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The Case for Bail Reform

WENDY R. CALAWAY*

INTRODUCTION

Bail reform is at an inflection point.¹ Over the past several years bail reform has been a main topic of conversation in research and criminal justice reform circles.² It has permeated political discourse, news, and popular culture.³ Reforms have been enacted and studied in various ways throughout the country.⁴ Overall, the implemented changes to bail policies have largely been focused on changing judicial decisions made at the bail setting stage of the criminal justice process.⁵ Recommendations for reform that have been put into practice in many areas include those that suggest that courts employ risk assessment tools, to take the defendant's ability to pay into account, or to establish a presumption of release without financial repercussions.⁶ These reform efforts have shown various degrees of success at accomplishing the goals of reducing the harms of pretrial detention but have also encountered opposition from certain political and law enforcement sectors.⁷ Political opposition has captured the attention of the news media and the proliferation of misinformation about bail reform threatens to undermine the progress of the current bail reform movement.⁸ Despite the political posturing that has become a prevalent part of this conversation, the urgent need for bail reform remains.⁹ Most of the people incarcerated in the country's jails are there

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1. Lauryn P. Gouldin, *Reforming Pretrial Decision-Making*, 20 Wake Forest L. Rev. 857, 858 (2020).

2. *Id.* at 858-59.

3. *Id.* at 859.

4. *Id.* at 859-61.

5. *Id.* at 861.

6. Isabella Jorgensen & Sandra Susan Smith, *The Current State of Bail Reform in the United States*, HARV. KENNEDY SCH. FAC. RSCH. WORKING PAPERS, RWP21-033 (Dec. 2021).

7. Joe Barrett, *Some Police Push Back on Bail Reform*, WALL STREET JOURNAL, <https://www.wsj.com/articles/some-police-push-back-on-bail-reform-citing-wave-of-killings-11626441851>, (last updated July 16, 2021, 11:35 AM).

8. Jared Trujillo & Simon McCormack, *Why We Can't Go Backwards on Bail Reform*, NYCLU (Jan. 13, 2022), <https://www.nyclu.org/en/news/why-we-cant-go-backwards-bail-reform>.

9. *Id.*

because they cannot afford to pay their bail.¹⁰ This translates to hundreds of thousands of people each day losing their jobs, housing, families, and well-being who are legally presumed innocent.¹¹

This article is a look back at what we have learned in the current bail reform movement. Part I discusses the evolution of the current bail reform movement, illustrating how our current policies and practices have veered from the original iteration of bail.¹² Part II looks at how bail works in practice in most places around the United States.¹³ This section will explore the use of money bail as well as non-financial conditions of release and how alternatives to money bail may be an avenue for reform as well as a cautionary tale.¹⁴ Part III summarizes the research that has been done on the harms of cash bail and its collateral consequences.¹⁵ The constitutional implications, racial bias, burgeoning jail populations as well as individual and community impact will be discussed.¹⁶ Part IV gives an overview of bail reform policies that have been enacted in various jurisdictions around the country and discusses the implementation of the reforms.¹⁷ This section also examines the counter bail reform movement and the efforts undertaken by law enforcement, political forces, and the media to undermine bail reform efforts.¹⁸ In addition, the research data on the impact of bail reform will be outlined, arguing that bail reform opposition arguments are not grounded in the research.¹⁹ Finally, Part V offers policy implications derived from the research and observations about reform efforts thus far.²⁰ This section suggests that the way forward for bail reform proponents is to coalesce behind clear directives grounded in the research to achieve the goal of reducing the harms of pretrial detention.²¹

I. HOW WE GOT HERE

Bail reform policies have been implemented in multiple states in various ways across the United States to address the issue of unjust incarceration of legally innocent people simply because they cannot afford bail.²² The current

10. SHIMA BARADARAN BAUGHMAN, *The Bail Book: A Comprehensive Look at Bail in America's Criminal Justice System* 170 (2017).

11. *Id.*

12. *See infra* Part I.

13. *See infra* Part II.

14. *See infra* Part II.

15. *See infra* Part III.

16. *See infra* Part III.

17. *See infra* Part IV.

18. *See infra* Part IV.

19. *See infra* Part IV.

20. *See infra* Part V.

21. *See infra* Part V.

22. Jorgenson & Smith, *supra* note 6, at 12-13.

crisis surrounding pretrial detention has reached a crescendo as a result of the policies and practices arising from the “get tough on crime” politics of the 1980s and 1990s.²³ The United States underwent a substantial transition in the 1970s from a rehabilitation-focused approach to a punitive approach to criminal justice.²⁴ This strategy was applied to choices about pretrial detention as well.²⁵ Courts reacted to this new environment by imposing hefty monetary bonds for pretrial offenders as the politicians and the general public called for “tough on crime” measures.²⁶ A rise in the commercial bail industry concurred with a rise in the use of cash bail.²⁷ State legislators passed laws allowing judges to detain accused people without posting bail.²⁸ Cash bail was employed by courts all around the nation and used as an indirect kind of preventative imprisonment.²⁹ Judges and magistrates who presided over the arraignment addressed the perceived risk to the community by establishing bond at a figure that would often be beyond the means of the offender.³⁰ In addition, the Bail Reform Act of 1984 was passed by the federal government, allowing federal judges to take into account public safety when determining bail and, in many circumstances, allowing for preventive detention.³¹ Jail populations grew as a result.³²

Early iterations of bail were designed to ensure a defendant’s release from custody, consistent with fundamental notions of liberty and based on English

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

24. *Id.*

25. See e.g., Dean A. Dabney, Joshua Page & Volkan Topalli, *American Bail and the Tinting of Criminal Justice*, 56 HOWARD J. OF CRIME AND JUSTICE 397 (2017).

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

27. Dabney, Page, & Topalli, *supra* note 25, at 397.

28. See SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950–1990 54–55 (1993).

29. Criminal Justice Policy Program at Harvard Law School, *Moving Beyond Money: A Primer on Bail Reform* 6 (Oct. 2016) [hereinafter *Moving Beyond Money*]. Preventative detention is the practice of incarcerating a person before trial. Because most state constitutional and legislative schemes provide that all cases, except very few, are bail-eligible, courts set purposely high bail amounts to prevent a person from being released before trial. See Jeffery Fagan & Martin Guggenheim, *Preventive Detention and the Judicial Prediction Of Dangerousness For Juveniles: A Natural Experiment*, 86 J. CRIM. L. & CRIMINOLOGY 415 (1996).

30. See John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. JUST. & CRIMINOLOGY 1, 3–4 (1985).

31. See 18 U.S.C. § 3142 (2008); Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L. J. 490, 492–93, 507 (2018) (“Even after the 1980s reforms, most jurisdictions have “continued to rely on money bail and *sub rosa* detention as a crude mechanism for managing pretrial crime risk”).

32. U.S. Commission of Civil Rights, *The Civil Rights Implications of Cash Bail* (2022) (finding that between 1970 and 2015, there was a 433% increase in the number of individuals who have been detained pre-trial) [hereinafter *Civil Rights Implications*].

traditions.³³ In colonial Massachusetts and Pennsylvania there was a definitive right to bail for non-capital offenses without regard to the identity of the defendant, his character, or the evidence against him.³⁴ However, these early guarantees of pretrial freedom were not specifically enshrined in the United States Constitution.³⁵ Only “[e]xcessive” bail, not pretrial detention, is forbidden by the Eighth Amendment.³⁶ The Supreme Court addressed the question of what constitutes “excessive” bail in the case of *Stack v. Boyle*.³⁷ The defendants in *Stack*, who were Communist Party members, were accused of plotting to break the Smith Act.³⁸ Each defendant was given a \$50,000 bond by the district court, which was far more than the bonds for comparable violent offences.³⁹ The bail, according to the Supreme Court, was unlawful since there was no factual evidence to support the claim that the defendants posed a flight risk.⁴⁰ The Court held that excessive bail was bail that was set at an amount higher than that reasonably calculated to ensure the presence of an accused.⁴¹

After the Supreme Court’s decision in *Stack v. Boyle*, the issue caught the attention of the United States Congress which enacted the Bail Reform Act of 1966.⁴² This law stipulated that everyone charged with breaking a federal law would be freed from jail without having to post a bond, unless the government could show that the defendant was likely to depart the area of the court’s jurisdiction to avoid being prosecuted.⁴³ When deciding whether to release a defendant from custody, the magistrate was not permitted to take into account the possibility that the particular defendant might be dangerous to the public.⁴⁴ Magistrates and judges were compelled to release people accused of breaking federal law under the Bail Reform Act of 1966 without requesting a cash bail unless it was judged from the facts of a particular case

33. June Carbone, *Seeing Through the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 530–31 (1983). See also Matthew J. Hegreness, *America’s Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 920 (2013).

34. WILLIAM H. WHITMORE, A BIBLIOGRAPHICAL SKETCH OF THE LAWS OF MASSACHUSETTS COLONY FROM 1630 TO 1686 AND THE RECORDS OR THE COURT OF ASSISTANTS 37 (1889); Carbone, *supra* note 33, at 531.

35. Charles E. Ares, Anne Rankin & Herbert Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-trial Parole*, 38 N.Y.U. L. REV. 67, 70 (1963).

36. U.S. CONST. amend. VIII.

37. *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

38. *Id.* at 3, 10. The Smith Act was passed to criminalize advocating the overthrow of the United States government. Smith Act of 1940, Pub. L. No. 76-670, 54 Stat. 670 (repealed 1952).

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

40. *Id.* at 5-6.

41. *Id.* at 5.

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

43. *Id.*

44. *Id.*

that further conditions of release were required.⁴⁵ As the tough on crime era came into full swing, the Bail Reform Act of 1984, enacted new bail criteria.⁴⁶ Under this law, courts are now free to consider whether a given defendant might pose a danger to the community should they be released on bail.⁴⁷ In *United States v. Salerno* the Supreme Court rejected a challenge that the Bail Reform Act of 1984 violated the Due Process Clause of the Fifth Amendment and the Excessive Bail Clause of the Eighth Amendment.⁴⁸ The Court's holding expanded the potential purposes of bail from simply assuring the presence of the defendant at trial to include protection of the community.⁴⁹

The states generally have taken a different approach than the federal system, with most states acknowledging a constitutional right to bail in some cases.⁵⁰ Historically most state constitutions included a right to bail calling for a presumption of release for non-capital offenses upon the receipt of sufficient sureties.⁵¹ The state's approach was based on the surety system which prioritized payment upon the defendant's failure to appear rather than payment in advance.⁵² Under this model monetary payment was only required if a person failed to appear.⁵³ The majority of sureties were given by people who knew the defendant personally and were prepared to assume responsibility for seeing that the prisoner appeared in court.⁵⁴ The purpose of this system of bail was to ensure the defendant's appearance in court.⁵⁵ A standard right to bail provision states: "[A]ll persons shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident, or

45. *Id.* at 214-15.

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

47. See *id.* at 1978-79.

48. *United States v. Salerno*, 481 U.S. 739, 748 (1987).

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

50. *Moving Beyond Money*, *supra* note 29, at 9 (listing Georgia, Hawaii, Maryland, Massachusetts, New Hampshire, New York, North Carolina, Virginia, and West Virginia as states that "mirror the language of the U.S. Constitution and only prohibit the use of excessive bail"). See also GA. CONST. art. I, § 1, para. XVII; HAW. CONST. art. I, § 12; MD. CONST., Declaration of Rights, art. 25; MASS. CONST. pt. I, art. XXVI; N.H. CONST. pt. I, art. 33; N.Y. CONST. art. I, § 5; N.C. CONST. art. I, § 27; VA. CONST. art. I, § 9; W. VA. CONST. art. III, § 5. For an example of a typical right-to-bail provision, see CAL. CONST. art. I, § 12 (providing release on bail except for incidents of "[c]apital crimes when the facts are evident or the presumption great").

51. Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 921-23 (2013); Caleb Foote, *The Coming Constitutional Crisis in Bail: I (Bail I)*, 113 U. PA. L. REV. 959, 975 (1956).

52. BAUGHMAN, *supra* note 10, at 167.

53. For a discussion on the historical evolution of money bail, see 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. OF CRIM. L. AND CRIMINOLOGY 701, no. 4, 713-14 (2018).

54. *Id.* at 713-14.

55. Steven R. Schlesinger, *Bail Reform: Protecting the Community and the Accused*, 9 HARV. J. L. & PUB. POL'Y 173 (1986).

the presumption great”⁵⁶ All defendants (except in capital cases) are eligible for release in jurisdictions where courts have construed the word “shall” to entail an absolute right to bail.⁵⁷ In these places, defendants are only held in custody if they are unable to pay the stipulated monetary bond sum.⁵⁸ In other states, the terms “bailable” and “sufficient sureties” have been interpreted to protect the court’s discretion when extending bail, while using the same or essentially comparable terminology.⁵⁹

II. HOW BAIL WORKS

After being detained and placed in custody, a person has their first court appearance, during which a judge or magistrate informs them of their official charges and decides whether to grant them a release without conditions, a release with conditions, or a detention in jail for the duration of their case.⁶⁰ Bail is a financial condition of release and involves the practice of using money or property as a guarantee that someone accused of a crime will appear in court as planned.⁶¹ These decisions are influenced by regional, national, and or municipal rules and regulations, which offer direction on the variables that can be taken into account while determining bail.⁶² Cash bail is not supposed to be used as a method of detaining someone until case resolution.⁶³ However, in many places, cash bail is used as a means of preventative detention under the auspices of community safety concerns.⁶⁴

In addition to the use of money as a condition of release, courts have a collection of other conditions that can be imposed as a condition of a person’s

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

57. *Id.* at 276.

58. *Id.*

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

60. Samantha A. Zottola, Sarah E. Duhart Clarke, & Sarah L. Desmarais, *Bail Reform in the United States: The What, Why, and How of Third Wave Efforts*, Chapter 9, p. 144, Springer Nature Switzerland AG 2022E, Jeglic, C. Calkins (eds.), *Handbook of Issues in Criminal Justice Reform in the United States*, https://doi.org/10.1007/978-3-030-77565-0_9.

61. *Id.*

62. *Id.*

63. *Stack*, 342 U.S. at 5 (noting a bail amount that is “higher than an amount reasonably calculated to” ensure the accused’s presence in court is “excessive.”).

64. *Moving Beyond Money*, *supra* note 29. Preventative detention is the practice of incarcerating a person before trial. Because most state constitutional and legislative schemes provide that all cases, except very few, are bail-eligible, courts set purposely high bail amounts to prevent a person from being released before trial. *See* Fagan & Guggenheim, *supra* note 29.

pretrial release from custody.⁶⁵ For example, electronic monitoring has become an increasingly popular alternative to pretrial incarceration.⁶⁶ Pretrial defendants are required to wear an ankle bracelet with a GPS monitor around-the-clock as part of the majority of these systems.⁶⁷ These surveillance measures can be imposed as a type of house arrest requiring defendants to obtain permission before leaving the house or allowing for certain preapproved movement throughout the day.⁶⁸ While many view electronic monitoring as a beneficial alternative to incarceration, the practice comes with a number of important limitations.⁶⁹ First, data is limited, but electronic monitoring has not been proven to impact failure to appear or rearrest rates compared to release without the requirement.⁷⁰ Second, the use of electronic monitoring is conditioned on many arduous requirements, including the right of pretrial services monitors to search the defendant's house without a warrant, limits on where a person can live and who they can live with, restrictions on when a person can leave home, even in the case of an emergency, and fees charged to the defendant to use the device.⁷¹ Third, violation of the conditions of the electronic monitoring release can result in incarceration often without due process or a hearing on the alleged violations.⁷² As a result of these issues, researchers caution that electronic monitoring be used only in cases where a heightened level of supervision is necessary.⁷³

Pretrial monitoring, also known as pretrial supervision, is the practice of imposing terms and conditions on a defendant as a condition of release.⁷⁴ The particulars of how this manifests itself can differ significantly between

65. Muhammad Sardar, *Give Me Liberty or Give Me Alternatives*, 84 BROOKLYN L. REV. 1421, no. 4, 1424 (2019).

66. *Id.*

67. James Kilgore, *Electronic Monitoring Is Not the Answer: Critical Reflections on a Flawed Alternative*, URBANA-CHAMPAIGN INDEP. MEDIA CTR, 7 (2015), <https://centerfor-mediajustice.org/wp-content/uploads/2015/10/EM-Report-Kilgore-final-draft-10-4-15.pdf> [<https://perma.cc/7CMA-UC4R>].

68. *Id.*

69. Marie VanNostrand, Kenneth J. Rose & Kimberly Weobrecht, *State of the Science of Pretrial Release Recommendations and Supervision*, PRETRIAL JUST. INST., 27 (2011), <http://www.ajc.state.ak.us/acjc/bail%20pretrial%20release/sciencepretrial.pdf> [<https://perma.cc/ZY2S-WRQG>]; Kilgore, *supra* note 67, at 7.

70. *Id.* See also Karla Dhungana Sainju, ET AL., *Electronic Monitoring for Pretrial Release: Assessing the Impact*, FEDERAL PROBATION, 4 (2018) (reporting some improvement in failure to appear rates).

71. Kilgore, *supra* note 67, at 7; Fines and Fees Justice Center, *Electronic Monitoring Fees A Fifty. State Survey of the Costs Assessed to People on E-Supervision* (Sept. 2022), <https://finesandfeesjusticecenter.org/content/uploads/2022/09/FFJC-Electronic-Monitoring-Fees-Survey-2022.pdf>.

72. Kilgore, *supra* note 67, at 7. See also *Moving Beyond Money* *supra* note 29, at 17.

73. Kilgore, *supra* note 67, at 15. See also *Moving Beyond Money*, *supra* note 29, at 6.

74. Christopher T. Lowenkamp & Marie VanNostrand, *Exploring the Impact of Supervision on Pretrial Outcomes*, THE ARNOLD FOUND. (Nov. 2013), http://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_Supervision_FNL.pdf; Evan Mintz, *What Works and What Doesn't in Pretrial Supervision*, ARNOLD VENTURES (Nov. 19, 2020), <https://www.arnoldventures.org/stories/what-works-and-what-doesnt-in-pretrial-supervision>.

jurisdictions or even case to case.⁷⁵ Conditions imposed as part of a pretrial supervision program can include regular contact with a pretrial supervision officer, drug screening or treatment, mental health treatment, court attendance reminders, and other measures.⁷⁶ Because of the varying approaches and conditions to pretrial release supervision, it is difficult to make comprehensive observations about the effectiveness of these programs.⁷⁷ However, research shows that certain pretrial supervision monitoring – that is designed to assist the defendant in making court appearances – tends to support that goal.⁷⁸ Simple text message reminders to help defendants keep track of court dates has shown great promise as a pretrial release intervention.⁷⁹

As discussed above, the original concept was a mechanism to ensure that a defendant would return to court to address the charges filed against them.⁸⁰ As time passed, the idea of bail evolved into a tool that could be used to protect the public from future criminal activity.⁸¹ This change in the way that bail is used has created some confusion and disagreement about the purpose of bail reform.⁸² Because there is no agreement on the purpose of bail, it can be difficult to reach a consensus on the purpose of bail reform.⁸³ Most commonly, reform efforts tend to focus on one or more of the following goals: to reduce or eliminate wealth-based detention, reduce generally the harms of pretrial detention, correct racial injustice of pretrial detention, and or to control the cost of pretrial detention.⁸⁴ Understanding the most pressing problems of pretrial detention practices can help guide policymakers toward the goal of bail reform endeavors.

75. Lowenkamp & VanNostrand, *supra* note 74; Mintz, *supra* note 74.

76. Ross Hatton & Jessica Smith, *Research on The Effectiveness Of Pretrial Support And Supervision Services: A Guide For Pretrial Services Programs*, U. N.C. SCH. GOV'T CRIM. JUST. INNOVATION LAB (July 2021), <https://cjl.sog.unc.edu/wp-content/uploads/sites/19452/2020/05/Research-on-the-Effectiveness-of-Pretrial-Support-Supervision-Services-5.28.2020.pdf>.

77. Mintz, *supra* note 74.

78. *See e.g.*, Lowenkamp & VanNostrand, *supra* note 74.

79. Hatton & Smith, *supra* note 76.

80. *Stack*, 342 US at 5.

81. *Salerno*, 481 U.S. at 748.

82. Zotolla, Clarke, & Desmarais, *supra* note 60, at 147.

83. *See* WALKER, *supra* note 28, at 71–72.

84. MALCOLM M. FEELEY, *COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL* (2013); Rachel Smith, *Condemned to Repeat History? Why the Last Movement for Bail Reform Failed, and How This One Can Succeed*, XXV GEO. J. POVERTY L. & POL'Y 451, no. 3, 469, 471 (2018).

III. THE PROBLEM OF PRETRIAL DETENTION

Due Process

In a nation that proudly boasts of its freedoms, the right to be free from government detention unless you have been proven guilty beyond a reasonable doubt of a crime is one honored more in rhetoric than reality. In theory, the right to freedom before conviction allows for the unimpeded preparation of a defense and works to preclude punishment prior to conviction.⁸⁵ Pretrial detention is inconsistent with due process because it constitutes punishment before conviction.⁸⁶ In both theory and practice, pretrial detention is the functional equivalent of punishment – detainees are held in the same place and manner as those serving sentences after conviction.⁸⁷ Detention is a serious deprivation of liberty and “in a liberal republic, the deprivation of a person’s liberty requires robust justification and process.”⁸⁸ When a court sets a cash bail amount that a person cannot afford to pay, it is the functional equivalent of an order of detention.⁸⁹ In many jurisdictions around the country, the use of cash bail to prevent a person’s release is a common practice.⁹⁰ The practice of using cash bail in this way is not accompanied by any of the due process safeguards that other detention orders are subjected to.⁹¹

Equal Protection - Racial Disparity

Defendants of color are overrepresented at all stages of the criminal justice system, including the pretrial detention phase.⁹² While reducing the racial disparity in pretrial incarceration has been a stated goal of some pretrial detention reforms, the problem persists.⁹³ Recent data from New Jersey and Kentucky demonstrate that while some changes have contributed to the

85. *Stack*, 342 U.S. at 7.

86. Sandra G. Mayson, *Detention by Any Other Name*, 69 DUKE L.J. 1643 (2019-2020). See also Laura I. Appleman, *Justice in The Shadowlands: Pretrial Detention, Punishment and the Sixth Amendment*, 69 WASHINGTON & LEE L. REV. 1297, no. 3 (2012) (arguing pretrial detention as currently practiced violates the Sixth Amendment right to trial by jury).

87. Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 368 (1990).

88. Mayson, *supra* note 86, at 1655 (citing *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (“Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects”).

89. *Id.*

90. *Moving Beyond Money*, *supra* note 29, at 6.

91. *Id.*

92. Wendy Sawyer, *How Race Impacts Who is Detained Pretrial*, THE PRISON POL’Y INITIATIVE (Oct. 9, 2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/#:~:text=Median%20bond%20amounts%2C%20when%20compared,bond%20set%20for%20white%20defendants.

93. *Id.*

reduction of pretrial populations, they have had little to no effect on the elimination of racial inequities.⁹⁴ The Bureau of Justice Statistics reports that as of 2021, about forty-nine percent of persons in local jails were white, thirty-five percent were black, and fourteen percent were Hispanic, American Indians and Alaska Natives. Asians, Native Hawaiians, and Other Pacific Islanders.⁹⁵ Comparing the percentage of the total U.S. population to the total jail population, Black and Hispanic defendants were overrepresented in the pretrial jail population.⁹⁶ Disparities have been noted at various points in the bail setting process.⁹⁷ Racial minorities are disadvantaged compared to white defendants both in decisions on whether to grant bail or detain pretrial and the types and amount of bail decisions.⁹⁸ Data also shows a pattern of disadvantage for Hispanic people through all phases of the pretrial release process.⁹⁹ Hispanic defendants were more likely to be denied bail, more likely to have to pay bail to gain release, required to pay higher amounts of bail, and more likely to be held on bail.¹⁰⁰ Black defendants were sixty-six percent more likely to be detained before trial compared to white defendants and Hispanic defendants who were ninety-one percent more likely to be detained.¹⁰¹ Hispanics were also thirty-nine percent more likely to have a financial consequence imposed for pretrial release than white counterparts.¹⁰² These disparities are exacerbated through the sentencing phase of a case and may explain some of the disparity in sentencing outcomes.¹⁰³ As will be discussed below, the decision to detain or release has significant consequences for quality of life and case outcomes.¹⁰⁴

Equal Protection – Wealth

The use of cash bail implicates the due process and equal protection clause of the Fourteenth Amendment because it disproportionately

94. *Id.*

95. Bureau of Justice Statistics, *Jail Inmates* (Dec. 2022), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/ji21st_sumB.pdf.

96. *Id.*

97. Traci Schlesinger, *Racial and Ethnic Disparity In Pretrial Criminal Processing*, *Justice Quarterly*, 22:2, 170-192 (2005).

98. *Id.*

99. *Id.*

100. Robert Crutchfield, April Fernandes, & Jorge Martinez, *Racial and Ethnic Disparity and Criminal Justice: How Much Is Too Much?*, 100 *J. CRIM. L. & CRIMINOLOGY* 903, no. 3, 925 (2010).

101. Jessica Eaglin & Danyelle Solomon, *Reducing Racial and Ethnic Disparities In Jails*, BRENNAN CTR. FOR JUST. AT N.Y. U. SCH. OF L. (2015), <https://www.brennancenter.org/our-work/policy-solutions/reducing-racial-and-ethnic-disparities-jails>.

102. *Id.*

103. See Emily Leslie & Nolan Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 *J. OF L. & ECON.* 529, 530-31 (Aug. 2017).

104. *Id.*

disadvantages low-income offenders.¹⁰⁵ Because they lack the funds to pay the cash bond, people who are legally presumed to be innocent and who are qualified for release are kept behind bars because they cannot afford to pay their way out.¹⁰⁶ Furthermore, the terms of monetary bail are frequently established without considering a person's capacity to pay in order to obtain release.¹⁰⁷ Data from 2015 showed that thirty-eight percent of criminal defendants were imprisoned throughout the entire pretrial term, and ninety percent of those detainees were held in jail solely because they were unable to pay to make bail.¹⁰⁸ Data from across the country continues to demonstrate that people incarcerated pretrial were not there because of public safety concerns or as a flight risk, but only because they could not afford to pay bail.¹⁰⁹

Collateral Consequences

The negative impact of incarcerating people in jail because they cannot afford to post a bond can be seen in several areas. When a person is incarcerated because they cannot pay a cash bond, employment, housing, and parental rights are jeopardized.¹¹⁰ Missing 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.¹¹¹ This in turn impedes economic success and decreases financial stability upon release.¹¹² Detention, even for a short period of time, causes job loss for many, setting in motion a domino effect leading to loss of housing,

105. *Moving Beyond Money*, *supra* note 29 at 8.

106. *Id.*

107. See, e.g., Léon Digard and Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, VERA INST. OF JUST. (Apr. 2019); Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J. of L. Econ. & Org. 511, no. 4 (2018).

108. Van Brunt & Bowman, *supra* note 53, at 740-41.

109. See e.g., Paul Heaton, Sandra Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713 (2017); Jon Wool, Alison Shih, and Melody Chang, *Paid in Full: A Plan to End Money Injustice in New Orleans*, VERA INST. (June 2019).

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

111. See e.g., Nick Pinto, *The Bail Trap*, N.Y. TIMES (Aug. 13, 2015), <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html>; Shima Baughman, *Costs of Pretrial Detention*, 97 BOS. U. L. REV. 1 (2017).

112. See, e.g., Stevenson, *supra* note 107, at 513; Will Dobbie, Jacob Goldin, & Crystal Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, NBER WORKING PAPER (Aug. 2016); Heaton, Mayson, & Stevenson, *supra* note 109, at 722.

transportation, and other necessities for the defendant and their family.¹¹³ An inability to post a bond resulting in pretrial detention correlates with an increase in failure-to-appear rates.¹¹⁴ Research also shows a connection between recidivism rates and pretrial detention.¹¹⁵ One study revealed that detention for as little as three or four days, compared to similarly situated defendants who were released within one day, correlated to a thirty-nine percent increase in pretrial criminal activity.¹¹⁶ Studies show that those who are incarcerated pretrial face harsher case sentencing outcomes.¹¹⁷ Pretrial incarceration has been shown to lead to a thirteen percent increase in conviction rates and a forty-two percent increase (124 days) in the length of incarceration sentence.¹¹⁸ The rate of infectious disease among people in jail is at least double that in the population at large.¹¹⁹ Mental and physical health concerns, such as anxiety and depression, have long lasting and serious consequences.¹²⁰ These pressures lead to those who are detained pretrial opting to plead guilty rather than go to trial.¹²¹ Researchers have discovered that pretrial detention can result in reducing detainees' prospects in the formal labor market three to four years after the bail hearing, whereas pretrial release was found to increase the probability of employment by almost twenty-seven

113. *Id.*

114. Christopher T. Lowenkamp, Marie VanNonstrand, & Alexander Holsinger, *The Hidden Costs Of Pretrial Detention*, 3, THE ARNOLD FOUND. (2013).

115. *Id.* at 19.

116. *Id.* Follow-up studies showed that these effects in the data after any time in pre-trial detention; see Christopher Lowenkamp, *The Hidden Costs of Pretrial Detention Revisited*, CORE CORRECTIONAL SOLUTIONS (Mar. 21, 2022) <https://craftmediabucket.s3.amazonaws.com/uploads/HiddenCosts.pdf>.

117. Stevenson, *supra* note 107, at 511.

118. *Id.*

119. Robert T. Trotter, ET. AL., *Health Disparities And Con- Verging Epidemics In Jail Populations: Protocol For A Mixed-Methods Study*, JMIR RESEARCH PROTOCOLS, 7(10), e10337 (2018). See also Michele Deitch, Alycia Welch, William Bucknall & Destiny Moreno, *COVID and Corrections: A Profile of COVID Deaths in Custody in Texas*, LYNDON B. JOHNSON SCH. OF PUB. AFF., U. OF TEX. AT AUSTIN (2020) (<https://repositories.lib.utexas.edu/bitstream/handle/2152/83635/Profile%20of%20COVID%20deaths%20in%20custody.pdf?sequence=6&isAllowed=y>) (discussing, a recent report showing that people in pretrial detention accounted for the majority of COVID-19 deaths in Texas county jails in 2020.); *Medical Problems of State and Federal Prisoners and Jail Inmates*, BUREAU OF JUST. STAT. (Feb. 2013) (reporting that HIV rates for jail populations are five times higher than the general public).

120. Tracey Meares and Arthur Rizer, *The 'Radical' Notion of the Presumption of Innocence*, SQUARE ONE PROJECT (May 2020). The case of Kalief Browder is often cited as an example of the physical and emotional toll of pretrial detention. Browder, a juvenile, who was incarcerated at Rikers for three years because he could not afford his bond, committed suicide shortly after his release. Jennifer Gonnerman, *Before the Law*, NEW YORKER (Oct. 6, 2014), <http://www.newyorker.com/magazine/2014/10/06/before-the-law>; Peter Holley, *Kalief Browder Hanged Himself After Jail Destroyed Him. Then 'a Broken Heart' Killed His Mother*, WASH. POST (Nov. 18, 2022), <https://www.washingtonpost.com/news/post-nation/wp/2016/10/18/kalief-browder-hanged-himself-after-jail-destroyed-him-then-a-broken-heart-killed-his-mother>.

121. Stevenson, *supra* note 107, at 511.

percent.¹²² Even if a defendant is acquitted, being detained while awaiting trial can harm a person's reputation and interpersonal connections.¹²³

Commercial Bail Industry

Bail-bonds companies are frequently used by people and families who lack the resources to pay for their release.¹²⁴ These people and their families pay a non-refundable percentage of the whole bail sum to a bail-bonds company, which then provides the court with a written bond for the full amount with the assurance that it will be paid if the defendant fails to show up for court.¹²⁵ Thus, if a defendant has the resources to pay the stated bond amount, they do not need the services of a bonds company.¹²⁶ The defendant pays the bond amount directly to the court.¹²⁷ When the defendant appears in court to resolve the case the bail money is returned by the court.¹²⁸ However, if they do not have the money to pay the bond, in order to secure pretrial release, they will need to pay a portion of the bond to a bondsperson.¹²⁹ The portion paid to the bondsperson is not refundable.¹³⁰ The bonds company signs a promise to pay the full amount to the court if the person fails to appear.¹³¹ In this system, a person's freedom is contingent on whether there is a private for-profit company that will take their case and fund their release.¹³² Defendants and their families from lower socioeconomic circumstances are more likely to need the private bail industry and are more likely to accrue debt long after a case is resolved regardless of whether there is a conviction.¹³³ The existence of cash bail is the basis for the commercial bail industry's business model – the higher the cash bailset by the court, the more money the commercial bondsman makes.¹³⁴ The industry as a whole is thought to bring in around two billion dollars a year as a result of the cash bail policies in the United States.¹³⁵

122. Dobbie, Goldin, & Yang, *supra* note 112, at 4.

123. Meares & Rizer, *supra* note 120 at 20.

124. *Civil Rights Implications*, *supra* note 32, at 71.

125. See Wendy Sawyer, *All Profit, No Risk: How the Bail Industry Exploits the Legal System*, PRISON POLICY INITIATIVE (Oct. 2022), <https://www.prisonpolicy.org/reports/bail.html> (discussing research suggesting that the failure of the bail bonds company to pay in the event that a defendant fails to return to court is systemic.)

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. Sawyer, *supra* note 125 at 1.

131. *Id.*

132. *Id.*

133. *Id.*

134. Mary A. Toborg, *Bail Bondsmen and Criminal Courts*, 8 JUST. SYS. J. 141 (1983).

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

The scope of political influence wielded by the commercial bail bonds industry has a significant impact on how bail decisions are made in the United States.¹³⁶ During the mid-1990s, commercial bail bond organizations, including the National Association of Bail Insurance Companies and various state bail organizations, worked with the American Legislative Exchange Council (“ALEC”) to create an initiative designed to eradicate pretrial services agencies and release on personal recognizance bond to promote the interests of the commercial surety industry.¹³⁷ The commercial bail business has a strong lobby that works against any bail reform measures, frequently appearing at state legislative sessions to publicly oppose plans to reform cash bail policies and practices.¹³⁸ The industry has also petitioned prosecutors, legislators, and sheriff’s offices in opposition to bail reform.¹³⁹ Between 2009 and 2017, the commercial bail industry made 1.7 million dollars in political contributions to state campaigns with almost 1.8 million going directly to candidates for governor, legislative office, district attorney, and attorney general.¹⁴⁰ An organized group of commercial bail insurers spent over seven million dollars to oppose bail reform in California and also led significant campaigns against reforms in Maryland, New Mexico, Florida, Texas, Colorado, New York, Ohio, and other states.¹⁴¹

Pretrial Detention and Mass Incarceration

The data consistently shows that not only does the United States have the highest incarceration rate in the world, but every state incarcerates more

136. Shima Baughman, Lauren Boone, Nathan Jackson, *Reforming State Bail Reform*, 74 S.M.U.L. REV. 447 (2021).

137. Thanithia Billings, *Private Interest, Public Sphere: Eliminating the Use of Commercial Bail Bondsmen In The Criminal Justice System*, 57 Bos. Coll. L. Rev. 1337, 1353 (2016).

138. 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).

139. Nat’l Task Force of Fines, Fees, & Bail Pracs., *Bail Reform: A Practical Guide Based On Research and Experience*, 72–73 (2019).

140. 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 (January 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; *Denton County: Dallas’ top prosecutor Craig Watkins owes for past bail bonds*, DALLAS MORNING NEWS (August 4, 2011), <https://www.dallasnews.com/news/2011/08/05/denton-county-dallas...0still%20owes%20Denton%20County,were%20not%20paid%20on%20time> (detailing \$70,000 in political contributions to the former district attorney for Dallas County).

141. Alwyn Scott, *U.S. Bail-Bond Insurers Spend Big to Keep Defendants Paying*, U.S. LEGAL NEWS (March 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>; Nick Evans, *Opponents line up against bail reform as cash bail gets cleared for the ballot*, OH. 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/>.

people per capita than virtually any independent democracy on earth.¹⁴² The prison population began to grow in the 1970s, when politicians from both parties adopted tough on crime rhetoric to push increasingly punitive policies.¹⁴³ Nixon perpetuated this trend, declaring a “war on drugs” and justifying it with speeches about being “tough on crime.”¹⁴⁴ Since that time, there has been a 500% increase in incarceration rates.¹⁴⁵ While this explosion in incarceration rates is not solely attributable to pretrial detention policies, bail determinations are a primary driver of mass incarceration.¹⁴⁶ Data reported by the Bureau of Justice Statistics shows that seventy-one percent of people in jail in 2021 had not been convicted and were awaiting court action on a charge.¹⁴⁷ Nearly half a million people are incarcerated without having been convicted of the crimes for which they are being held.¹⁴⁸ This represents the highest rate of pretrial detention in the world; for example, at approximately 150 people per 100,000 population, the U.S.’s pretrial detention rate is fifty percent higher than Russia, a distant second.¹⁴⁹ These practices contribute to the overcrowding of jails and create unsustainable corrections budgets.¹⁵⁰

IV. REFORM EFFORTS AND THE BACKLASH

Researchers, social scientists, journalists, and activists have consistently and widely disseminated well-documented information about the ills of pretrial detention.¹⁵¹ In many states and towns, new laws and court procedures have been suggested and adopted.¹⁵² For example, in New York the legislature passed a law ending the use of cash bail for most

142. Emily Widra and Tiana Herring, *States of Incarceration the Global Context*, PRISON POL’Y INITIATIVE (Sept. 2021), https://www.prisonpolicy.org/global/2021.html?gclid=Cj0KCQjw0tKiBhC6ARIsAAOXutk0s0Orcw0XSrQmYmOAdFlmK-LjkOX7vGfkUjR-lWD7y7AkygfH-oaAhhEALw_wcB.

143. HINTON, *supra* note 23, 165–66.

144. James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 20, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration>.

145. *Growth in Mass Incarceration*, THE SENTENCING PROJECT, <https://www.sentencingproject.org/research/>.

146. *Id.*

147. Bureau of Justice Statistics, *supra* note 95.

148. Sandra Susan Smith, Tom Shirley, Damarcus Bell, & Isabella Jorgensen, *Mass Incarceration and Criminalization*, SOC. POL’Y DATA LAB (2021), <https://github.com/vera-institute/incarceration-trends>.

149. *Id.*

150. Nick Pinto, *The Bail Trap*, N.Y. TIMES (Aug. 13, 2015), <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html> (“Disappearing into the machinery of the justice system separates family members, interrupts work and jeopardizes housing.”). *See also* Quenton King, *Overcrowded and Overburdened: West Virginia Struggle to Pay Regional Jail Bills*, W. VA. CTR. ON BUDGET & POL’Y (January 2021), <https://wvpolicy.org/wp-content/uploads/2021/02/WVCBVP-Jail-Cost-Brief-final.pdf>.

151. *See generally* Pinto, *supra* note 150.

152. *See generally* The Bail Elimination Act of 2019, S.B. S2101-A, 2019 Sen. (N.Y. 2019); SAFE-T Act, H.B. 3653, 101st Gen. Assemb., Reg. Sess. (Ill. 2021).

misdeemeanors and non-violent felonies, and Illinois banned the use of cash bail.¹⁵³ Legislative reforms have also focused on setting requirements for what judges are permitted to consider when establishing bail, including limitations on when cash bail can be used.¹⁵⁴ Some states have implemented the use of risk assessment tools in making decisions about pretrial release.¹⁵⁵ There has also been an increased reliance on the use of pretrial services as a condition of release in many legislative reform efforts in conjunction with or as an alternative to cash bail.¹⁵⁶ Community leaders across the nation have set up bail funds to assist in paying the cash bail set for individuals who cannot afford it.¹⁵⁷ Legal challenges have been filed to pretrial detention practices in the courts.¹⁵⁸ Politicians, activists, and progressive prosecutors have also worked to enact changes in policy and practice at the local level.¹⁵⁹

The widespread acknowledgment of the harms associated with pretrial detention and the efforts to address the harm created a groundswell of hope that the current wave of bail reform would create significant and lasting changes to the system. Considerable research is available on the impact of

153. *Id.*

154. Timothy Schnacke, *Best Practices in Bond Setting: Colorado's New Pretrial Bail Law*, CTR. FOR LEGAL & EVIDENCE BASED PRAC., 59 (July 3, 2013); *Maine Enacts Significant Bail Reform Law*, ACLU OF ME. (July 1, 2021), <https://www.aclumaine.org/en/press-releases/maine-enacts-significant-bail-reform-law>; Pretrial Release Act Pub. L. No. Senate Bill 1430, 1 (2000); Omnibus Crime Reduction and Sentencing Reform Act of 2010, Pub. L. No. A273, R262, S1154, 39 (2010), https://www.sestatehouse.gov/sess118_2009-2010/bills/1154.htm; Pitcher, *Bail and Pretrial Release Amendments; An Act Concerning Prohibiting the Use of Monetary Bail for Certain Levels of Offenses Except in Certain Circumstances*, Pub. L. No. House Bill 19-1225 (2019), <https://legiscan.com/CO/text/HB1225/2019>; Bail Reform: A Practical Guide Based on Research and Experience; Colin Doyle, Chiraag Bains, and Brook Hopkins, *Bail Reform: A Guide for State and Local Policymakers*, 44-45, CRIM. JUST. POL'Y PROGRAM (2019); An Act Relating to Bail Reform, Pub. L. No. 164 (2018).

155. Megan Russo and Samantha Harvell, *Justice Reinvestment Initiative: Delaware*, URB. INST. (March 2020), https://www.urban.org/sites/default/files/2020/03/27/justice_reinvestment_initiative_jri_delaware.pdf; Eli Mensing and Samantha Harvell, *Justice Reinvestment Initiative: Hawaii*, URB. INST. (Nov. 2020), https://www.urban.org/sites/default/files/2020/03/06/justice_reinvestment_initiative_jri_hawaii.pdf; Amendment to House Bill 3653 (2021), 157; Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 308; *What's Happening in Pre-Trial Justice*, 17-18, PRETRIAL JUST. INST. (January 20, 2021), <https://university.pretrial.org/viewdocument/where-pretrial-improvements-are-hap-2>; S.B. 59, 65th Leg. (M.T. 2017).

156. See Jorgensen & Smith, *supra* note 6, at 4.

157. See National Bail Fund Network, *Directory of Community Bail Funds*, COMM. JUST. EXCH., <https://www.communityjusticeexchange.org/en/nbfn-directory> (last accessed 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, Wisconsin).

158. See *Challenging the Money Bail System*, CIVIL RIGHTS CORPS, <https://civilrightscorps.org/our-work/> (last accessed July 11, 2022).

159. See e.g., Paola Suro, *Cincinnati City Council Oks Motion to Eliminate Cash Bond for Nonviolent Misdemeanors*, WCPO (April 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>; Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 FORDHAM L. REV. 8, 10 (2018).

bail reform efforts, and it reveals positive impacts across several metrics. It is challenging to draw conclusions regarding the overall effects of bail reforms due to the wide variety in the sorts of reforms that have been adopted, the jurisdictions in which they are implemented, and the policy actors that are implementing them.¹⁶⁰ However, several findings have been noted in repeated studies and inform the path forward.¹⁶¹

Contrary to the narrative espoused by those who oppose bail reform studies, bail reform does not increase rearrest rates or impact violent felony arrest rates.¹⁶² At least one study showed a reduction in recidivism rates after bail reform was implemented.¹⁶³ Research has also demonstrated that the use of money bail does not impact failure to appear rates.¹⁶⁴ Studies have also shown a decrease in pretrial jail populations as a result of bail reform implementation.¹⁶⁵ Researchers discovered that shorter average pretrial detention periods and or earlier release from custody after arrest were both outcomes of bail modifications.¹⁶⁶ For example, robust data is available from Harris County, Texas, after a federal lawsuit led to a consent decree. Among other things, the decree requires data collection on pretrial detention practices and calls for a monitor to assess the implementation of these requirements.¹⁶⁷ The data analyzed shows that when the reforms were enacted, the number of people released within two days of initial arrest increased by more than twenty percent, from less than sixty percent in 2016, to over eighty percent

160. Jorgenson & Smith, *supra* note 6, at 25.

161. *Id.*

162. *Id.* at 11 (citing Don Stemen & David Olson, *Dollars and Sense in Cook County: Examining the Impact of General Order 18.8A on Felony Bond Court Decisions, Pretrial Release, and Crime*, LOY. U. CHI. (2020)); Brooker, et. al., *The Jefferson County Bail Project: Impact Study Found Better Cost Effectiveness for Unsecured Recognizance Bonds Over Cash and Surety Bonds*, 18; Glenn A. Grant, *Report to the Governor and the Legislature*, 13 (2018); Melanie Skemer, Cindy Redcross, & Howard Bloom, *Pursuing Pretrial Justice Through an Alternative to Bail: Findings from an Evaluation of New York City's Supervised Release Program*, 57, MDRC (Sept. 2020); Aurelie Ouss & Megan Stevenson, *Does Cash Bail Deter Misconduct?*, 16 (June 20, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335138; Claire M.B. Brooker, *Yakima County, Washington Pretrial Justice System Improvements: Pre- and Post Implementation Analysis*, 6, PRETRIAL JUST. INST. (Nov. 2017), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=cd5b7e4ecc63-dffd-1419-633fed1b64bf&forceDialog=0>.

163. Rene Ropac & Michael Rempel, *Does New York's Bail Reform Law Impact Recidivism? A Quasi-Experimental Test in New York City*, DATA COLLABORATIVE FOR JUST., 14 (March 2023), <https://datacollaborativeforjustice.org/wp-content/uploads/2023/03/RecidivismReport-1.pdf>.

164. Michael R. Jones, *Unsecured Bonds: The Most Effective and Efficient Pretrial Release Option*, U.S. DEP'T. OF JUST. (Oct. 2013), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/unsecured-bonds-most-effective-and-efficient-pretrial-release>.

165. Jorgenson & Smith, *supra* note 6, at 12-13 (referencing studies examining reforms in Kentucky, New Jersey, New York City, and others).

166. *Id.* at 14.

167. *O'Donnell v. Harris Cty.*, No. H-16-1414, 2019 U.S. Dist. LEXIS 202474, at *35 (S.D. Tex. Nov. 21, 2019).

in 2019.¹⁶⁸ Studies have further shown a reduction in the number of guilty findings after changes to bail reform practices.¹⁶⁹

Despite the documented success of bail reform implementation, there has been a rapid and forceful resistance to contemporary efforts to change pretrial custody policies, notwithstanding the attention that has been paid to the harmful impacts of pretrial incarceration and the reform initiatives that have resulted on numerous fronts.¹⁷⁰ The bail reform legislative efforts in New York have received national attention.¹⁷¹ In 2019, the New York legislature passed a law ending the use of cash bail for most misdemeanors and non-violent felonies.¹⁷² The changes went into effect on January 1, 2020.¹⁷³ Politicians and members of the law enforcement community immediately began a campaign against the bail reform legislation, blaming it for increases in violent crime.¹⁷⁴ In April 2020, in response to the public criticism, amendments were passed nullifying portions of the bill by expanding bail eligible offenses.¹⁷⁵ Recently, additional rollbacks of the reform were enacted, removing the requirement that judges impose the least restrictive bail conditions necessary.¹⁷⁶

The Supreme Court in Ohio upheld a finding that bail in a single case was excessive under both the state and federal constitutions.¹⁷⁷ The county prosecutor and state attorney general reacted by seeking a constitutional amendment which would expand the use of money bail.¹⁷⁸ The constitutional

168. Jorgenson & Smith, *supra* note 6 at 14; Brandon L. Garrett & Sandra Guerra Thompson, *Monitoring the Misdemeanor Bail Reform Consent Decree in Harris County, Texas*, 105 *Judicature* 41, 44 (2021).

169. Dobbie, Goldin, & Yang, *supra* note 112, at 203.

170. See e.g., Martin Kaste, *There's A Backlash Brewing Against Bail Reform After The Parade Tragedy In Waukesha*, NPR (Nov. 25, 2021), <https://www.npr.org/2021/11/25/1059019616/theres-a-backlash-brewing-against-bail-reform-after-the-parade-tragedy-in-waukesha>; John L. Micek, *Bail Reformers Are Facing Backlash. Here's What the Facts Say*, PHILA. CAP. STAR (April 7, 2022, 7:19 a.m.); Jamiles Lartey, *New York Tried to Get Rid of Bail Then the Backlash Came*, POLITICO (April 23, 2020, 5:08 a.m.), <https://www.politico.com/news/magazine/2020/04/23/bail-reform-coronavirus-new-york-backlash-148299>. See also Wendy R. Calaway, *Probable Cause Reform as Bail Reform*, 67 *ST. LOUIS U. L.J.* 295, 324 (2023) (examining the rise of the countermovement to bail reform).

171. See generally Jamiles Lartey, *New York Tried to Get Rid of Bail Then the Backlash Came*, POLITICO (April 23, 2020), <https://www.politico.com/news/magazine/2020/04/23/bail-reform-coronavirus-new-york-backlash-148299>.

172. The Bail Elimination Act of 2019, S.B. S2101-A, 2019 Sen. (N.Y. 2019).

173. Lartey, *supra* note 171.

174. *Id.*

175. 2020 Amendments to Bail Reform Law, S.7506-B/A. 9506-B (Part UU).

176. Nick Reisman, *Once Again, New York's Bail Law is Set to Change*, SPECTRUM NEWS ONE (April 28, 2023), <https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2023/04/28/once-again-new-york-s-bail-law-is-set-to-change>.

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

178. Jasmine Styles, *Hamilton County Prosecutor, Ohio AG Call for Bail Reform Constitutional Amendment*, WCPO (March 29, 2020), <https://www.wcpo.com/news/state/state-ohio/hamilton-county-prosecutor-ohio-ag-call-for-bail-reform-constitutional-amendment>; Ohio Sub. H. J. R. No. 2. (proposing to amend Section 9 of Article I of the Ohio Constitution to eliminate the requirement that the amount and

amendment passed and the authority to use money to decide whether someone should stay in jail based on “. . . public safety, including the seriousness of the offense, and a person’s criminal record, the likelihood a person will return to court. . . “ is currently enshrined in the Ohio Constitution.¹⁷⁹ Statutory provisions exist in Ohio, with due process safeguards, that permit a court to incarcerate defendants facing certain charges if the government can prove by “clear and convincing evidence” that the “proof is evident [the accused] committed the [serious offense] with which the accused is charged, * * * that the accused poses a substantial risk of serious physical harm to any person or to the community, and * * * that no release conditions will reasonably assure the safety of that person and the community” are met.¹⁸⁰ This constitutional provision appears to circumvent those statutory requirements and allow for pretrial incarceration based on wealth. Whether this provision will survive challenges based on the United States Constitutional provision and the Supreme Court’s holding in *Stack v. Boyle* remains to be seen.¹⁸¹

The use of wealth-based incarceration by Harris County, Texas, was deemed to be unlawful by the court, which resulted in modification of the bail practices.¹⁸² News reports and an amicus brief to the court opposing the reforms noted the county prosecutor’s objection to the suggested changes that resulted from the case.¹⁸³ The court’s decision described the prosecutor’s objections as “essentially an argument for incarcerating every arrestee and defendant until trial or other disposition.”¹⁸⁴

In addition to political pushback, bail reform efforts have encountered many initiatives and have failed to achieve an impact because the approach taken has not been evidence-based or relied on piecemeal or half measures.¹⁸⁵

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

179. OHIO CONST. art. I, § 9.

180. OHIO REV. CODE § 2937.222(B).

181. *Stack*, 342 U.S. at 5 (finding that a bail amount that is “higher than an amount reasonably calculated to” ensure the accused’s presence in court is “excessive.”).

182. *O’Donnell*, 2019 U.S. Dist. LEXIS 202474, at *17.

183. Amicus Brief of Harris County District Attorney, *O’Donnell v. Harris Cnty.*, 2019 U.S. Dist. LEXIS 202474, Doc. 614 (S.D. Tex. Nov. 21, 2019); Randy Wallace, *DA’s Office Releases 60-Page Report Detailing How Bail Reform Is the Reason Behind Harris Co. Rise in Crime*, FOX (Sept. 2, 2021), <https://www.fox26houston.com/news/das-office-releases-60-page-report-detailing-how-bail-reform-is-the-reason-behind-harris-co-rise-in-crime>.

184. *O’Donnell*, 2019 U.S. Dist. LEXIS 202474, at *49.

185. See Edmund F. McGarrell et al., *Obstacles to Seemingly Simple Reform: A Case Study of Bail Reform, Review of Policy Research*, 9: 433-443 (1990) (discussing the gap between intent and implementation); MALCOM M. FEELY, COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL (2013). See also Wendy R. Calaway, *Judicial Discretion and Bail Reform*, __ UMKC Law Review __ (forthcoming 2023) (discussing impediments to successful bail reform efforts).

For example, in Ohio, after convening a task force to study the bail practices in the state, the Ohio Supreme Court voted to amend the criminal rules governing bail to require that a court release a defendant on the “least restrictive conditions” that, in the discretion of the court, will “reasonably ensure the defendant’s appearance in court, the protection or safety of any person or the community, and that the defendant will not obstruct the criminal justice process.”¹⁸⁶ If the court orders financial conditions of release, those financial conditions shall be related to the defendant’s risk of non-appearance.¹⁸⁷ Any financial conditions shall be in an amount and type which are least costly to the defendant while also sufficient to reasonably assure the defendant’s future appearance in court.¹⁸⁸ The rule changes also included the provision that “Crim. R. 46 continues to entrust to the judicial officer’s sound discretion the setting of particular conditions of release that will be imposed on a particular defendant in a particular case.”¹⁸⁹ Research conducted on bail proceedings before and after the rule change revealed that these amendments had no effect on the frequency of cash bail, the amount of cash bail, or judicial decision making.¹⁹⁰

V A NEW PATH FORWARD

Much can be learned from the various attempts, successes, failures, reactions, and research of bail reform efforts. If the current wave of bail reform is to have a lasting impact on reducing the harms of pretrial detention, the movement needs to coalesce around certain goals and the methods for accomplishing these goals that are informed by research. Multiple directives have emerged from the data which should guide decision-making moving forward.¹⁹¹

End the Use of Cash Bail

Bryan Stevenson famously said that the United States criminal justice system “treats people better if they are rich and guilty than if they are poor and innocent.”¹⁹² No place is this more apparent than our system of wealth-based detention. Money bail allows poor people who are charged with even

186. Supreme Court of Ohio, *Report and Recommendation of the Task Force to Examine the Ohio Bail System*, 15 (July 2019), <https://www.supremecourt.ohio.gov/docs/Publications/bailSys/report.pdf>. [hereinafter *Report and Recommendation of the Task Force to Examine the Ohio Bail System*].

187. *Id.* at 16.

188. *Id.*

189. OHIO CRIM. R. 46. (July 2020) (proposed Staff Notes, July 1, 2020).

190. Wendy R. Calaway, *Judicial Discretion and Bail Reform*, ___ UMKC Law Review ___ (forthcoming 2023).

191. *Report and Recommendation of the Task Force to Examine the Ohio Bail System*, *supra* note 186, at 15.

192. BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 313 (2014).

minor crimes to face lengthy periods of incarceration, while people of means who are accused of the same offenses, or worse, are released simply because they have the funds to buy their freedom.¹⁹³ This system allows the government to extract guilty pleas from people regardless of actual guilt so they can save their jobs, families, and housing.¹⁹⁴ It has created a two tiered system of justice where the rich can experience the presumption of innocence while the poor cannot.¹⁹⁵ The practice creates and exacerbates racial bias in the criminal justice system and is inconsistent with constitutional guarantees of fairness and equal protection.¹⁹⁶ Moreover, using money to decide which defendants should be incarcerated and which should be released fails to accomplish any of its stated goals.¹⁹⁷ It does not result in higher return to court rates and it does not reduce rearrest rates; it is not connected to public safety.¹⁹⁸ The use of cash bail is fundamentally at odds with notions of equal protection, does not increase public safety and is detrimental to society's most vulnerable communities.¹⁹⁹ Future bail reform concerns should focus on eliminating the practice.

The Use of Pretrial Detention Should be the Exception

Even when not based on wealth, pretrial detention is harmful.²⁰⁰ It is incompatible with the presumption of innocence, amounts to punishment before the crime, it causes family separation, joblessness, housing instability, and increases the instances of communicable disease and mental health complications.²⁰¹ The practice of pretrial incarceration makes it more difficult for people to assist in the preparation of their defense to the charges against them, forces guilty pleas, and leads to worse case outcomes.²⁰²

193. See Lorelei Laird, *Court Systems Rethink the Use of Financial Bail, Which Some Say Penalizes the Poor*, AM. B. ASS'N J. (Apr. 2016), http://www.abajournal.com/magazine/article/courtsarerethinking_bail [<https://perma.cc/RK2D-56FB>].

194. Sardar, *supra* note 65, at 1423.

195. Cassie Miller, *The Two-Tiered Justice System: Money Bail in Historical Perspective*, S. POVERTY L. CTR. (June 6, 2017), <https://www.splcenter.org/20170606/two-tieredjustice-system-money-bail-historical-perspective> [<https://perma.cc/R392-XF5M>].

196. Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 JUST. QUARTERLY 170, no. 2, (2005).

197. *Id.* at 170-192.

198. See e.g., Jones, *supra* note 164. See also Pretrial Services Agency for D.C., *Congressional Budget Justification and Performance Budget Request Fiscal Year 2017*, 1, 23 (Feb. 2016) (reporting on Washington D.C. pretrial practices where almost all pretrial arrestees are released without financial consequence).

199. See Miller, *supra* note 195.

200. *Id.*

201. *Id.*

202. See e.g., Sardar, *supra* note 65, at 1423.

Incarceration before conviction, if used at all, should be a rare exception.²⁰³ If the hope of pretrial incarceration is to ensure appearance in court and protect the public, there are a myriad of alternatives that have been shown to do this without a deleterious impact and in a much more cost-effective manner.²⁰⁴ If pretrial incarceration is the only option, pretrial incarceration should only proceed with robust due process protections.²⁰⁵ The cases for which pretrial incarceration is an option should be limited to a specific small list of violent felonies.²⁰⁶ The accused should be entitled to a hearing within days of arrest, the government should be required to prove the person committed the crime clear and convincing evidence, and that no other combination of conditions could protect the public.²⁰⁷ Further, courts should be required to make specific findings with reference to the evidence in the record to justify a detention decision.²⁰⁸ These hearings should be accompanied by accelerated appellate review.²⁰⁹

Reduce Arrests

Reliance on suggestions to guide judicial discretion in making bail determinations has largely been unsuccessful as a bail reform approach.²¹⁰ A more effective bail reform intervention focuses on reducing the number of people presented to a court for a bail decision.²¹¹ Reducing the number of

203. Richard L. Lippke, *Preventive Pre-Trial Detention Without Punishment*, RES PUBLICA, 11 (2014).

204. See e.g., Lowenkamp & VanNostand, *supra* note 74, at 10.

205. See, e.g., Lippke, *supra* note 203, at 10 (arguing that detention on the basis of dangerousness should be permitted only if the defendant is likely to commit a serious crime in the pretrial phase, no less arduous means can prevent it, and there is “substantial evidence” of the defendant’s guilt on a serious charge); Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 1953 (2005) (arguing that the state should compensate detained defendants for their lost liberty); Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J., 490, 537 (2018) (arguing that pretrial detention for dangerousness is not justified unless the state could detain an equally dangerous person not accused of any crime); Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, and the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297 (2012).

206. For a discussion on separating flight risk analysis from dangerousness considerations, see Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 B.Y.U. L. REV. 837, 871 (2016).

207. See e.g., OHIO REV. CODE § 2937.222(A).

208. Brandon L. Garrett, *Models of Bail Reform*, 74 FLA. L. REV. 879, 915 (2022).

209. *Id.* at 893.

210. Lauryn P. Gouldin, *Reforming Pretrial Decision-Making*, 20 WAKE FOREST L. REV. 857, 861 (2020); Nicole M. Myers, *Shifting Risk: Bail and the Use of Sureties*, 21 CURRENT ISSUES IN CRIM. J. 127, 128 (2009); Van Brunt & Bowman, *supra* note 53, at 701, 724. See also Wendy R. Calaway, *Judicial Discretion and Bail Reform*, ___ UMKC ___ (forthcoming 2023) (reporting data showing that rule changes to effect bail outcomes premised on judicial discretion had no impact on the frequency or use of cash bail).

211. See Wendy R. Calaway, *Probable Cause Reform as Bail Reform*, 67 ST. LOUIS U. L.J. 295 (forthcoming 2023) (Reporting data showing that the majority of arrests lead to case dismissals and arguing that the standard of probable cause that a crime should be committed should be disconnected from the power to arrest and that arrest standards should be related to public safety concerns).

arrests which require a judicial hearing tackles the issues concerning the number of cases requiring a bail hearing, judicial perceptions, and bias in assessments and political concerns.²¹² Probable cause that a crime was committed does not necessarily create the need for an arrest.²¹³ Citations in lieu of arrest policies have been employed in select jurisdictions throughout the country and highlighted for their cost savings.²¹⁴ This also affords law enforcement the flexibility to focus their resources on issues directly related to public safety. It is not in the interests of society or the individual to make arrests and to bring about the accompanying destabilization that comes with arrests for individuals who have not demonstrated a specific threat to public safety.²¹⁵ Implementing a needs-based approach for making arrest decisions can help achieve the goal of reducing harms of pretrial detention. Bail reform efforts should focus on policy and legislative changes that would limit the number of people arrested.

Education

For the current bail reform movement to live up to the ideals it set out to achieve, advocates need to leverage the data on the successes that bail reform has achieved and to counter the false narrative that bail reform undermines public safety.²¹⁶ Engaging with community members and policymakers to discuss the evidence demonstrating benefits of bail reform and how it can

212. Russell M. Gold and Ronald F. Wright, *The Political Patterns of Bail Reform*, 55 Wake Forest L. Rev. 743, 746 (2020).

213. *United States v. Watson*, 423 U.S. 411, 428–29 (1976) (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.”).

214. See, e.g., Cal. Penal Code § 853.6(a)(1); *Final Report of the President’s Task Force on 21st Century Policing*, OFFICE OF JUSTICE PROGRAMS, 43 (2015), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/final-report-presidents-task-force-21st-century-policing>; ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE, STANDARD 10-1.3 (3d ed. 2007) (use of citations is widely embraced as a law enforcement tool). International Association of Chiefs of Police, *Citation in Lieu of Arrest: Examining Law Enforcement’s Use of Citation Across the United States* (2016), <https://www.theiacp.org/projects/citation-in-lieu-of-arrest>; CHARLESTON COUNTY CRIMINAL JUSTICE COORDINATING COUNCIL (South Carolina), MID-YEAR REPORT, 1 (2017) (discussing increased use of “cite and release” practices in that jurisdiction). See also Henry F. Fradella and James A. Purdon, *Citation in Lieu of Arrests*, Handbook on Pretrial Justice, Routledge (2021).

215. *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 N.W. U. L. REV. 1119, 1166 (2008).

216. See generally *Report and Recommendation of the Task Force to Examine the Ohio Bail System*, *supra* note 187.

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lead to a fairer and more just criminal justice system can help educate stakeholders, voters, and representatives.