at which criminal cases are dismissed and the large number of people who are detained until dismissal underscores the need for reforms to pretrial detention practices. This is especially pressing where resistance to current bail reform strategies is growing. Outlining the social science research on what drives arrest decisions, the paper calls for systemic changes to the policies and practices around arrest decisions. The data and analysis presented advances the argument that the probable cause standard

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as currently operationalized facilitates erroneous arrest decisions, exacerbating the pretrial detention problem. The arguments proposed here draw on scholarly research around reforming the standard for arrests and the definition of probable cause in order to reduce the number of people subject to pretrial detention.

INTRODUCTION

Over the last several years, substantial time, effort, and energy have been expended bringing attention and changes to current systems of pretrial detention. Researchers have provided copious amounts of data about the negative effects of pretrial detention and activists and scholars have highlighted the disparate impact of the practice on marginalized groups in society.¹ Scholars have proposed changes and states and communities have responded.² Litigation, state constitutional amendments, criminal rule changes, legislative enactments and prosecutor policy preferences are all approaches that have been employed to bring justice to the pretrial detention system.³ Modifications to pretrial detention policies have largely been incremental, centered on changing judicial behavior at the bail setting stage of the criminal justice process.⁴ Rule changes that require judges to use risk assessment tools, to consider the defendant's ability to pay, or that create a presumption of release without financial consequence are examples of recommendations for reform that have been implemented in many places.⁵ While the bail reform movement has had many notable successes, there are still places where the issue continues to be debated or where reforms have yet to take hold. Even in some places where changes have been made at the legislative or rule level, little progress has been made at the judicial decision-making level.⁶

Despite the gains that have been made on certain fronts, the movement has experienced a backlash reminiscent of historical attempts to bring changes to pretrial detention practices. Political pushback on the decision to release pretrial defendants has become popular fodder for candidates running for governor, mayor, district attorney and local office.⁷ In many places, bail reform efforts

1. Will Dobbie, Jacob Goldin & Crystal Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 201–40 (2018).

2. See, e.g., Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1403 & n.9–11, 1404 & n.15 (2017).

3. SHIMA BARADARAN BAUGHMAN, *THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM* 170 (Cambridge Univ. Press ed., 2018).

4. Laurn P. Gouldin, *Reforming Pretrial Decision-Making*, 55 WAKE FOREST L. REV. 857, 870–89 (2020).

5. Isabella Jorgensen & Sandra Susan Smith, *The Current State of Bail Reform in the United States: Results of a Landscape Analysis of Bail Reforms Across All 50 States* (Harv. Kennedy Sch., Faculty Rsch. Working Paper, No. RWP21-033, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3975594 [<https://perma.cc/6KK5-KPQG>].

6. See, e.g., Andres F. Rengifo, Sofia G. Flores & Ashley N. Jackson, *From Bright Plots to Blind Spots: Mapping Departures in Case Review Post-Bail Reform in Two New Jersey Courts*, 48 CRIM. JUST. & BEHAV., 96–102 (2021) (outlining research analyzing the rate at which judges comply with bail reform protocols).

7. Joe Barrett, *Some Police Push Back on Bail Reform, Citing Wave of Killings*, WALL ST. J. (July 16, 2021), <https://www.wsj.com/articles/some-police-push-back-on-bail-reform-citing-wave-of-killings-11626441851> [<https://perma.cc/LU66-636V>].

have stalled or been rolled back as a result.⁸ New data presented here on the dismissal rates for criminal arrests underscores the urgent need for bail reform. This paper reports on data showing that over fifty percent of criminal cases are dismissed after an arrest and a bail decision but before adjudication. The research shows that cases are dismissed at the grand jury stage or later in the process for want of prosecution. This new data emphasizes the negative effects of pretrial detention undermining the notion of arrests as justified. The systematic delegitimizing nature of this finding coupled with the problematic state of the current bail reform movement suggests that reforms addressing the ills of pretrial detention need to occur at the systemic level.

This paper proceeds in Four Parts. Part One examines the current status of the bail reform movement, highlighting the gains that have been made in the arena as well as the backlash that the movement has experienced. Part Two will describe the results of the current case study looking at dismissal rates in criminal cases in the context of pretrial detention, including a review of the study methodology and relevant findings. This section will also summarize the archival on dismissal rates in other jurisdictions and in the federal system. Part Three will review the historical underpinnings of probable cause analysis and summarize the current schools of thought around probable cause reform. Analysis of the social science research on decision making motivators of criminal justice actors will also be reviewed. Finally, in Part Four, the article concludes with normative analysis proposing bail reform framing in the context of probable cause reform suggesting systemic alterations to the method arrests are made and the definitions employed in probable cause determinations.

I. BAIL REFORM EFFECTS AND CHALLENGES

Bail reform efforts have been much in the news, up for vote in the legislature, and in the conversation for everyone from law enforcement to politicians of late. Journalists have told the stories of those incarcerated without the money to pay their bail.⁹ Advocates have called for reforms to a system that “treats you better if you are rich and guilty than if you are poor and innocent.”¹⁰ There has been widespread dissemination of data, facts, and statistics from legal scholars and social scientists about the current practices of bail in the United States, including: pointing out that the practice of connecting pretrial release

8. Joseph Spector & Anna Gronewold, *New York Democrats Pare Back Nation-Leading Bail Reform Amid Crime Wave*, POLITICO (Apr. 11, 2022), <https://www.politico.com/news/2022/04/11/new-york-democrats-pare-back-nation-leading-bail-reform-amid-crime-spikes-and-election-fights-00024361> [<https://perma.cc/3RE5-2J8D>].

9. See, e.g., Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG. (Aug. 13, 2015), <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html> [<https://perma.cc/8EH6-TDQ9>] (“Disappearing into the machinery of the justice system separates family members, interrupts work and jeopardizes housing.”).

10. BRYAN STEVENSON, JUST MERCY 313 (One World ed., 2014).

from incarceration on the ability to pay money not only unfairly affects the poor, but also has a disparate impact on racial minorities;¹¹ documenting the deleterious effects to individuals and society as a result of time spent in pretrial detention, which prevents people from taking care of their families, jobs, and communities;¹² discussing how it contributes to the overcrowding of jails;¹³ and creates budget crises for both individuals and local governments.¹⁴ Community organizers across the country have established bail funds to help pay the cash bail set for people who cannot afford it.¹⁵ Complaints have been filed multiplying legal challenges to pretrial detention practices.¹⁶ Legislative reforms and court rule changes have been proposed and enacted in many states and cities. New York legislature passed a law ending the use of cash bail for most misdemeanors and non-violent felonies.¹⁷ Illinois passed legislation banning the use of cash bail in pretrial release decisions.¹⁸ In Ohio, bills have been introduced in the house and the senate to create a presumption of pretrial release and requiring due process protections before setting conditions to release.¹⁹ Analysts have heralded the Ohio proposals both for their bipartisan support and

11. David Arnold, Will Dobbie & Crystal S. Yang, *Racial Bias in Bail Decisions*, 133 Q. J. ECON. 1885, 1885–1932 (Nov. 2018); Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, FAC. SCHOLARSHIP PENN. CAREY L. 21, 29 (2018) (finding that Black defendants make up 35% of the pretrial detainee population despite constituting only 13% of the U.S. population).

12. Léon Digard & Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, VERA INST. JUST. (Apr. 2019), <https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf>.

13. See, e.g., Quenton King, *Overcrowded and Overburdened: West Virginia Counties Struggle to Pay Regional Jail Bills*, W. VA. CTR. ON BUDGET & POL'Y (Jan. 2021), <https://wvpolicy.org/wp-content/uploads/2021/01/WVCBP-Jail-Cost-Brief.pdf>.

14. Will Dobbie & Crystal S. Yang, *The Economic Costs of Pretrial Detention*, BROOKINGS PAPERS ON ECON. ACTIVITY 251, 251–60 (2021).

15. See Directory of Community Bail Funds, CMTY. JUST. EXCH., <https://www.communityjusticeexchange.org/en/nbfn-directory> [<https://perma.cc/A6NZ-3ENT>] (last visited July 13, 2022) (providing a directory of community bail funds in Alabama, Arizona, California, Colorado, Connecticut, Delaware, Florida Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin).

16. See *Challenging the Money Bail System*, C.R. CORPS., <https://civilrightscorps.org/our-work/> [<https://perma.cc/68CT-J6XP>] (last visited Oct. 22, 2022) (reporting that, through litigation, the organization has brought an end to money bail in Clanton, Alabama; Velda City, Missouri; Ann, Missouri; Cullman County, Alabama; and Orleans Parish, Louisiana).

17. The Bail Elimination Act of 2019, S.B. S02101A, Reg. Sess. (N.Y. 2019).

18. Illinois Safety, Accountability, Fairness and Equity-Today (SAFE-T) Act, H.B. 3653, 101st Gen. Assemb. (Ill. 2021).

19. Make Bail Changes Act of 2022, S.B.182, 134th Gen. Assemb., Reg. Sess. (Ohio 2021).

as an important step forward in ensuring that people are not held in jail simply because they are too poor to pay.²⁰

Constitutional amendments have addressed bail reform in other states. For example, New Jersey began bail reform efforts in 2014, amending the state constitution to require courts to consider alternatives to cash bail.²¹ In 2017, the state went further, passing legislation which moved the state further away from the use of money bail and toward reliance on risk-based assessment.²² These reform efforts were successful in virtually eliminating the use of money in bail decisions, increasing the number of defendants released and reducing jail populations.²³ Similarly, in 2016, New Mexico passed a constitutional amendment prohibiting a person who is otherwise eligible for release from being detained pretrial because of inability to pay.²⁴ Bail reform has also been a concern of regional politicians and activists with changes enacted at the local level.²⁵ Progressive prosecutors have also addressed bail reform at the local level, including in Philadelphia, Chicago, Houston, Milwaukee, and San Francisco.²⁶

While the last several years have seen attention on the issues surrounding pretrial detention, this is not the first time the country has turned its focus to the issue of bail reform only to see progress stalled and the reforms rolled back.²⁷ The Bail Reform Act of 1966 was signed into law by President Johnson and

20. Kira Lerner, *Ohio Pursues Powerful and Bipartisan Bail Reform*, ARNOLD VENTURES (Sept. 15, 2021), <https://www.arnoldventures.org/stories/ohio-pursues-powerful-and-bipartisan-bail-reform> [<https://perma.cc/34B5-FSCC>].

21. N.J. CONST., art. I, § XI.

22. N.J. STAT. 2A:162 (2017).

23. Chloe Anderson Golub, Cindy Redcross, & Erin Jacobs Valentine, *Evaluation of Pretrial Justice System Reforms That Use the Public Safety Assessment: Effects of New Jersey's Criminal Justice Reform*, MDRC CTR. CRIM. JUST. RSCH. 1, 2 (Nov. 2019), https://www.mdrc.org/sites/default/files/PSA_New_Jersey_Report_%231.pdf [<https://perma.cc/6UKT-WJBP>] (last visited July 14, 2022).

24. N.M. CONST., art. 2, § 13.

25. Paola Suro, *Cincinnati City Council Oks Motion to Eliminate Cash Bond for Nonviolent Misdemeanors*, WCPO, (Apr. 23, 2019), <https://www.wcpo.com/news/local-news/hamilton-county/cincinnati/cincinnati-city-council-oks-motion-to-eliminate-cash-bond-for-nonviolent-misdemeanor-cases> [<https://perma.cc/9984-RM2Y>]; *Reforming the Bail System*, N.Y.C. COUNCIL, <https://council.nyc.gov/bail-reform/> [<https://perma.cc/92XL-ZSEL>] (last visited Oct. 3, 2022) (discussing “a package of legislation in June 2017 to fix New York City’s bail system and keep people out of Rikers”).

26. Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 FORDHAM L. REV. ONLINE 1, 1–4 (2018); *No Cash Bail*, S.F. DIST. ATT’Y, <https://www.sf.districtattorney.org/policy/no-cash-bail/> [<https://perma.cc/SY2P-TGRB>] (last visited Oct. 3, 2022); Aurelie Ouss & Megan Stevenson, *Does Cash Bail Deter Misconduct?* (Jan. 1, 2022), <https://ssrn.com/abstract=3335138> [<https://perma.cc/3UQZ-V6ST>] (discussing the empirical impact of a prosecutor’s no cash bail request).

27. See SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950–1990, 71–72 (Oxford Univ. Press ed., 1993).

made significant changes to bail practices in federal courts.²⁸ The Bail Reform Act of 1966 codified the notion that a person's inability to pay money should not be the barrier that keeps them incarcerated and that the reason for bail was to ensure a person's appearance at their court hearing.²⁹ These reforms were enacted in the context of a growing awareness that jails across the country were full of inmates who were there simply because they could not afford to pay their way out.³⁰ Activists worked to bring reforms to bail practices around the country and to educate the public about the problem and their solutions.³¹ The work resulted in significant reform at the federal and state level.³²

The backlash against these reforms was immediate and multi-faceted. In addition to signing the bail reform legislation, President Johnson declared a war on crime that he claimed would be "thorough, intelligent and effective."³³ This declaration was followed by legislation that changed the course of criminal justice in the United States and ushered in a new punitive era in criminal justice policies.³⁴ At the same time, the United States was experiencing significant demographic changes, including the civil rights movement.³⁵ Many viewed the societal changes as an assault on traditional way of life and much of the rhetoric was focused on pushing back against the calls for racial desegregation.³⁶ The Vietnam War grew increasingly unpopular and protests against the government

28. Bail Reform Act of 1966, 18 U.S.C. § 3146–52 (1966); Warren L. Miller, *The Bail Reform Act of 1966: Need for Reform in 1969*, 19 CATH. U. L. REV. 24, 24 (1970).

29. Miller, *supra* note 28, at 24.

30. Lyndon B. Johnson, *Remarks at the Signing of the Bail Reform Act of 1966*, AM. PRESIDENCY PROJECT (June 22, 1966), <https://www.presidency.ucsb.edu/documents/remarks-the-signing-the-bail-reform-act-1966>.

31. Rachel Smith, *Condemned to Repeat History? Why the Last Movement for Bail Reform Failed, and How This One Can Succeed*, 25 GEO. J. ON POVERTY L. & POL'Y, 451, 455 (2018). Detailing how:

rapid nationwide change, aided by stories showing how punishing pretrial detention could be and further research showing that because poor people generally could not afford bail, many stayed in jail regardless of innocence. Researchers also found that pretrial release affected conviction rates. People released pretrial were 250% more likely to be acquitted, which translated into the incarceration of fewer innocent people. These studies and stories, combined with the Manhattan Bail Project's success, "captured the attention of the White House, the Congress, the news media, and a national network of reformers and scholars."

Id. (internal citations omitted).

32. WALKER, *supra* note 27, at 54.

33. Lyndon B. Johnson, President of the United States, Statement by the President on Establishing the President's Commission on Law Enforcement and the Administration of Justice, 42 PUB. PAPERS 785 (July 26, 1965).

34. The Law Enforcement Assistance Act, Omnibus Crime Control and Safe Streets Act, 42 U.S.C. §3711 (1968).

35. ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME 11 (Harv. Univ. Press ed., 2016).

36. *Id.* at 57.

occurred with regularity.³⁷ Ignoring these social factors which existed at the time, bail reform was an easy place to lay the blame for societal disruptions. Politicians seized the moment to capitalize on rising crime rates by arguing that the country should “get tough on crime.”³⁸ Among other things, in response, the Bail Act of 1984 was passed, greatly expanding the discretion of federal judges to detain a person pretrial if the judge believed a person posed a threat to public safety.³⁹ States and local jurisdictions also enacted legislative and rule changes to expand the criteria for using money bail for purposes of pretrial detention.⁴⁰

Much like past movements and despite the attention that has been paid to the pernicious effects of pretrial detention and the resulting reform efforts on multiple fronts, there has been a swift and aggressive corresponding backlash to current efforts to transform pretrial detention practices.⁴¹ Most notably has been the bail reform legislative efforts in New York. In 2019, the New York legislature passed a law ending the use of cash bail for most misdemeanors and non-violent felonies.⁴² The changes went into effect on January 1, 2020. Law enforcement leaders and politicians immediately launched a campaign against the bail reform legislation blaming the measure for rises in violent crime.⁴³ In April 2020, in response to the public criticism, amendments were passed nullifying portions of the bill by expanding bail-eligible offenses.⁴⁴ In Harris County Texas, federal litigation led to reform of the bail practices where the court found that the county’s use of wealth-based detention was unconstitutional.⁴⁵ The county prosecutor’s opposition to the proposed reforms that arose from the case were documented both in the press and in an amicus

37. *Id.* at 106.

38. Alexa Van Brunt & Locke E. Bowman, *Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription For What’s Next*, 108 J. CRIM. L. & CRIMINOLOGY 701, 705 (2018).

39. Bail Reform Act of 1984, H.R. 5865, 98th Cong. (1984). For a discussion on the evolution of the public safety component of bail decisions, see John S. Goldkamp, *A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1 (1985).

40. Timothy R. Schnacke, Michael R. Jones & Claire M. Brooker, *The History of Bail and Pretrial Release*, PRETRIAL JUST. INST. 18 (2010).

41. See, e.g., Jesse McKinley, *The Bail Reform Backlash that has Democrats at War*, N.Y. TIMES (Feb. 16, 2020), <https://www.nytimes.com/2020/02/14/nyregion/new-york-bail-reform.html> [<https://perma.cc/4EV3-NH5E>]; John L. Micek, *Bail Reformers Are Facing Backlash. Here’s What the Facts Say*, PHILA. CAP. STAR (Apr. 7, 2022), <https://www.penncapital-star.com/commentary/bail-reformers-are-facing-backlash-heres-what-the-facts-say-thursday-morning-coffee/> [<https://perma.cc/RRZ9-R6GD>].

42. The Bail Elimination Act of 2019, S.B. S2101A, Reg. Sess. (N.Y. 2019).

43. Jamiles Lartey, *New York Tried to Get Rid of Bail. Then the Backlash Came*, POLITICO (Apr. 23, 2020), <https://www.politico.com/news/magazine/2020/04/23/bail-reform-coronavirus-new-york-backlash-148299> [<https://perma.cc/T5QM-UHX5>].

44. S.B. 7506-B, Aseemb. A9506-B, Part UU (N.Y. 2020).

45. *O’Donnell v. Harris County*, 251 F. Supp. 3d 1052 (S.D. Tex. 2017).

brief to the court opposing the reforms.⁴⁶ The court's opinion characterized the prosecutor's objections as "essentially an argument for incarcerating every arrestee and defendant until trial or other disposition."⁴⁷ In Ohio, the state supreme court affirmed a lower court's finding that bail in a single case was excessive under both the state and federal constitution.⁴⁸ The county prosecutor and state attorney general responded by seeking a constitutional amendment which would expand the use of money bail.⁴⁹

Bail industry opposition has also been a factor contributing to the political opposition to bail reform efforts.⁵⁰ The commercial bail industry's profit model is premised on the existence of cash bail and the higher cash bail is set by the court, the more money the commercial bondsman makes.⁵¹ The industry as a whole is thought to bring in around \$2 billion a year as a result of the cash bail policies in the United States.⁵² The commercial bail industry has a powerful lobby that moves in opposition to bail reform proposals across the United States, including making appearances at state legislative hearings to provide opposition on the record.⁵³ The industry has also lobbied prosecutors, legislators and sheriff's offices in opposition to bail reform.⁵⁴ Between 2009 and 2017, the commercial bail industry made 1.7 million dollars in political contributions to state campaigns with almost 1.4 million going directly to candidates for

46. Amicus Brief of Harris County District Attorney, *O'Donnell v. Harris County*, 892 F.3d 147 (5th Cir. 2018) (No. 17-2033), 2018 WL 4603243.

47. *O'Donnell v. Harris County*, No. H-16-1414, 2019 WL 4224040 (S.D. Tex. Sept. 5, 2019).

48. *Dubose v. McGuffey*, 195 N.E.3d 951, 960 (Ohio Jan. 4, 2022).

49. Jasmine Styles, *Hamilton County Prosecutor, Ohio AG Call for Bail Reform Constitutional Amendment*, WCPO (Mar. 29, 2020), <https://www.wcpo.com/news/state/state-ohio/hamilton-county-prosecutor-ohio-ag-call-for-bail-reform-constitutional-amendment> [<https://perma.cc/ZSK9-MULL>]; Ohio Sub. H.J.R. No. 2, 134th Gen. Assemb. (Ohio 2022):

Proposing to amend Section 9 of Article I of the Constitution of the State of Ohio to eliminate the requirement that the amount and conditions of bail be established pursuant to Section 5(b) of Article IV of the Constitution of the State of Ohio, and instead allow the courts to use factors such as public safety, including the seriousness of the offense, and a person's criminal record, the likelihood a person will return to court, and any other factor the General Assembly may prescribe.

50. Shima Baradaran Baughman, Lauren Boone, & Nathan Jackson, *Reforming State Bail Reform*, 74 SMU L. REV. 447, 450 (2021).

51. Mary A. Toborg, *Bail Bondsmen and Criminal Courts*, 8 JUST. SYS. J. 141, 153–55 (1983).

52. Gillian B. White, *Who Really Makes Money Off of Bail Bonds?*, ATLANTIC (May 12, 2017), <https://www.theatlantic.com/business/archive/2017/05/bail-bonds/526542/>.

53. Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1398–99 (2014) (highlighting cases where the bail industry blocked legislation from 2006 to 2010).

54. *Bail Reform: A Practical Guide Based on Research and Experience*, NAT'L TASK FORCE FINES, FEES, & BAIL PRACS. 72–73 (2019), https://www.ncsc.org/_data/assets/pdf_file/0023/16808/bail-reform-guide-3-12-19.pdf.

governor, legislative office, district attorney and attorney general.⁵⁵ The American Bail Coalition, a group of commercial bail insurers, spent over seven million dollars to oppose bail reform in California and also led significant campaigns against reforms in New Mexico, Florida, Texas, Colorado, New York, Ohio, and other states.⁵⁶

A. *The Need for Bail Reform Continues*

Much has been written over the last several years highlighting the deleterious effects of pretrial detention in general and in particular, wealth-based pretrial detention. Researchers have noted that pretrial detention is inconsistent with due process because it constitutes punishment before conviction.⁵⁷ A system of pretrial release based on the ability to pay is inconsistent with guarantees of equal protection detaining only those who are too poor to pay their way out.⁵⁸ Beyond the constitutional implication of this disparate treatment the practicalities of pretrial detention lead to the loss of jobs, housing, and children, and to community destabilization.⁵⁹ Cash bail incentivizes the use of commercial surety bonds, which have non-refundable fees, by those who cannot afford to post bail on their own.⁶⁰ People who are detained pretrial because they

55. Ciara O'Neill, *Bail Bond Businesses Buck for Bookings*, FOLLOW THE MONEY (June 7, 2018), <https://www.followthemoney.org/research/institute-reports/bail-bond-businesses-buck-for-bookings>; Ovetta Wiggins, *Report: Campaign Cash From Bail Industry Surged as State Considered Reforms*, WASH. POST (Jan. 25, 2017), https://www.washingtonpost.com/local/md-politics/report-campaign-cash-from-bail-industry-surged-as-state-considered-reforms/2017/01/25/8ef77f5c-e28c-11e6-a547-5fb9411d332c_story.html?utm_term=.6ae08b3381eb#comments [<https://perma.cc/2YQJ-M39Y>]; *Denton County: Dallas' Top Prosecutor Craig Watkins Owes for Past Bail Bonds*, DALLAS MORNING NEWS (Aug. 4, 2011), <https://www.dallasnews.com/news/2011/08/05/denton-county-dallas-top-prosecutor-craig-watkins-owes-for-past-bail-bonds/> [<https://perma.cc/4MKN-DYN4>] (detailing \$70,000 in political contributions to the former district attorney for Dallas County).

56. Alwyn Scott & Suzanne Barlyn, *U.S. Bail-Bond Insurers Spend Big to Keep Defendants Paying*, REUTERS (Mar. 26, 2021), <https://www.reuters.com/article/us-usa-insurance-bail-jails-insight/u-s-bail-bond-insurers-spend-big-to-keep-defendants-paying-idUSKBN2B11BP> [<https://perma.cc/4LZY-X6PS>]; Nick Evans, *Opponents Line Up Against Bail Reform as Cash Bail Gets Cleared for the Ballot*, OHIO CAP. J. (May 26, 2022), <https://ohiocapitaljournal.com/2022/05/26/opponents-line-up-against-bail-reform-as-cash-bail-gets-cleared-for-the-ballot/> [<https://perma.cc/27U8-52EG>].

57. AMANDA L. RUSSELL & ROBERT G. MORRIS, *ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE* 2088 (Gerben Bruinsma et al. eds., 2014); Sandra G. Mayson, *Detention by Any Other Name*, 69 DUKE L.J. 1643, 1643 (2020).

58. 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, 75 (1969).

59. Pinto, *supra* note 9 (“Disappearing into the machinery of the justice system separates family members, interrupts work and jeopardizes housing.”).

60. Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STANFORD L. REV. 711, 721, 733 (2017).

cannot afford bail are more likely to be convicted and sentenced more severely than those released.⁶¹ Pretrial detention also causes people detained pretrial to disproportionately plead guilty.⁶² This includes the decision to plead guilty even when a person is innocent, especially when offered a sentence of probation to end the incarceration.⁶³ Studies have found that failure to appear rates have a positive correlation with time in pretrial detention.⁶⁴ Cash bail also drives mass incarceration and overburdens both jail budgets and personnel.⁶⁵ Conceptually, pretrial detention is akin to punishment—detainees are held in the same place and manner as those serving sentences after conviction.⁶⁶ Despite the scholarship that has emerged on these issues in the past several years, the problems persist.⁶⁷

II. THE CURRENT STUDY

A. *New Data on the Rate of Case Dismissals Underscores the Need for Bail Reform*

Many of the justifications for bail reform have been well documented and have driven the current movement to eliminate wealth-based detention. Opponents to bail reform often tend to operate in the political realm and focus on public safety arguments.⁶⁸ However, these arguments fail to address the research that shows that reforms to cash bail practices do not contribute to increased criminal activity.⁶⁹ Critics also generally decline to tackle the research

61. Christopher T. Lowenkamp, Marie VanNostrand & Alexander Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, LAURA & JOHN ARNOLD FOUND. (2013); Dobbie, *supra* note 1, at 225; Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J. L. ECON. ORG. 4, 516, 532 (2018).

62. Heaton, *supra* note 60, at 717.

63. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1316–17 (2012) (“[E]very year the criminal system punishes thousands of petty offenders who are not guilty.”).

64. Christopher T. Lowenkamp, Marie VanNostrand & Alexander Holsinger, *The Hidden Costs of Pretrial Detention*, LAURA & JOHN ARNOLD FOUND. (2013).

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

66. Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 357 (1990) (arguing that pretrial detention serves the traditional purpose of punishment after trial—incapacitation).

67. Jorgensen & Smith, *supra* note 5; Russell M. Gold & Ronald F. Wright, *The Political Patterns of Bail Reform*, 55 WAKE FOREST L. REV. 743, 743–44 (2020).

68. See, e.g., Louis Tobin, *Balancing Bail Reform: A Prosecutorial Perspective*, OHIO BAR (Mar. 24, 2020), <https://www.ohioabar.org/member-tools-benefits/practice-resources/practice-library-search/practice-library/2020OL/balancing-bail-reform-a-prosecutorial-perspective/>.

69. Christopher Lowenkamp, *The Hidden Costs of Pretrial Detention Revisited*, CORE CORR. SOLS. (Mar. 21, 2022), <https://craftmediabucket.s3.amazonaws.com/uploads/HiddenCosts.pdf> [<https://perma.cc/B6M8-WKHG>]; Tiana Herring, *Releasing People Pretrial Doesn’t Harm Public Safety*, PRISON POL’Y INITIATIVE (Nov. 17, 2020), <https://www.prisonpolicy.org/blog/2020/11/17>

on the destabilizing, criminogenic, racial disparity, or economic costs of pretrial detention.⁷⁰ New research reveals that the harm of pretrial detention also impacts the structure and legitimacy of the criminal justice process. New data from a larger study on bail reform in Ohio shows that over fifty percent of the cases presented in court concerning bail decisions are eventually dismissed.^{71*}

B. Study Methodology

Research collected from bail hearings from a county in Ohio shows that it is statistically more likely than not that when an arrest is made and a person is taken into custody, it will be dismissed.⁷² The current study examines pretrial bail hearings in Hamilton County, Ohio. In Ohio, all offenses are constitutionally eligible for bail except capital charges.⁷³ Bail hearings are governed by both rule and statute.⁷⁴ Hamilton County is in the southwest corner of the state and the county seat is Cincinnati.⁷⁵ As of July of 2021, Hamilton County has a population of 826,139.⁷⁶ In Hamilton County, initial bail decisions are made by a judge of the Municipal Court; hearings are held six days a week and no later than forty-eight hours after arrest.⁷⁷ At these hearings judges review felony cases for probable cause, refer felony cases to the grand jury, enter initial pleas for misdemeanors and set bail for all cases. Lack of access to comprehensive data on judicial decision-making is a barrier to court decision-making trends in

/pretrial-releases/ [https://perma.cc/6G3V-DZWH] (summarizing the impact of bail reforms from several jurisdictions); Office of the Chief Judge, *Bail Reform In Cook County: An Examination Of General Order 18.8a And Bail In Felony Cases*, ST. OF ILL. CIR. CT. OF COOK CNTY. (2019) (finding that bail reform measures in Cook County, Illinois did not increase crime rates). *But see* Paul G. Cassell & Richard Fowles, *Does Bail Reform Increase Crime? An Empirical Assessment Of The Public Safety Implications Of Bail Reform In Cook County, Illinois*, 55 WAKE FOREST L. REV. 933, 948–49 (2020) (criticizing the Office of the Chief Judge’s findings).

70. Cassell & Fowles, *supra* note 69, at 983 (addressing the costs of bail reform, but not the costs of pretrial detention).

71. *See* Research Notes and Excel Data Collection Spreadsheets (*on file with SLU Law Journal).

72. *Id.*

73. OHIO CONST. art. I, § 9.

74. OHIO REV. CODE ANN. § 2973; OHIO CRIM. R. 46 (West 2022).

75. *Ohio County Profiles: Hamilton County*, OHIO OFF. OF STRATEGIC RSCH., <https://web.archive.org/web/20070621234200/http://www.odod.state.oh.us/research/FILES/S0/Hamilton.pdf> [https://perma.cc/F4EJ-KUWV] (last visited Oct. 15, 2022).

76. *QuickFacts: Hamilton County, Ohio*, U.S. CENSUS BUREAU, www.census.gov [https://perma.cc/3NBB-723L] (last visited Oct. 15, 2022).

77. HAMILTON CNT’Y, OHIO Mun. R. 9.11; *see also* Peter Krouse, *Hamilton County Municipal Court is a model for equal justice and efficiency: Justice for All*, CLEVELAND, https://www.cleveland.com/metro/2017/11/hamilton_county_municipal_cour_1.html [https://perma.cc/MPS4-B3PP] (Nov. 9, 2017).

Ohio.⁷⁸ Therefore, this study involved in-person court observations of bail hearings at initial appearance and follow up review of the filings and outcomes for each case.^{79*} All judges responsible for setting bail at an initial appearance in Hamilton County were observed on two separate randomized dates.⁸⁰ For each of the cases, data was collected for variables involving various demographic factors, length of hearings, probable cause assessments, case resolution, bail type, amount of any monetary bail, and other conditions of release.⁸¹ The case docket for the individual defendant was accessed through the county clerk's publicly available website and followed through the conclusion of the case. Additional data was then collected for how the case was resolved, including whether it was concluded by plea, trial, failure to appear, or dismissal.⁸² Cases were coded as dismissals if they were dismissed either by the grand jury after an arrest and bail hearing or for want of prosecution by the court. Cases resolved by acquittal after trial or dismissed as part of a plea agreement were coded separately. In Hamilton County, as a matter of practice, felony cases are not submitted to a preliminary hearing, but are submitted to the grand jury for review within 10 days of arrest.⁸³

78. See NEAL B. KAUDER & BRIAN J. OSTROM, SENTENCING GUIDELINES PROFILES AND CONTINUUM, NAT'L CTR. FOR STATE CTS. 5 (2008). Some judges in Ohio have recognized the lack of a centralized repository of information on sentencing in the state; however, the Ohio Supreme Court has yet to take corrective action or to mandate consistent data collection practices in the state trial courts. Michael P. Donnelly & Ray Headen, *Create Centralized Criminal-Sentencing Database to Reduce Mass Incarceration in Ohio: Michael P. Donnelly and Ray Headen*, CLEVELAND (Jan. 8, 2020), <https://www.cleveland.com/opinion/2020/01/create-centralized-criminal-sentencing-database-to-reduce-mass-incarceration-in-ohio-michael-p-donnelly-and-ray-headen.html> [https://perma.cc/4HP4-SCQP]; Pierre H. Bergeron & Michael P. Donnelly, *How a Spreadsheet Could Change the Criminal Justice System*, ATLANTIC (Dec. 14, 2020). Although efforts have been made to collect and report some data, the reforms apply to sentencing data—not bail decisions. Widespread non-compliance persists, and datasets are not yet available. Csaba Sukosd, *New Platform Provides a Path to Accessible Sentencing Data*, CT. NEWS OHIO (June 25, 2021), https://www.courtnewsoriohio.gov/happening/2021/sentencingDataPlatform_062521.asp#.YtBUx-zMKRs [https://perma.cc/TFP3-M4ZZ]; see also *Ohio Sentencing Data Platform*, OHIO CRIM. SENT'G COMM'N, <https://www.ohiosentencingdata.info/> [https://perma.cc/XF7D-ZHCQ] (last visited Oct. 15, 2022); Meghan Shanahan, *Opinion: Justice by Spreadsheet Doesn't Compute*, CINCINNATI ENQUIRER (Mar. 24, 2022) (arguing against a public database sharing judicial decision making).

79. See Research Notes and Excel Data Collection Spreadsheets (*on file with SLU Law Journal).

80. *Id.*

81. *Id.*

82. *Id.*

83. See OHIO CRIM. R. 5(B) (West 2022):

In felony cases a defendant is entitled to a preliminary hearing unless waived in writing. If the defendant waives preliminary hearing, the judge or magistrate shall forthwith order the defendant bound over to the court of common pleas. Except upon good cause shown, any misdemeanor, other than a minor misdemeanor, arising from the same act or transaction

C. *The Study Results*

The study sought to examine the rate at which cases are dismissed and to examine this factor in the context of bail decisions. Of the many problematic consequences of the cash bail system, little attention has been paid to the issue of dismissals. The study examined 517 cases consisting of misdemeanor domestic violence and felonies of all types with the following results: 51% of cases were dismissed at some point in the process after a bail determination, but before adjudicative resolution of the case.^{84*} Dismissals came in the form of either a finding of no probable cause by the grand jury or a dismissal for want of prosecution by the court. Most felony dismissals happened at the grand jury stage (99.94%).⁸⁵ Misdemeanor dismissals came in the form of dismissals by the court for want of prosecution.⁸⁶ Forty percent of the cases were resolved by plea; .0096% went to trial and .0735% resulted in a failure to appear.⁸⁷ Defendants were unable to post a money bond and therefore were held until resolution in 51% of cases.⁸⁸ The average length of incarceration prior to case resolution was 32.6 days.⁸⁹ The average length of an initial appearance hearing was 63.8 seconds.^{90*}

The study findings are consistent with dismissal rates across the nation. In counties across the country, the dismissal rates for criminal cases are consistent with those in Hamilton County, Ohio with several jurisdictions reaching dismissal rates of 60% or higher.⁹¹ Archival research revealed a stark contrast with the dismissal rate for felony cases at 8%.⁹² Further research is required to

involving a felony shall be bound over or transferred with the felony case. If the defendant does not waive the preliminary hearing, the judge or magistrate shall schedule a preliminary hearing within a reasonable time, but in any event no later than ten consecutive days following arrest or service of summons if the defendant is in custody and not later than fifteen consecutive days following arrest or service of summons if the defendant is not in custody.

84. See Research Notes and Excel Data Collection Spreadsheets (*on file with SLU Law Journal).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Measures for Justice Data Portal: Cases Dismissed*, MEASURES FOR JUST., <https://www.measuresforjustice.org> [<https://perma.cc/9AC4-QCEV>] (Data Release: 3.11.0); see also *County-Level Courts Misdemeanor Activity Detail*, TEX. OFF. OF CT. ADMIN., https://www.txcourts.gov/media/1455720/misdemeanor_activity_detail-2022.pdf [<https://perma.cc/59YW-G9WZ>] (last visited Oct. 15, 2022).

92. *Only 2% Of Federal Criminal Defendants Go To Trial, And Most Who Do Are Found Guilty*, PEW RSCH. CTR. (June 11, 2019), <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/> [<https://perma.cc/GF5A-Q6BD>].

examine this disparity. Hypotheses include federal law enforcement education requirements, lack of required response to emergency calls, investigatory budgets, or systemized internal policies requiring evidence for an arrest.

III. ADDRESSING BAIL AT THE SYSTEMIC LEVEL

Bail reform advocates have focused on straightforward approaches to improving the system of pretrial detention to accomplish several important goals. Generally, supporters of bail reform aim to remove wealth as a determining factor for pretrial detention decisions and limit the kinds of offenses and thereby the number of people in detention before case resolution.⁹³ Because bail determinations are made at the initial appearance, the discretion to hold or release, set conditions, and require a cash bond are in the hands of judicial actors. Prior research shows that judicial actors are often incentivized by political movements, election results, and public sentiment.⁹⁴ However, the discretionary decision of who is placed before a judge for a bail determination is made by the police, while prosecutors exercise discretion in deciding which cases are presented to the grand jury and how.⁹⁵ The research uncovered by the data described in this study, showing a dismissal rate for criminal cases of over 50%, calls into question the legitimacy of the criminal justice system, especially for those detained prior to the resolution of the case.⁹⁶ Thus, broad system reforms are implicated. The rhetoric around opposition to bail reform assumes at some level that those arrested committed the crime and have rightly been subjected to bail.⁹⁷ Data revealing case dismissals of over 50% undermines these arguments and tears at the notion that deprivation of liberty are reserved for those who have

93. SAMANTHA A. ZOTTOLA, SARAH E. DUHART CLARKE, & SARAH L. DESMARAIS, *HANDBOOK OF ISSUES IN CRIMINAL JUSTICE REFORM IN THE UNITED STATES* 143–69 (Elizabeth Jeglic & Cynthia Calkins eds., 2021).

94. Alma Cohen & Crystal S. Yang, *Judicial Politics and Sentencing Decisions*, 11 *AM. ECON. J.* 160, 162–63 (2019).

95. WAYNE R. LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 3 (Frank J. Remington ed., 1965) (“In most cases, decisions to charge, to convict, and to sentence are made only with respect to those persons whom the police have first arrested. Thus, to a large extent, this decision determines those offenders against whom the official process is to be invoked.”).

96. EMILY EKINS, *POLICING IN AMERICA: UNDERSTANDING PUBLIC ATTITUDES TOWARD THE POLICE. RESULTS FROM A NATIONAL SURVEY* 1, 6 (Cato Institute ed., 2016) (reporting data that, despite demographic variations, the public generally supports the police and the legitimacy of their decision making and also believes that it is more important to protect the innocent than punish the guilty).

97. *See, e.g.*, Martin Kaste, *There’s A Backlash Brewing Against Bail Reform After The Parade Tragedy In Waukesha*, *NPR CRIM. JUST. COLLABORATIVE* (Nov. 25, 2021), <https://www.npr.org/2021/11/25/1059019616/theres-a-backlash-brewing-against-bail-reform-after-the-parade-tragedy-in-waukesha> [<https://perma.cc/B4A8-9XDL>] (quoting Rafael Mangual of the Manhattan Institute: “I think incarceration, both pre-trial and post-conviction, carries with it significant benefits, in the form of incapacitation of serious offenders. We are pushing the envelope and risking an over-correction in the direction of leniency, and that’s not going to be good.”).

been found guilty of a criminal offense.^{98*} While some could argue that the dismissal rate addresses legal guilt, not factual guilt, a tolerance of the status quo as it relates to the probability of case dismissal and current practices around pretrial detention would also require an acceptance of a criminal justice system that provides for punishment before conviction.⁹⁹

A. *A Review of the Probable Cause Standard*

The police may arrest a person if they have probable cause to believe that person committed a crime.¹⁰⁰ In its modern iteration, the probable cause standard is defined as circumstances that would cause a prudent person to conclude that the arrestee had carried out or was carrying out a criminal act.¹⁰¹ Probable cause that a crime was committed is synonymous with probable cause authorizing an arrest. However, at the time the Fourth Amendment was enacted, the term probable cause had a much different application. At the time of the framing of the constitution, criminal procedure was victim-oriented and based on an accusation by a victim rather than investigatory or centered on a police force.¹⁰² Research on the historical origins of probable cause reveals that probable cause that a crime was committed “never sufficed to justify either a warrantless arrest or search, or even issuance of an arrest warrant or search warrant.”¹⁰³ Professor Thomas Y. Davies argues that historically an arrest was justified only if there was both a sworn accusation that “a crime actually had been committed ‘in fact’” and a sworn factual showing of at least “probable cause of suspicion” as to the identity of the perpetrator.¹⁰⁴ “‘Probable cause of suspicion’ [. . .] applied only to the identity of culprit or the location of stolen goods, not to the commission of the crime.”¹⁰⁵ Further, it was the complainant personally who was responsible for the physical arrest and potential damages if the arrestee was not convicted. At common law, the authority to arrest was premised not on “reasonableness”

98. See Research Notes and Excel Data Collection Spreadsheets (*on file with SLU Law Journal).

99. Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 727–28 (2011) (explaining that the presumption of innocence has historically served to require a “legal determination at trial to punish a defendant for a crime.” The presumption of innocence is the foundation for the right to bail).

100. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985).

101. *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949).

102. Wesley MacNeil Oliver, *The Modern History of Probable Cause*, 78 TENN. L. REV. 377, 381 (2011).

103. Thomas Y. Davies, *How the Post-Framing Adoption of The Bare-Probable-Cause Standard Drastically Expanded Government Arrest and Search Power*, 72 L. & CONTEMP. PROBS 1, 11 (2010).

104. *Id.*

105. *Id.*

as the touchstone principle in case law of today, but in necessity.¹⁰⁶ The onset of Prohibition gave rise to a police force investigating victimless crimes and the evolution of a new understanding of probable cause.¹⁰⁷ By the late 1800s the probable cause standard had broadened and could be satisfied by a person with information, including a police officer, rather than just a victim.¹⁰⁸ Thus the standard for an arrest was significantly expanded from the time of the constitution—which required officers to see a crime in progress or wait for a victim’s complaint before they could seek authorization for an arrest.¹⁰⁹ The historical record on how the probable cause standard was applied provides some historical context for the intent of the framers in the use of the term in the constitution, however, the meaning of the standard is left to some debate.¹¹⁰ The historical record on how the probable cause standard was applied provides some historical context for the intent of the framers in the use of the term in the constitution, however, the meaning of the standard is left to some debate.¹¹¹

Despite this historical reality, the modern courts have crafted a definition of probable cause that bears little resemblance to this standard at the time of the constitutional framing.¹¹² This is apparent, even as the Court continued to pay homage in word, if not in analytical outcome, to the intent of the framers.¹¹³ As

106. WORKS OF JAMES WILSON 649 (Robert G. McCloskey ed. 1967); WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 127 (1765). For commentary on the evolution of search and arrest standards related to specific categories of criminal offenses see Davies, *supra* note 103.

107. Oliver, *supra* note 102, at 419; *see also* Carroll v. United States, 267 U.S. 132, 132 (1924) (holding that “reasonable cause” in the Volstead Act (formally the National Prohibition Act) has the same meaning as “probable cause” in the Fourth Amendment).

108. Oliver, *supra* note 102, at 419.

109. *Id.* at 428.

110. *See* Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 978 (2003) (arguing there was not one definition for the term probable cause and tracing the earliest references of the term “probable cause” to the 13th century and finding no fixed definition, but an imprecise aphorism based on common sense); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1813–14 (2000) (critiquing the Court’s justification for probable cause jurisprudence on common law understandings).

111. *See* Lerner, *supra* note 110, at 978 (arguing there was not one definition for the term probable cause and tracing the earliest references to the term “probable cause” to the 13th century and finding no fixed definition, but an imprecise aphorism based on common sense.); Sklansky, *supra* note 110, at 1813–14 (critiquing the Court’s justification for probable cause jurisprudence on common law understandings).

112. Thomas Y. Davies, *The Fictional Character of Law-And-Order Originalism: A Case Study of The Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 2, 239 (2002); Sklansky, *supra* note 111, at 1764.

113. *See* Wyoming v. Houghton, 526 U.S. 295, 299–300 (1999) (finding that the framer’s understanding of criminal procedure doctrine should govern in assessing whether a particular police search or seizure met the constitutional Fourth Amendment standard of reasonableness). For a discussion of seminal cases developing the modern probable cause standard *see* Lerner, *supra* note 110, at 972 (discussing *Locke v. United States*, 11 U.S. (7 Cranch) 339 (1813); *The Apollon*, 22

the Court's jurisprudence on this issue developed, the authority of the officer to effectuate arrests that occurred in the officer's presence was assumed and all analysis regarding the "reasonableness" or "necessity" of such action was abandoned.¹¹⁴ The merging of the originally distinct uses of the constitutional probable cause standard is now accepted by the courts and not subject to serious scrutiny.¹¹⁵

B. The Standard for Arrest

The current Supreme Court rationale on the issue of probable cause has equated probable cause that a crime was committed as the justification for an arrest. However, the Court has declined to examine, or in some cases even agreed, that the existence of probable cause does not give rise to the *need* for an arrest.¹¹⁶ This has given rise to an expansive view of the Fourth Amendment's warrant requirement as it relates to the government's power to make arrests.¹¹⁷ Although the warrant requirement applies to both searches and seizures, the Court's interpretation of the Amendment's directives for searches has taken a different turn than for seizures. Even though the Court has created many exceptions to the warrant requirement for searches, a warrant is still the default position, requiring the government to prove an exception to justify a warrantless search.¹¹⁸ Contrast that standard with arrests which without a warrant are presumed to be in line with Fourth Amendment requirements.¹¹⁹ This is the

U.S. (9 Wheat.) 362 (1824); *Bacon v. Towne*, 58 Mass. (4 Cush.) 217 (1849); *Boyd v. United States*, 116 U.S. 616 (1886)).

114. *Virginia v. Moore*, 553 U.S. 164, 179 (2008) ("In a long line of cases, we have said that when an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt. The arrest is constitutionally reasonable."); *see also, e.g.*, *Atwater v. Lago Vista*, 532 U.S. 318, 354 (2001); *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004); *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975); *Brinegar v. United States*, 338 U.S. 160, 164, 170, 175-176 (1949)).

115. Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 322 (2016); *Moore*, 553 U.S. at 171.

116. *Atwater v. Lago Vista*, 532 U.S. at 354.

117. For an excellent discussion on the Court's treatment of Fourth Amendment seizures versus Fourth Amendment searches see Harmon, *supra* note 115, at 322 and *Moore*, 553 U.S. at 171.

118. This paper is focused on probable cause to arrest, however, it is important to acknowledge that the standard applies to a plethora of additional intrusions to person and property, including the determination to issue a search warrant (*Johnson v. United States*, 333 U.S. 10 (1948)), decisions about whether a search warrant is necessary, exigent circumstances (*United States v. Santana*, 427 U.S. 38, 42-43 (1976)), automobile exceptions (*United States v. Ross*, 456 U.S. 798, 800 (1982); *Carroll v. United States*, 267 U.S. 132, 155-56, 162 (1925); *but see Arizona v. Gant*, 556 U.S. 332 (2009) (finding warrantless search is permissible only upon a "reasonable belief")), the plain view exception (*Horton v. California*, 496 U.S. 128 (1990)), the decision to use deadly force (*Tennessee v. Garner*, 471 U.S. 1 (1985)), bail decisions (*see Gerstein v. Pugh*, 420 U.S. 103, 125 (1975)), and grand jury indictments (*Kaley v. United States*, 134 S. Ct. 1090 (2014)).

119. Harmon, *supra* note 115, at 322; *Moore*, 553 U.S. at 171.

result of the Court's assumption that the government's interest in securing an arrest is valid, even without a warrant.¹²⁰ In *Gerstein v. Pugh*, the Court effectively eliminated the warrant requirement for arrests, holding that the Court has "never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant . . . [A] policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime. . . ."¹²¹ In this 1975 case the Court set forth the analysis from which future jurisprudence would develop on the probable cause required for seizure of a person. The Court held that the probable cause as justification for arrest standard "represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime."¹²²

In 1979, the Court found that the standard of probable cause represented the "accumulated wisdom of precedent and experience" as to make the kind of intrusion involved in an arrest "reasonable" under the Fourth Amendment.¹²³ Encroaching on its own balancing test announced in *Gerstein*, the Court found that the standard applied to all arrests, without the need to "balance" the interests and circumstances involved in particular situations.¹²⁴ In 1996, the Court observed that, although the Fourth Amendment generally requires a "balancing of individual and governmental interests, the result is rarely in doubt where an arrest is based on probable cause."¹²⁵

By 2001 the Court abandoned all pretext of an attempt to balance government interests with individual liberty as applied to probable cause for an arrest. In *Atwater v. Lago Vista*, the Court addressed a case with broad sweeping implications for probable cause to arrest standards.¹²⁶ The case arose from Texas, where it was a misdemeanor, punishable by a fine only, either for a front-seat passenger not to wear a safety belt or not to secure a child riding in the front.¹²⁷ A mother was driving, her children were riding in the car, and none were wearing a seatbelt. A police officer observed the seat belt violations and

120. *City of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991).

121. 420 U.S. 103, 113–14 (1975); *see also* *United States v. Watson*, 423 U.S. 411, 422–23 (1976) (holding that a warrantless arrest for a felony in public does not violate the Fourth Amendment); *State v. Jordan*, 166 Ohio St. 3d 339, 345 (Ohio 2021) (relying on *Gerstein* and *Watson* finding that neither exigent circumstances nor the impracticability of obtaining a warrant is required to justify a warrantless felony arrest that is supported by probable cause and is conducted in public).

122. *Gerstein*, 420 U.S. at 112; *see also* Jacob W. Landynski, *Search and Seizure and The Supreme Court: A Study in Constitutional Interpretation* 13 (The Johns Hopkins Univ. Studies in Historical and Political Sci., Series No. 84, 1966) (The issues raised under the Fourth Amendment "bring into sharp focus the classic dilemma of order versus liberty in the democratic state.").

123. *Dunaway v. New York*, 442 U.S. 208 (1979).

124. *Id.*

125. *Whren v. United States*, 517 U.S. 806, 817–18 (1996).

126. 532 U.S. 318, 326 (2001).

127. *Id.* at 324.

pulled the car over. The officer removed the mother from the car, berated her, handcuffed her, took her to the police station where she was placed alone in a jail cell. She was eventually released on bond of over \$300.¹²⁸ Ultimately, she entered a plea of guilty and paid a \$50 fine. Atwater then filed suit alleging that the officer's actions had violated her Fourth Amendment right to be free from unreasonable seizure.¹²⁹

In response to Atwater's assertion that the officer's seizure was not supported by historical underpinnings of Fourth Amendment understanding, the Court engaged in a lengthy historical analysis of the right to arrest and how the power was conceived at the time the constitution was ratified. The Court rejected Atwater's argument that the constitution forbids custodial arrest, even upon probable cause, when conviction could not ultimately carry any jail time and the government can show no compelling need for immediate detention. Atwater argued that, when historical practice fails to speak conclusively to a Fourth Amendment claim, courts must strike a current balance between individual and societal interests by subjecting particular contemporary circumstances to traditional standards of reasonableness.¹³⁰ Refusing this historical interpretation, the Court found that a Fourth Amendment balance is not well-served by standards requiring case-by-case determinations of government need. The Court's holding was announced by proclamation:

[W]e confirm today what our prior cases have intimated: the standard of probable cause applie[s] to all arrests, without the need to 'balance' the interests and circumstances involved in particular situations. If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.¹³¹

Atwater firmly cemented the Court's intention to remove from analysis whether the government's interests were served by an arrest.

C. *Applying the Probable Cause Standard*

That the standard for an arrest is probable cause without reference to any other data points is now firmly anchored in Supreme Court case law. However, the definition of probable cause is the subject of debate. Critics have charged that the Court's jurisprudence has left us with a definition of probable cause that is confusing, tilted toward the government and away from personal liberty protections, and difficult to review.¹³² The most oft-cited case for a definitive

128. *Id.*

129. *Id.*

130. *Id.* at 321.

131. *Id.* at 354.

132. Cynthia Lee, *Probable Cause with Teeth*, 270 GEO. WASH. L. REV. 269, 269 (2020).

explanation of probable cause is *Brinegar v. United States*.¹³³ “‘The substance of all the definitions’ of probable cause ‘is a reasonable ground for belief of guilt.’ And this ‘means less than evidence which would justify condemnation’ or conviction . . . [but] more than bare suspicion.”¹³⁴ The Court has explained that the definition of the probable cause standard is a “nontechnical conception” of probable cause at all levels of review, allowing for flexibility in application.¹³⁵ “Although the Court has stressed the importance of a ‘single uniform standard’ of probable cause for criminal investigatory conduct, it has not defined that standard in a manner that is particularly illuminating to those charged with enforcing and interpreting the criminal law.”¹³⁶

The Supreme Court’s interpretation of the probable cause standard for arrest has created a police force with powerful policy making authority. It is the police who use their discretion to decide which laws will be enforced, against whom, and when.¹³⁷ As a result of this broad authority to arrest, police are often referred to as the “gatekeepers of the criminal justice system, as our entire judiciary process is predicated upon an initial arrest of an individual suspected of criminal activity.”¹³⁸ Police officers have pervasive discretionary power, and uncontrolled discretion can result in severe consequences including the denial of due process, unequal protection of the law, and police corruption.¹³⁹ Researchers reviewing the patterns and practices of police arrest decisions have cautioned that, absent meaningful monitoring, police officers can, even unconsciously, employ discriminatory policing “which would inevitably result in strained police-community relations and questions of police legitimacy.”¹⁴⁰

Research shows that arrests are often driven by extra-legal factors. Police are more likely to arrive in incidents that involved the presence of a victim, other officers, or where the suspect is antagonistic.¹⁴¹ Researchers have hypothesized

133. 338 U.S. at 175.

134. *Id.* (quoting *McCarthy v. De Armit*, 99 Pa. 63, 69 (1881); *Locke v. United States*, 7 Cranch 339, 348 (1813)) (citations and footnote omitted).

135. *Id.*

136. Barry Jeffrey Stern, *Warrants Without Probable Cause*, 59 BROOK. L. REV. 1385, 1436–37 n.172 (1994).

137. M. K. BROWN, *WORKING THE STREET: POLICE DISCRETION AND THE DILEMMAS OF REFORM* (1988); Jessica Huff, *Understanding Police Decisions to Arrest: The Impact of Situational, Officer, and Neighborhood Characteristics on Police Discretion*, 75 J. CRIM. JUST. (2021).

138. Robin S. Engel, et al., *Deconstructing the Power to Arrest: Lessons from Research*, JOHN F. FINN INST. FOR PUB. SAFETY v (Mar. 15, 2018) (citing E. Bittner, *Police on Skid-Row: A Study of Peace Keeping*, 32 AM. J. SOCIO. 699–715 (1967)).

139. S. Walker, *Origins of the Contemporary Criminal Justice Paradigm: The American Bar Foundation Survey, 1953–1969*, JUST. Q. 9, 47–76 (1992).

140. Engel, *supra* note 138, at 91.

141. Preeti Chauhan et al., *Trends in Arrests for Misdemeanor Charges in New York City, 1993–2016* (2018); Robin S. Engel, James J. Sobol & Robert E. Worden, *Further Exploration of*

that the work of the police involves control, and that control is enabled by a disparity of power—police arrest decisions are driven by a desire to maintain that disparity.¹⁴² For example, where a suspect is disrespectful to police authority, officers respond with a higher incidence of arrests.¹⁴³ Similarly, the presence of others may increase the need of the police to appear to be in control or to impress fellow officers or supervisors in the area.¹⁴⁴ For perhaps similar reasons, police officers with fewer years of service are significantly more likely to conduct arrests.¹⁴⁵ Officers are more likely to conduct arrests during incidents that were self-initiated rather than civilian requests for assistance.¹⁴⁶ This trend is particularly visible in departments that employ proactive policing, broken windows, and stop-and-frisk policing strategies where police-citizen encounters and corresponding arrests are driven by department policy.¹⁴⁷ Police are also more likely to make an arrest when a suspect has a prior criminal record.¹⁴⁸

Consistently, studies have found that arrests are more likely to occur against those at a social disadvantage.¹⁴⁹ Neighborhood racial/ethnic population distributions influence the probability of arrest, even when controlling for the specifics of the incident and the responding officer.¹⁵⁰ One study found that arrests were about 27% more likely to occur in neighborhoods with larger

the Demeanor Hypothesis: The Interaction Effects of Suspects' Characteristics and Demeanor on Police Behavior, 17 JUST. Q. 2, 235–58 (2000); Eric Riksheim & Steven Chermak, *Causes of Police Behavior Revisited*, 21 J. CRIM. JUST. 353–82 (1993); Douglas A. Smith & Christy A. Visher, *Street-Level Justice: Situational Determinants of Police Arrest Decisions*, 29 SOCIAL PROBS. 2, 167–77 (1981).

142. Smith & Visher, *supra* note 141, at 167–77.

143. *Id.* at 175.

144. *Id.*

145. Luke Bonkiewicz, *Shooting Stars: Estimating the Career Productivity Trajectories of Patrol Officers*, 20 POLICE Q. 1, 20 (2016).

146. DONALD J. BLACK, *THE MANNERS AND CUSTOMS OF THE POLICE* 98–99 (Associated Press ed., 1980); *see also* Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform,"* 128 YALE L.J.F. 848, 899–900 (2019).

147. L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1151, 1160 (2012); *see also* Edmund F. McGarrell et al., *Reducing Firearms Violence Through Directed Police Patrol*, 1 CRIMINOLOGY & PUB. POL'Y 119, 120, 131, 137, 143, 145–46 (2001); David Weisburd et al., *Reforming to Preserve: Compstat and Strategic Problem Solving in American Policing*, 2 CRIMINOLOGY & PUB. POL'Y 421, 442–44, 448 (2003).

148. Lisa Stolzenberg, Stewart J. D'Alessio & Jamie L. Flexon, *The Usual Suspects: Prior Criminal Record and the Probability of Arrest*, 24 POLICE Q. 31, 41 (2020).

149. Douglas A. Smith & Christy A. Visher, *Street-Level Justice: Situational Determinants of Police Arrest Decisions*, 29 SOC. PROBS. 167, 174 (Dec. 1981).

150. Jessica Huff, *Understanding Police Decisions to Arrest: The Impact of Situational, Officer, and Neighborhood Characteristics on Police Discretion*, 75 J. OF CRIM. JUST. 1, 4 (2021); *see also* ROBIN ENGEL & KRISTIN SWARTZ, *THE OXFORD HANDBOOK OF ETHNICITY, CRIME, AND IMMIGRATION* 140 (Oxford Univ. Press ed., 2014); Tammy Reinhart Kochel, David B. Wilson, & Stephen D. Mastrofski, *Effect of Suspect Race on Officers' Arrest Decisions*, 49 CRIMINOLOGY 473, 495–96, 498–500 (2011).

Hispanic populations and 71% more likely to occur in neighborhoods with larger Black populations, holding all other variables constant.¹⁵¹ While not solely attributable to police inclinations, officers are more likely to use their discretion to arrest the economically disadvantaged over the wealthy.¹⁵² The mentally ill are also the subject of disparate police arrest decisions.¹⁵³ One study found that the probability of being arrested was nearly twenty percent greater for suspects exhibiting signs of mental disorder than for those who apparently were not mentally ill.¹⁵⁴

Police interaction is the most likely path for entry to the criminal justice system. Explicit and implicit biases held by the police cause racially discriminatory decisions about whom to arrest and therefore account, at least in part, for disparities in criminal justice outcomes.¹⁵⁵ While unconscious biases may seem subtle, both the impact on the individual and the collective effects of persistent biased observations and attributions in general have large effects on case outcomes.¹⁵⁶ One of the most levied criticisms of the use of risk assessment tools in making bail determinations is the racial bias embedded due to the algorithmic reliance on arrest data which is racially biased.¹⁵⁷ Implicit bias is dangerous because it unconsciously impacts how an officer perceives a situation, and is most likely to be demonstrated in situations that involve ambiguity where an officer is using discretionary powers or is required to act quickly.¹⁵⁸ For this

151. Huff, *supra* note 150, at 10.

152. Mirko Bagaric, *Rich Offender, Poor Offender: Why It (Sometimes) Matters in Sentencing*, 33 MINN. J. L. & INEQ. 1, 10–11, 47 (2015). Many criminal offenses are aimed at poverty itself and law enforcement institutions often make the decision to concentrate police officers more heavily in impoverished areas, increasing the disparate representation of the poor in arrest numbers. See JEFFREY REIMAN & PAUL LEIGHTON, *THE RICH GET RICHER AND THE POOR GET PRISON: THINKING CRITICALLY ABOUT CLASS AND CRIMINAL JUSTICE* 120 (Routledge ed., 12th ed. 2020).

153. Lorie A. Teplin, *Criminalizing Mental Disorder: The Comparative Arrest Rate of the Mentally Ill*, 39 AM. PSYCH. 794, 800 (1984).

154. *Id.* at 798.

155. Katherine B. Spencer, Amanda K. Charbonneau & Jack Glaser, *Implicit Bias and Policing*, 10 SOC. & PERSONALITY PSYCH. COMPASS 50, 51 (2016).

156. Anthony G. Greenwald, Mahzarin Banaji & Brian A. Nosek, *Statistically Small Effects of The Implicit Association Test Can Have Societally Large Effects*, 108 J. PERSONALITY & SOC. PSYCH. 553, 553, 559–60 (2015).

157. See, e.g., Angèle Christin, Alex Rosenblat & Danah Boyd, *Courts and Predictive Algorithms*, DATA & SOC'Y 6 (Oct. 27, 2015), <https://datasociety.net/library/data-civil-rights-courts-and-predictive-algorithms/> [<https://perma.cc/HU4J-SXYJ>]; Michael Tonry, *Legal and Ethical Issues in the Prediction of Recidivism*, 26 FED. SENT'G REP. 167, 173 (2014).

158. John T. Clemons, Note, *Blind Injustice: The Supreme Court, Implicit Racial Bias, and The Racial Disparity in The Criminal Justice System*, 51 AM. CRIM. L. REV. 689, 713 (2014); L.A. FRIDELL, *PRODUCING BIAS-FREE POLICING: A SCIENCE-BASED APPROACH* 20 (Cynthia Lum et al. eds., 2017).

reason, social science researchers have cautioned against granting increased discretion to police officers.¹⁵⁹

Arrests are the catalyst for bail decisions that lead to well-documented negative effects for both individuals and society.¹⁶⁰ Still, the consequences of an arrest in and of itself are serious and extensive. As arrests are the most often initiated entry to the criminal justice system, arrests significantly contribute to mass incarceration.¹⁶¹ The United States spends approximately \$80 billion per year on corrections with most of that budget used to support prisons.¹⁶² Local jails hold over 700,000 people on any given day.¹⁶³ Over sixty percent of those held in local jails are there because they are too poor to pay their bond.¹⁶⁴ The local jail is one of the most significant expenditures a community makes every year.¹⁶⁵ For an individual subject to an arrest there are psychological costs to the experience. Professor Harmon notes that there are intangible costs that implicate the essence of American ideals: “[e]very arrest diminishes a citizen’s freedom. It denies the arrestee—albeit briefly—the possibility of living according to his own reasons and motives. Protecting this kind of autonomy is a central goal of liberalism and depriving a person of it is a moral and political harm.”¹⁶⁶ The process also involves being handcuffed, transported, fingerprinted, strip searched, photographed, questioned, and placed in a cage; all of which are privacy invasions and intrusions to liberty that are not often discussed by the courts.¹⁶⁷ In addition, any arrest can lead to other consequences, including loss of time from work or loss of a job, childcare issues which could include children being placed in foster care, and financial liabilities (attorney fees, bail, booking fees, towing fees).¹⁶⁸ The costs of arrest, both tangible and intangible, pressure defendants into pleading guilty to these offenses rather than fighting a case at trial and continuing to incur the costs.¹⁶⁹

Given the stakes of an arrest and the propensity of law enforcement officers to use extralegal metrics for arrest decisions, it is disconcerting that the judicial

159. Engel, *supra* note 138, at 91.

160. Digard & Swavola, *supra* note 12.

161. E. ANN CARSON, PRISONERS IN 2016 1 (Dep’t of Just., Off. of Just. Programs, Bureau of Just. Stat., 2018).

162. SANETA DE VUONO-POWELL ET AL., WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES 7 (Ella Baker Ctr., 2015).

163. RAM SUBRAMANIAN ET AL., INCARCERATION’S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 4 (Vera Inst. of Just., Ctr. on Sent’g and Corr., 2015).

164. See Natalie Ortiz, *County Jails At A Crossroads: An Examination Of The Jail Population And Pretrial Release*, 2 NAT’L ASS’N CNTYS. 1, 6, 8 (July 2015), <https://www.naco.org/resources/county-jails-crossroads> [<https://perma.cc/FQ4K-P9VM>].

165. SUBRAMANIAN ET AL., *supra* note 163, at 12, 13.

166. Harmon, *supra* note 115, at 313; *Virginia v. Moore*, 553 U.S. 164, 171 (2008).

167. Harmon, *supra* note 115, at 311, 315.

168. Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 811, 821–23 (2015).

169. Josh Bowers, *Punishing the Innocent*, 156 UNIV. PA. L. REV. 1117, 1158 (2008).

review of an officer's arrest decision and the authority to set bail requires the very same standard as the initial decision to arrest.¹⁷⁰

In *Gerstein v. Pugh*, the Court held that a “prompt judicial determination” of probable cause is required to hold an arrestee for trial.¹⁷¹ The judicial determination is not required to be adversarial.¹⁷² Ostensibly the Court's decision and its “judicial determination” requirement provide for the equivalent of an arrest warrant after the fact.¹⁷³ Immediately after the *Gerstein* decision, scholars feared that this process would become nothing more than a rubber stamp of “hurried magistrates or those who tend to be influenced by prosecutors.”¹⁷⁴ Indeed this practice was evident in the data collected for this study, where probable cause was found upon a prosecutor's reading of the charging document or waived entirely by the defense in 100% of the cases, which lasted on average just over 60 seconds.^{175*}

In addition to the little time paid to the determination of probable cause, there seems to be little understanding of the precise meaning of the Supreme Court's current use of the term.¹⁷⁶ The Court has repeatedly held that the

170. *Pretrial Detainees Have a Fourth Amendment Right to a Nonadversary, Judicial Determination of Probable Cause*, 10 VAL. U. L. REV. 199, 204–09, 216 (1975) [hereinafter *Pretrial Detainees*].

171. *Gerstein v. Pugh*, 420 U.S. 103, 124–25 (1975); George C. Thomas, *The Poisoned Fruit of Pretrial Detention*, 61 N.Y.U. L. REV. 413, 413 (1986).

172. *Gerstein*, 420 U.S. at 120.

173. *Pretrial Detainees*, *supra* note 170, at 211 (arguing that *Gerstein* merely requires that the prosecutor procure an arrest warrant after the defendant's arrest).

174. *Id.* (noting that “while the same argument has been used to criticize the warrant-issuing process before arrest, the possibility exists that the practice might become even more prevalent once the magistrate is aware that the suspect is in custody”).

175. See Research Notes and Excel Data Collection Spreadsheets (*on file with SLU Law Journal).

176. Christopher Slobogin, *Let's Not Bury Terry: A Call for Rejuvenation of the Proportionality Principle*, 72 ST. JOHN'S L. REV. 1053, 1082 (1998) (“[P]robable cause . . . is the standard with which we are most familiar—except that we don't really know what it means.”); *Holmes v. State*, 796 A.2d 90, 98 (Md. 2002). For example, there is a circuit split on whether the probable cause requirement extends to each of the elements of an offense. *Cilman v. Reeves*, 452 F. App'x 263, 270–71 (4th Cir. 2011); *Spiegel v. Cortese*, 196 F.3d 717, 724 n.1 (7th Cir. 1999); *Gasho v. United States*, 39 F.3d 1420, 1428 (9th Cir. 1994) (finding that an officer is not required to have probable cause of each element of an offense to make an arrest); *Williams v. City of Alexander, Ark.*, 772 F.3d 1307, 1312 (8th Cir. 2014); *Wesby v. District of Columbia*, 765 F.3d 13, 20 (D.C. Cir. 2014); *United States v. Joseph*, 730 F.3d 336, 342 (3rd Cir. 2013). See, e.g., *Anderson v. Creighton*, 483 U.S. 635, 636, 640–44 (1987):

There is no merit to respondents' argument that it is inappropriate to give officials alleged to have violated the Fourth Amendment—and thus necessarily to have *unreasonably* searched or seized—the protection of a qualified immunity intended only to protect *reasonable* official action. Such argument is foreclosed by the fact that this Court has previously extended qualified immunity to officials who were alleged to have violated the Fourth Amendment.

definition is nontechnical, though efforts to quantify it endure.¹⁷⁷ A survey of judges reveals that they quantify “probable cause to believe,” on average, at 45.78%. Two judges associated probable cause with 10% and one judge with 90%. A majority of the judges believed probable cause was around 40% or 50%, but fifty-two of the judges thought probable cause was either around 30% or around 60%.¹⁷⁸ Some scholars have described it as a determination of probability.¹⁷⁹ Others see it as a matter of commonsense.¹⁸⁰ The Court has embraced a deferential review of probable cause decisions, which adds to the difficulty of ascertaining a precise definition of the standard.¹⁸¹ Ultimately, judicial review provides little constraint on the arrest decisions made by police.

Prosecutors too have significant discretion over who and how the criminal justice system operates, including the charges that get filed, which plea bargains to offer, and the sentence to recommend.¹⁸² The prosecutor is also responsible for the presentation of cases to the grand jury, which is also governed by the probable cause standard.¹⁸³ Like the concept of probable cause itself, the grand jury was supposed to act as a due process shield between the individual and the power of the government, thus bolstering the legitimacy of arrest decisions and

Id. (emphasis in original); see, e.g., WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 3.2(e) 60–64 (3d ed. 1996) (analyzing the probable cause standard as “more-probable-than-not”); Christopher Slobogin, *Government Data Mining and the Fourth Amendment*, 75 U. CHI. L. REV. 317, 329 (2008) (describing probable cause as “a level of certainty akin to the civil preponderance standard”); Lawrence Rosenthal, *The Crime Drop and the Fourth Amendment: Toward an Empirical Jurisprudence of Search and Seizure*, 29 N.Y.U. REV. L. & SOC. CHANGE 641, 680 (2005); *Texas v. Brown*, 460 U.S. 730, 742 (1983) (Justice Rehnquist arguing that probable cause “does not demand any showing that such a belief [of criminal wrongdoing] be correct or more likely true than false”).

177. See, e.g., *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (quoting *Illinois v. Gates*, 462 U.S. 213, 231 (1983)); Orin Kerr, *Why Courts Should Not Quantify Probable Cause*, in *THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM J. STUNTZ* 131–33 (Michael Klarman et al. eds., 2012) (discussing how quantifying probable cause would lead to less accurate probable cause determinations).

178. C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1324–25, 1327 (1982).

179. Ronald J. Bacigal, *Making the Right Gamble: The Odd on Probable Cause*, 74 MISS. L.J. 279, 295, 338 (2004).

180. Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 U. MICH. J. L. REFORM 465, 469 (1984); see also Andrew Manuel Crespo, *Probable Cause Pluralism*, 129 YALE L.J. 1276, 1369 (2020) (offering a framework for understanding and application of probable cause that is more “predictable and more likely to yield consistent results”).

181. Erica Goldberg, *Getting Beyond Intuition in the Probable Cause Inquiry*, 17 LEWIS & CLARK L. REV. 789, 790 (2013).

182. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871, 872 n.11 (2009); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1980 (1992).

183. Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 719 (2008).

the criminal justice process itself.¹⁸⁴ However, in their modern iteration, grand juries are an arm of the prosecutor's office and dependent in their decision making on the information provided by the government,¹⁸⁵ which many scholars have noted.¹⁸⁶ Physically, the grand jury is dependent on the prosecutor. The grand jury lacks a physical building or staff and is not a singular body, but rather a series of citizens summoned for service as grand jurors, who meet at the convenience of the prosecutor and the court and who have no control over the information and are sworn to secrecy about the proceedings.¹⁸⁷ Empirical evidence reveals that ninety-nine percent of the cases presented to federal grand juries lead to indictments.¹⁸⁸

Despite this well-earned criticism, the data presented in this research suggests that grand jury proceedings may be a more useful screening mechanism at the state level. Of the felony cases that resulted in dismissal in this study, ninety-nine percent were ignored at the grand jury stage at some point after a bail decision.^{189*} This is a check on police discretion ostensibly led by prosecutors. However, as mitigation against the perils of pretrial detention, the grand jury decisions come too late. In Hamilton County, Ohio felony arrests are presented to a grand jury within ten days of arrest.¹⁹⁰ In other jurisdictions, the grand jury decisions take much longer.¹⁹¹ Research has shown that by this time in the process the damage of pretrial detention is done. Early data showed that the negative community impact of pretrial detention takes effect within three

184. Melvin P. Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A. J. 153, 153 (1965).

185. William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 174, 177 (1973) ("Today, the grand jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any time, for almost anything, before any grand jury.").

186. Peter Arenella, *Reforming the State Grand Jury System: A Model Grand Jury Act*, 13 RUTGERS L.J. 1, 9 (1981); see also Richard L. Braun, *The Grand Jury-Spirit of the Community?*, 15 ARIZ. L. REV. 893, 914-15 (1973); Susan W. Brenner, *Is the Grand Jury Worth Keeping?*, 81 JUDICATURE 190, 190 (1998); Anne B. Poulin, *Supervision of the Grand Jury: Who Watches the Guardian?*, 68 WASH. U. L. Q. 885, 927 (1990).

187. Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 29 (2004); Samuel Dash, *The Indicting Grand Jury: A Critical Stage?*, 10 AM. CRIM. L. REV. 807, 818-24 (1972).

188. Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury's Shield*, 98 J. CRIM. L. & CRIMINOLOGY 1171, 1176 (2008) (citing Raju Chebium, *Government Urges Congress to Leave Grand Jury System Alone*, CNN (Jul. 27, 2000), <http://www.cnn.com/2000/LAW/07/27/grand.jury/> [<https://perma.cc/3ZWQ-R6CZ>] ("The Justice Department said in written testimony to the House panel that grand juries return indictments in ninety-nine percent of the cases presented to them.")).

189. See Research Notes and Excel Data Collection Spreadsheets (as opposed to dismissals for want of prosecution, acquittal or other legal reason) (*on file with SLU Law Journal).

190. *Id.*

191. Ohio Sup. Ct. Prac. R. 39 (providing that cases must be presented to the grand jury within 60 days).

days of incarceration having, among other things, a criminogenic effect.¹⁹² One study found that people who were incarcerated for as little as two to three days were more than forty percent more likely to commit crimes in the future compared with equivalent defendants held less than twenty-four hours.¹⁹³ When incarcerated eight to fourteen days, that percentage increases to fifty-one percent.¹⁹⁴ The authors of the original study revisited these questions in 2022 using data on 1,487,107 booked into a jail and found that pretrial detention for any length of time (not only two to three days) is associated with higher likelihood of rearrest.¹⁹⁵ The economic impact of pretrial detention is also significant—having long lasting consequences for both the community and the individuals impacted.¹⁹⁶ In addition to these negative societal impacts, the effect of pretrial detention to the individual is immense. Absence from work for even one day can lead to employment termination; failure to pick up a child from school or to be available to provide care can result in action by the child protective services to initial dependency proceedings and the inability to pay rent because of incarceration can lead to eviction proceedings and housing instability.¹⁹⁷ The rates of infectious diseases among people in jail are at least double those in the population at large.¹⁹⁸ For instance, a recent report showed that people in pretrial detention accounted for the majority of COVID-19 deaths in Texas county jails in 2020.¹⁹⁹

Further research is needed to more fully understand dismissals at the grand jury stage. Because these proceedings are shrouded in secrecy, research to understand the functioning and decision-making mechanisms is limited.²⁰⁰ If it is that prosecutors are using their discretion to move grand jurors to a dismissal outcome, this serves as a probable cause review function that needs to happen

192. Lowenkamp, VanNostrand, & Holsinger, *supra* note 64, at 10–12.

193. *Id.* at 3.

194. *Id.*

195. Lowenkamp, *supra* note 69.

196. Dobbie & Yang, *supra* note 14; T. Bak, *Pretrial Release Behavior of Defendants Whom the U. S. Attorney Wished To Detain*, 30 AM. J. CRIM. L. 45, 45–74 (2002).

197. *See, e.g.*, Pinto, *supra* note 9; Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. REV. 1, 4 (2017); People who are released pretrial have significantly higher rates of employment and higher incomes up to four years after the bail hearing. Dobbie, Goldin, & Yang, *supra* note 61, at 225–28.

198. Robert T. Trotter et al., *Health Disparities And Con- Verging Epidemics In Jail Populations: Protocol For A Mixed-Methods Study*, JMIR RSCH. PROTOCOLS 7(10), e10337 (2018).

199. Michele Deitch et al., *COVID and Corrections: A Profile of COVID Deaths in Custody in Texas*, LYNDON B. JOHNSON SCH. OF PUB. AFFS., UNIV. OF TEX. AT AUSTIN (2020), <https://law.utexas.edu/faculty/publications/2020-covid-and-corrections—a-profile-of-covid-deaths-in-custody-in-texas/download> [<https://perma.cc/9RYW-GNYC>].

200. Nicole Smith Futrell, *Visibly (Un)Just: The Optics of Grand Jury Secrecy and Police Violence*, 123 DICK. L. REV. 1, 6 (2018).

much earlier in the process to avoid the negative impact of pretrial detention. If the dismissal outcome is the result of evidentiary issues, reforms to the investigatory and arrest decisions are warranted. Police are not required to make an arrest.²⁰¹ Cases can be presented directly to the grand jury for determination before an individual is subjected to arrest and bail process.²⁰² This is a policy change that could be driven by data in future research.

IV. RECOMMENDATIONS FOR FUTURE BAIL REFORM

While important improvements in bail practices have been made in some places, bail reform has encountered significant resistance in many others. A number of important factors have contributed to the challenges facing the current bail reform movement.²⁰³ First, the current reform undertakings lack a systemic approach to curbing the harms of pretrial detention.²⁰⁴ As discussed in Part One above, improvements to bail practices have taken many different forms and, depending on the jurisdiction, may have different aims. The focus in one city or state may be to reduce the harms of pretrial detention generally, in another the efforts turn toward eliminating the disparities between the rich and poor in the pretrial context.²⁰⁵ Reforms at the state and local level have shown some promise.²⁰⁶ Nevertheless, the jurisdictions that have not engaged in reform efforts are left without the protections of due process afforded in other places. The variation in approaches has created unintended consequences in some communities.²⁰⁷ Second, reform efforts are hampered by the lack of data

201. Shima Baradaran Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 972 (2020).

202. Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 473–79 (1980).

203. Brunt & Bowman, *supra* note 38, at 753 (noting reasons for concern with outcomes of the current bail reform movement).

204. Gold & Wright, *supra* note 67, at 749–56; *Bail Reform: a Practical Guide Based on Research and Experience*, NAT'L TASK FORCE ON FINES, FEES & BAIL PRACS. (Mar. 12, 2019), https://www.ncsc.org/__data/assets/pdf_file/0026/42587/Bail-reform-guide-3-12-19.pdf [<https://perma.cc/FP8U-QKSL>].

205. Isabella Jorgenson & Sandra Susan Smith, *The Current State of Bail Reform in the United States: Results of a Landscape Analysis of Bail Reforms Across All 50 States*, FACULTY RESEARCH WORKING PAPER SERIES, HARVARD KENNEDY SCHOOL (Dec. 2021), <https://www.hks.harvard.edu/publications/current-state-bail-reform-united-states-results-landscape-analysis-bail-reforms-across> [<https://perma.cc/7RC2-PCP8>].

206. Gold & Wright, *supra* note 67, at 745, 748–49.

207. John Raphling, *California Ended Cash Bail—but May Have Replaced It With Something Even Worse*, NATION (Sept. 24, 2018), <https://www.hrw.org/news/2018/09/24/california-ended-cash-bail-may-have-replaced-it-something-even-worse> [<https://perma.cc/8AX6-BYXA>]; *see also* Wendy R. Calaway & Jennifer M. Kinsley, *Rethinking Bail Reform*, 52 RICHMOND L. REV. 795, 795 (2018) (advising caution in the use of litigation to effectuate bail reform which “often results in incomplete remedies that do not fully address, rectify, or prevent the range of harms inflicted by the money bail system”).

collection to analyze, review and inform decision making.²⁰⁸ In some jurisdictions it is difficult to ascertain which people incarcerated in local jails are pretrial defendants and which are serving sentences.²⁰⁹ The lack of available public data on basic variables like failure to appear rates, new criminal activity, and incarceration costs make it difficult to identify the source of problems, craft evidence based solutions, and evaluate the efficacy of the interventions.²¹⁰ For example, the current study's data collection required in-person court observations to collect bail and probable cause data, as well as review of the online case docket of each individual case to code case outcomes. This considerable investment, required by the lack of available data, is a barrier to the analysis of the practices driving pretrial detention. Third, the utter volume of arrests requiring bail hearings is an impediment to reform in many places due to the time required to provide meaningful probable cause review and bail determinations.²¹¹ Providing the due process promised in case law, rule, and statute is not only the legally correct course of action, but may also solve many of the issues discussed in the pretrial context.²¹² However, much like the use of cash bail as a proxy for preventative detention where pretrial detention without bail is not otherwise available, it is the failure to many system actors to perform consistent with the mandates already in place that drives the need to bail reform discussions.²¹³ Fourth, political resistance has halted and reversed bail reform progress in many places.²¹⁴ Under the current approach, bail reform requires the

208. See, e.g., Jessica Smith, *Bail in North Carolina*, 55 WAKE FOREST L. REV. 907, 915 (2020); Avlana K. Eisenberg, *Mass Monitoring*, 90 S. CAL. L. REV. 123, 152–53 (2017) (finding that, in some instances, reforms to the cash bail system have led to highly-restrictive conditions of release, including GPS tracking and electronic monitoring with severely restrictive effects on people's lives).

209. Smith, *supra* note 208, at 915.

210. See, e.g., William E. Crozier, Brandon L. Garrett & Arvind Krishnamurthy, *The Transparency of Jail Data*, 55 WAKE FOREST L. REV. 821, 826 (2020); Donnelly & Headen, *supra* note 78.

211. Baughman, *supra* note 201, at 949.

212. Russell M Gold, *Jail as Injunction*, 107 GEO. L.J. 501, 548–51 (2019).

213. See, e.g., Jenny E. Carroll, *Beyond Bail*, 73 FLA. L. REV. 143, 147 (2021) (these provisions suggest a “measured, precise, and just” process that differs in troubling ways from the realities of pretrial judicial decision-making); *Dubose v. McGuffey*, 195 N.E.3d 951, 961 (Ohio 2022) (Donnelly, J., concurring):

If a defendant does not appear to be bailable, a trial court may not prevent the defendant's pretrial release by misapplying Crim.R. 46(B) and (C), which apply to defendants who *are* bailable. The trial court must instead follow the procedures to deny bail under R.C. 2937.222. See Crim.R. 46(A) (“A defendant may be detained pretrial, pursuant to a motion by the prosecutor or the court's own motion, in accordance with the standards and procedures set forth in the Revised Code”). The fact that a defendant might have committed a terrible crime does not allow us to ignore the law.

Id. (emphasis in original).

214. Wiseman, *supra* note 53, at 1398–99.

assent of judges, prosecutors, defense counsel, law enforcement officials, and jail administrators as well as politicians: mayors, legislators, governors, and city council members.²¹⁵ Bail reform creates an easy strawman for the “tough on crime” crowd.²¹⁶ The politics around the issue have halted or reversed gains based on political arguments that pretrial release leads to increased criminal activity, even in the face of empirical evidence to the contrary.

The current bail reform movement has largely focused on the practices of judges in making bail decisions.²¹⁷ Researchers have aptly noted that the extent and quality of bail reform success as it is currently constituted depends on how and whether judicial behavior will change.²¹⁸ Like other actors in the criminal legal system, judges are motivated by extra-legal concerns and their perceptions influence how they make decisions.²¹⁹ That these outside motivations influence judicial decision makings is something judges have historically been unwilling to acknowledge.²²⁰

As Professor Swisher notes, elected judges face incentives to set high bonds.²²¹ 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.²²² Further, unlike other public officials, judges are not responsible for the cost of pretrial detention and receive no reward for releasing pretrial defendants.²²³ Whether, consistent with the dictates of the law, this personal risk-reward analysis should be part of the equation for judges, research shows that it is the judges who are subject to public scrutiny if a pretrial release decision results in a negative outcome.²²⁴ Thus, despite the current movement, the default

215. See Ronald F. Wright, *Persistent Localism in the Prosecutor Services of North Carolina*, 41 CRIME & JUST. 211, 243–47 (2012).

216. Alessandro Corda & Rhys Hester, *Leaving the Shining City on a Hill: A Plea for Rediscovering Comparative Criminal Justice Policy in the United States*, 31 INT’L CRIM. JUST. REV. 203, 213 (2021).

217. Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 455 (2016); Gouldin, *supra* note 4, at 861.

218. Gouldin, *supra* note 217, at 858–59; Nicole M. Myers, *Shifting Risk: Bail and the Use of Sureties*, 21 CURRENT ISSUES IN CRIM. JUST. 127, 128 (2009); Van Brunt & Bowman, *supra* note 38, at 723–24 (“The seemingly intractable reliance on custom and intuition by the judiciary in the assignment of money bond remains one of the foremost roadblocks to reform.”).

219. Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. REV. 837, 837 (2016); For a comprehensive discussion about how judicial ideology informs decision-making, see Matthew Tokson, *Judicial Resistance and Legal Change*, 82 U. CHI. L. REV. 901, 903 (2015).

220. Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 5 (1994).

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

222. *Id.*

223. Wiseman, *supra* note 217, at 422–23.

224. Wiseman, *supra* note 217, at 455–56 (arguing that public scrutiny is a factor influencing bail decisions for judges facing elections); see also Kate Berry, *How Judicial Elections Impact*

position of courts in some quarters has become detention rather than risking release. These concerns are aided by the media who devotedly provide airtime and column space to politicians pontificating on dangers of pretrial release without reference to any data points and often in the face of evidence to the contrary.²²⁵

It is into this context that the research presented in this paper suggests justification for a new way forward. Dismissal rates as high as 60–70% for criminal arrests imitate a system delegitimizing problems. Coupled with current pretrial detention practices, the need for reforms is urgent. In many places it is more likely than not that when a person is arrested, they will not be found guilty of the offense, but if detained before trial they will experience a punishment that is akin to having been convicted.²²⁶ The current approach to bail reform has not taken this data and the urgency of its implications into consideration in establishing reform priorities. Due to the political resistance encountered in the bail reform—as currently practiced—arena, it is time to address bail reform at the systemic level.

Social science research shows police routinely rely on factors outside the probable cause standard to make arrest decisions leading to the high dismissal rate in the data discussed here.²²⁷ Research has also demonstrated that prioritizing policing strategies that rely on the use of arrest may not have intended deterrent effects on crime and related outcomes. Instead, the greatest crime reducing effects are usually associated with policing policies that involve the strategic use of arrest—those tactics with a high degree of focus and wide

Criminal Cases, BRENNAN CTR. FOR JUST. (Dec. 2, 2015), https://www.brennancenter.org/sites/default/files/publications/How_Judicial_Elections_Impact_Criminal_Cases.pdf [<https://perma.cc/9X83-KA6R>].

225. Laura Bennett & Jamil Hamilton, *Freedom, Then the Press: New York Media and Bail Reform*, FWD.ORG (Apr. 2, 2021), https://www.fwd.us/wp-content/uploads/2021/06/Bail_Reform_Report_052421-1.pdf [<https://perma.cc/6APE-JU7L>]; Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*, NAT'L INST. OF CORRS. (Sept. 2014), <https://nicic.gov/fundamentals-bail-resource-guide-pretrial-practitioners-and-framework-american-pretrial-reform>, archived at <https://perma.cc/6J54-ZG44> (detailing a study revealing that when controlling for other factors, release on cash bail and release without a financial consequence achieve the same court appearance rate and show no differences in public safety).

226. Anna Roberts, *Arrests As Guilt?*, 70 ALA. L. REV. 987, 989 (2019), arguing that:

[I]n a wide range of ways, in a wide range of contexts, and in the assumptions of a wide range of people, arrests appear to be fused with guilt. The stage that is supposed to lie between arrest and adjudication—that period of diligent investigation, zealous representation, exploration of defenses, and possible dismissal—has too often collapsed in our implicit, and sometimes explicit, understandings of the criminal legal system.

Id.

227. Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 83 (1991) (“[T]he suspicion underlying the detention of a person believed to be a potential criminal is often based on police experience with previous crimes under similar circumstances . . .”).

variation in tactics.²²⁸ Due to the gatekeeping role of police, any “comprehensive reform effort targeting portions of the criminal justice system should also focus specifically on the initial arrest decision.”²²⁹ These findings should guide the setting of legal policy for arrest decisions.

A. Reforming the Probable Cause Standard to Arrest

As discussed above, the court has parted ways with historical underpinnings of the understanding and function of probable cause. History “teaches that criminal procedure can only be based on assessments of current values, conditions, needs, and threats.”²³⁰ “Decision making regarding criminal procedure will be more likely to produce sound policy—and less likely to succumb to undiluted statism—if it proceeds without the distorting influence of fictional law-and-order originalism.”²³¹ The research outlined in this paper revealing the large percentage of cases that are dismissed due to lack of evidence to proceed with prosecution underscores the argument that a stricter charging standard is necessary “when an adjudicative system does not otherwise provide adequate certainty that the people it punishes are guilty.”²³²

Making changes to arrest practices provides a comprehensive path forward. Reducing custodial arrests before judicial hearings happen addresses the concerns of volume, judicial perceptions and bias in assessments and political concerns.²³³ The risk of pretrial detention determinations is distributed more evenly across the criminal justice system.²³⁴ That choice early in the process separates the quantity of cases filed in the criminal courts from the quantity of pretrial-detention decisions that judges face.²³⁵ One way to accomplish this outcome is to disconnect the probable cause standard from the arrest standard. As discussed above, as the Court’s analysis evolved on the standard required to make an arrest, the finding of probable cause that a crime was committed merged with the power to make an arrest.²³⁶ Probable cause that a crime was committed

228. NICHOLAS CORSARO, & DAVID WEISBURD, 23 DETERRENCE, CHOICE, AND CRIME: CONTEMPORARY PERSPECTIVES 239–268 (Daniel S. Nagin, Francis T. Cullen, & Cheryl Lero Jonson, eds., 2018); Robin S. Engel & John E. Eck, *Effectiveness vs. Equity in Policing: Is A Tradeoff Inevitable?*, 18 IDEAS IN AM. POLICING POLICE FOUND. (Jan. 2015), https://www.policing.institute.org/wp-content/uploads/2015/09/PF_IIAP_EngelandEck_Jan2015.pdf [<https://perma.cc/AQ8C-SZRU>]; David Weisburd & John Eck, *What Can Police Do To Reduce Crime, Disorder And Fear?*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 42, 54–60 (2004).

229. Engel et al., *supra* note 138.

230. Davies, *supra* note 112, at 437.

231. *Id.*

232. William Ortman, *Probable Cause Revisited*, 68 STAN. L. REV. 511, 540 (2016).

233. Gold & Wright, *supra* note 67, at 746.

234. *Id.*

235. *Id.*; Unif. Pretrial Release & Det. Act § 201 (Unif. L. Comm’n 2020).

236. Unif. Pretrial Release & Det. Act § 201., at 3.

does not logically or constitutionally give rise to the need for an arrest.²³⁷ Making voluminous arrests and causing the concomitant destabilization that accompanies an arrest only to have the case dismissed does not serve society or individual interests.²³⁸ Moving back to a needs-based analysis for arrest decisions—as an additional step after a determination of probable cause balancing society’s interest in public safety with individual interests in liberty—will help accomplish this end.²³⁹

In addition, reforming the definition of probable cause to a more comprehensible standard will avoid the collection of large numbers of arrestees who are later found to have committed no prosecutable crime.²⁴⁰ Scholars have provided an array of more quantifiable alternatives that would give police affirmative, measurable criteria by which to be guided.²⁴¹ Because the Supreme Court has resisted judicial remedy to expansive police discretion, this may require legislative remedy.²⁴² As discussed above, the judicial review of the arrest decision is cursory at best.²⁴³ Given the high costs of an arrest to the person impacted, the current system is an unacceptable shifting from the taxpayer to the individual.²⁴⁴ Changes to policies on who can be arrested and under what circumstances would limit the number of people presented to the courts for bail decisions.²⁴⁵ To the extent that efficiencies now make proper bail hearings less

237. *United States v. Watson*, 423 U.S. 411, 428–29 (Powell, J., concurring):

Since the Fourth Amendment speaks equally to both searches and seizures, and since an arrest, the taking hold of one’s person, is quintessentially a seizure, it would seem that the constitutional provision should impose the same limitations upon arrests that it does upon searches. Indeed, as an abstract matter an argument can be made that the restrictions upon arrest perhaps should be greater. A search may cause only annoyance and temporary inconvenience to the law-abiding citizen. . . . An arrest, however, is a serious personal intrusion regardless of whether the person seized is guilty or innocent. . . . Logic therefore would seem to dictate that arrests be subject to the warrant requirement at least to the same extent as searches.

238. *Id.* at 431.

239. *United States v. Place*, 462 U.S. 696, 703 (1983) (“We must balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.”); Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U.L. REV. 1119, 1166 (2008).

240. Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a “Pointless Indignity,”* 66 STAN. L. REV. 987, 989 (2014).

241. Max Minzner, *Putting Probability Back into Probable Cause*, 87 TEX. L. REV. 913, 915 (2009); Goldberg, *supra* note 181, at 837; Bacigal, *supra* note 179, at 338.

242. *Rizzo v. Goode*, 423 U.S. 362, 387 (1976); Ayesha Hardaway, *The Supreme Court and the Illegitimacy of Lawless Fourth Amendment Policing*, 100 B.U. L. REV. 1193, 1193 (2020) (“Supreme Court decisions have allowed local police departments nearly unlimited discretion in their policies and practices.”).

243. Hardaway, *supra* note 242, at 1200.

244. *Id.* at 1214.

245. *Id.* at 1198.

likely, reduced volume would allow for more robust determinations under revised probable cause standards.²⁴⁶

B. *Data and Education-Based Solutions*

The only way that any intervention can be properly assessed is through better data collection and analysis. Requiring individual jurisdictions to collect relevant offender characteristics—such as race, gender, age, bail decision, days incarcerated before case determination, and costs of detention for each criminal case, and to organize specific offenders according to judges—is a necessary first step.²⁴⁷ Making this information available to future researchers will allow further exploration on the significance of judicial and offender characteristics, costs, case outcomes, and bail decisions at the judge specific level.²⁴⁸ In addition, placing individual level judicial bail data organized by offender characteristics in the hands of individual judges would allow judicial actors to become informed about their bail practices relative to costs, dismissal rates, and other case outcomes, compared with other judges in their county and state. Assuming the disparate bail practices of judicial actors is the product of unconscious bias, illuminating an individual’s patterns and practices would help inform judicial behavior.²⁴⁹ This point may more arguably be applied to racial bias in bail setting as the research in this paper suggests that bail decisions in particular strongly are motivated by political concerns.²⁵⁰ However, if judges are made aware of the extent of the damage that pretrial detention causes and the high rate at which cases are dismissed, it may help offset the “incentives that make judges care more about false negatives than false positives when they predict future misconduct by defendants.”²⁵¹

It is also imperative that this information is disseminated to other criminal justice actors and the public. Education can combat the media narrative around criminal justice reform in general, and bail reform in particular.²⁵² It will also allow the decision makers to reflect on the consequences of the decisions that are made.²⁵³ As it is currently constituted, the law of arrest requires little to no

246. Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 373 (2018).

247. *Id.* at 304–05.

248. *Id.* at 371–72.

249. Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1195 (2009) (finding that while judges are influenced by implicit bias, they are motivated to avoid it); see also Nancy J. King & Roosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three State Study*, 57 VAND. L. REV. 886, 896–97 (2004).

250. Stevenson, *supra* note 246, at 308–35 (discussing research showing judges provided with risk assessment tools recommending release ignored the recommendation in two-thirds of cases).

251. Gold & Wright, *supra* note 67, at 747.

252. Harmon, *supra* note 115, at 364.

253. *Id.* at 352.

investigation to justify an arrest.²⁵⁴ Those who are inclined to trust in the legitimacy of the criminal legal system may be predisposed to arrest with less caution, believing that the just outcome will eventually come to fruition—the system works.²⁵⁵ Therefore, erring on the side of an arrest is the correct decision. Education on the data discussed in this paper illustrates the peril of such thinking and could act as its own system correction, both to on-the-street law enforcement and judicial reviewers of arrest decisions. In the context of the current research, the court, law enforcement officers, and the public should be aware of the high rate at which arrests are made and individual lives disrupted on cases which are later dismissed due to an inability prosecute them. Most people assume that when an arrest is made, it is justified.²⁵⁶ The data in this study reveals that this reliance is not only unwarranted, but the consequences of this assumption has destabilizing effects on the entire system.

254. *Id.* at 307.

255. *Id.* at 324–25.

256. *Id.* at 307.