

The Civil Rights Implications of Cash Bail



BRIEFING
REPORT



JANUARY 2022

U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.
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The Civil Rights Implications of Cash Bail

Briefing Before

The U.S. Commission on Civil Rights

Held in Washington, D.C.

Briefing Report

January 2022



UNITED STATES COMMISSION ON CIVIL RIGHTS

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Letter of Transmittal

January 20, 2022

President Joseph R. Biden, Jr.
Vice President Kamala D. Harris
Speaker of the House Nancy Pelosi

On behalf of the United States Commission on Civil Rights (“the Commission”), I am pleased to transmit our briefing report, *The Civil Rights Implications of Cash Bail*. The report is also available in full on the Commission’s website at www.usccr.gov.

This report examines current approaches towards reform in the pre-trial and bail system within our criminal justice system. The Commission held a virtual briefing on February 26, 2021 and collected testimony from multiple panels examining the foundations and current state of the cash bail system, as well as a number of reforms at the state and local level meant to address current challenges. Panelists included members of state judiciaries, state and local law enforcement, public policy experts, bill reform advocates, civil rights and criminal justice scholars, and legal experts.

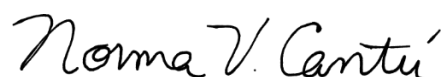
Overall, the report shows that there was a 433 percent increase in the number of individuals that have been detained pre-trial between 1970 and 2015, with pretrial detainees representing a larger proportion of the total incarcerated population in that same amount of time. Of those held prior to trial, there were stark disparities with regards to race (i.e., Black and Latinx individuals have higher rates of pretrial detention and have financial conditions of release imposed much more often than other demographic groups) and gender (i.e., males are less likely to be granted non-financial release and consistently have higher bails set than women); additionally, disparities exists between individuals of differing socioeconomic status, and data show that more than 60 percent of inmates are detained prior to trial due to an inability to afford posting bail. Moreover, pretrial detention presents a number of negative consequences for the detainee population, including an increased likelihood of being convicted, lack of access to housing, detrimental effects on employment status, and increased recidivism. State and local jurisdictions have taken a number of steps to address these concerns, such as applying the use of risk assessment tools, wider collection of demographic data, implementing diversion programs, utilizing “compassionate release” policies, and other measures that are emphasized in the report.

In terms of recommendations for a federal response, a number of panelists suggested improved funding to the criminal justice system such as re-examining the grant making strategy of the Department of Justice (DOJ), or potentially expanding grant programs available to local and state

jurisdictions, while others suggested that the DOJ could provide its expertise in a “monitoring and compliance role” to curb some of the abuses at the pre-trial level apparent in local jurisdictions. Other measures, such as the DOJ asking states to expand mandatory release and the federal government working with Congress to pass cash bail-free legislation were also suggested by stakeholders on the panels regarding a federal response to cash bail reform.

We at the Commission are pleased to share our views, informed by careful research and investigation as well as civil rights expertise, to help ensure that all Americans enjoy civil rights protections to which we are entitled.

For the Commission,

A handwritten signature in black ink that reads "Norma V. Cantu". The signature is written in a cursive, flowing style.

Norma V. Cantu
Chair

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Acknowledgements

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The Kentucky, Maryland, and Oregon Advisory Committees to the U.S. Commission on Civil Rights also collected and provided testimony on related civil rights issues within their respective jurisdictions.

*Employee is no longer with the Commission at the time of publication.



The Civil Rights Implications of Cash Bail

February 26, 2021

Briefing Agenda

Panel 1: Foundations

Insha Rahman – Vice President of Advocacy and Partnerships, [Vera Institute of Justice](#)

Rafael Mangual – Fellow & Deputy Director, [Manhattan Institute](#)

Kanya Bennett – Senior Policy Counsel & Legislative Coalition Manager, The Bail Project

Lars Trautman – Resident Senior Fellow, [R Street Institute](#)

Sakira Cook – Program Director of Justice Reforms, [Leadership Conference on Civil and Human Rights](#)

Break: 11:05 – 11:20 am

Panel 2: Criminal Justice Stakeholders

Hon. Glenn Grant – Acting Administrative Director, [New Jersey Courts](#)

DeAnna Hoskins – President & CEO, [JustLeadership](#)

Peter Newsham – Chief of Police, [Prince William County Police Department](#)

William Bratton – Executive Chairman of [Teneo Risk](#) & Former Commissioner of NYPD and Chief of LAPD

Sharlyn Grace – Member, Illinois Network for Pretrial Justice

Panel 3: Reforms

Megan Stevenson, Ph.D. – Associate Professor of Law, [University of Virginia](#)

Erika Maye – Deputy Senior Campaigns Director for Criminal Justice, [Color of Change](#)

Elijah Gwynn – Co-Founder & CTO, [UpTrust](#)

Michelle Esquenazi – President, [National Association of Bail Agents](#)

Hon. Douglas Herndon – Justice, Nevada Supreme Court

Panel 4: Written Testimony

Matt DeLisi – Professor of Sociology, [Iowa State University](#)

Lori Eville – Correctional Program Specialist, [Community Services Division, National Institute of Corrections](#)

Craig Trainor – Attorney, [Trainor Law](#)

James Cadogan – Vice President of Criminal Justice, [Arnold Ventures](#)

Gina Clayton-Johnson – Executive Director & Founder, [Essie Justice Group](#)

Executive Summary

Based on bipartisan calls for changes in pretrial and bail practices and policies, the Commission has undertaken an evaluation of the civil rights implications of current bail reform measures.¹ Bail is broadly understood as the “process of releasing a defendant from jail or other governmental custody with conditions set to provide reasonable assurance of court appearance or public safety.”² While bail is most often associated with an amount of money that individuals must post to be released pretrial until their court date, pretrial release need not be tied to a financial obligation. Rather, it can be substituted (or combined) with a variety of non-financial release conditions, such as community supervision, attending treatment services, or maintaining or commencing an educational or employment program.³ The goals of release on bail are intended to minimize a defendant’s failure to appear at subsequent court dates and reduce possible threats to public safety. Criminal justice experts assert that there are two central concerns when it comes to imposing financial release conditions that are driving reform measures to the current system.⁴ First, data show that imposing monetary bail amounts can result in detaining defendants who cannot afford to post a commercial bail yet pose little danger to the public. Conversely, data also suggest that money bail can allow for the release of high-risk defendants who have the financial means to secure release yet should be detained without bail.⁵

In the United States, over ten and a half million people are arrested each year, the majority for low-level offenses, drug violations, and civil violations.⁶ For instance, in 2016, data showed that approximately 5 percent of arrests in the U.S. were for charges of violent offenses, and that charges

¹ See U.S. Comm’n on Civil Rights, Business Meeting (July 19, 2019), <https://www.usccr.gov/calendar/2019/07-19-Transcript-Commission-Business-Meeting.pdf>.

² Timothy Schnacke, “Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform,” National Institute of Corrections, Sept. 2014, p. 2, <https://s3.amazonaws.com/static.nicic.gov/Library/028360.pdf>.

³ See, e.g., Will Dobbie and Crystal Yang, “Proposals for Improving the U.S. Pretrial System,” The Hamilton Project, Brookings Institution, Mar. 2019; Jenny Carroll, *Beyond Bail*, 2020 Fla. L. Rev. 1,1, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3678992; Marie VanNostrand, “Alternatives to Pretrial Detention: Southern District of Iowa, A Case Study,” Federal Probation, vol. 74, no. 3, 2010, https://www.uscourts.gov/sites/default/files/74_3_3_0.pdf; Marc Levin and Michael Haugen, “Open Roads and Overflowing Jails: Addressing High Rates of Rural Pretrial Incarceration,” Right on Crime, Texas Public Policy Foundation, May 2018, <https://files.texaspolicy.com/uploads/2018/08/16104511/2018-04-RR-Rural-Pretrial-Incarceration-CEJ-Levin-Haugen-1.pdf>.

⁴ See, e.g., Timothy Schnacke, “Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform,” Sept. 2014, <https://s3.amazonaws.com/static.nicic.gov/Library/028360.pdf>.

⁵ Ibid.

⁶ Federal Bureau of Investigation, “FBI Releases 2018 Crime Statistics,” Sept. 30, 2019, <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2018-crime-statistics>; Vera Institute of Justice, “Arrests,” <https://arresttrends.vera.org/arrests>.

of low-level offenses accounted for about 83 percent of arrests that year.⁷ Some defendants are released on bail, while millions of others are held in detention while awaiting their trial.

Approximately 631,000 individuals are held in jails every day and almost half a million or 74 percent of these individuals are unconvicted and awaiting trial.⁸ This number is particularly striking considering that our criminal justice system is founded on a presumption of innocence, where “liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”⁹ Historically, the imposition of bail was intended to assure an individual’s appearance in court, while minimizing the intrusion of liberty, but in practice, it has led to many defendants being detained prior to their trial due to an inability to post bond.¹⁰

The pretrial population grew substantially between 1970 and 2015 and accounted for an increasing proportion of the total jail population.¹¹ Research suggests that the jail population was five times higher in 2013 than it was in 1970, and while the growth in urban, suburban, and medium-to-small counties began to decrease in 2005, rural jail populations continued to grow.¹² Some of the increase in rural jails may be correlated with the local criminal justice systems having fewer financial and staff resources, lack of pretrial services programs, diversion programs, and community-based services.¹³ Data show that “since 2000, 95 percent of the growth in the need for jail resources—the most expensive asset of the criminal justice system—is from the increase in un-convicted detainees.”¹⁴

⁷ Vera Institute of Justice, “Arrests,” <https://arresttrends.vera.org/arrests>. The remaining approximately 12% were property offenses. Ibid.

⁸ Wendy Sawyer and Peter Wagner, “Mass Incarceration: The Whole Pie 2020,” Prison Policy Initiative, Mar. 24, 2020, <https://www.prisonpolicy.org/reports/pie2020.html>.

⁹ *U.S. v. Salerno*, 481 U.S. 739, 755 (1987).

¹⁰ Bernadette Rabuy and Daniel Kopf, “Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time,” <https://www.prisonpolicy.org/reports/incomejails.html>; Megan Stevenson, “Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes,” *Journal of Law, Economics, and Organization*, vol. 34, no. 4., 2018; Criminal Justice Policy Program, “Moving Beyond Money: A Primer on Bail Reform,” Harvard Law School, Oct. 2016, <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>.

¹¹ Vera Institute, Incarceration Trends, <http://trends.vera.org/incarceration-rates?data=pretrial>; Leon Digard and Elizabeth Swavola, “Justice Denied: The Harmful and Lasting Effects of Pretrial Detention,” Vera Institute, Apr. 2019.

¹² Marc Levin and Michael Haugen, “Open Roads and Overflowing Jails: Addressing High Rates of Rural Pretrial Incarceration,” Right on Crime, Texas Public Policy Foundation, May 2018, <https://files.texaspolicy.com/uploads/2018/08/16104511/2018-04-RR-Rural-Pretrial-Incarceration-CEJ-Levin-Haugen-1.pdf>.

¹³ Jacob Kang-Brown and Ram Subramanian, “Out of Sight: The Growth of Jails in Rural America,” Vera Institute, June 2017, <https://www.vera.org/downloads/publications/out-of-sight-growth-of-jails-rural-america.pdf>.

¹⁴ National Association of Pretrial Services Agencies (2004). *Standards on Pretrial Release, Third Edition*. Washington, D.C.: National Association of Pretrial Services Agencies, pp. 3, 7.

Longstanding research suggests that money bail has been imposed arbitrarily and can result in unjustified inequalities in the criminal justice system.¹⁵ U.S. Bureau of Justice Statistics data from the 75 largest counties show that nearly all felony defendants (96 percent) who are held pretrial had a monetary bail set and they would be released if they had the means to post it.¹⁶ Nine out of ten were unable to post it.¹⁷ Persons with low-income and persons of color have been disparately impacted by being unable to pay bail and thus staying in jail.¹⁸ Unsurprisingly, defendants with lower bail amounts were more likely to secure release than those who had higher bail amounts.¹⁹ However, empirical studies show that even when bail amounts are low, rates of pretrial detention are still high.²⁰ For instance, in one study, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, analyzing bail practices in Philadelphia, researchers found over half of pretrial detainees would be able to secure their release by paying a deposit of \$1,000 or less; and many defendants remain incarcerated at even lower amounts of bail, with deposits to secure release set at \$50 or \$100.²¹

Moreover, longstanding research suggests that people of color may also have higher bond amounts imposed and are more likely to be perceived as dangerous during bail hearings.²² For example, in

¹⁵ See, e.g., Bernadette Rabuy and Daniel Kopf, “Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time,” <https://www.prisonpolicy.org/reports/incomejails.html>; Megan Stevenson, “Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes,” *Journal of Law, Economics, and Organization*, vol. 34, no. 4, 2018; Justice Policy Institute, “Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail,” Sept. 2012, <http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf>; Tracey Meares and Arthur Rizer, “The ‘Radical’ Notion of the Presumption of Innocence,” The Square One Project, May 2020, <https://squareonejustice.org/wp-content/uploads/2020/05/CJLJ8161-Square-One-Presumption-of-Innocence-Paper-200519-WEB.pdf>.

¹⁶ Brian Reaves, “Felony Defendants in Large Urban Counties, 2009 – Statistical Tables,” Bureau of Justice Statistics, U.S. Dep’t. of Justice, Dec. 2013, at 15, <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf>.

¹⁷ Ibid.

¹⁸ See *infra* notes in Chapter 2 in Racial and Gender Disparities and Socioeconomic Disparities.

¹⁹ When comparing defendants with bail amounts under \$5,000, researchers found that defendants were nearly 3 times as likely (71%) to secure release, compared to about 27% of those who secured release of bail amounts over \$50,000 or more. See Brian Reaves, “Felony Defendants in Large Urban Counties, 2009 – Statistical Tables,” Bureau of Justice Statistics, U.S. Dep’t. of Justice, Dec. 2013, at 15, <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf>.

²⁰ See, e.g., Paul Heaton, Sandra Mayson, & Megan Stevenson, The Downstream Consequences of Misdemeanor Pretrial Detention, 69 *Stan. L. Rev.* 711, 736 (2017) (reporting that fifty-three percent of Houston misdemeanor defendants were detained pretrial from 2008 to 2013); Charlie Gerstein, Plea Bargaining and the Right to Counsel at Bail Hearings, 111 *Mich. L. Rev.* 1513, 1525 n.81 (2013) (reporting that twenty-five percent of New York City misdemeanor defendants and fifty percent of Baltimore misdemeanor defendants are held on bail); Megan Stevenson, “Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes,” *Journal of Law, Economics, and Organization*, 2018, vol. 34, no. 4 (reporting that, between 2006 and 2013, forty percent of defendants with bail set at five hundred dollars or less were detained in Philadelphia).

²¹ Megan Stevenson, “Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes,” *The Journal of Law, Economics, and Organization*, vol. 34, no. 4, 2018, <https://academic.oup.com/jleo/article/34/4/511/5100740>.

²² See, e.g., Katherine Hood and Daniel Schneider, “Bail and Pretrial Detention: Contours and Causes of Temporal and County Variation,” *RSF: Russell Sage Foundation Journal of the Social Sciences*, vol. 5, no. 1, Feb. 2019; Wendy Sawyer, “How race impacts who is detained pretrial,” Prison Policy Initiative, Oct. 9, 2019, https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/; Stephan Demuth and Darrell Steffensmeier, “The Impact of Gender and Race-Ethnicity in the Pretrial Release Process,” *Social Problems*, vol. 51, no. 2, May 2004

one 2018 study, researchers found that when Black defendants were assigned monetary bail, they received significantly greater amounts than White defendants.²³ The study also showed that judges were also more likely to perceive Black defendants as more “dangerous” compared to White defendants, and thus, denied bail and detained pretrial.²⁴ As such, criminal justice stakeholders ranging from law enforcement to impacted communities have raised concerns regarding the imposition of cash bail that can result in unnecessary pretrial detention. At the Commission’s briefing, many panelists addressed these issues.

While there are members of both parties who favor the current system, there is also bipartisan support reform is needed; however, there are disagreements about what those reforms should look like and how it should be implemented.²⁵ Many criminal justice stakeholders believe that getting rid of a wealth-based pretrial system will ultimately make the pretrial process fairer and more equitable for all defendants regardless of financial means.²⁶ Yet other stakeholders, raise concerns over how to accomplish this goal without leading to an increase in crime or failure to appear in court.²⁷ In addition, non-financial conditions of release may be perceived by some defendants as more burdensome than money bail.²⁸

Additionally, criminal justice stakeholders have also grown increasingly concerned over the collateral consequences of widespread detention²⁹ and have pointed to the lack of empirical evidence demonstrating that pretrial detention is necessary to ensure public safety.³⁰ Research has actually found that pretrial detention can have adverse effects on public safety.³¹ Detaining low-

²³ David Arnold, Will Dobbie, and Crystal Yang, “Racial Bias in Bail Decisions,” *Quarterly Journal of Economics*, 2018, vol. 133, no. 4, pp. 1885-1932, https://scholar.harvard.edu/files/cyang/files/ady_racialbias.pdf.

²⁴ See, e.g., Ibid.

²⁵ See generally Stephanie Wykstra, “Bail Reform, which could save millions of unconvicted people from jail,” Vox, Oct. 17, 2018, <https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice-inequality>; Charlotte McPherson, “Pretrial Supervision, Like Detention, Should Be Carefully Limited,” Pretrial Justice Institute, July 19, 2016; Marc Levin and Michael Haugen, “Open Roads and Overflowing Jails: Addressing High Rates of Rural Pretrial Incarceration,” Right on Crime, Texas Public Policy Foundation, May 2018, <https://files.texaspolicy.com/uploads/2018/08/16104511/2018-04-RR-Rural-Pretrial-Incarceration-CEJ-Levin-Haugen-1.pdf>.

²⁶ See generally U.S. Comm’n on Civil Rights, *Bail Reform Briefing*.

²⁷ See, e.g., William Bratton testimony, p. 76; Rafael Mangual testimony, *Bail Reform Briefing*, transcript pp. 16-18.

²⁸ David O’Boyle, “Going Against the Grain: D.C.’s No-Bail Pretrial Release System,” DC Bar Association, July 13, 2016, <https://old.dcbar.org/about-the-bar/news/dc-no-bail-release.cfm>.

²⁹ See U.S. Comm’n on Civil Rights, “Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities,” June 2019, <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf>; see also Katherine Hood and Daniel Schneider, “Bail and Pretrial Detention: Contours and Causes of Temporal and County Variation,” *RSF: The Russell Sage Foundation Journal of the Social Sciences*, vol. 5, no. 1, Feb. 2019; Megan Stevenson, “Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes,” *The Journal of Law, Economics, and Organization*, vol. 34, no. 4, 2018, <https://academic.oup.com/jleo/article/34/4/511/5100740>.

³⁰ See, e.g., Michael Jones, “Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option,” Pretrial Justice Institute, 2013; Tracey Meares and Arthur Rizer, “The ‘Radical’ Notion of the Presumption of Innocence,” The Square One Project, May 2020, at 26-28.

³¹ Paul Heaton, Sandra Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 759 (2017); Christopher Lowenkamp, Marie VanNostrand, and Alexander Holsinger, “The Hidden Costs of Pretrial Detention,” Arnold Foundation, Nov. 2013, <https://perma.cc/498S-LM6P>.

and moderate-risk defendants has strong correlations to higher rates of new criminal activity, both during the pretrial period and in the years following case disposition.³² Moreover, there is a statistically significant and positive correlation between longer pretrial detention periods and rates of post-disposition recidivism.³³ The current research has not been able to fully explain these correlations, however, scholars have suggested that this relationship may be the result of the collateral consequences of pretrial detention (e.g., loss of job, unstable housing, familial problems upon release).³⁴

Based on these facts, bipartisan reform efforts to reduce the number of individuals who are detained pretrial have gained momentum.³⁵ At least 10 states and 40 counties have accordingly revised, or are in the process of revising, their pretrial law and policy—and in some cases their state constitutions.³⁶ Specifically, stakeholders have raised concerns that, according to federal data, while prison populations across the country have continued to decline over the past decade, the nation’s jail population has continued to increase – especially in the number of pretrial detainees.³⁷ While the terms prison and jail are often used interchangeably, specifically jails are local facilities where defendants are held generally for shorter periods of time while awaiting trial, awaiting bail hearings, or held for minor offenses that carry sentences of less than a year. Conversely, prisons are institutions where defendants are held post-sentencing and generally for individuals serving sentences for a year or more.³⁸ Reform advocates have pointed out that both the United States Constitution (Fourth Amendment) and the Supreme Court clarify that pretrial liberty is the norm,

³² Christopher Lowenkamp, Marie VanNostrand, and Alexander Holsinger, “The Hidden Costs of Pretrial Detention,” Arnold Foundation, Nov. 2013, <https://perma.cc/498S-LM6P>.

³³ Ibid.

³⁴ Tracey Meares and Arthur Rizer, “The ‘Radical’ Notion of the Presumption of Innocence,” The Square One Project, May 2020, <https://squareonejustice.org/wp-content/uploads/2020/05/CJLJ8161-Square-One-Presumption-of-Innocence-Paper-200519-WEB.pdf>.

³⁵ See, e.g., John Wagner, “Trump signs bipartisan criminal justice bill amid partisan rancor over stopgap spending measure,” *New York Times*, Dec. 21, 2018, https://www.washingtonpost.com/politics/trump-to-sign-bipartisan-criminal-justice-bill-amid-partisan-rancor-over-stopgap-spending-measure/2018/12/21/234f9ffc-0510-11e9-b5df-5d3874f1ac36_story.html; Marc Levin and Michael Haugen, “Open Roads and Overflowing Jails: Addressing High Rates of Rural Pretrial Incarceration,” Right on Crime and Texas Public Policy Foundation, May 2018.

³⁶ Pretrial Justice Institute, “Rational and Transparent Bail Decision Making: Moving From A Cash-Based to a Risk-Based Process,” Mar. 2012, <http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/05/Rational-and-Transparent-Bail-Decision-Making.pdf>.

³⁷ See, e.g., Marc Levin and Michael Haugen, “Open Roads and Overflowing Jails: Addressing High Rates of Rural Pretrial Incarceration,” Right on Crime and Texas Public Policy Foundation, May 2018; Alexi Jones, “Stagnant populations and changing demographics: what the new BJS reports tell us about correctional populations,” Prison Policy Institute, May 5, 2020, <https://www.prisonpolicy.org/blog/2020/05/05/bjs-reports/>; Chris Mai, Mikelina Belaineh, Ram Subramanian, and Jacob Kang-Brown, “Broken Ground: Why America Keeps Building More Jails and What It Can Do Instead?” Vera Institute of Justice, Nov. 2019, <https://www.vera.org/downloads/publications/broken-ground-jail-construction.pdf>.

³⁸ See, e.g., Prison Fellowship, “FAQ: Jail vs. Prison,” <https://www.prisonfellowship.org/resources/training-resources/in-prison/faq-jail-prison/>.

and that detention should be a “carefully limited exception.”³⁹ In practice, however, pretrial detention has become the norm, particularly for defendants with low-income and defendants of color.

Over the past several decades, the imposition and the amounts of money bail have grown substantially.⁴⁰ From 1990 to 2009, across the nation, the proportion of pretrial jail releases involving the private bail industry doubled for defendants who were arrested for felonies.⁴¹ Bail amounts have also continued to increase across the majority of the nation.⁴² The national average for bail amounts for a felony arrest is now \$10,000—and an increasing number of Americans cannot afford to pay these bail amounts.⁴³ Millions of individuals and families are left with the only option to pay nonrefundable premiums to the for-profit bail industry to secure release from detention.⁴⁴ With the imposition of financial conditions increasing along with bail amounts, the number of defendants who are detained in jail pretrial has grown, but the number of those sentenced have decreased.⁴⁵ Regardless of the outcome of the case, even in cases where the arrest

³⁹ See, e.g., *U.S. v. Salerno*, 481 U.S. 739, 754-55; Charlotte McPherson, “Pretrial Supervision, Like Detention, Should Be Carefully Limited,” Pretrial Justice Institute, July 19, 2016; Marc Levin and Michael Haugen, “Open Roads and Overflowing Jails: Addressing High Rates of Rural Pretrial Incarceration,” Right on Crime, Texas Public Policy Foundation, May 2018, <https://files.texaspolicy.com/uploads/2018/08/16104511/2018-04-RR-Rural-Pretrial-Incarceration-CEJ-Levin-Haugen-1.pdf>.

⁴⁰ Bernadette Rabuy and Daniel Kopf, “Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time,” Prison Policy Initiative, May 10, 2016, <https://www.prisonpolicy.org/reports/DetainingThePoor.pdf>; Timothy Schnacke, Michael Jones, and Claire Brooker, “The History of Bail and Pretrial Release,” Pretrial Justice Institute, Sept. 24, 2010, https://b3cdn.net/crjustice/2b990da76de40361b6_rzm6ii4zp.pdf; Thomas Cohen and Brian Reaves, “Pretrial Release of Felony Defendants in State Courts,” Bureau of Justice Statistics, U.S. Dept. of Justice, Nov. 2007, <https://www.bjs.gov/content/pub/pdf/prfdsc.pdf>.

⁴¹ Data reflects rates in the 75 largest counties. See Brian Reaves, “Felony Defendants in Large Urban Counties, 2009 – Statistical Tables,” Bureau of Justice Statistics, U.S. Dept. of Justice, Dec. 2013, <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf>.

⁴² See, e.g., Chandra Bozelko, “The cash bail system should be eliminated rather than reformed.” *The Guardian*, Feb. 5, 2016, <https://www.theguardian.com/commentisfree/2016/feb/05/the-cash-bail-system-should-be-eliminated-rather-than-reformed>; Council of Economic Advisers, “Fines, Fees, and Bail,” Dec. 2015, https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf; Color of Change and ACLU’s Campaign for Smart Justice, “Selling Off Our Freedom: How insurance corporations have taken over our bail system,” May 2017, https://www.aclu.org/sites/default/files/field_document/059_bail_report_2_1.pdf.

⁴³ Board of Governors of the Federal Reserve System, “Report on Economic Well-Being of U.S. Households in 2015,” May 2016, <https://www.federalreserve.gov/2015-report-economic-well-being-us-households-201605.pdf>.

⁴⁴ See, e.g., Justice Policy Institute, “For Better or For Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice,” Sept. 2012, http://www.justicepolicy.org/uploads/justicepolicy/documents/for_better_or_for_profit.pdf; Gillian 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/>; Bernadette Rabuy and Daniel Kopf, “Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time,” Prison Policy Initiative, May 10, 2016, <https://www.prisonpolicy.org/reports/DetainingThePoor.pdf>; Timothy Schnacke, “‘Model’ Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention,” Center for Legal and Evidence-Based Practices, Apr. 18, 2017, http://www.clebp.org/images/04-18-2017_Model_Bail_Laws_CLEPB.pdf.

⁴⁵ See Zhen Zeng, “Jail Inmates in 2018,” Bureau of Justice Statistics, U.S. Dep’t of Justice, Mar. 2020, <https://www.bjs.gov/content/pub/pdf/ji18.pdf>; E. Ann Carson, “Prisoners in 2018,” Bureau of Justice Statistics, U.S. Dep’t of Justice, Apr. 2020, <https://www.bjs.gov/content/pub/pdf/p18.pdf>.

itself is determined to be wrongful, defendants and their families lose the money that they paid to the private bail industry, which can continue to have dire financial effects for years to follow.⁴⁶ Moreover, a money-based bail system correlates to low-risk individuals being detained because they are unable to post bond, not because they are a public safety risk. Conversely, higher-risk individuals in the money-bail system are sometimes released because they have access to the necessary monetary funds, regardless of the public safety risk they pose.⁴⁷

Defendants and their families are not only financially affected by these increasing bail amounts; studies have shown that there is a correlation between the imposition of monetary conditions to secure pretrial release and the increased likelihood of individuals suffering from housing insecurity, unemployment, loss of child custody, and an increased risk of future criminal behavior.⁴⁸ Being incarcerated during the pretrial period can also undermine an individual's ability to freely interact with their lawyer to mount a defense.⁴⁹ Additionally, pretrial detention can limit their ability to demonstrate that they are acting responsibly (e.g., supporting their families, maintaining employment, working in the community), which can result in less lenient sentencing outcomes. Those detained can only hope to receive time off their sentence, if convicted, or to receive a time-served sentence – like those who were not convicted, and therefore were wrongfully incarcerated.⁵⁰ Bipartisan efforts have been underway in many states to reform pretrial practices and to offer alternatives to pretrial detention, while maintaining public safety and assuring court appearance.⁵¹ Both conservative and progressive reform efforts have focused on the need to offer alternatives to pretrial detention, recognizing that those who are detained are too often not incarcerated because of fear for public safety or absconding, but solely reflect economic

⁴⁶ See, e.g., Bernadette Rabuy and Daniel Kopf, “Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time,” Prison Policy Initiative, May 10, 2016, <https://www.prisonpolicy.org/reports/DetainingThePoor.pdf>.

⁴⁷ See, e.g., Timothy Schnacke, “Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform,” National Institute of Corrections, Sept. 2014, <https://s3.amazonaws.com/static.nicic.gov/Library/028360.pdf>; Criminal Justice Policy Program, “Moving Beyond Money: A Primer on Bail Reform,” Harvard Law School, Oct. 2016, <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>.

⁴⁸ Katherine Hood and Daniel Schneider, “Bail and Pretrial Detention: Contours and Causes of Temporal and County Variation,” *RSF: The Russell Sage Foundation Journal of the Social Sciences*, vol. 5, no.1, Feb. 2019, at 143; Léon Digard and Elizabeth Swavola, “Justice Denied,” Vera Institute of Justice, Apr. 2019, <https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf>.

⁴⁹ Paul Heaton, Sandra Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 *Stan. L. Rev.* 711, 772 (2017); Tracey Meares and Arthur Rizer, “The ‘Radical’ Notion of the Presumption of Innocence,” The Square One Project, May 2020.

⁵⁰ Mary Phillips, “A Decade of Bail Research in New York City,” New York City Criminal Justice Agency, Inc., Aug. 2012, at 118-20.

⁵¹ See, e.g., Charlotte McPherson, “Pretrial Supervision, Like Detention, Should Be Carefully Limited,” Pretrial Justice Institute, July 19, 2016; Marc Levin and Michael Haugen, “Open Roads and Overflowing Jails: Addressing High Rates of Rural Pretrial Incarceration,” Right on Crime, Texas Public Policy Foundation, May 2018, <https://files.texaspolicy.com/uploads/2018/08/16104511/2018-04-RR-Rural-Pretrial-Incarceration-CEJ-Levin-Haugen-1.pdf>; Bernadette Rabuy and Daniel Kopf, “Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time,” Prison Policy Initiative, May 10, 2016, <https://www.prisonpolicy.org/reports/DetainingThePoor.pdf>.

disparities.⁵² For instance, in a bipartisan report, *The ‘Radical’ Notion of the Presumption of Innocence*, bail reform experts assert that:

Rampant pretrial detention erodes the meaning of the presumption of innocence. Pretrial detention, as currently used, tears apart individual lives, families, and entire communities. It hurts our local economies while further burdening taxpayers. It puts public health at risk. And it risks rather than promotes long-term public safety. But, perhaps most importantly of all, it is a direct contradiction of the principles upon which this nation is founded.⁵³

The Commission held a briefing titled: *The Civil Rights Implications of Cash Bail* on February 26, 2021, regarding the state of bail and pretrial detention practices, including the involvement of the private bail industry, various mechanisms for reform, and the potential regulatory role of the federal government. The Commission heard from panels that included government officials, academics, law enforcement professionals, advocates, and impacted persons. The Commission also received written testimony from the panelists and comments from the public during an open comment period in the month following the briefing. The Report is also informed by independent research by experts in the field and empirical data about racial and income disparities in pretrial and bail practices.

As part of the Commission’s assessment of the state of pretrial and bail reform and the potential role of the federal government in ensuring the equal administration of justice, the Commission also conducted 19 qualitative interviews with a variety of experts and community stakeholders, which included legislators, judges, prosecutors, public defenders, law enforcement officers, and community advocates. The Commission assessed six jurisdictions as case studies to evaluate how bail reform measures can reduce disparities, limit unnecessary pretrial detention, and ensure the equal administration of justice.

The Commission selected these six jurisdictions’ pretrial systems for review because they have either implemented pretrial and bail reforms or are in the process of reforms. These jurisdictions are racially, ethnically, and geographically diverse, which can highlight differences between urban and rural pretrial practices and examine the possibility of disparities among racial groups. Lastly, these jurisdictions offer some promising pretrial reform measures, along with ongoing challenges in balancing individuals’ rights to liberty, public safety, and assuring court appearance.

⁵² See, e.g., Marc Levin and Michael Haugen, “Open Roads and Overflowing Jails: Addressing High Rates of Rural Pretrial Incarceration,” Right on Crime, Texas Public Policy Foundation, May 2018, <https://files.texaspolicy.com/uploads/2018/08/16104511/2018-04-RR-Rural-Pretrial-Incarceration-CEJ-Levin-Haugen-1.pdf>; Tracey Meares and Arthur Rizer, “The ‘Radical’ Notion of the Presumption of Innocence,” The Square One Project, May 2020, <https://squareonejustice.org/wp-content/uploads/2020/05/CJLJ8161-Square-One-Presumption-of-Innocence-Paper-200519-WEB.pdf>.

⁵³ Tracey Meares and Arthur Rizer, “The ‘Radical’ Notion of the Presumption of Innocence,” The Square One Project, May 2020, <https://squareonejustice.org/wp-content/uploads/2020/05/CJLJ8161-Square-One-Presumption-of-Innocence-Paper-200519-WEB.pdf>.

The following report examines pretrial incarceration data trends, constitutional and legal concerns regarding pretrial and bail practices, an analysis of the role of the federal government regarding bail practices, and an in-depth investigation of four jurisdictions. After discussing the civil rights framework in Chapter 1; Chapter 2 examines the national data trends, and Chapter 3 discusses the role of the Department of Justice. Chapter 4 then analyzes and compares pretrial and bail policies and practices in New Jersey, Illinois, District of Columbia, Texas, New York, and Nevada.

Chapter 1: Constitutional and Legal Framework of Bail

Broadly speaking, bail refers to the release or detention of a defendant pending trial, release or detention pending a criminal sentencing or appeal, and/or release or detention of a material witness.⁵⁴ In the context of criminal law, bail refers to the posting of some form of security – often in the form of a sum of money – to be exchanged for the release of an arrested person to ensure the presence of that person’s appearance at subsequent judicial proceedings.⁵⁵ Bail money may be paid to the court by a defendant or through a bail bondsperson through the use of a cash bond. Broadly defined, bonds are pledges by a bondsperson to the court stating that the bail will be made if the defendant does not appear in court.⁵⁶ There are two types of bonds: secured and unsecured. A secured bond is the money paid by a defendant or a property levied to secure the defendant’s release; whereas an unsecured bond is a document stating that a particular sum of money will be paid if the defendant breaks the defendant’s bond conditions.

Bail is often set in amounts that are beyond the financial capabilities of most people; thus, many defendants and/or defendants’ families must utilize a private bail bond company.⁵⁷ In most states, these companies are for-profit businesses that charge a nonrefundable fee, usually 10 to 20 percent of the bail amount, to post bail for the pretrial release defendant.⁵⁸ These agreements are in the form of surety bonds, which is a contract where a bondsperson agrees to be liable for the full bail amount if the defendant fails to appear in court. If the defendant fails to appear in court, bond agencies may choose to utilize a bail recovery agent, sometimes known as a bounty hunter.⁵⁹

⁵⁴ Charles Doyle, “Bail: An Overview of Federal Criminal Law,” Congressional Research Service, July 31, 2017, at 1, <https://fas.org/sgp/crs/misc/R40221.pdf>; Lindsey Devers, “Bail Decisionmaking,” Jan. 24, 2011, Bureau of Justice Assistance, U.S. Dep’t. of Justice,

<https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BailDecisionmakingResearchSummary.pdf>.

⁵⁵ Lindsey Devers, “Bail Decisionmaking,” Jan. 24, 2011, Bureau of Justice Assistance, U.S. Dep’t. of Justice.

⁵⁶ Bernadette Rabuy and Daniel Kopf, “Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time,” Prison Policy Initiative, May 10, 2016, <https://www.prisonpolicy.org/reports/DetainingThePoor.pdf>.

⁵⁷ See, e.g., Justice Policy Institute, “For Better or For Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice,” Sept. 2012,

http://www.justicepolicy.org/uploads/justicepolicy/documents/for_better_or_for_profit.pdf; Gillian 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/>.

⁵⁸ Bernadette Rabuy and Daniel Kopf, “Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time,” Prison Policy Initiative, May 10, 2016, <https://www.prisonpolicy.org/reports/DetainingThePoor.pdf>; Timothy Schnacke, “‘Model’ Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention,” Center for Legal and Evidence-Based Practices, Apr. 18, 2017, http://www.clebp.org/images/04-18-2017_Model_Bail_Laws_CLEPB_.pdf.

⁵⁹ Timothy Schnacke, “‘Model’ Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention,” Center for Legal and Evidence-Based Practices, Apr. 18, 2017, http://www.clebp.org/images/04-18-2017_Model_Bail_Laws_CLEPB_.pdf.

Critics of the current pretrial justice system in the U.S. often argue that when judicial officers are considering pretrial release and bail, they too often understand the only bail option to be money.⁶⁰ Executive Director for the Center for Legal and Evidence-Based Practices, Timothy Schnacke states that bail can be better understood as “a process of conditional release and the purpose of bail is to provide a mechanism for release, just as ‘no bail’ is a process of detention with a purpose to provide a mechanism for potential pretrial detention.”⁶¹ Further, Schnacke argues that:

Secured money bonds interfere with a defendant’s right to release by keeping lower, medium, and even some higher risk persons in jail for lack of money even though those persons could be safely managed outside of secure detention. It interferes with detention by allowing extremely high-risk persons to buy their way out of jail when they are better suited for secure detention.⁶²

At the Commission’s briefing Insha Rahman, Vice President of Advocacy and Partnerships at the Vera Institute explained that:

Across the federal pretrial system and almost all state systems, for the past 50 years, the two justifications for imposing jail or detention are, first and foremost, risk of failure to appear and, second, risk to public safety. Bail is set or detention is imposed on one of these two bases, yet we know that we can manage the challenge of court appearance through effective community-based pretrial services and supports and that actual danger or harm to the community upon pretrial release is rare.⁶³

Similarly, Rafael Mangual, Fellow and Deputy Director at the Manhattan Institute, also testified to the constitutional concerns of the current cash bail system that is utilized in many jurisdictions.⁶⁴ He explained that:

Getting pretrial justice wrong can mean more defendants unjustifiably spending unreasonable amounts of time in American jails, but it can also mean more American citizens being criminally victimized by pretrial releasees who should have been but were not remanded to pretrial detention. Balancing these concerns for the rights of defendants on the one hand and the safety of communities on the other requires parsing complicated questions...

The first of these points is that pretrial justice systems that rely heavily on monetary release conditions, i.e., cash bail, can and often do place undue burdens on both

⁶⁰ Timothy Schnacke, Michael Jones, and Claire Brooker, “The History of Bail and Pretrial Release,” Pretrial Justice Institute, Sept. 24, 2010, p. 13.

⁶¹ Timothy Schnacke, “‘Model’ Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention,” Center for Legal and Evidence-Based Practices, Apr. 18, 2017, p. 16.

⁶² *Ibid.*, p. 30.

⁶³ Insha Rahman, Vice President of Advocacy and Partnerships, Vera Institute, testimony, *Bail Reform Briefing*, transcript, p. 13.

⁶⁴ Rafael Mangual, Fellow & Deputy Director, Manhattan Institute, testimony, *Bail Reform Briefing*, transcript pp. 15-16.

individual liberty and public safety. In a cash bail system, you can end up with a situation in which a relatively dangerous, but well-off defendant can essentially purchase his release, despite his risk of reoffending during the pretrial period, while a relatively harmless, but indigent defendant gets stuck in pretrial detention, despite posing very little risk of reoffending. This, in my view, illustrates one of the strongest arguments in favor of reforming cash bail systems.⁶⁵

Conversely, one central argument supporting the need for cash bail is that it is necessary to ensure public safety.⁶⁶ For instance, Craig Trainor, a criminal defense and civil rights attorney in New York, argues that any reform measures need to allow judges the discretion to “remand criminal defendants where it appears that they are a strong risk for failure to appear in court on felony charges or present a danger to the public, no matter the underlying criminal charges.”⁶⁷

Overview of Applicable Constitutional Protections for Pretrial Detainees

Several constitutional limits and statutory rules apply to pre-trial detention and bail.⁶⁸ Article I of the U.S. Constitution protects persons from being detained without charges.⁶⁹ The Fourth Amendment to the U.S. Constitution more clearly prohibits detention without first being arrested for and charged of a crime.⁷⁰ The Fourth Amendment requires that individuals who have been arrested be provided, as a matter of due process, a “fair and reliable determination of probable cause” before a judge promptly after arrest.⁷¹ The Supreme Court has also ruled that this initial

⁶⁵ Ibid.

⁶⁶ See, e.g., Michael Jones, “Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option,” Pretrial Justice Institute, 2013; Tracey Meares and Arthur Rizer, “The ‘Radical’ Notion of the Presumption of Innocence,” The Square One Project, May 2020, at 26-28.

⁶⁷ Craig Trainor, Criminal Defense and Civil Rights Attorney, Member of New York Advisory Committee to the U.S. Comm’n on Civil Rights, Written Testimony for the Civil Rights Implications of Cash Bail Briefing before the U.S. Comm’n on Civil Rights, Feb. 26, 2021, p. 6 (hereinafter Trainor Statement).

⁶⁸ See, e.g., U.S. Const. art. I, § 9; U.S. Const., Amend. IV; U.S. Const. amend. XIV.

⁶⁹ U.S. CONST. art. I, § 9; see *Ex parte Watkins*, 28 U.S. 193, 202 (1830) (Marshall, C.J.) (“The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment.”).

⁷⁰ U.S. CONST. amend. IV.

⁷¹ *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975). The Court held that the Fourth Amendment requires a prompt judicial determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest. Under *Gerstein*, warrantless arrests are permitted, but persons arrested without a warrant must promptly be brought before a magistrate for a judicial determination of probable cause; see also Patricia A. Reed, *Pretrial Bail: A Deprivation Of Liberty Or Property With Due Process Of Law*, 40 Wash. & Lee L. Rev. 1575, 1577-80 (1983), <https://scholarlycommons.law.wlu.edu/wlulr/vol40/iss4/9> (discussing the right to bail in certain circumstances as derived from the Constitutional right to due process).

determination hearing has to occur within 48 hours of arrest.⁷² Some hearings occur sooner, and some counties and states have changed the maximum time to require that the accused must appear before a judge within 24 hours following arrest and booking.⁷³ Furthermore, the Court has written that “[i]nordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense.”⁷⁴

Based on the Constitution and the Bill of Rights, the Judiciary Act of 1789 first established the principle of a defendant’s right to bail.⁷⁵ The Act provided that “upon all arrests in criminal cases, bail *shall* be admitted, except where the punishment may be death,” in which cases bail was subject to judicial discretion.⁷⁶ As discussed further herein, federal statutes have continued to develop based on federal caselaw and legislation since 1789.

The Eighth Amendment to the U.S. Constitution specifies that “excessive bail shall not be required.”⁷⁷ The U.S. Supreme Court has interpreted this provision multiple times over years, most recently holding that the Eighth Amendment did not create a right to bail in criminal cases.⁷⁸ In fact, in the 1987 case of *United States v. Salerno*, the Court upheld the constitutionality of the Bail Reform Act of 1984, which required courts to detain prior to trial arrestees charged with serious felonies if the Government demonstrates by clear and convincing evidence, after an adversary hearing, that no release conditions “will reasonably assure . . . the safety of any other person and the community.”⁷⁹ The Court reiterated however, that pretrial detention should be the “carefully limited exception” and liberty “the norm.”⁸⁰

The Court has also explained, in separate cases interpreting the Eighth Amendment, that:

[W]hile a right to bail is a fundamental precept of the law, it is not absolute, and its parameters must be determined by federal and possibly state legislatures. Where a bail bond is permitted, however, there must be an individualized determination using standards designed to set the bail bond at “an amount reasonably calculated”

⁷² *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). The case claimed that the county’s policy of combining probable cause determinations with its arraignment procedures violated the Fourth Amendment because while there is a two-day requirement this does not take into account weekends and holidays. Therefore, the case claimed that an individual arrested without a warrant late in the week could be held for as long as five days before receiving a probable cause determination and over the Thanksgiving holiday, a 7-day delay was also possible; see also *Gerstein*, 20 U.S. at 126 (“[T]he Fourth Amendment requires a timely judicial determination of probable cause”).

⁷³ See, e.g., Maricopa County, California, Attorney’s Office, “Adult Criminal Trial Process,” <https://www.maricopacountyattorney.org/189/Adult-Criminal-Trial-Process>; Prince George County, Maryland, “When Someone Is Arrested,” <https://www.princegeorgescountymd.gov/1217/When-Someone-Is-Arrested>.

⁷⁴ *U.S. v. Marion*, 404 U.S. 307, 320 (1971).

⁷⁵ An Act to Establish the Judicial Courts of the United States, 1 Stat. 73.

⁷⁶ *Id.*

⁷⁷ U.S. Const. amend. XIII.

⁷⁸ See *United States v. Salerno*, 481 U.S. 739, 755 (1987) (“[T]he Eighth amendment does not require release on bail.”); see also *Carlson v. Landon*, 342 U.S. 524, 544-47 (1952).

⁷⁹ *Salerno*, 481 U.S. at 741.

⁸⁰ *Id.* at 755.

to assure the defendant's return to court; when the purpose of a money bail bond is only to prevent flight, the monetary amount must be set at a sum designed to meet that goal, and no more.⁸¹

In addition to the Eighth Amendment, the Fourteenth Amendment's Due Process Clause protects individual rights by prohibiting states from depriving "any person of life, liberty or property, without due process of law."⁸² The Supreme Court has held that similar protections apply to the federal government through the Fifth Amendment.⁸³

Federal courts have held that due process requires that state, federal, and local laws that impose pretrial detention "serve a compelling government interest."⁸⁴ Considering that "there is no doubt that the longer the pretrial detention, the more likely the denial of due process,"⁸⁵ and this factor often weighs in favor of releasing the defendant on bail following detention.⁸⁶ State courts have similarly held that due process may favor the opportunity to petition for setting bail at a lower amount or under different conditions, if a high amount of bail was not the least restrictive alternative to ensure appearance and if the pretrial defendant did not have the financial resources to pay the set amount.⁸⁷

There is a distinction between pretrial detention and "preventive detention," also called "remand," in which a defendant is detained because the court views the defendant as a flight or public safety risk who on that basis has lesser constitutional protection.⁸⁸ The Second Circuit explained that:

⁸¹ Timothy R. Schnacke, Michael R. Jones, Claire M. B. Brooker, *The History of Bail and Pretrial Release*, PRETRIAL JUST. INST. 1, 9 (Sept. 23, 2010), https://cdpsdocs.state.co.us/ccjj/Committees/BailSub/Handouts/HistoryofBail-Pre-TrialRelease-PJI_2010.pdf; see generally *Carlson v. Landon*, 342 U.S. 524, 534 ("where there is no evidence to justify a fear of unavailability for the hearings . . . denial of bail . . . is an abuse of discretion and violates a claimed right to reasonable bail secured by the Eighth Amendment to the Constitution"); see generally *Stack v. Boyle*, 342 U.S. 1, 5 (1951) ("Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment").

⁸² U.S. Const. amend. XIV.

⁸³ See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 498-500 (1954).

⁸⁴ *Salerno*, 481 U.S. at 754; see also *U.S. v. Ailemen*, 165 F.R.D. 571, 578-80 (N.D. Cal. 1996) (internal citations omitted).

⁸⁵ See U.S. Dep't of Justice, "Release and Detention Pending Judicial Proceedings," Criminal Resource Manual, <https://www.justice.gov/archives/jm/criminal-resource-manual-26-release-and-detention-pending-judicial-proceedings-18-usc-3141-et> (citing *U.S. v. Gonzales-Claudio*, 806 F.2d 334, 341 (2d Cir. 1986), cert denied 479 U.S. 978 (1986) ("detention that has lasted for fourteen months and, without speculation, is scheduled to last considerably longer, points strongly to a denial of due process"))).

⁸⁶ *Ibid.* *United States v. Gonzales-Claudio*, 806 F.2d 334, 341 (2d Cir. 1986) ("detention that has lasted for fourteen months and, without speculation, is scheduled to last considerably longer, points strongly to a denial of due process"); see also U.S. Dep't of Justice, Criminal Resource Manual, "Release and Detention Pending Judicial Proceedings (18 U.S.C. 3141 ET SEQ.)," at 6, <https://www.justice.gov/archives/jm/criminal-resource-manual-26-release-and-detention-pending-judicial-proceedings-18-usc-3141-et>.

⁸⁷ *In re Humphrey*, 19 Cal. App. 5th 1006, 1026 (2018).

⁸⁸ See, e.g., Colin Doyle, Chiraag Bains, and Brook Hopkins, "Bail Reform: A Guide for State and Local Policymakers," Criminal Justice Policy Program at Harvard Law School, Feb. 2019, <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=9a804d1d-f9be-e0f0-b7cd-cf487ec70339&forceDialog=0>.

The amount of bail is subject to the Eighth Amendment limitation that it may not be “excessive.” In the Bail Reform Act, Congress has given significant additional protection to defendants by prohibiting judicial officers from imposing “a financial condition that results in the pretrial detention of the person.”⁸⁹ The defendant detained for failure to post bail has some opportunity to obtain release, if not through his own resources, then at least with the help of family, friends, or even charities. Moreover, he has a constitutional, and now a statutory, limitation on the amount of bail. By contrast, the defendant subject to preventive detention has not even the prospect of obtaining release prior to trial on any conditions. For both types of defendants, liberty protected by the Fifth Amendment has been denied, but under some circumstances those without any opportunity to secure release might have a more substantial claim that fundamental fairness has been denied than those for whom bail has been set.⁹⁰

Unnecessary delays between arrest and bail hearings may constitute due process violations.⁹¹ For instance, in *Hayes v. Faulkner County*, a defendant was held for 38 days pretrial because he did not post bail, despite an Arkansas criminal statute that required that the county allow Hayes to appear in court for a bail hearing within 72 hours of arrest.⁹² The Eighth Circuit Federal Court of Appeals held that the 38-day confinement violated Hayes’ substantive due process rights.⁹³

The Equal Protection Clause of the Fourteenth Amendment prohibits a state or local government from “deny[ing] to any person within its jurisdiction the equal protection of the laws,” and federal courts have held that the substance of this clause also applies to the federal government through the Fifth Amendment.⁹⁴

The Sixth Amendment and its guarantee of the right to counsel⁹⁵ may also be applicable, as effective attorney representation can be the difference between release on reasonable bail and pretrial detention. Georgetown Law Professor Charles Gerstein characterizes the right to counsel as synonymous with the right to effective assistance, which affects the outcome of the defendant at every stage of criminal proceedings.⁹⁶ For instance, a defendant’s plea decision is considerably tied to the ability to post bail and can have a prejudicial effect on those accused of relatively minor

⁸⁹ 18 U.S.C. § 3142(c)(2).

⁹⁰ *Gonzales-Claudio*, 806 F.2d at 340.

⁹¹ Article: II. Preliminary Proceedings, 49 *Geo. L.J. Ann. Rev. Crim. Proc.* 273, 290 (2020).

⁹² 388 F.3d 669, 672-74 (8th Cir. 2004).

⁹³ *Id.* at 674-76.

⁹⁴ U.S. CONST. amend. XIV, § 1 (“Nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”); *Bolling v. Sharpe*, 347 U.S. 497, 498-500 (1954); see generally *People ex rel. Desgranges v. Anderson*, 59 Misc. 3d 238, 242 (2018) (a lower court’s lack of consideration of the defendant’s ability to pay the imposed bail amount at the arraignment was a violation of the equal protection and due process clauses in both the New York State Constitution and the United States Constitution; the court reasoned that a petitioner’s freedom should not be dependent upon economic status).

⁹⁵ U.S. Const. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335(1963).

⁹⁶ Charlie Gerstein, Plea Bargaining and the Right to Counsel at Bail Hearings, 111 *Mich. L.Rev.* 1513, 1516 (2013), <https://repository.law.umich.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1047&context=mlr>.

offenses.⁹⁷ One study found that defendants represented by counsel at bail hearings were 2.5 times more likely to be released on recognizance, 4 times as likely to have their bail reduced, and almost 2 times as likely to be released within a day of their arrest.⁹⁸ Moreover, defendants with attorneys at bail hearings spent an average of 2 days in jail, compared with 9 days for those without representation.⁹⁹

But while the Sixth Amendment of the Constitution is explicit in its protection of the right to counsel “in all criminal prosecutions,”¹⁰⁰ it does not specifically provide a right to an attorney when the accused appears at bail hearings.¹⁰¹ Bail hearings are typically conducted in front of a magistrate judge without an attorney present, and courts have repeatedly determined states are not required to appoint counsel when bail is set.¹⁰² Defendants who cannot post bail are subject to imprisonment without being charged with a crime.¹⁰³ As discussed above, defendants who are unable to be released pretrial may suffer negative consequences outside of court including for example job loss, loss of housing and benefits, and financial inability to care for dependents.¹⁰⁴

⁹⁷ *Id.*

⁹⁸ Douglas L. Colbert, Raymond Paternoster, & Shawn Bushway, Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail, 23 *Cardozo L. Rev.* 1719, 1721 (2002).

⁹⁹ *Ibid.*, 1753, 1755.

¹⁰⁰ *See* U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.”). *See* U.S. CONST. amend. VI.

¹⁰¹ The Supreme Court has held that “a criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger the attachment of the Sixth Amendment right to counsel.” *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 213 (2008). This does not mean however that a criminal defendant is entitled to counsel as soon as the Sixth Amendment right attaches. *See id.* at 213–14 (Alito, J., concurring) (“[T]he term ‘attachment’ signifies nothing more than the beginning of the defendant’s prosecution. It does not mark the beginning of a substantive entitlement to the assistance of counsel.”). Instead, the Court held that “[o]nce attachment occurs, the accused at least is entitled to the presence of appointed counsel during any ‘critical stage’ of the postattachment proceedings.” *Id.* at 212.

¹⁰² *See* Charlie Gerstein, Plea Bargaining and the Right to Counsel at Bail Hearings, 111 *Mich. L.Rev.* 1513, 1514 (2013), <https://repository.law.umich.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1047&context=mlr> (citing several Supreme Court cases and explaining that “the defendant only actually gets a lawyer when two criteria are met. First, the right to counsel must have “attached.” “Attachment” occurs at the first formal, adversarial proceeding against the defendant, even if that procedure does not involve a prosecutor.5 Second, the proceeding at which the defendant seeks assistance of counsel must be a “critical stage” of the prosecution. 6 Critical stages are pretrial procedures so dangerous to the defendant, or so similar to a trial itself, that they require the presence of counsel to protect the defendant’s trial rights.”).

¹⁰³ *See, e.g.*, American Bar Association, *Pretrial Release*, Criminal Justice Section Standards, https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk/.

¹⁰⁴ *See, e.g.*, Katherine Hood and Daniel Schneider, “Bail and Pretrial Detention: Contours and Causes of Temporal and County Variation,” *RSF: The Russell Sage Foundation Journal of the Social Sciences*, vol. 5, no.1, Feb. 2019, at 143; Léon Digard and Elizabeth Swavola, “Justice Denied,” Vera Institute of Justice, Apr. 2019, <https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf>.

Relevant Federal Legislation & Reforms

Based on the above constitutional framework, Congress passed and President Lyndon B. Johnson signed into law the Federal Bail Reform Act of 1966, which governed pretrial release in the federal system.¹⁰⁵ The Act created the presumption of release on personal recognizance for defendants in non-capital cases, unless the judge believed the defendant posed a flight risk and would not appear at court.¹⁰⁶ In these cases, judges were mandated to apply the least restrictive conditions of release necessary to ensure the defendant's appearance at court.¹⁰⁷ Each state's criminal justice system may also set up a system of pretrial release. Pretrial release conditions that a judge is permitted to impose can vary by state or jurisdiction, but generally these conditions mean that the accused is being released back into the community provided that a friend, family member, or pretrial services organization will supervise the individual during the pretrial period.¹⁰⁸ Judges may also impose restrictions on travel; require the use of electronic monitoring, drug and alcohol testing, and proof of seeking employment; and prohibit the ownership of a handgun, to name a few options.¹⁰⁹

The Act also added provisions limiting the use of money bail bonds and encouraging other non-financial release options unless these options were considered insufficient to ensure a defendant's appearance in court.¹¹⁰ It also added that a defendant could post a ten percent deposit of a money bail bond to the court in lieu of the full monetary amount of a surety bond.¹¹¹ The Act's language stated: "all persons, regardless of their financial status, shall not needlessly be detained, pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest."¹¹² Lastly, the Act imposed a mandatory review of bail bonds for defendants who have been detained for 24 hours or more.¹¹³

¹⁰⁵ Bail Reform Act of 1966, Pub. L. 89-465, 80 Stat. 214 (1966).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*; Pretrial Justice Center for Courts, Legal Framework, <https://www.ncsc.org/pjcc/topics/legal-framework>.

¹⁰⁸ See, e.g., National Association of Pretrial Services Agencies, "Pretrial Release,"

<https://napsa.org/eweb/DynamicPage.aspx?Site=napsa&WebCode=Release>; For list of state statutes on pretrial release see also, National Conference of State Legislatures, "Pretrial Release: Guidance for Courts."

<https://www.ncsl.org/research/civil-and-criminal-justice/guidance-for-setting-release-conditions.aspx#Presumptions>

¹⁰⁹ See e.g., Mo. R. Crim. Proc. 33.01 (2020),

<https://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/c0c6ffa99df4993f86256ba50057dcb8/3746fcd8eae678fe86256ca600521224?OpenDocument>; Wash. R. Crim. § 3.2 (2017),

https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=sup&set=crr&ruleid=supCrR3.2.

¹¹⁰ Bail Reform Act of 1966, Pub. L. 89-465, 80 Stat. 214 (1966).

¹¹¹ *Id.* at § 3146 (a)(3).

¹¹² *Id.* at Sec. 2; Alexa Van Brunt and Locke E. Bowman, "Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next," *Journal of Criminal Law and Criminology*, vol. 108, no. 4, Fall 2018, at 725.

¹¹³ Bail Reform Act of 1996, Pub. L. 89-465, 80 Stat. 214, Sec. 3(d); Timothy Schnacke, Michael Jones, and Claire Brooker, "The History of Bail and Pretrial Release," Pretrial Justice Institute, Sept. 24, 2010, at 12.

Some critics of the reform argue that the Act did not go far enough to ensure that defendants were not being detained due to inability to pay.¹¹⁴ Because the Act only applied to cases under federal jurisdiction and to the District of Columbia, it accounted for only a small percentage of pretrial detainees.¹¹⁵

Legislators expressed further criticism of the 1966 Act when considering the passage of the 1970 District of Columbia Reform and Criminal Procedure Act, due in large part to highly publicized violent crimes committed by people who were released pretrial.¹¹⁶ Proposals called for legislators to implement more restrictive bail release policies because prior policies focused on ensuring court appearances and did not include provisions for community safety.¹¹⁷ The 1970 Act sought to expand the use of pretrial detention for three categories of defendants: those charged with “dangerous crimes,” “crime of violence,” or those charged with any offense if the defendant threatened or attempted to threaten, injure, or intimidate a witness or juror.¹¹⁸

This Act became the first bail legislation in the United States to make concerns over community safety consideration equal to court appearances in determining pretrial detention or release.¹¹⁹ The Act also became the first federal legislation that permitted the pretrial detention of defendants for non-capital offenses on the bases of public safety or flight risk.¹²⁰

Under this Act, while judges could preventively detain defendants for reasons of public safety, money bail bonds were not permitted to be used to ensure that public safety.¹²¹ The new provision in the Act specified that “no financial condition may be imposed to assure the safety of any other person or the community.”¹²² According to Northwestern Law professors Alexa Van Brunt and Locke Bowman, judges could, however, still use money bonds to “unintentionally detain” individuals whom they did not want released while avoiding having to sign explicit detention orders or affording the required due process protections that a detention decision would require.¹²³

¹¹⁴ See, e.g., Alexa Van Brunt and Locke E. Bowman, “Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What’s Next,” *Journal of Criminal Law and Criminology*, vol. 108, no. 4, Fall 2018, at 726-27.

¹¹⁵ *Ibid.*

¹¹⁶ D.C. Reform & Crim. Pro. Act, Pub. L. No. 91-358, 84 Stat. 473 (1970) (codified as 23 D.C. Code Ann. §§ 23-1321-32).

¹¹⁷ Timothy Schnacke, Michael Jones, and Claire Brooker, “The History of Bail and Pretrial Release,” Pretrial Justice Institute, Sept. 24, 2010, at 17.

¹¹⁸ See 23 D.C. Code Ann. §§ 23-1321-32; see also Timothy Schnacke, “‘Model’ Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention,” Apr. 18, 2017, at 73-74.

¹¹⁹ Timothy Schnacke, “‘Model’ Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention,” Apr. 18, 2017; 23 D.C. Code Ann. §§ 23-1321-32. District of Columbia Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (1970).

¹²⁰ 23 D.C. Code Ann. §§ 23-1321-32.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Alexa Van Brunt and Locke E. Bowman, “Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What’s Next,” *Journal of Criminal Law and Criminology*, vol. 108, no. 4, 2018, at 732.

Then, in 1984, as part of the Comprehensive Crime Control Act,¹²⁴ Congress passed the Bail Reform Act of 1984,¹²⁵ which solidified a judge's ability to impose "preventive detention" and deny pretrial bail to defendants deemed too dangerous to the public. The Bail Reform Act of 1984 specifically stated that "[a] judicial officer authorized to order the arrest of a person... before whom an arrested person is brought shall order that such person be released or detained, pending judicial proceedings..."¹²⁶ However, this detention is allowed only if a judge determines that no conditions or combination of conditions exist to "reasonably assure the appearance of the person,"¹²⁷ and/or for "the safety of any other person and the community."¹²⁸

The crimes that may make a defendant ineligible for release generally include: crimes of violence, capital crimes, drug offenses that carry potential sentences of 10 years or more, a felony charge for a defendant who has two prior violent or serious drug convictions, felonies involving minors or possession or use of weapons, or failure to register as a sex offender.¹²⁹ However, being charged with one of these crimes only makes a defendant eligible for a judicial officer to deny them bail.¹³⁰ For actual denial of bail, the judge must also find by "clear and convincing evidence" that there are no conditions of release that could protect the public if the defendant were released pretrial.¹³¹

Shortly after the passage of the 1984 Bail Reform Act, the Supreme Court upheld the constitutionality of considering the dangerousness of a defendant when making pretrial release decisions for alleged serious crimes.¹³² The *Salerno* Court ruled that the "government's interest in preventing crime by arrestees is both legitimate and compelling";¹³³ therefore, considering a defendant's dangerousness does not violate due process protections.¹³⁴ The Court "affirmed that there was no categorical prohibition on preventive detention under the Constitution ... [and] found

¹²⁴ Pub. L. No. 98-473, 98 Stat. 1837 (1984).

¹²⁵ 18 U.S.C. §§ 3141-3156 (1990).

¹²⁶ *Id.*

¹²⁷ *See U.S. v. Xulam*, 84 F.3d 441, 442 (D.C. Cir. 1996) (per curiam); 18 U.S.C. § 3142(c) (1994).

¹²⁸ *U.S. v. Rodriguez*, 897 F. Supp. 1461, 1463 (S.D. Fla. 1995); 18 U.S.C. § 3142(e) (1986).

¹²⁹ 18 U.S.C. §§ 3142(e), (f)(1) (2016).

¹³⁰ *Id.*

¹³¹ 18 U.S.C. § 3142.

¹³² 481 U.S. 739, 755 (1987); *see also infra* notes 78-80 (discussing this case).

¹³³ 481 U.S. at 749.

¹³⁴ *Id.* at 755.

no merit to the respondent's Eighth Amendment claim, dismissing the argument, based on *Stack v. Boyle*¹³⁵ that stated there was an absolute right to bail."¹³⁶

As a result, by 1999, most states and the District of Columbia had added statutes to include public safety considerations, in addition to flight risk concerns, when making decisions regarding pretrial release and detention.¹³⁷ The *Salerno* Court did state, however, that the idea of pretrial release should be the norm and pretrial detention must be "carefully limited."¹³⁸ The Court offered three considerations to ensure this careful limitation: 1) the need to articulate a particularly acute problem or justification for detention; 2) the need to limit detention by charge; and 3) the need for procedural due process.¹³⁹ This opinion further noted that the government must prove "by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or the person" to withhold pretrial release under the Bail Reform Act of 1984.¹⁴⁰ Thus, in interpreting the 1984 Act the *Salerno* Court ruled that pretrial detention is lawful as long as it is justified, carefully limited, and fair.¹⁴¹

The next significant piece of federal legislation regarding bail practices came in 2008 with the passage of the 2008 Bail Reform Act. The law provides that:

The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, ..., unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.¹⁴²

¹³⁵ 342 U.S. 1, 4 (1951). In *Stack*, The Court wrote that, "The modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as an additional assurance of the presence of the accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment." The majority also wrote that there was no factual evidence to justify the bail amount, so ruled that it was arbitrary and excessive. *Stack* did not create a constitutional right to affordable bail; however, it did equate the right to bail to the "right to release before trial" and the "right to freedom before conviction." *Id.* at 4-5.

¹³⁶ Alexa Van Brunt and Locke E. Bowman, "Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next," *Journal of Criminal Law and Criminology*, vol. 108, no. 4, Fall 2018, at 733-34 (citing *Salerno*, 481 U.S. at 746-53).

¹³⁷ Timothy Schnacke, Michael Jones, and Claire Brooker, "The History of Bail and Pretrial Release," Pretrial Justice Institute, Sept. 24, 2010, at 18.

¹³⁸ See *Salerno*, 481 U.S. at 755.

¹³⁹ Timothy Schnacke, "'Model' Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention," Center for Legal and Evidence-Based Practices, Apr. 18, 2017, at 34.

¹⁴⁰ *United States v. Salerno*, 481 U.S. 739, 750 (1987); see also Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified as 18 U.S.C. §§ 3141-3150).

¹⁴¹ See *Salerno*, 481 U.S. at 755; Timothy Schnacke, "'Model' Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention," Center for Legal and Evidence-Based Practices, Apr. 18, 2017, at 38-39.

¹⁴² 18 U.S.C. § 3142(b).

Concerning release, 18 U.S.C. § 3142(c)(2) states that “the judicial officer may not impose a financial condition that results in the pretrial detention of the person.”¹⁴³

In *United States v. Robinson*, the court imposed a \$7,500 bail (in cash or property) amount along with GPS monitoring, pretrial supervision, and travel restrictions, even though pretrial services informed the court of that the defendant was unemployed and living with his girlfriend’s mother.¹⁴⁴ The defendant’s attorney petitioned the court to remove the monetary bail conditions as a violation of 18 U.S.C. § 3142(c)(2). The pretrial hearing judge concluded that Robinson would be allowed another hearing to revisit the necessity of the financial condition imposed by the magistrate judge.¹⁴⁵

State legislation is also an important source of law as most adjudications of criminal justice issues happen at the state level. This is in part because of “police power” that lies with the states.¹⁴⁶ For a discussion on the relevant state policies on pretrial release, see Chapter 4 of this report.

¹⁴³ 18 U.S.C. § 3142(c)(2); *see also U.S. v. Robinson*, 16 Mag. 323 (S.D.N.Y. 2016) (citing 5th and 2d Circuit that § 3142 (c) was intended to prevent the “sub rosa use of money bond” to detain defendants automatically and without proper evidentiary support (internal citations removed), at 3; *U.S. v. Diaz-Hernandez*, 943 F.3d 1196, 1199 (9th Cir. 2019) (citing that the imposition of a \$10,000 bail could run afoul of 18 U.S.C. § 3142 (c)(2)); *U.S. v. Mantecon-Zayas*, 949 F.2d 548, 549-50 (1st Cir. 1991); *U.S. v. McConnell*, 842 F.2d 105, 108 (5th Cir. 1988).

¹⁴⁴ *United States v. Robinson*, U.S. Dist. 16 Mag. 323 (S.D.N.Y. 2016).

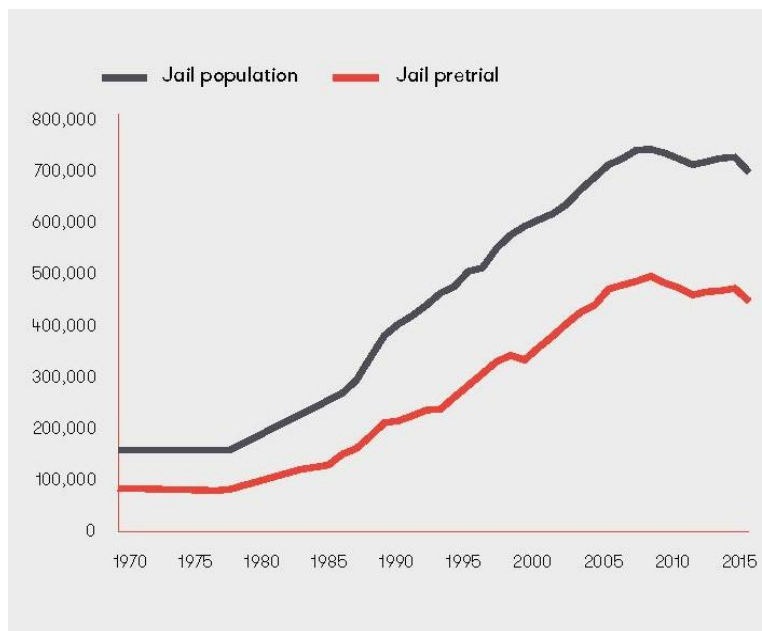
¹⁴⁵ *Id.*

¹⁴⁶ In the U.S. constitutional system of federalism, local “police power” falling under state sovereignty which includes the ability to legislate and regulate to ensure public safety, education, and health and welfare. The Supreme Court has reasoned that “states traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.” *See* U.S. Dep’t of Justice, Bureau of Justice Statistics, *National Sources of Law Enforcement Employment Data*, 2016, at 1, <https://www.bjs.gov/content/pub/pdf/nsleed.pdf>; *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985).

Chapter 2: Incarceration Data and Trends

National incarceration trends show that while the number of individuals serving sentences in jails and prisons across the U.S. has decreased, the number of those detained pretrial has continued to increase.¹⁴⁷ The pretrial population increased 433 percent between 1970 and 2015, from 92,922 people to 441,790 people (see Chart 1 below).¹⁴⁸ The pretrial population also accounted for an increasing proportion of the total jail population over the same time period (which includes those already convicted or sentenced).¹⁴⁹ The non-sentenced pretrial jail population was 53 percent in 1970 and increased to 64 percent in 2015.¹⁵⁰

Chart 1: U.S. Pretrial and Total Jail Population (1970-2015)



Source: Leon Digard and Elizabeth Swavola, “Justice Denied: The Harmful and Lasting Effects of Pretrial Detention,” Vera Institute, Apr. 2019.

According to data collected by the Prison Policy Initiative, by 2013, in all but eight states with available pretrial population data, pretrial defendants accounted for over 50 percent of the total jail

¹⁴⁷ Vera Institute, Incarceration Trends, <http://trends.vera.org/incarceration-rates?data=pretrial>; Leon Digard and Elizabeth Swavola, “Justice Denied: The Harmful and Lasting Effects of Pretrial Detention,” Vera Institute, Apr. 2019

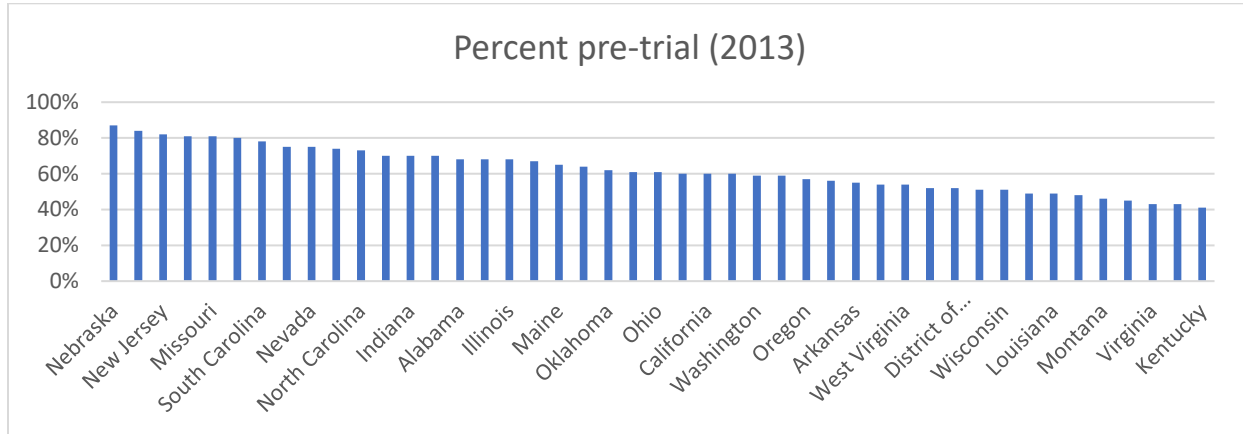
¹⁴⁸ Vera Institute, Incarceration Trends, <http://trends.vera.org/incarceration-rates?data=pretrial>; Leon Digard and Elizabeth Swavola, “Justice Denied: The Harmful and Lasting Effects of Pretrial Detention,” Vera Institute, Apr. 2019.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

population (see Chart 2 below).¹⁵¹ The pretrial population made up the highest percentage of the jail population in Nebraska (87 percent) and the lowest percentage in Kentucky (41 percent).¹⁵²

Chart 2: Percentage of Pretrial Population of Total Jail Population (2013)



Source: Joshua Aiken, Jail trends by state, Prison Policy Initiative, May 2017.

According to Bureau of Justice Statistics data, by midyear 2018, across the United States, approximately 66 percent (490,000) of the more than 738,000 people in city and county jails remain in jail despite having not been convicted of a crime and await their day in court.¹⁵³ The remaining percentage were either sentenced or convicted offenders awaiting sentencing. However, including the counts in the six states with combined prison-jail systems, these pretrial counts may be underestimating the number of unconvicted individuals held in jail by approximately 8,000 to 9,000 individuals.¹⁵⁴ While the number of pretrial individuals detained has continued to increase, data show that the overall incarceration rate declined from midyear 2008 to midyear 2018 – from 258 to 226 inmates per 100,000 U.S. residents, representing a 12 percent decrease.¹⁵⁵

These increasing pretrial populations occurred despite declining violent and property crime rates: there was a 50 percent decrease for violent crime and a 47 percent decrease for property crimes between 1991 and 2013.¹⁵⁶ Arrest rates also decreased from 5,807 per 100,000 in 1995 to 3,691 in

¹⁵¹ Joshua Aiken, “Jail trends by state” in *Era of Mass Expansion: Why State Officials Should Fight Jail Growth*, Prison Policy Initiative, May 2017, https://www.prisonpolicy.org/reports/jailsovertime_table_2.html.

¹⁵² Ibid.

¹⁵³ Zhen Zeng, “Jail Inmates in 2018,” Bureau of Justice Statistics, U.S. Dep’t of Justice, Mar. 2020.

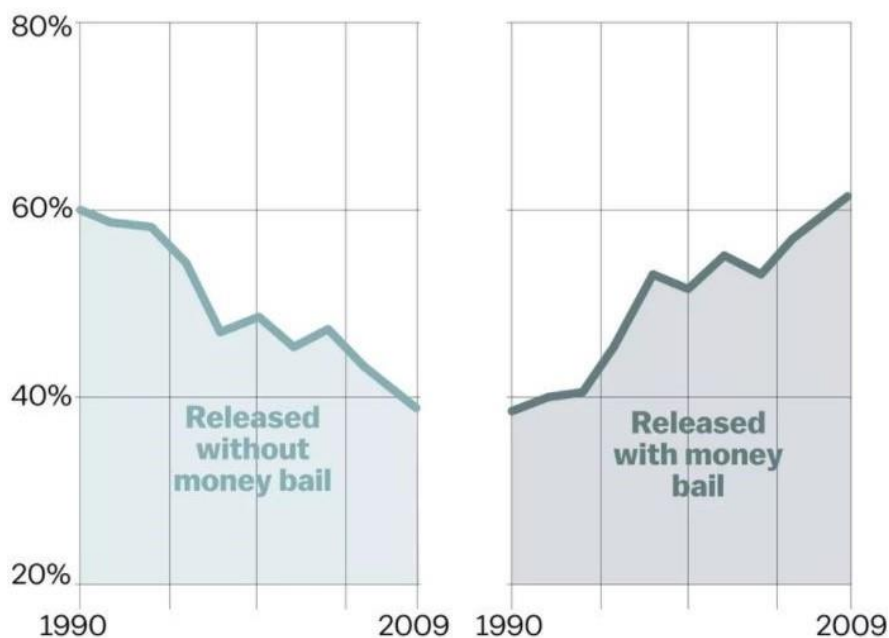
¹⁵⁴ See, e.g., Jacob Kang-Brown and Ram Subramanian, “Out of Sight: The Growth of Jails in Rural America,” Vera Institute, June 2017, <https://www.vera.org/downloads/publications/out-of-sight-growth-of-jails-rural-america.pdf>.

¹⁵⁵ Zhen Zeng, “Jail Inmates in 2018,” Bureau of Justice Statistics, U.S. Dep’t of Justice, Mar. 2020.

¹⁵⁶ Ibid.

2013.¹⁵⁷ Part of the increase in pretrial populations was due to local jurisdictions imposing more financial conditions for release. For instance, between 1990 and 2009, the use of financial conditions as a condition in felony cases for pretrial release in the largest urban counties increased from 37 to 61 percent (see Chart 3 below).¹⁵⁸ The use of commercial surety bonds accounted for nearly all this increase.¹⁵⁹ This growth illustrated a paradigm shift in the rising number of judges issuing not only more financial bail conditions, but also, higher amounts of bail which many defendants could not afford to pay.¹⁶⁰

Chart 3: Felony defendants released pretrial in 75 largest counties, 1990-2009



Source: Stephanie Wykstra, “Bail Reform, which could save millions of unconvicted people from jail,” Vox, Oct. 17, 2018, <https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice-inequality> (citing Brian Reaves, “Felony Defendants in Large Urban Counties, 2009 – Statistical Tables,” Bureau of Justice Statistics, Dec. 2013, <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf>)

As Color of Change and the ACLU emphasized in a recent report, this change meant that for families who could not afford the imposed bail amount, they had to choose to either leave their family member incarcerated or enter into financial agreements with bail-bond corporations.¹⁶¹ Relatedly, the number of pretrial releases that relied upon the private, for-profit bail industry also

¹⁵⁷ Leon Digard and Elizabeth Swavola, “Justice Denied: The Harmful and Lasting Effects of Pretrial Detention,” Vera Institute, Apr. 2019, p. 2.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid., p. 2.

¹⁶⁰ Ibid.

¹⁶¹ Katie Unger, “Selling Our Freedom,” Color of Change and the ACLU Campaign for Smart Justice, May 2017.

increased along with the number of arrests requiring money bail for release, growing from 24 percent in 1990 to 49 percent in 2009.¹⁶²

Even in states that do not permit the private bail industry to operate, defendants may face unaffordable bonds.¹⁶³ In such jurisdictions, while the private bail industry is banned, bail itself is not. Defendants must therefore pay cash bail to the court to secure their release.¹⁶⁴ Sharlyn Grace, a member of the Illinois Network for Pretrial Justice, testified at the Commission's briefing that some stakeholders opposed reform measures due to state and local government's reliance upon monetary bail.¹⁶⁵ She explained:

We have no private bail bonds industry in Illinois because it was eliminated in 1963 in the first wave of bail reform. But, instead, people pay money to the courts. And in 2017, when we first began introducing legislation to end money bail, it was in fact the court clerks who were our biggest opposition, because, not based on ethics or legality, but on their need for revenue, they could not give up the money being generated by money bail. And one of the reports that was referenced earlier today, the *Dollars and Sense* report evaluating the reforms in Cook County, found that just a 50 percent reduction in the use of money bonds in Cook County saved families \$31.4 million in bail payments.¹⁶⁶

At the Commission's briefing, Lars Trautman, Resident Senior Fellow at the R Street Institute explained these trends show that:

[T]here are literally thousands of individuals who are held prior to trial for no better reason than a financial inability to pay whatever money bail has been assessed on their case. What's more, there are many more thousands who are released, but only after significant financial hardship to themselves or their family, particularly through the payment of non-refundable commercial bail fees. What evidence we have suggests that there are significant racial and ethnic disparities, both in the amount of money bail that is set in a case, as well as who ends up detained prior to trial. In this, we also see wealth-based disparities.¹⁶⁷

Pretrial Data Trends and Demographics

There are no national databases on the pretrial detention rates, bail, or sentencing for defendants accused of committing a misdemeanor, as the Bureau of Justice Statistics does not collect these

¹⁶² Ibid.

¹⁶³ See e.g., Sandra Mayson, "Detention By Any Other Name," 69 Duke L.J. 1643 1645 (2020), <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4027&context=dlj>.

¹⁶⁴ See, e.g., Grace testimony, *Bail Reform Briefing*, transcript p. 83; See 725 Ill. Comp. Stat. Ann. 5/110-13 (West 1964); Ky. Rev. Stat. Ann. § 431.510 (LexisNexis 2010); OR. Rev. Stat. § 135.245 (2015); Wis. Stat. § 969.12 (2013–14).

¹⁶⁵ Grace testimony, *Bail Reform Briefing*, transcript p. 83.

¹⁶⁶ Ibid.

¹⁶⁷ Lars Trautman, Resident Senior Fellow, R Street Institute, testimony, *Bail Reform Briefing*, transcript p. 28-29.

statistics.¹⁶⁸ The available national data on pretrial detention – which are over a decade old – show that that approximately four in ten felony defendants in the largest urban counties were detained pretrial.¹⁶⁹ The lack of data on pretrial detention for misdemeanors is significant because FBI data show that about 80 percent of the over 10 million arrests each year are for misdemeanor as opposed to felony charges.¹⁷⁰

But there are overall pretrial detention data, based on Bureau of Justice estimates as well as state data. Empirical studies over the past several decades show that the number of individuals held in pretrial detention nationally has grown more than five times, from 82,900 in 1970 to 462,000 in 2013.¹⁷¹ During this time, this growth in detention more than tripled the nationwide pretrial detention rate from 68 per 100,000 to 220 per 100,000 residents.¹⁷² Studies show that federal pretrial detention rates have reached to nearly 75 percent, which is more than double the rates in the early 1990s.¹⁷³ Some counties, however, have far exceeded this rate. For instance, in 2017 in St. Bernard Parish, Louisiana, the pretrial detention rate was 772 per 100,000 residents, which was higher than the county’s overall jail population (720).¹⁷⁴

Regarding the demographic makeup of county and city jail populations, which include pretrial detainees, data from the Bureau of Justice Statistics show that men were incarcerated at nearly six times the rate of women in 2018 (387 versus 69 per 100,000 individuals, respectively).¹⁷⁵ Comparing the incarceration rate over time shows that from 2005 to 2018, the male incarceration

¹⁶⁸ Paul Heaton, Sandra Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention* 69 STAN. L. REV. 711, 732 (2017), <https://review.law.stanford.edu/wp-content/uploads/sites/3/2017/02/69-Stan-L-Rev-711.pdf>; Tracey Meares and Arthur Rizer, “The ‘Radical’ Notion of the Presumption of Innocence,” The Square One Project, May 2020, <https://squareonejustice.org/wp-content/uploads/2020/05/CJLJ8161-Square-One-Presumption-of-Innocence-Paper-200519-WEB.pdf>.

¹⁶⁹ Bureau of Justice Statistics, “Felony Defendants in Large Urban Counties, 2009 – Statistical Tables,” U.S. Dep’t of Justice, Dec. 2013, <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf>.

¹⁷⁰ FBI, “FBI Releases 2018 Crime Statistics,” Sept. 30, 2019, <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2018-crime-statistics>.

¹⁷¹ Jacob Kang-Brown and Ram Subramanian, “Out of Sight: The Growth of Jails in Rural America,” Vera Institute, June 2017, at 9-10. The researchers estimate these numbers from state and federal sources. The Bureau of Justice Statistics estimates that 453,200 people were unconvicted in local jails in midyear 2013. See Todd D. Minton and Zhen Zeng, *Jail Inmates in 2015* (2016), Table 3. Minton and Zeng’s analysis focuses on the population of local jails, but it does not include people who are held pretrial in the six states with combined prison-jail systems (Alaska, Connecticut, Delaware, Hawaii, Rhode Island, and Vermont). Vera researchers include the roughly “unsentenced” 9,000 people in these state’s facilities to estimate the nationwide pretrial population of 462,000, <https://www.vera.org/downloads/publications/out-of-sight-growth-of-jails-rural-america.pdf>.

¹⁷² *Ibid.*

¹⁷³ Matthew Rowland, “The Rising Federal Pretrial Detention Rate, in Context,” U.S. Courts, Sept. 2018, https://www.uscourts.gov/sites/default/files/82_2_2_0.pdf.

¹⁷⁴ Vera Institute, Incarceration Trends: St. Bernard Parish, LA, <http://trends.vera.org/rates/st-bernard-parish-la>.

¹⁷⁵ *Ibid.*

rate declined by 14 percent (448 to 387 per 100,000 male residents), whereas the female incarceration rate increased by 10 percent (63 to 69 per 100,000 female residents).¹⁷⁶

The racial composition of those confined in county and city jails show, from 2005 to 2018, the incarceration rate for Black, Latinx, and Asian inmates declined (see Table 1 below).¹⁷⁷ Rates for Latinx inmates declined 34 percent – from 274 to 182 per 100,000 Latinx residents; Black inmates declined by 28 percent – from 825 to 592 per 100,000 Black U.S. residents; and Asian inmates declined by 35 percent – from 40 to 26 per 100,000 Asian U.S. residents.¹⁷⁸ This means that the incarceration rate for Black U.S. residents fell below 600 per 100,000 for the first time since 1990.¹⁷⁹ Comparatively, the incarceration rate of White inmates increased by 12 percent – from 167 to 187 per 100,000 white residents.¹⁸⁰

While the incarceration rate of Native American and Alaska Native (AIAN) individuals witnessed a small increase during this time period (339 in 2005 to 401 in 2018),¹⁸¹ previous years data show that the number of these individuals incarcerated in local jails nearly doubled from 1999 to 2014.¹⁸² During these years, the number of AIAN inmates held in county and city jails increased nearly 90 percent and grew by an average of 4.3 percent in each of those years, compared to an increase of 1.4 percent per year for all other races and Latinx inmates combined.¹⁸³ In terms of pretrial incarceration, in 2011 alone, approximately 51 percent of all AIAN inmates were held in jails awaiting sentencing, compared to about 53 percent of all other races (including Latinx) combined.¹⁸⁴

¹⁷⁶ Note: these data are compiled from Annual Survey of Jails, which is national survey of county and city jails. However, the data do not include the combined jail and prison populations in six states – Alaska, Connecticut, Delaware, Hawaii, Rhode Island, and Vermont. But Alaska’s 15 locally run jails are included in the dataset. The 2018 sample (most recent available) is based on the most Census of Jails dataset that was conducted in 2013. While the Annual Survey of Jails includes some racial and ethnic demographics, it does not include more detailed data on individuals in jail such as current offenses, criminal histories, and detention status. See Zhen Zeng, “Jail Inmates in 2018,” Bureau of Justice Statistics, U.S. Dep’t of Justice, Mar. 2020, <https://www.bjs.gov/content/pub/pdf/ji18.pdf>. As discussed above, the more comprehensive nationally representative dataset is the Survey of Inmates in Local Jails which BJS has slated to update in 2021. See Office of Justice Programs, *FY 2020 Program Summaries*, Mar. 2019, at 10, <https://www.justice.gov/jmd/page/file/1160581/download>.

¹⁷⁷ Zhen Zeng, “Jail Inmates in 2018,” Bureau of Justice Statistics, U.S. Department of Justice, March 2020.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ Zhen Zeng, “Jail Inmates in 2018,” Bureau of Justice Statistics, U.S. Dep’t of Justice, Mar. 2020.

¹⁸² Todd Minton, Susan Brumbaugh, and Harley Rohloff, “American Indian and Alaska Natives in Local Jails, 1999-2014,” Bureau of Justice Statistics, Sept. 2017, <https://www.bjs.gov/content/pub/pdf/aianlj9914.pdf>.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

Table 1: Incarceration Rates, by sex and race/ethnicity, 2005, 2008, 2010-2018

	2005	2008	2010	2011	2012	2013	2014	2015	2016	2017	2018
Male	448	457	431	419	418	404	405	394	398	394	387
Female	63	65	59	59	62	64	67	64	66	69	69
AIAN	339	386	426	410	401	437	443	378	379	366	401
Asian	40	37	31	32	30	28	32	30	30	26	26
Black	803	825	745	721	709	668	667	640	633	616	592
Latinx	263	273	235	219	212	199	200	184	196	185	182
White	167	167	167	167	173	174	178	178	180	187	187
Other	34	37	26	26	34	33	24	36	40	39	50
Total	253	258	242	236	237	231	233	226	229	229	226

Source: Bureau of Justice Statistics, "Jail Inmates in 2018," Mar. 2020.

In 2018 (the most current federal incarceration data available), the estimated average time in jail for detained individuals was 25 days.¹⁸⁵ Smaller jails that house fewer inmates tended to have higher weekly inmate turnover rates and shorter lengths of stay than larger jails.¹⁸⁶ On average, jails with average daily population of 2,500 or more held inmates about twice as long (34 days) as smaller jails with an average daily population of less than 100 (15 days).¹⁸⁷ From 2008 to 2018, the number of individuals held in jails decreased from 785,500 to 738,400.¹⁸⁸ Additionally, jail authorities also supervised 57,900 individuals in programs outside of jails that included weekend programs, electronic monitoring, home detention, day reporting, community service, treatment programs, and other pretrial and work programs.¹⁸⁹ Similar to the overall inmates in jails in this time period, the number of individuals who were supervised outside of jails also decreased, by 21 percent, from 72,900 to 57,900.¹⁹⁰

¹⁸⁵ Ibid.

¹⁸⁶ Ibid

¹⁸⁷ Zhen Zeng, "Jail Inmates in 2018," Bureau of Justice Statistics, U.S. Dep't of Justice, Mar. 2020.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

Researchers have found, however, that by midyear 2019, the estimated number of incarcerated individuals in local jails had grown to 758,400, which is a 1.8 percent increase from midyear 2017.¹⁹¹ This growth in local jail populations represents the highest number of people in jail since midyear 2009; and similar to previous years, a majority of these individuals have not been convicted and many are being detained for civil issues (e.g., immigration cases, unpaid child support, or fines and fees).¹⁹² The incarceration rate also increased slightly (0.5 percent) from midyear 2017 to midyear 2019, but the overall national rate of 230 individuals per 100,000 residents is 2.8 times higher than it was in 1960.¹⁹³ Much of this increase is due to the growth of incarceration rates in rural jail populations. Jail populations in rural counties have increased 27 percent from 2013 and 7 percent in small and mid-sized metropolitan areas; in contrast, jail populations in large urban counties have declined by 18 percent and 1 percent in surrounding suburban counties during that same period.¹⁹⁴ This means that in 2019, rural counties' incarceration rates were more than double the rates of urban counties (see Table 2 below).¹⁹⁵

Table 2: Jail Incarceration Rate and Changes by Region

	2013	2019	Change	% Change
National	231	230	-1	0
Urban	212	165	-46	-22
Suburban	192	180	-12	-6
Small/Midsize Metro	257	265	8	3
Rural	314	398	83	26

Source: Jacob Kang-Brown, Oliver Hinds, Eital Schnattner-Elmaleh, and James Wallace-Lee, "People in Jail in 2019," Dec. 2019.

These increasing incarceration rates in rural jails are also mirrored in the rates of pretrial detention. In 1970, the pretrial incarceration rate of 49 per 100,000 residents grew to 265 per 100,000 residents in 2013, which represents a 436 percent increase in rural jails.¹⁹⁶ Regional differences show that states in the South and the West have the highest pretrial detention rates (281 and 198 per 100,000, respectively) compared to states in the Northeast and Midwest (177 and 170 per

¹⁹¹ Jacob Kang-Brown, Oliver Hinds, Eital Schnattner-Elmaleh, and James Wallace-Lee, "People in Jail in 2019," Dec. 2019, <https://www.vera.org/downloads/publications/people-in-jail-in-2019.pdf>.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ Jacob Kang-Brown and Ram Subramanian, "Out of Sight: The Growth of Jails in Rural America," Vera Institute, June 2017, <https://www.vera.org/downloads/publications/out-of-sight-growth-of-jails-rural-america.pdf>.

100,000, respectively).¹⁹⁷ As discussed, these differences are the most pronounced in the rural areas of these regions at 335 and 226 per 100,000, respectively, in 2013.¹⁹⁸ Moreover, data trends show that even in states with historically low pretrial detention rates, between 1970 and 2013, these rates grew more than five times, from 24 to 154 per 100,000 residents and from 30 to 194 per 100,000 residents, in the Northeast and Midwest, respectively.¹⁹⁹

Furthermore, the decline of urban pretrial detention rates since 2008 has put these counties near the same level with their surrounding suburban counties.²⁰⁰ For instance, the pretrial detention rate in New York City (144 per 100,000 residents) is nearly the same as in Westchester County (140 per 100,000); Los Angeles (148 per 100,000 residents) as in Orange County (188 per 100,000), and San Francisco (136 per 100,000 residents) as in Marin County (144 per 100,000).²⁰¹ Conversely, between 1970 and 2013, the proportion of defendants held pretrial outside of these metropolitan areas grew from 37 to 51 percent.²⁰²

One potential cause of the growth in pretrial rates in rural areas has been traced to the local criminal justice system having fewer resources, such as court practitioners and administrators (e.g., judges, prosecutors, public defenders, staff), as well as a lack of pretrial services programs, diversion programs and community-based services.²⁰³ Some rural counties may only be able to hold court hearings during normal business hours, while others may rely on circuit court judges and can only convene bail hearings a few times a month or per year in a given location. Comparatively, some urban counties have specified arraignment courts providing more opportunities to hold court proceedings such as initial appearances and bail hearings, which can have a significant impact on the amount of time spent in pretrial detention.²⁰⁴

National trends also show that the types of bail imposed have changed over the past several decades which has contributed to the growth in pretrial detention. From 1990 to 1994, 41 percent of all defendants were released on personal recognizance, while 24 percent of releases were based on surety bonds.²⁰⁵ But a decade later, from 2002 to 2004, 42 percent of all release cases depended on surety bonds for release, whereas personal recognizance releases comprised only 23 percent of all releases.²⁰⁶ Moreover, the imposition of cash bail also continued to increase.²⁰⁷ Between 1992

¹⁹⁷ *Ibid.*, 12-13.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*, pp. 11-12.

²⁰² *Ibid.*

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

²⁰⁵ Alexa Van Brunt and Locke Bowman, "Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next," *Journal of Criminal Law and Criminology*, vol. 108, no. 4, 2018, at 740.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

and 2006, the use of cash bail increased 32 percent, and by 2015, 61 percent of all pretrial releases included financial conditions.²⁰⁸

The growth of the pretrial detainee population can also be traced back to the Bail Reform Act of 1984, which changed criteria regarding bail in the federal system, and thus changed who was released.²⁰⁹ The 1984 Act limited criteria for which defendants are “bailable,” by making it a rebuttable presumption that persons charged with “a crime of violence,” a drug crime, an offense with a firearm, or involving a minor child, or other serious offenses, or persons with two prior felony convictions, may not be released.²¹⁰ This change correlates with the growth of the detainee population because it increased the categories of defendants who could be deemed ineligible for release.²¹¹

The 1984 Act also permitted judges wide discretion when setting bail conditions.²¹² Judges may determine which factors to consider when determining bail, including a defendant’s character, reputation, habits and mental condition, employment and financial resources, family ties and length of residence in the community, criminal record, adjudication of a juvenile, previous record of flight risk, and the strength of the evidence presented at the hearing. Judges can also decide how they want to consider these factors and which conclusions to draw from them.²¹³ In New York, the statute to determine if a defendant is bailable does not mention public safety as a factor that judges should consider when determining bail, but public safety has nonetheless been shown to have a large impact on a judge’s decision-making.²¹⁴

The process of how judges establish what bail conditions are appropriate, whether in the federal or state systems, raises many concerns, however. For example, R Street Senior Fellow, Lars Trautman testified that one of the problems with bail hearings is that they can be

rushed and reckless. Studies have indicated that in some places, the typical bail hearing lasts only one to three minutes on average. That is hardly enough time to assess an individual’s risk of flight or danger to the community, let alone their financial ability to pay whatever money bail may be assessed on their case. I can personally attest that when I was a prosecutor, on numerous occasions, I had to stand up and quickly familiarize myself with the case and determine my bail recommendation in the minute or two it took a court clerk to formally read charges

²⁰⁸ Ibid., p. 740.

²⁰⁹ 18 U.S.C. §§ 3141-3150.

²¹⁰ 18 U.S.C. § 3142(e)(3) & (f)(1).

²¹¹ See *infra* notes 127-133.

²¹² 18 U.S.C. § 3142.

²¹³ Lindsey Devers, “Bail Decisionmaking,” Bureau of Justice Assistance, U.S. Dep’t of Justice, Jan. 24, 2011, p. 2; see also *supra*. notes 127-131 (list of statutory factors in Ch. 1, citing the Bail Reform Act).

²¹⁴ Lindsey Devers, “Bail Decisionmaking,” Bureau of Justice Assistance, U.S. Dep’t of Justice, Jan. 24, 2011, p. 2.

to a defendant. That's a system that invites error and inconsistency, no matter how evenhanded or thoughtful its participants attempt to be.²¹⁵

One study found that in 1990, 53 percent of pretrial felony defendants were assigned financial conditions of release, but by 2009, 72 percent were assigned money bail.²¹⁶ Also, the average bail amount had increased by 46 percent during this time.²¹⁷ These changes were also witnessed at the state and local levels. For example, by November 2016, the average money bond in Cook County, Illinois (which holds the city of Chicago) was over \$70,000 which far exceeded the median household income of \$54,648.²¹⁸ By 2015 on the national level, the median bail amount for a felony arrest was \$10,000; and some jurisdictions had much higher amounts, such as California that had median amounts of \$50,000.²¹⁹ These medians were despite the fact that the Federal Reserve found that nearly half of Americans would be unable to pay for an unexpected expense of \$400.²²⁰ According to testimony submitted by the Essie Justice Group, they found that a family member's incarceration is associated with a 64 percent decline in household assets²²¹ and criminal cases can result in the average family going into over \$13,000 in debt over court fees and fines.²²²

The disparity between bail amounts and average incomes is significant because the inability to afford bail increases the likelihood of defendants being detained pretrial. Research has shown that the majority of pretrial detainees were detained because they could not afford bail, which was often a few thousand dollars or less.²²³ For example, in 2009, 90 percent of defendants were held in pretrial detention despite the fact bail had been set.²²⁴ Therefore, since many individuals lack the necessary funds to post bail, millions of people every year turn to the private bail industry to secure release from detention. Trend data have shown that using the private bail industry was the most

²¹⁵ Trautman testimony, *Bail Reform Briefing*, transcript p. 28-29.

²¹⁶ Shima Baradaran Baughman, *The Bail Book: A Comprehensive Look at Bail in America's Criminal Justice System*, Cambridge University Press, 2018, pp. 166-67.

²¹⁷ *Ibid.*

²¹⁸ Alexa Van Brunt and Locke Bowman, "Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next," *Journal of Criminal Law and Criminology*, vol. 108, no. 4, 2018, p. 740.

²¹⁹ Sonya Tafoya, "Pretrial Detention and Jail Capacity in California," Public Policy Institute of California, July 2015, https://www.ppic.org/content/pubs/report/R_715STR.pdf.

²²⁰ Board of Governors of the Federal Reserve System, *Report on the Economic Well-Being of U.S. Households in 2015*, May 2016, p. 22, <https://www.federalreserve.gov/2015-report-economic-well-being-us-households-201605.pdf>.

²²¹ See Gina Clayton-Johnson, Rena Karefa-Johnson, and Titilayo Rasaki, Essie Justice Group, Written Testimony for the Civil Rights Implications of Cash Bail Briefing before the U.S. Comm'n on Civil Rights, Feb. 26, 2021, p. 4 (hereinafter Essie Statement); see also Bryan L. Sykes & Michelle Maroto, *A Wealth of Inequalities: Mass Incarceration, Employment, and Racial Disparities in U.S. Household Wealth, 1966 to 2011*, 2 RSFJ. OF SOC. SCI. 129, 141 (2016).

²²² Essie Statement; see also, Saneta de Vuono-powell, et al., "Ella Baker Center, Who Pays? The True Cost of Incarceration on Families," 19 (2015), p. 4, <https://ellabakercenter.org/who-pays-the-true-cost-of-incarceration-on-families/>.

²²³ Paul Heaton, Sandra Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713 (2017).

²²⁴ Brian Reaves, "Felony Defendants in Large Urban Counties, 2009 – Statistical Tables," Bureau of Justice Statistics, Dec. 2013, <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf>.

common form of release from 1990 to 2009, doubling from 24 percent to 49 percent of pretrial releases from jail.²²⁵ What this means is that defendants and/or their families need to raise 10 percent of the total bond amount, and these funds are nonrefundable, regardless of the final outcome of the case.²²⁶

In a study examining pretrial practices over an almost twenty-year period, researchers found considerable variation across U.S. counties. These variations included both the rates in which counties imposed money bail conditions and in the amounts at which that bail is set.²²⁷ For instance, some counties released more than 50 percent of pretrial defendants with no financial conditions, whereas other counties released fewer than five percent on nonfinancial conditions.²²⁸ Further, they found that average bail amounts ranged from less than \$10,000 to more than \$100,000.²²⁹ Similar to other studies, they found that nonfinancial release conditions continued to steadily decline over time, while bail amounts doubled from \$20,000 to \$40,000.²³⁰ The differences in bail amounts were not found to be correlated to different types of cases nor were these differences accounted for by individual charges and prior records.²³¹ While criminal history accounted for some of the rise of nonfinancial release, the decrease of nonfinancial release over time was found unrelated to changes in demographics or charges.²³² Similarly, the doubling of bail amounts during this period was not explained by any of the individual case characteristics.²³³ The researchers did find however, that the rise in bail amounts and nonfinancial release conditions were correlated to higher levels of state income inequality, higher unemployment rates, politicization of judicial officers, partisan affiliation of district attorneys and governors, income inequality, unemployment rates, and the size of the Black community.²³⁴

Racial and Gender Disparities

Research consistently shows Black and Latinx individuals have higher rates of pretrial detention, are more likely to have financial conditions imposed and set at higher amounts, and lower rates of being released on recognizance bonds or other nonfinancial conditions compared to white

²²⁵ Ibid.; Katie Unger, “Selling Our Freedom,” Color of Change and the ACLU Campaign for Smart Justice, May 2017.

²²⁶ Katie Unger, “Selling Our Freedom,” Color of Change and the ACLU Campaign for Smart Justice, May 2017; Timothy Schnacke, “Money as a Criminal Justice Stakeholder: The Judge’s Decision to Release or Detain a Defendant Pretrial,” National Institute of Corrections, U.S. Dep’t of Justice, Sept. 2014.

²²⁷ Katherine Hood and Daniel Schneider, “Bail and Pretrial Detention: Contours and Causes of Temporal and County Variation,” *RSF: Russell Sage Foundation Journal of the Social Sciences*, vol. 5, no. 1, Feb. 2019, p. 127.

²²⁸ Ibid.

²²⁹ Ibid., p. 143.

²³⁰ Ibid.

²³¹ Ibid.

²³² Ibid.

²³³ Ibid.

²³⁴ Ibid., p. 143.

defendants.²³⁵ The size of the racial gap in pretrial detention rates has ranged from 10 to 80 percent in various studies.²³⁶ Methodological differences in how pretrial detention is defined and studied contribute to the wide range of statistical findings, but a persistent disparity between white and Black/Latinx defendants has been consistently identified across many jurisdictions.

Researchers have also worked to identify racial bias in the decision to release or detain accused criminal defendants. This problem is even more difficult to study, as pretrial release decisions are the culmination of multiple factors that are determined by various entities (e.g., judges, prosecutors, public defenders, police officers). These decision points include whether to release a defendant on personal recognizance or impose financial conditions; and if the latter, then what amount to set, whether to impose additional release conditions, whether to offer or accept a plea bargain, or whether to reduce or dismiss charges.²³⁷

Racial bias may be evident in some of these decisions, or may not be present in any, which means that if researchers are merely dichotomizing the issue of pretrial release – to release or not to release – these aggregate datasets may not be able to successfully demonstrate if racial bias appears in this process. Matt DeLisi, professor of sociology at Iowa State University, testified, “Unfortunately, allegations of discrimination are overwhelmingly *inferred* from data disparities and most criminological studies lack measures of discriminatory actions that could be used to substantiate allegations of bias and/or do not contain adequate control variables that could mediate demographic effects.”²³⁸ On the other hand, criminal justice scholars with the Vera Institute argue that “many studies use an overly simplistic consideration of racial discrimination and the ways in which it manifests, failing to consider the ways in which race intersects with other diverse factors such as income, crime type, and the race of the harmed party.”²³⁹

While data has shown persistent racial disparities in pretrial and bail practices, researchers have sought to determine the underlying causes of these disparities. One issue stems from pretrial and bail decisions being complicated, and as such, researchers’ conclusions may vary. One prominent issue is that the data on bail decisions are complex and multifaceted, and the available data can vary widely by jurisdictions.²⁴⁰ For example, researchers may aggregate their data across

²³⁵ Wendy Sawyer, “How race impacts who is detained pretrial,” Prison Policy Initiative, Oct. 9, 2019, https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/.

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ DeLisi statement at 3 (emphasis in original).

²³⁹ Marvin D. Free Jr., “Racial Bias and the American Criminal Justice System: Race and Presentencing Revisited,” *Critical Criminology*, 2001, vol. 10, no. 3, at 197-99.

²⁴⁰ *See, e.g.*, Marvin D. Free Jr., “Racial Bias and the American Criminal Justice System: Race and Presentencing Revisited,” *Critical Criminology*, 2001, vol. 10, pp. 195-223; Robert Smith, Justin Levinson, & Zoe Robinson, *Bias in the Shadows of Criminal Law: The Problem of Implicit White Favoritism*, 66 Ala. L. Rev. 53 (2015).

jurisdictions and offense type, instead of measuring the strength of their sampled cases.²⁴¹ Pretrial release decisions are also the culmination of multiple factors that are determined by various entities (e.g., judges, prosecutors, public defenders, police officers). These decision points include whether to release a defendant on personal recognizance or impose financial conditions; and if the latter, then what amount to set, whether to impose additional release conditions, whether to offer or accept a plea bargain, or whether to reduce or dismiss charges.²⁴²

Decades of research regarding pretrial release and bail decisions have shown that people of color are treated more harshly during the pretrial release decision-making process.²⁴³ For example, one study that analyzed state court data collected from 75 large jurisdictions in the 1990s found that Black and Latinx defendants were more likely to be detained without bail than White defendants even after controlling for a number of different factors such as crimes charged.²⁴⁴ The researchers also found that when bail was granted, it was set at significantly higher amounts for people of color; and these effects were the most notable for Latinx people who were charged with low-level drug offenses.²⁴⁵ Other studies have also shown that Black and Latinx individuals are more likely to be considered to be “dangerous” compared to White defendants and thus denied bail and detained pretrial.²⁴⁶

Bail studies have also shown that the continued reliance on money bonds beginning in the 1980s show that Black defendants are more negatively affected by the imposition of financial bail conditions than similarly situated White defendants.²⁴⁷ Several studies have found that Black defendants received worse bail outcomes that included being charged higher monetary bonds for release which translates to more time in pretrial detention; and these trends have continued to

²⁴¹ See, e.g., Marvin D. Free Jr., “Racial Bias and the American Criminal Justice System: Race and Presentencing Revisited,” *Critical Criminology*, 2001, vol. 10, pp. 195-223; Robert Smith, Justin Levinson, & Zoe Robinson, *Bias in the Shadows of Criminal Law: The Problem of Implicit White Favoritism*, 66 Ala. L. Rev. 53 (2015); Leon Digard and Elizabeth Swavola, “Justice Denied: The Harmful and Lasting Effects of Pretrial Detention,” Vera Institute Brief, April 2019, <http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/04/Justice-Denied-Evidence-Brief.pdf>.

²⁴² Leon Digard and Elizabeth Swavola, “Justice Denied: The Harmful and Lasting Effects of Pretrial Detention,” Vera Institute Brief, April 2019, <http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/04/Justice-Denied-Evidence-Brief.pdf>.

²⁴³ See, e.g., Katherine Hood and Daniel Schneider, “Bail and Pretrial Detention: Contours and Causes of Temporal and County Variation,” *RSF: Russell Sage Foundation Journal of the Social Sciences*, vol. 5, no. 1, Feb. 2019; Wendy Sawyer, “How race impacts who is detained pretrial,” Prison Policy Initiative, Oct. 9, 2019, https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/;

Stephan Demuth and Darrell Steffensmeier, “The Impact of Gender and Race-Ethnicity in the Pretrial Release Process,” *Social Problems*, vol. 51, no. 2, May 2004.

²⁴⁴ Katherine Hood and Daniel Schneider, “Bail and Pretrial Detention: Contours and Causes of Temporal and County Variation,” *RSF: Russell Sage Foundation Journal of the Social Sciences*, vol. 5, no. 1, Feb. 2019.

²⁴⁵ Leon Digard and Elizabeth Swavola, “Justice Denied: The Harmful and Lasting Effects of Pretrial Detention,” Vera Institute Brief, Apr. 2019, at 7, <http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/04/Justice-Denied-Evidence-Brief.pdf>.

²⁴⁶ See, e.g., David Arnold, Will Dobbie, and Crystal Yang, “Racial Bias in Bail Decisions,” *Quarterly Journal of Economics*, vol. 133, no. 4, May 2018, https://scholar.harvard.edu/files/cyang/files/ady_racialbias.pdf.

²⁴⁷ Ibid.

increase nationally.²⁴⁸ For instance, one study showed that when comparing defendants with the same charge and the same criminal history, people of color are more likely to have higher bail amount imposed.²⁴⁹ Specifically, the researchers found that Black men receive bail amounts that are 35 percent higher and Latino men receive bail amounts that are 19 percent higher than White men.²⁵⁰

As of 2002, the last time the federal government collected data on the status and demographics of pretrial detainees, about 29 percent of individuals held in local jails were unconvicted.²⁵¹ Nearly seven in ten (69 percent) of these detainees were people of color, with an overrepresentation of Black and Latinx defendants (43 percent, 19.6 percent, respectively).²⁵² Another study from 2010 similarly showed that Black defendants were approximately 80 percent less likely to be released on personal recognizance than White defendants, even after controlling for factors that are often weighed in bail decisions – such as offense severity, criminal history, age, and employment status.²⁵³

Conversely, two other studies have not shown disparate treatment regarding bail decisions and suggest that racial differences disappear after controlling for other factors such as socioeconomic status or likelihood of re-arrest.²⁵⁴ For instance, one study examining about 2,600 cases in Michigan found that gender and age had a direct effect on a judge’s pretrial release or detention decisions, but the effect of a defendant’s race was more complex in the study’s sample.²⁵⁵ The results showed that women and younger defendants were less likely to be detained pretrial compared to men and older defendants.²⁵⁶ In terms of racial differences, the researchers also found that Black defendants were more likely to be detained pretrial than White defendants.²⁵⁷ However, these differences were accounted for with the addition of socioeconomic variables. Thus, the researchers suggest that “Black disadvantage in the court system may not be as simple as racial

²⁴⁸ Alexa Van Brunt and Locke Bowman, “Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What’s Next,” *Journal of Criminal Law and Criminology*, vol. 108, no. 4, 2018, p. 741.

²⁴⁹ Jonah Gelbach and Shawn Bushway, “Testing for Racial Discrimination in Bail Setting Using Nonparametric Estimation of a Parametric Model,” *SSRN*, Aug. 20, 2011, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990324.

²⁵⁰ *Ibid.*

²⁵¹ Wendy Sawyer, “How race impacts who is detained pretrial,” Prison Policy Initiative, Oct. 9, 2019, https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/.

²⁵² *Ibid.*

²⁵³ Tina Freiburger and Carly Hilinski, “The Impact of Race, Gender, and Age on the Pretrial Decision,” *Criminal Justice Review*, 2010, vol. 35, no. 3, pp. 76-86, <https://scholarworks.gvsu.edu/cgi/viewcontent.cgi?article=1008&context=scjpeerpubs>.

²⁵⁴ See, e.g., *Ibid.*, pp. 331-334; Frank McIntyre and Shima Baradaran, “Race, Prediction, and Pretrial Detention,” *Journal of Empirical Legal Studies*, 2013, vol. 10, no. 4, pp. 741-770.

²⁵⁵ Tina Freiburger and Carly Hilinski, “The Impact of Race, Gender, and Age on the Pretrial Decision,” *Criminal Justice Review*, 2010, vol. 35, no. 3, pp. 331-334, <https://scholarworks.gvsu.edu/cgi/viewcontent.cgi?article=1008&context=scjpeerpubs>.

²⁵⁶ *Ibid.*, p. 330.

²⁵⁷ *Ibid.*

bias, but instead stems from inequality and general disadvantage in society.”²⁵⁸ The study also found, when looking at these cases intersectionally, race remained a significant factor for women.²⁵⁹ Specifically, Black women in the study were the least likely to be detained pretrial compared to both Black and White women and men.²⁶⁰ The researchers posit that this may be the result of judges taking into account other factors such as family responsibility, and since Black women are more likely to be single parents compared to the other groups in the study, they may be granted more leniency in pretrial decisions.²⁶¹

Yet another study, *Bail and Pretrial Detention: Contours and Causes of Temporal and County Variation*, which examined pretrial release practices across 75 large U.S. counties from 1990 to 2009 not only found a nationwide decline in utilizing nonfinancial forms of release and the doubling of bail amounts during this period; but also, evidence of racial disparities in bail decision-making.²⁶² Specifically, the researchers found that after adjusting for offense charges and previous record, Latinx defendants were less likely to be granted nonfinancial release and have higher bail amounts than similarly situated White defendants.²⁶³ The study did not find significant disparities between Black and White defendants in terms of setting nonfinancial conditions or cash bail amounts after controlling for prior records and offense charges; however, when only controlling for offense charge and not prior record, there was a significant gap between Black and White defendants.²⁶⁴ Moreover, the gap in bail amounts was also statistically significant when only adjusting for demographics; thus, the researchers conclude that the racial disparities witnessed between Black and White defendants in pretrial detention practices exist at the case level.²⁶⁵ The study’s other findings show expected relationships between the severity of the charge and the former record with the criminal justice system: those accused of felonies are much less likely to be granted nonfinancial release and have higher bail amounts and those with prior failure to appear, prior arrests, and prior felony and violent felony convictions are less likely to be granted nonfinancial release and have higher bail amounts than those defendants who do not.²⁶⁶

Other research suggests that in large urban areas, Black felony defendants are over 25 percent more likely to be held pretrial than similarly situated White defendants.²⁶⁷ Specifically, young Black men are over 50 percent more likely to be detained pretrial than White defendants; Black and brown defendants also receive bail amounts that are on average twice as high as White

²⁵⁸ Note, the study’s sample only included an analysis of Black and White defendants. Ibid.

²⁵⁹ Ibid.

²⁶⁰ Ibid.

²⁶¹ Ibid.

²⁶² Katherine Hood and Daniel Schneider, “Bail and Pretrial Detention: Contours and Causes of Temporal and County Variation,” *RSF: Russell Sage Foundation Journal of the Social Sciences*, vol. 5, no. 1, Feb. 2019.

²⁶³ Ibid.

²⁶⁴ Ibid.

²⁶⁵ Ibid., p. 139.

²⁶⁶ Ibid.

²⁶⁷ Wendy Sawyer, “How race impacts who is detained pretrial,” Prison Policy Initiative, Oct. 9, 2019, https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/.

defendants; and Black defendants are less likely to be able to afford bail than White defendants, which in turn, increases the length of pretrial detention.²⁶⁸ When examining the average bond amounts, research shows that Black defendants often have bonds set about \$10,000 higher than White defendants.²⁶⁹ Moreover, these defendants are less likely than similarly situated White defendants to be released on personal recognizance or other non-monetary conditions (e.g., pretrial supervision).²⁷⁰ Intersectional data regarding age and race also show that young Black men have the highest levels of disparities among all other national pretrial populations.²⁷¹

Yet additional research has shown that there may be evidence of significant bias against Black defendants in bail setting decisions.²⁷² For instance, researchers utilizing court case data across five counties in four states showed that judges systematically imposed higher bail amounts to Black defendants compared to White defendants with similar offenses.²⁷³ The researchers argue that the data suggest that:

[J]udges value lost freedom substantially less for blacks than whites, with \$60-\$80 per day being a reasonable estimate. For a defendant held until trial for a typical period of nearly three months, this range amounts to several thousand dollars difference. These findings suggest the possibility of substantial bias against blacks in bail setting.²⁷⁴

Moreover, in a 2018 study, *Racial Bias in Bail Decisions*, researchers found that White defendants who were granted pretrial release were approximately 22 percentage points more likely to be rearrested during the time before their case was finalized compared to Black defendants.²⁷⁵ This may indicate that judges have a different perception of and tolerance for an individual's risk of violating bail conditions and committing another crime, in ways that may be related to a defendant's race.²⁷⁶

Some of the racial disparities have been attributed to the discretionary nature of how bail hearings are held and how pretrial decisions are made, such as whether a defendant is "bailable" and the

²⁶⁸ Ibid.; Bernadette Rabuy and Daniel Kopf, "Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time," Prison Policy Initiative, May 10, 2016,

<https://www.prisonpolicy.org/reports/DetainingThePoor.pdf>.

²⁶⁹ Wendy Sawyer, "How race impacts who is detained pretrial," Prison Policy Initiative, Oct. 9, 2019,

https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/.

²⁷⁰ Ibid.

²⁷¹ Ibid.

²⁷² Ibid.

²⁷³ Ibid.

²⁷⁴ Shawn Bushway and Jonah Gelbach, "Testing for Racial Discrimination in Bail Setting Using Nonparametric Estimation of a Parametric Model," *UC Berkeley: Berkeley Program in Law and Economics*, 2010, at 37, <https://escholarship.org/uc/item/6hj1g9gh#main>.

²⁷⁵ David Arnold, Will Dobbie, and Crystal Yang, "Racial Bias in Bail Decisions," *Quarterly Journal of Economics*, 2018, vol. 133, no. 4, pp. 1885-1932, at 20, https://scholar.harvard.edu/files/cyang/files/ady_racialbias.pdf.

²⁷⁶ Leon Digard and Elizabeth Swavola, "Justice Denied: The Harmful and Lasting Effects of Pretrial Detention," Vera Institute, Apr. 2019, p. 7.

amount upon which bail should be set, which may allow for implicit biases to play a role in these determinations.²⁷⁷ Researchers have found that:

Judicial officials have a great deal of discretion, minimal constraints, and often little information on which to base their decisions. In these conditions, they may employ racialized assumptions—for example, by considering people of color to pose a higher risk, be more culpable or less reliable, or be better able to bear the pains of incarceration than white people—in order to make up for missing case information and to guide their decisions. As a result, in many jurisdictions, people of color are unduly burdened by pretrial detention and the imposition of monetary bail.²⁷⁸

Court data from 75 counties and spanning nearly a decade show evidence that the demographic composition of counties may play a role in understanding the racial disparities found in pretrial release decisions.²⁷⁹ After controlling for the individual case characteristics, researchers found a large and statistically significant negative association between percentage of Black residents and the probability of nonfinancial release – meaning that counties with a higher percentage of Black residents in a county equated to a lower likelihood of judges imposing nonfinancial release conditions.²⁸⁰ Moreover, after controlling for the racial composition of defendants, 40 percent of the defendants in counties with effectively zero percent Black residents were granted nonfinancial release compared to 25 percent of those in counties with the largest share of Black residents in the study (45 percent).²⁸¹ The researchers note that courts located in conservative counties also produced more racial sentencing disparities, specifically with longer sentences imposed for Black and male defendants.²⁸²

Other studies note that Black men are disproportionately more likely to be detained pretrial due to their inability to post a monetary bond which results in a cyclical relationship of incarceration.²⁸³ Subramanian et al., explain that “[a]lthough their bail amounts are similar to bail amounts set for whites, black men appear to be caught in a cycle of disadvantage. Because they are incarcerated at higher rates, they are more likely to be unemployed and/or in debt, resulting in more trouble

²⁷⁷ Cynthia Jones, “‘Give Us Free’: Addressing Racial Disparities in Bail Determinations,” *Legislation and Policy*, 2013, vol. 16, pp. 920-961, <https://www.nyujlpp.org/wp-content/uploads/2014/01/Jones-Give-Us-Free-16nyujlpp919.pdf>.

²⁷⁸ Leon Digard and Elizabeth Swavola, “Justice Denied: The Harmful and Lasting Effects of Pretrial Detention,” Vera Institute, Apr. 2019, p. 7; *see also* Traci Schlesinger, “Racial and Ethnic Disparity in Pretrial Criminal Processing,” *Justice Quarterly* vol. 22, no. 2, 2005, pp. 170-71; Tina L. Freiburger, Catherine D. Marcum, and Mari Pierce, “The Impact of Race on the Pretrial Decision,” *American Journal of Criminal Justice*, vol 35, no. 1 (2010), p. 84; Cynthia Jones, “‘Give Us Free’: Addressing Racial Disparities in Bail Determinations,” *Legislation and Policy*, 2013, vol. 16, p. 943.

²⁷⁹ Leon Digard and Elizabeth Swavola, “Justice Denied: The Harmful and Lasting Effects of Pretrial Detention,” Vera Institute, Apr. 2019, p. 7.

²⁸⁰ *Ibid.*

²⁸¹ Katherine Hood and Daniel Schneider, “Bail and Pretrial Detention: Contours and Causes of Temporal and County Variation,” *Journal of the Social Sciences*, Feb. 2019, vol. 5, no. 1, p. 142.

²⁸² *Ibid.*, 130.

²⁸³ *Ibid.*

posting bail.”²⁸⁴ Therefore, judges’ decisions to either release or detain individuals at the pretrial level can have additive and long-lasting negative effects.

In terms of gender differences, research shows that pretrial detention is more common for men; male defendants are less likely to be granted nonfinancial release, and bail amounts are consistently set higher for male defendants compared to women.²⁸⁵ Intersectional data regarding gender and race also show pretrial disparities.²⁸⁶ Black men are significantly more likely to have interactions with police, to be questioned, and to be arrested than White men.²⁸⁷ These factors not only place them at higher risk for being unjustly detained, but also establishes a history of interactions with the criminal justice system that has been shown to have subsequent negative consequences that exacerbate inequalities of the justice system.²⁸⁸

While incarceration rates show that more men are involved in the criminal justice system than women, the number of women incarcerated in jails is growing at a faster rate than any other correctional population in the U.S.²⁸⁹ Research further shows that pretrial detention may have more pronounced effects on women due to several circumstances.²⁹⁰ Although research demonstrates that women are more likely to be released on personal recognizance bonds, more likely to be released pretrial, and have lower bail amounts set compared to men, a compounding factor is that

²⁸⁴ Ram Subramanian, Ruth Delaney, Stephen Roberts, Nancy Fishman, and Peggy McGarry, “Incarceration’s Front Door: The Misuse of Jails in America,” Vera Institute, July 29, 2015, at 15, https://www.vera.org/downloads/publications/incarcerations-front-door-report_02.pdf.

²⁸⁵ Katherine Hood and Daniel Schneider, “Bail and Pretrial Detention: Contours and Causes of Temporal and County Variation,” *Journal of the Social Sciences*, Feb. 2019, vo. 5, no. 1, at 139, https://www.jstor.org/stable/10.7758/rsf.2019.5.1.06#metadata_info_tab_contents. See also U.S. Comm’n on Civil Rights, *Women In Prison: Seeking Justice Behind Bars*, Feb. 2020, <https://www.usccr.gov/pubs/2020/02-26-Women-in-Prison.pdf>, at 26 (finding both racial and gender disparities in pretrial release rates).

²⁸⁶ *Ibid.*

²⁸⁷ Racial Bias and Disparities in Proactive Policing in *Proactive Policing: Effects on Crime and Communities*, National Academies of Sciences, Engineering, and Medicine, (2018), Washington, D.C.: The National Academies Press, Chapter 7., <https://www.nap.edu/catalog/24928/proactive-policing-effects-on-crime-and-communities>;

²⁸⁸ Paul Heaton, Sandra Mayson, & Megan Stevenson, “The Downstream Criminal Justice Consequences of Pretrial Detention,” 69 STAN. L. REV. 711 (2017); Kamala Harris and Rand Paul, “To Shrink Jails, Let’s Reform Bail,” *New York Times*, July 20, 2017, <https://www.nytimes.com/2017/07/20/opinion/kamala-harris-and-rand-paul-lets-reform-bail.html>; Will Dobbie, Jacob Goldin, and Crystal Yang, “The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges,” *NBER Working Paper*, Aug. 2016, <https://www.nber.org/papers/w22511>; Megan Stevenson, “Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes,” *Journal of Law, Economics, and Organization*, 2018, vol. 34, no. 4, pp. 511-42; Katherine Hood and Daniel Schneider, “Bail and Pretrial Detention: Contours and Causes of Temporal and County Variation,” *Journal of the Social Sciences*, Feb. 2019, vo. 5, no. 1, at 127-28, https://www.jstor.org/stable/10.7758/rsf.2019.5.1.06#metadata_info_tab_contents.

²⁸⁹ Elizabeth Swavola, Kristine Riley, and Ram Subramanian, “Overlooked: Women and Jails in an Era of Reform,” Vera Institute, Aug. 2016, <http://www.safetyandjusticechallenge.org/wp-content/uploads/2016/08/overlooked-women-in-jails-report-web.pdf>; see also U.S. Comm’n on Civil Rights, *Women in Prison: Seeking Justice Behind Bars*, Feb. 2020, <https://www.usccr.gov/pubs/2020/02-26-Women-in-Prison.pdf>.

²⁹⁰ Leon Digard and Elizabeth Swavola, “Justice Denied: The Harmful and Lasting Effects of Pretrial Detention,” Vera Institute Brief, Apr. 2019, <http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/04/Justice-Denied-Evidence-Brief.pdf>.

women are less likely to be able to afford monetary bail amounts when they are set.²⁹¹ Some of these differences may be due to women being less likely to be employed full time— often due to the responsibility of childcare falling predominantly on women and/or being single mothers – and earn less compared to men when employed.²⁹²

In an interview with Commission staff, Myesha Braden, Director for Special Justice Initiatives with Alliance for Justice, explained that policies and research regarding the criminal justice system often focus on men because they represent more of the incarcerated population.²⁹³ Women, however, are more likely to have different concerns and needs which need more attention.²⁹⁴ For example, women may also need additional assistance or services to ensure that they can return to court for their court date, because they are more likely to be primary caregivers and require childcare and transportation.

In written testimony to the Commission, the Essie Justice Group testified that to these disparities and impacts stating that:

Black and Brown women disproportionately bear the harms of pretrial detention and cash bail. Almost one-quarter of the 231,000 women incarcerated in the United States are being held in jails pretrial and Black women make up 29% of incarcerated women despite only being 13% of the total population of women in the U.S. These high rates of pretrial detention for Black women have rippling effects on our children and community. Eighty percent of women in jails are mothers, and most of them are the primary caregivers of their children.²⁹⁵

²⁹¹ Elizabeth Swavola, Kristine Riley, and Ram Subramanian, “Overlooked: Women and Jails in an Era of Reform,” Vera Institute, Aug. 2016, <http://www.safetyandjusticechallenge.org/wp-content/uploads/2016/08/overlooked-women-in-jails-report-web.pdf>; Natasha Camhi, “Women’s Experience Behind Bars, Brennan Center for Justice,” Aug. 24, 2018, <https://www.brennancenter.org/our-work/analysis-opinion/womens-experience-behind-bars>; see also Bernadette Rabuy and Daniel Kopf, “Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time, Prison Policy Initiative, 2016, <https://www.prisonpolicy.org/reports/DetainingThePoor.pdf> (One study found that women who could not post bail had an annual median income of \$11,071 compared to \$15,598 for men who could not post bail).

²⁹² See, e.g., Stephanie Covington and Barbara Bloom, “Gendered Justice: Women in the Criminal Justice System,” in *Gendered Justice: Addressing Female Offenders*, Barbara Bloom, eds., Durham: Carolina Academic Press, (2003) at 5, <https://perma.cc/3GY7-GNRA> (Study showed that 60% of women in jail did not have full time employment prior to being arrested, compared to 40% of men); Wendy Sawyer, “How does unaffordable money bail affect families?” Prison Policy Initiative, Aug. 15, 2018, <https://www.prisonpolicy.org/blog/2018/08/15/pretrial/> (Analysis showed that over half of the people held in pretrial detention were parents of minor children. Of the women who could not afford to post bail, two-thirds or 66% were mothers of minor children, compared to 53% of men).

²⁹³ Myesha Braden, Director for Special Justice Initiatives with Alliance for Justice, Interview Transcript (8/25/20) at 33 [on file].

²⁹⁴ Ibid. Myesha Braden, Director for Special Justice Initiatives with Alliance for Justice, Interview Transcript (Aug. 25, 2020) at 33 [on file].

²⁹⁵ Gina Clayton-Johnson, Rena Karefa-Johnson, and Titilayo Rasaki, Essie Justice Group, Written Testimony for the Civil Rights Implications of Cash Bail Briefing before the U.S. Comm’n on Civil Rights, Feb. 26, 2021, p. 2 (internal citations omitted) (hereinafter Essie Statement).

Socioeconomic Disparities

The Eighth Amendment mandates that judicial officers cannot impose excessive bail and the Supreme Court has interpreted this to “prohibit the imposition of excessive bail without creating the right to bail in criminal cases.”²⁹⁶ During a bail hearing, judicial officers have several options regarding bail amounts.²⁹⁷ Judges can choose to release a defendant on personal recognizance or an unsecured appearance (which would equate to no financial obligations), or a judge could set the standard bail amount for the particular crime according to posted bail schedules (e.g., setting bail in the amount of \$500 for nonviolent petty misdemeanors), raise or lower the standard bail amount, or deny bail entirely.²⁹⁸

Moreover, bail schedules may vary greatly between districts in the same state, which will also impact the likelihood of pretrial detention.²⁹⁹ For example, one study found that in rural counties in Nebraska, the bail schedule in the Fifth Judicial District sets bail at \$10,000 for Class 1 offenses; comparatively, the Fourth Judicial District that contains Omaha in urban Douglas County, sets bail at \$5,000 for Class 1 offenses.³⁰⁰ In Nebraska, these discrepancies are largely due to bail schedules being set by each of the 12 judicial districts without consideration of other districts.³⁰¹ As such, experts suggest that these types of bail schedules may be unconstitutional.³⁰² At the Commission’s briefing, Associate Professor of Law at the University of Virginia, Megan Stevenson, explained that the use of bail schedules has “been struck down in a number of federal appeals courts already

²⁹⁶ *United States v. Salerno*, 481 U.S. 739, 754-55 (1987); see also U.S. Dep’t of Justice, Criminal Justice Manual, “Chapter 26: Release and Detention Pending Judicial Proceedings,” Jan. 16, 2020, <https://www.justice.gov/archives/jm/criminal-resource-manual-26-release-and-detention-pending-judicial-proceedings-18-usc-3141-et>.

²⁹⁷ See Department of Justice, “Release and Detention Pending Judicial Proceedings,” <https://www.justice.gov/archives/jm/criminal-resource-manual-26-release-and-detention-pending-judicial-proceedings-18-usc-3141-et>, (citing “Title 18, U.S.C. § 3141(a) gives ‘judicial officers’ authority to make determinations regarding bail in all stages of a criminal case, up to and including the trial stage. The term ‘judicial officers’ is defined in Title 18, U.S.C. § 3156, along with other terms relevant to the matter of bail in criminal cases.”). See Dep’t of Justice, “Release and Detention Pending Judicial Proceedings,” <https://www.justice.gov/archives/jm/criminal-resource-manual-26-release-and-detention-pending-judicial-proceedings-18-usc-3141-et>.

²⁹⁸ See, e.g., Adureh Onyekwere, “How Cash Bail Works,” Brennan Center for Justice, June 2, 2020, <https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works>.

²⁹⁹ See, e.g., ACLU, “Unequal Justice: bail and modern day debtors’ prisons in Nebraska,” Dec. 13, 2016, https://www.aclunebraska.org/sites/default/files/field_documents/unequal_justice_2016_12_13.pdf.

³⁰⁰ *Ibid.*, 19.

³⁰¹ See NEB. REV. STAT. § 29-901.05, (“It shall be the duty of the judges of the county court in each county to prepare and adopt, by a majority vote, a schedule of bail for all misdemeanor offenses and such other offenses as the judges deem necessary. It shall contain a list of such offenses and the amounts of bail applicable thereto as the judges determine to be appropriate.”).

³⁰² Megan Stevenson, Associate Professor of Law, University of Virginia, testimony, *Bail Reform Briefing*, transcript p. 148.

on the basis that they [] inadequately take ability to pay into account and, therefore, violate the equal protection clause.”³⁰³

Organizations such as the American Bar Association (ABA) – the first organization to release pretrial standards in 1968 – followed by other national organizations such as the National Advisory Commission on Criminal Justice Standards and Goals, the National District Attorneys Association, and the National Association of Pretrial Service Agencies have all called for reforms to the bail system largely due to judicial officers’ emphasis on the use of money bail bonds.³⁰⁴ According to the ABA, “the problems with the traditional surety bail system undermine the integrity of the criminal justice system and are ineffective in achieving key objectives of the release/detention decision.”³⁰⁵ The ABA states that a judicial officer’s decision regarding the release or detention of a defendant must balance the need for liberty and public safety.³⁰⁶ The standards suggest that when a defendant is released, it should be through the use of least restrictive conditions, and any decision to detain must only be through a transparent process “designed to work when no condition or combination of conditions suffice to reasonably assure court appearance or public safety.”³⁰⁷ And in terms of money bail specifically, the ABA Standards state that:

Financial conditions . . . are to be imposed only to ensure court appearance and . . . [t]he amount of bond should take into account the assets of the defendant and financial conditions imposed by the court should not exceed the ability of the defendant to pay.³⁰⁸

The possibility of defendants being detained due to inability to pay was recognized as potentially problematic as far back at the National Conference on Bail and Criminal Justice in 1964.³⁰⁹ The conference convened a variety of criminal justice stakeholders consisting of over 400 judges, prosecutors, defense attorneys, police, bondspeople, and prison officials to discuss alternatives to the money bail system.³¹⁰ At the closing of the conference, then-U.S. Attorney General Robert Kennedy stated that:

What has been made clear today, in the last two days, is that our present attitudes toward bail are not only cruel, but really completely illogical. What has been demonstrated here is that usually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not

³⁰³ Ibid.

³⁰⁴ Timothy Schnacke, Michael Jones, and Claire Brooker, “The History of Bail and Pretrial Release,” Pretrial Justice Institute, Sept. 24, 2010, p. 13.

³⁰⁵ Timothy Schnacke, “Money as a Criminal Justice Stakeholder: The Judge’s Decision to Release or Detain a Defendant Pretrial,” National Institute of Corrections, U.S. Dep’t of Justice, Sept. 2014, p. 35.

³⁰⁶ Ibid.

³⁰⁷ Ibid., 36.

³⁰⁸ See Standard 10-5.2, American Bar Association, *ABA Standards for Criminal Justice Pretrial Release*, 2007, at 109, https://www.ncsc.org/data/assets/pdf_file/0030/34986/aba-standards-for-criminal-justice-pretrial-release.pdf.

³⁰⁹ Ibid.

³¹⁰ Ibid.

the nature of the crime. It is not the character of the defendant. That factor is, simply money. How much money does the defendant have?³¹¹

Moreover, financial bail conditions are often set without any assessment of an individual's ability to pay to secure release.³¹² In 2015, data showed that 38 percent of felony defendants were detained during the entire pretrial period and 90 percent of those detainees were jailed solely because they could not afford to post bail.³¹³ The researchers argued that:

The money bond system capitalizes on the indigence of the overwhelming majority of criminal defendants, confining them based on the certain knowledge that they will never be able to afford the price set for their pretrial liberty. Under that system, the wealthy are able to remain free pending trial; the poor, whom are most defendants, stay behind bars."³¹⁴

A 2018 study analyzing bail outcomes in Philadelphia showed that while monetary bail was imposed in almost two-thirds of cases, there was no evidence that judges assessed if the defendant would be able to pay the set amount.³¹⁵ Professor Megan Stevenson found that when equal bail amounts were set, residents from low-income neighborhoods were less likely to be able to afford bail and thus, more likely to be detained pretrial and often times these defendants were detained for the entire duration of their pending case.³¹⁶ These results apply even for defendants who have relatively low monetary bail amounts set.³¹⁷ For instance, in a report of pretrial detainees in New York, 40 percent of defendants remained in jail until case disposition, despite having bail amounts that were \$500 or less.³¹⁸ Other data from 2015 in New Orleans show that in 85 percent of the felony cases that were studied where monetary bail was imposed as the condition for release, approximately one-third (1,275 of 3,483) of defendants remained in jail until their cases were resolved because they could not afford bail.³¹⁹ Further, these defendants spent an average of nearly four months (114 days) in pretrial detention.³²⁰ Similarly, in misdemeanor cases, one in five

³¹¹ Timothy Schnacke, Michael Jones, and Claire Brooker, "The History of Bail and Pretrial Release," Pretrial Justice Institute, Sept. 24, 2010, pp. 11-12.

³¹² See, e.g., Léon Digard and Elizabeth Swavola, "Justice Denied: The Harmful and Lasting Effects of Pretrial Detention," Vera Institute of Justice, Apr. 2019.

³¹³ Alexa Van Brunt and Locke E. Bowman, "Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next," *Journal of Criminal Law and Criminology*, vol. 108, no. 4, Fall 2018, pp. 740-41.

³¹⁴ *Ibid.*, p. 743.

³¹⁵ Megan Stevenson, "Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes," *Journal of Law, Economics, and Organization*, 2018, vol. 34, no. 4, pp. 511-42, at 521.

³¹⁶ *Ibid.*

³¹⁷ *Ibid.*

³¹⁸ New York City Criminal Justice Agency, 2016, *Annual Report 2015*, New York, <https://www.nycja.org/publications/cja-annual-report-2015>.

³¹⁹ Mathilde Laisne, Jon Wool, and Christian Henrichson, "Past Due: Examining the Costs and Consequences of Charging for Justice in New Orleans," Vera Institute, Jan. 2017 <https://www.vera.org/downloads/publications/past-due-costs-consequences-charging-for-justice-new-orleans.pdf>.

³²⁰ *Ibid.*, p. 8.

(1,153) individuals were unable to pay their bail amounts and remained incarcerated for an average of 29 days until their cases were resolved.³²¹

The outcomes of these pretrial systems are far from isolated cases. Data from around the country have continued to show that individuals held in jails pretrial were not there on the grounds of public safety or due to being a flight risk; rather they remained in jails solely because they could not afford to pay bail.³²² According to the American Bar Association, nationwide more than 60 percent of jail inmates are detained pretrial; of those, over 30 percent remained in jail because they cannot afford to post bail.³²³ Many of the individuals being held on bail have been accused of non-violent, for example, 75 percent of pretrial detainees have been charged with drug or property offenses.³²⁴ As discussed below, this inability to pay bail resulting in remaining in detention in jails pretrial have numerous effects on the accused, their families, and communities.³²⁵

At the Commission’s briefing, Judge Glenn Grant, Acting Administrative Director of the New Jersey Courts testified that:

bail doesn’t work. Research has confirmed that access to money is not a reliable predictor for determining whether a defendant released pretrial will pose a public safety risk or fail to show up for court...The system discriminates against the poor and has a disproportionate impact on people of color.

For example, in 2013, a study involving New Jersey’s monetary bail system showed that we had an especially adverse effect on poor defendants and members of minority groups. This study uncovered that poor individuals were over-represented, with 12 percent, or one in eight defendants, being incarcerated on bails of \$2,500

³²¹ Ibid.

³²² *Id.* at 44; see also 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 Institute, June 2019, https://storage.googleapis.com/vera-web-assets/downloads/Publications/paid-in-full-a-plan-to-end-money-injustice-in-new-orleans/legacy_downloads/paid-in-full-report.pdf; Cindy Redcross, Brit Henderson, Luke Miratrix, and Erin Valentine, “Evaluation of Pretrial Justice System Reforms that Use the Public Safety Assessment,” MDRC Center for Criminal Justice Research, Mar. 2019, https://www.mdrc.org/sites/default/files/PSA_Mecklenburg_Brief1.pdf.

³²³ John Matthews II and Felipe Curiel, “Criminal Justice Debt Problems,” *Human Rights Magazine*, vol. 44, no. 3: Economic Justice, American Bar Association, Nov. 30, 2019, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economic-justice/criminal-justice-debt-problems/.

³²⁴ Ibid.

³²⁵ See, e.g., Katherine Hood and Daniel Schneider, “Bail and Pretrial Detention: Contours and Causes of Temporal and County Variation,” *RSF: The Russell Sage Foundation Journal of the Social Sciences*, vol. 5, no. 1, Feb. 2019; Megan Stevenson, “Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes,” *The Journal of Law, Economics, and Organization*, vol. 34, no. 4, 2018, <https://academic.oup.com/jleo/article/34/4/511/5100740>; Tracey Meares and Arthur Rizer, “The ‘Radical’ Notion of the Presumption of Innocence,” The Square One Project, May 2020.

or less. This impact was significant on Black and Hispanic individuals, who made up 71 percent of that jail population.³²⁶

Collateral Consequences of Pretrial Detention

Data shows that pretrial detention can result in numerous negative consequences such as a higher likelihood of being convicted, losing one's job, housing, and parental rights, harsher sentences, higher likelihood of pleading guilty, and increased recidivism.³²⁷ Further, the financial burden and strain of securing bail often falls disproportionately on women and other family members.³²⁸

As discussed previously, many pretrial detainees are low-income and are held in jail because they cannot afford to post bail, and when detained, they may lose their job which will further hinder economic success and decrease financial stability once released.³²⁹ For instance, researchers have found that pretrial detention can result in lowering 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 27 percent and the probability of having any formal sector income increased by 18 percent.³³⁰

Moreover, even if the defendant is found not guilty, being held pretrial may damage the accused person's reputation and relationships in the community.³³¹ For instance, many states, law enforcement agencies, and private companies post mugshots and other identifying information on

³²⁶ Hon. Judge Glenn Grant, Acting Administrative Director, New Jersey Courts, testimony, *Bail Reform Briefing*, transcript pp. 63-64.

³²⁷ See, e.g., Katherine Hood and Daniel Schneider, "Bail and Pretrial Detention: Contours and Causes of Temporal and County Variation," *RSF: The Russell Sage Foundation Journal of the Social Sciences*, vol. 5, no. 1, Feb. 2019; Megan Stevenson, "Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes," *The Journal of Law, Economics, and Organization*, vol. 34, no. 4, 2018, <https://academic.oup.com/jleo/article/34/4/511/5100740>.

³²⁸ Joshua Page, Victoria Piehowski, Joe Soss, "A Debt of Care: Commercial Bail and the Gendered Logic of Criminal Justice Predation," *RSF: The Russell Sage Foundation Journal of the Social Sciences*, vol. 5, no. 1, Feb. 2019, <https://www.rsfjournal.org/content/rsfjss/5/1/150.full.pdf>.

³²⁹ See, e.g., Megan Stevenson, "Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes," *The Journal of Law, Economics, and Organization*, vol. 34, no. 4, 2018, <https://academic.oup.com/jleo/article/34/4/511/5100740>; Will Dobbie, Jacob Goldin, and Crystal Yang, "The

Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges," NBER Working Paper, Aug. 2016; Paul Heaton, Sandra Mayson, & Megan Stevenson, "The Downstream Consequences of Misdemeanor Pretrial Detention," *Stanford Law Review*, 69 *Stan. L. Rev.* 711 (2017).

³³⁰ Will Dobbie, Jacob Goldin, and Crystal Yang, "The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges," NBER Working Paper, Aug. 2016 at 4.

³³¹ Tracey Meares and Arthur Rizer, "The 'Radical' Notion of the Presumption of Innocence," *The Square One Project*, May 2020.

websites that can permanently harm an individual's image and reputation.³³² University of California-Hastings Law Professor Eumi Lee maintains that:

Mugshots now present an acute problem in the digital age [and] nearly one out of every three American adults – 77.7 million people—has been arrested and, thus, could be impacted. Once these images are online, whether posted initially by mugshot companies or law enforcement, they live on in perpetuity. They serve as the digital scarlet letter of our times, permanently affecting the reputation of those who have paid their debt to society and even may have expunged their criminal record, those who were found innocent, and those who were never prosecuted.³³³

These mugshots also can be pernicious for pretrial detainees since the accused person's reputation can be damaged despite that the individual has not been convicted or is innocent of the charges levied against them.

Pretrial detention of defendants also raises concerns related to the mental and physical health of defendants, which may further increase the likelihood of defendants accepting a plea bargain in order to secure release more quickly.³³⁴ Not only do pretrial detainees show higher levels of anxiety and depression as they await their trial compared to those released pretrial,³³⁵ but the effects of detention can have long lasting and serious consequences.

³³² Eumi Lee, *Monetizing Shame: Mugshots, Privacy, and the Right to Access*, 70 RUTGERS UNIV. L. REV. 557, 560-63 (2018), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2668&context=faculty_scholarship; see also *Detroit Free Press, Inc. v. U.S. Dep't of Justice (Detroit Free Press I)*, 73 F.3d 93, 96-98 (6th Cir. 1996): Detroit Free Press (DFP) requested the release of the mugshots of 8 Defendants awaiting trial from DOJ and DOJ refused. DFP filed FOIA suit to compel DOJ to release mugshots. The DOJ asserted that the mugshots were taken during a law enforcement action and were exempt based on FOIA Exemption 7(c). District Court ruled in favor of DFP and Appellate Court affirmed. The Appellate Court reasoned that the public interest was to be considered in releasing certain photos and privacy interests of the Defendants were not at issue because their names had already been released when they appeared in court and their mugshots were not exempt from disclosure.

Detroit Free Press, Inc. v. U.S. Dep't of Justice (Detroit Free Press II), 829 F.3d 478, 486 (6th Cir. 2016): After *Detroit Free Press I*, DFP attempted to use the ruling in the first case as leverage to request the booking photos of four MI police officers charged with bribery and drug conspiracy and was again denied. Another lawsuit was filed which triggered the en banc review of the privacy issue related to the booking photos. DFP again used the FOIA and the public interest to justify its request and the fact that the court previously ruled that there are no privacy interests in these photos. The court did not agree and overturned the *Detroit Free Press I* ruling. The court reasoned that even though the public interest may outweigh privacy interests in making these sort of requests, *Detroit Free Press I* erred in setting the privacy interest to zero (the court noted that the booking photo could haunt that person for a lifetime). The case was remanded back to the District Court.

³³³ Eumi Lee, *Monetizing Shame: Mugshots, Privacy, and the Right to Access*, 70 RUTGERS U. L. REV. 557, 560 (2018), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2668&context=faculty_scholarship.

³³⁴ Emily Leslie and Nolan Pope, "The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments," *Journal of Law and Economics*, vol. 60, (Aug. 2017), http://econweb.umd.edu/~pope/pretrial_paper.pdf; Paul Heaton, Sandra Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 784-86 (2017).

³³⁵ Tracey Meares and Arthur Rizer, "The 'Radical' Notion of the Presumption of Innocence," The Square One Project, May 2020.

One example that reached national attention occurred in May 2010, where 16-year-old Kalief Browder and his friend were arrested on suspicion of robbery.³³⁶ While his friend was granted pretrial release, Browder (who was on probation at the time) was detained with an imposed bail amount of \$3,000.³³⁷ Since his family could not afford the set bail amount and Browder was sent to Rikers Island to await trial.³³⁸ At the arraignment, Browder maintained his innocence and the New York Department of Probation filed a “violation of probation” against him – which is standard procedure when an individual on probation is indicted of a new violent felony – and the judge remanded him without bail.³³⁹ While many states have a right to a “speedy trial,” the State of New York’s rule is known as a “ready rule” which mandates that felony cases (excluding homicides) must be ready for trial within six months of arraignment or charges can be dismissed.³⁴⁰ However, in practice, this time limit can be extended for multiple reasons; and in 2011, 74 percent of felony cases in the Bronx extended over the six-month time limit.³⁴¹ Due to court backlogs, prosecutor extensions, and Browder’s insistence on his innocence and refusal to plead guilty, by the time Browder was able to appear before a judge his case (along with 952 other felony cases) was over two-years old.³⁴² On May 29, 2013, the district attorney dismissed the case and Browder (who was never convicted of a crime) was released from Rikers after spending three years in prison, much of that time was spent in solitary confinement.³⁴³ Due to the physical and psychological damage he suffered while detained, Browder committed suicide in June 2015.³⁴⁴ Myesha Braden, Director for Special Justice Initiatives with Alliance for Justice, explained that:

Kalief Browder is an example of what can happen when people are detained for extended periods of time, [we] even have people who end up being detained pretrial for longer than they would be able to be sentenced for the actual crime that was committed.³⁴⁵

³³⁶ Jennifer Gonnerman, “Before the Law,” *The New Yorker*, Sept. 29, 2014, <https://www.newyorker.com/magazine/2014/10/06/before-the-law>.

³³⁷ *Ibid.*

³³⁸ *Ibid.*

³³⁹ *Ibid.*

³⁴⁰ *See* N.Y. Crim. Proc. Law §§ 30.20, 30.30.

³⁴¹ Jennifer Gonnerman, “Before the Law,” *The New Yorker*, Sept. 29, 2014, <https://www.newyorker.com/magazine/2014/10/06/before-the-law>.

³⁴² *Ibid.*

³⁴³ *Ibid.*

³⁴⁴ Jennifer Gonnerman, “Kalief Browder, 1993-2015,” *The New Yorker*, June 7, 2015, <https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015>.

³⁴⁵ Myesha Braden, Director for Special Justice Initiatives with Alliance for Justice, Interview Transcript (Aug. 25, 2020) at 25:14 [on file].

In response to the case, the City of New York settled with the Browder family for \$3.3 million.³⁴⁶ Mayor Bill de Blasio also stated that he seeks to close Rikers Island by 2027 and reform the city's court system and end the excessive delays that detains individuals like Browder for so long.³⁴⁷

In written testimony to the Commission, the Essie Justice Group explained that while pretrial detention has a deleterious impact the individual incarcerated, family members often bear the additional costs.³⁴⁸ They wrote:

Pretrial detention, and the use of cash bail in particular, have a devastating impact on the physical, emotional, and economic wellbeing of the 1 in 4 women, and nearly 1 in 2 Black women, who have an incarcerated family member in the United States. Pretrial incarceration disproportionately harms Black women, both those incarcerated and those who are left to bear the cost while a loved one is incarcerated.³⁴⁹

Similarly, Erika Maye, Deputy Senior Campaigns Director for Criminal Justice at Color of Change testified that pretrial detention and bail decisions can have widespread outcomes not only for the individuals themselves, but also for entire communities.³⁵⁰ She explained that:

Money bail creates a system of wealth-based detention that criminalizes poverty, worsens racial bias in the criminal justice system, and extracts wealth from poor and Black communities. Money bail also exacerbates overcharging and coerces guilty pleas, depriving people of rights to defend their innocence... This is a community, not an individual problem. Pretrial detention bleeds Black communities and their resources and perpetuates a cycle of poverty and jail time... That's money taken from families, children, and communities. The billion-dollar commercial bail industry profits off of Black communities, taking advantage of the urgency of detention to bind people and their loved ones to predatory contracts that can mean debt and payments that last far longer than any court proceedings and continue to burden families regardless of dropped charges or innocence.³⁵¹

³⁴⁶ David K. Li, "Family of Kalief Browder, young man who killed himself after jail, gets \$3.3M from New York," NBC News, Jan. 24, 2019, <https://www.nbcnews.com/news/us-news/family-kalief-browder-young-man-who-killed-himself-after-jail-n962466>.

³⁴⁷ Ibid.

³⁴⁸ Gina Clayton-Johnson, Rena Karefa-Johnson, and Titilayo Rasaki, Essie Justice Group, Written Testimony for the Civil Rights Implications of Cash Bail Briefing before the U.S. Commission on Civil Rights, Feb. 26, 2021, p. 1 (internal citations omitted) (hereinafter Essie Statement).

³⁴⁹ Ibid.

³⁵⁰ Erika Maye, Deputy Senior Campaigns Director for Criminal Justice, Color of Change, testimony, *Bail Reform Briefing*, transcript p. 120.

³⁵¹ Ibid.

Sentencing and Conviction Rates

In her study on pretrial practices in Philadelphia, Professor Stevenson found that pretrial detention led to a 13 percent increase in the likelihood of being convicted.³⁵² She posited that this result could be explained by an increase of guilty pleas among defendants who otherwise would have been acquitted or had their charges dropped.³⁵³ Further, her data revealed that pretrial detention led to a 42 percent increase (or 124 days) in the average length of the incarceration sentence, and a 41 percent increase in the amount of non-bail court fees owed.³⁵⁴ Stevenson maintained that the latter finding suggests that the use of money bail contributes to the growing concern of the connection between fines-and-fees and the criminal justice system that can contribute to a “poverty trap” for those who are unable to pay bail because they end up accruing more court debt.³⁵⁵ Stevenson found that 82 percent of defendants who were charged court fees remain in debt to the court five years later, with an average debt of \$691.³⁵⁶

Stevenson further noted that in Philadelphia, over half of pretrial detainees would be able to secure their release by paying a deposit of \$1,000 or less; and many defendants remain incarcerated at even low amounts of bail, with deposits to secure release of \$50 or \$100.³⁵⁷ Moreover, the majority of these defendants are not being held due to violent crimes: 60 percent of defendants who were held for more than three days were charged with non-violent crimes and 28 percent were charged only with a misdemeanor.³⁵⁸

Matt DeLisi, Professor of Sociology at Iowa State University, submitted testimony explaining that overall:

Pretrial detention is significantly associated with several downstream criminal justice consequences for the defendant’s subsequent including more guilty pleas, and convictions, increased jail confinement, increased prison confinement, increased prison sentence length, more recidivism, and more institutional misconduct in prison.³⁵⁹

³⁵² Megan Stevenson, “Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes,” *The Journal of Law, Economics, and Organization*, vol. 34, no. 4, 2018, <https://academic.oup.com/jleo/article/34/4/511/5100740>.

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid.*; see also U.S. Comm’n on Civil Rights, “Targeted Fines and Fees Against Communities of Color,” Sept. 2017, https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf.

³⁵⁶ Megan Stevenson, “Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes,” *The Journal of Law, Economics, and Organization*, vol. 34, no. 4, 2018.

³⁵⁷ *Ibid.*

³⁵⁸ *Ibid.*

³⁵⁹ Delisi written testimony at p. 3

Other studies found similar effects on conviction rates in New York City for both misdemeanor and felony cases.³⁶⁰ One study that examined approximately one million cases showed that pretrial detention increased the likelihood of similarly situated defendants being convicted by at least 13 percentage points in felony cases.³⁶¹ The researchers note that while the majority of defendants in the analysis were bail eligible (i.e., not deemed to be too high a public safety or a flight risk to have bail set), they were not able to secure financial release set by the arraignment judge (71 percent of felony defendants and 68 percent of misdemeanor defendants, respectively).³⁶² This resulted in pretrial detention for most of the defendants in this study, despite the bail amounts being relatively low: about 15 percent of the felony cases had bail set at less than \$2,000 and the majority had bail set at less than \$5,000.³⁶³

Additionally, the researchers found that similar felony pretrial detainees were more likely to plead guilty by 10 percentage points and the researchers stated that “detention primarily affects conviction by inducing some individuals who would not have pled guilty if released to plead guilty after they were detained.”³⁶⁴ Further, the analysis showed inconsistencies in bail amounts, convictions, and guilty pleas among judges.³⁶⁵ The researchers found that some judges are correlated with imposing higher amounts of bail and a higher likelihood of defendants being convicted and pleading guilty.³⁶⁶ Moreover, the effects of pretrial detention had a more pronounced effect on defendants without a prior criminal record.³⁶⁷ For first-time felony defendants being detained pretrial, the likelihood of being convicted increased by 15.2 percentage points, compared to the increase of 11.5 percentage points for those with prior convictions.³⁶⁸

The researchers also found that 34 percent of cases where a defendant had been released were dismissed, compared to 19 percent of dismissals for those who were detained.³⁶⁹ The researchers also point out that while pretrial detention may reduce criminal activity during the detention period, this result is mostly offset by an increase in recidivism within two years post-sentencing, calling

³⁶⁰ Emily Leslie and Nolan Pope, “The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments,” *Journal of Law and Economics*, vol. 60, (Aug. 2017),

http://econweb.umd.edu/~pope/pretrial_paper.pdf; Christopher Lowenkamp, Marie VanNostrand, and Alexander Holsinger, “The Hidden Costs of Pretrial Detention,” Arnold Foundation, Nov. 2013, <https://perma.cc/498S-LM6P>; Paul Heaton, Sandra Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 *STAN. L. REV.* 711, 713 n.3 (2017).

³⁶¹ The researchers note that pretrial detention also had a significant effect on misdemeanor cases, but those cases were not the primary focus of the study. See Emily Leslie and Nolan Pope, “The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments,” *Journal of Law and Economics*, vol. 60, (Aug. 2017), at 530, http://econweb.umd.edu/~pope/pretrial_paper.pdf.

³⁶² *Ibid.*, pp. 544-45.

³⁶³ *Ibid.*, p. 545.

³⁶⁴ *Ibid.*

³⁶⁵ *Ibid.*

³⁶⁶ *Ibid.*, p. 543.

³⁶⁷ *Ibid.*

³⁶⁸ *Ibid.*, p. 543.

³⁶⁹ *Ibid.*, pp. 531-47.

into question whether an initial decrease in crime rates is a sufficient reason for pretrial detention.³⁷⁰ Similar to other studies, the study found that controlling for demographic and previous criminal history characteristics, Black felony defendants were 3.7 percentage points more likely and Latinx felony defendants were 3.1 percentage points more likely to be sentenced to prison than White felony defendants.³⁷¹ While pretrial detention was not found to have a dissimilar effect on conviction rates due to the race or ethnicity of the defendant, minority defendants were more likely to be detained pretrial.³⁷²

Specifically, the analysis showed that pretrial detention resulted in a 40 percent difference in the Black-white sentencing gap and 28 percent in the Latinx-white sentencing gap.³⁷³

Being detained pretrial does not affect blacks or Hispanics differently than whites, but minority defendants fail to make bail at higher rates than their white counterparts and are consequently detained more often. As a result, they are disproportionately affected by pretrial detention. The disparity in the rates at which whites and minorities are detained pretrial is an important factor in explaining why minorities are at least 25 percent more likely to be sent to prison, conditional on being charged with a crime.³⁷⁴

Research also shows that pretrial detention may decrease public safety and increase recidivism, even though one of the goals of pretrial detention is intended to do the opposite.³⁷⁵ For low- and moderate-risk defendants who were detained and then released, researchers have found strong correlations to higher rates of new criminal activity, both during the pretrial period and in the years post disposition.³⁷⁶ Moreover, there is a statistically significant and positive connection between longer pretrial detention periods and rates of recidivism.³⁷⁷ For instance, when low-risk defendants are held pretrial for two to three days, low-risk defendants are about 40 percent more likely to commit a new crime before trial, compared to similarly situated defendants who are held for 24 hours or less.³⁷⁸ For low-risk pretrial detainees that are held for 8 to 14 days, they were found to be 51 percent more likely to commit another crime within two years after the resolution of their case when compared to similar defendants held for 24 hours or less.³⁷⁹ While the current research has not fully been able to explain these statistics, scholars have suggested that these correlations

³⁷⁰ Ibid., p. 555.

³⁷¹ Ibid., p. 550.

³⁷² Ibid.

³⁷³ Ibid., p. 531.

³⁷⁴ Ibid.

³⁷⁵ Christopher Lowenkamp, Marie VanNostrand, and Alexander Holsinger, "The Hidden Costs of Pretrial Detention," Arnold Foundation, Nov. 2013, <https://perma.cc/498S-LM6P>; Paul Heaton, Sandra Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 759 (2017).

³⁷⁶ Christopher Lowenkamp, Marie VanNostrand, and Alexander Holsinger, "The Hidden Costs of Pretrial Detention," Arnold Foundation, Nov. 2013, <https://perma.cc/498S-LM6P>.

³⁷⁷ Christopher Lowenkamp, Marie VanNostrand, and Alexander Holsinger, "The Hidden Costs of Pretrial Detention," Arnold Foundation, Nov. 2013, <https://perma.cc/498S-LM6P>.

³⁷⁸ Ibid., p. 3.

³⁷⁹ Ibid.

may be the result of the collateral consequences of pretrial detention (e.g., loss of job, stable housing, familial problems upon release).³⁸⁰

While pretrial detention is not intended to have bearing on the legal proceedings of one's case, data continue to show that it does.³⁸¹ For example, those who are detained may lose bargaining power with the prosecutor and be more likely to plead guilty (even if they are innocent) because of the costs (both monetary and non-monetary) of being detained and because they want to secure release.³⁸² These outcomes seem especially true for defendants charged with minor offenses since a guilty plea in exchange for a sentence to time served or probation can be the fastest path for release. Taking a guilty plea and being released is especially enticing for those at risk of losing employment, housing, or custody of their children while detained.³⁸³ This latter finding may be particularly salient for women facing less serious charges compared to men, as they are more likely to be single parents who need to quickly gain release to care for their children.³⁸⁴ Researchers with the Yankee Institute explain that

many poor defendants who can neither afford to post bond nor languish in jail while awaiting trial are incentivized to plead guilty to charges even if they're innocent. The resulting criminal conviction poses a slew of barriers for individuals attempting to re-enter society.³⁸⁵

At the Commission's briefing, DeAnna Hoskins, President and CEO of JustLeadership testified to the correlation between pretrial detention and conviction rates. She explained:

I was arrested in 1998, from a drug addiction that I had at the time, but it was for a theft charge, and was given a bail that I could not afford, a \$10,000 cash bail. The options were I can plea out to go to treatment immediately and be home in six months or take it to trial and actually go to prison for up to 18 months. Having small

³⁸⁰ Tracey Meares and Arthur Rizer, "The 'Radical' Notion of the Presumption of Innocence," The Square One Project, May 2020, <https://squareonejustice.org/wp-content/uploads/2020/05/CJLJ8161-Square-One-Presumption-of-Innocence-Paper-200519-WEB.pdf>.

³⁸¹ Emily Leslie and Nolan Pope, "The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments," *Journal of Law and Economics*, vol. 60, (Aug. 2017), http://econweb.umd.edu/~popo/pretrial_paper.pdf; Paul Heaton, Sandra Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 *Stan. L. Rev.* 711, 759 (2017).

³⁸² Emily Leslie and Nolan Pope, "The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments," *Journal of Law and Economics*, vol. 60, (Aug. 2017); Will Dobbie, Jacob Goldin, and Crystal Yang, "The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges," NBER Working Paper, Aug. 2016.

³⁸³ See, e.g., Paul Heaton, Sandra Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 *Stan. L. Rev.* 711, 784-86 (2017).

³⁸⁴ See, e.g., Emily Leslie and Nolan Pope, "The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments," *Journal of Law and Economics*, vol. 60, (Aug. 2017), at 554.

³⁸⁵ Thurston Powers and Lauren Krisai, "Reforming the Constitution State's Pre-Trial System," Yankee Institute for Public Policy, Mar. 8, 2016, https://yankeeinstitute.org/wp-content/uploads/2016/03/reforming_connecticut_bail_system-1.pdf.

children at home, I was not afforded the opportunity, because I couldn't pay bail, to actually try to get treatment outside or see what my options were.

I felt I was forced to plead to the six months so that I can return home to my children as soon as possible. But also, [I] was returning home and wanted to address the issue I had. So, when we talk about the coerced plea deals and the opportunities, that was my quickest path to return back to my children, so I felt forced to take that path to come back home, instead of taking a chance to do 18 months in a state facility.³⁸⁶

The correlation between higher conviction rates and pretrial detention may also be due to detainees having less access to their defense attorneys than they might have if released and less time and resources to prepare a defense case.³⁸⁷ Additionally, detainees have less access to engage in positive measures that may increase the likelihood of gaining an acquittal, dismissal, or diversion, such as seeking treatment services, pursuing education or employment, and paying restitution to victims or the community.³⁸⁸

Pretrial detention is not only correlated with higher conviction rates, but also have been linked to harsher sentences that include incarceration versus probation or community service and for longer amounts of time compared to those who are not detained.³⁸⁹ One study of over 150,000 cases in Kentucky found that low-risk defendants who were detained during their entire pretrial period were 5.41 times more likely to be sentenced to jail and 3.76 times more likely to be sentenced to prison, compared to similarly situated low-risk defendants who were released at some point during the pretrial period.³⁹⁰ These effects hold for moderate or high-risk defendants as well (approximately four and three times as likely, respectively) to be sentenced to jail and approximately three times as likely to be sentenced to prison.³⁹¹ The researchers noted these

³⁸⁶ DeAnna Hoskins, President & CEO, JustLeadership, testimony, *Bail Reform Briefing* transcript, pp. 85-86.

³⁸⁷ Paul Heaton, Sandra Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711-712, 772 (2017); Tracey Meares and Arthur Rizer, "The 'Radical' Notion of the Presumption of Innocence," The Square One Project, May 2020.

³⁸⁸ *Ibid.*

³⁸⁹ See, e.g., Leon Digard and Elizabeth Swavola, "Justice Denied: The Harmful and Lasting Effects of Pretrial Detention," Vera Institute of Justice, Apr. 2019, <http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/04/Justice-Denied-Evidence-Brief.pdf>; Christopher Lowenkamp, Marie VanNostrand, and Alexander Holsinger, "Investigating the Impact of Pretrial Detention on Sentencing Outcomes," Arnold Foundation, Nov. 2013, at 10, http://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_state-sentencing_FNL.pdf.

³⁹⁰ Christopher Lowenkamp, Marie VanNostrand, and Alexander Holsinger, "Investigating the Impact of Pretrial Detention on Sentencing Outcomes," Arnold Foundation, Nov. 2013, at 11, http://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_state-sentencing_FNL.pdf.

³⁹¹ Christopher Lowenkamp, Marie VanNostrand, and Alexander Holsinger, "Investigating the Impact of Pretrial Detention on Sentencing Outcomes," Arnold Foundation, Nov. 2013, at 10. The researchers note that the effects of pretrial detention are not intended to prove causality, since it is possible that those held during the entire pretrial period may be different in significant and unmeasurable ways from those who are released during some point before trial. However, the findings are significant and demonstrate the need for further empirical research to determine which defendants need to be detained. *Ibid.*, p. 4.

pretrial effects after controlling for factors such as severity of charge, demographics, and prior criminal records.³⁹²

Another study out of Harris County, Texas showed that misdemeanor defendants who were detained for more than a week post initial bail hearing were 25 percent more likely to be convicted and 43 percent more likely to be sentenced to jail compared to similarly situated defendants who were released pretrial.³⁹³ Additionally, their sentences were nine days longer, which was more than double the length of those released.³⁹⁴

One of the main criteria that judges utilize in determining if a defendant is bailable, and also the bail amount, is considering the likelihood that the defendant is a flight risk and will not appear at the future court date.³⁹⁵ Paradoxically, research suggests that defendants who are detained pretrial are less likely to appear at their court dates.³⁹⁶ Specifically, data suggest that individuals who have been detained for two to three days pretrial and then released are slightly more likely (1.09 times) to fail to appear at their subsequent court date, when compared to those who were detained for 1 day.³⁹⁷ The researchers found that the probability of a defendant failing to appear increased as length of pretrial detention increased.³⁹⁸ For instance, low-risk defendants detained two to three days were 1.22 times more likely not to appear, detainees held for four to seven days were also 1.22 more likely, and those held for 15 to 30 days were 1.41 times more likely not to appear compared to low-risk defendants detained one day or less (see Chart 4).³⁹⁹ This shows statistically that defendants held in pretrial detention for longer periods are less likely to appear at court. Furthermore, as the length of pretrial detention increases the likelihood of a defendant failing to appear at their court date also increases.

³⁹² *Ibid.*, p. 12.

³⁹³ Paul Heaton, Sandra Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 *Stan. L. Rev.* 711, 717 (2017).

³⁹⁴ *Id.*, 717. The researchers note that the sample of defendants include “those without a jail sentence, so it incorporates both the extensive effect on jail time (those detainees who, but for detention, would not have received a jail sentence at all) and intensive effect on jail time (those who would have received a jail sentence regardless but whose sentence may be longer as result of detention.” *Id.*, 747.

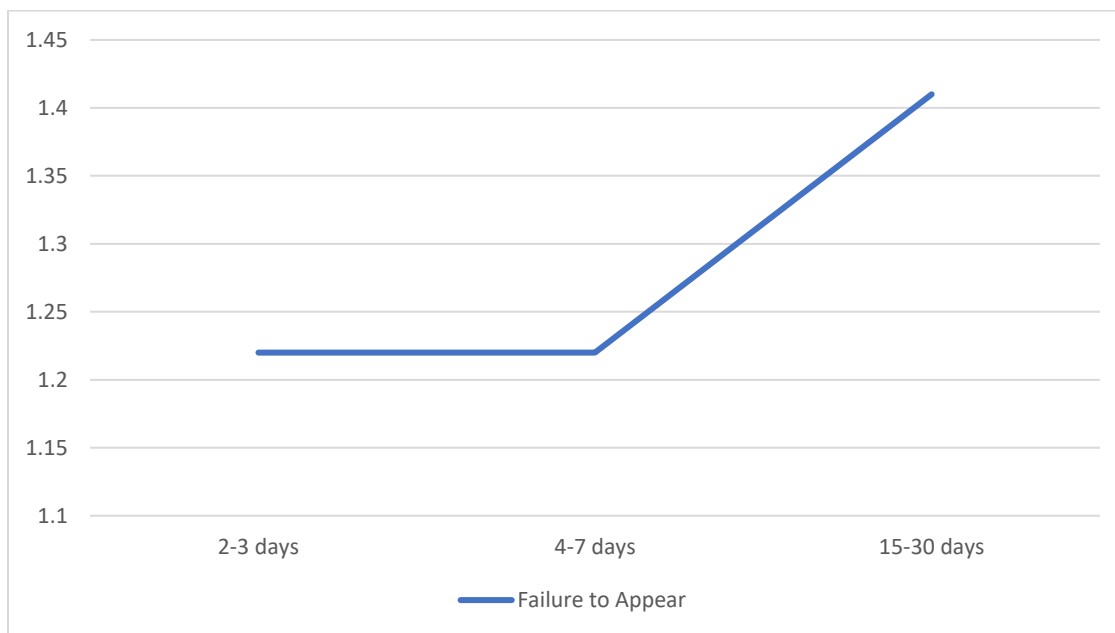
³⁹⁵ *See* 18 U.S.C. § 3142.

³⁹⁶ Christopher Lowenkamp, Marie VanNostrand, and Alexander Holsinger, “The Hidden Costs of Pretrial Detention,” Arnold Foundation, Nov. 2013, at 10, <https://perma.cc/498S-LM6P>.

³⁹⁷ *Ibid.*

³⁹⁸ *Ibid.*

³⁹⁹ *Ibid.*

Chart 4: Pretrial Detention and Failure to Appear Correlations

Source: Christopher Lowenkamp, Marie VanNostrand, and Alexander Holsinger, “The Hidden Costs of Pretrial Detention,” Arnold Foundation, Nov. 2013.

These studies, taken together, suggest that pretrial detention may have the most effect on low-risk defendants, those held on the smallest amounts of bail, and those charged with a misdemeanor rather than a felony.⁴⁰⁰ These effects may be explained in part due to low-level detainees being more likely to be sentenced to time-served compared to those with more severe charges. However, when controlling for the effect of time-served sentences, pretrial detention is still shown to be a factor in increasing incarceration sentences.⁴⁰¹ Further, research also suggests that many of these low-level detainees may have spent more time detained than what they would have been sentenced to.⁴⁰²

⁴⁰⁰ See, e.g., Christopher Lowenkamp, Marie VanNostrand, and Alexander Holsinger, “Investigating the Impact of Pretrial Detention on Sentencing Outcomes,” Arnold Foundation, Nov. 2013; Paul Heaton, Sandra Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. REV. 711, 751 (2017); Megan Stevenson, “Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes,” *The Journal of Law, Economics, and Organization*, vol. 34, no. 4, 2018.

⁴⁰¹ Christopher Lowenkamp, Marie VanNostrand, and Alexander Holsinger, “Investigating the Impact of Pretrial Detention on Sentencing Outcomes,” Arnold Foundation, Nov. 2013, at 10.

⁴⁰² See, e.g., John Matthews II and Felipe Curiel, “Criminal Justice Debt Problems,” *Human Rights Magazine*, vol. 44, no. 3: Economic Justice, American Bar Association, Nov. 30, 2019, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economic-justice/criminal-justice-debt-problems/.

While the effects of pretrial detention seem to be more significant for low-level and misdemeanor defendants, it also impacts felony defendants.⁴⁰³ For instance, one study found that pretrial detention for felony defendants resulted in increasing the minimum sentence by more than 150 days.⁴⁰⁴ For felony detainees held during the entire pretrial period, 87 percent of sentences included incarceration, compared to 20 percent of felony defendants who were released during pretrial.⁴⁰⁵

Additionally, the time in pretrial also was found to have an effect on sentencing.⁴⁰⁶ For example, the average sentence for cases with less than a day in pretrial detention was 120 days, compared to 730 days for defendants held for more than two months pretrial.⁴⁰⁷ The researcher notes that while there are several variables that predict incarceration, pretrial detention was the “strongest *single* factor influencing a convicted defendant’s likelihood of being sentenced to jail or prison.”⁴⁰⁸ Similar to low-level defendants, these effects may be due to defendants not being able to engage in “prophylactic measures”⁴⁰⁹ or demonstrate their ability to “behave responsibly” (e.g., supporting their families, maintaining employment, working in the community) which can result in more lenient sentencing outcomes; while those detained can only hope to receive time off their sentence, if convicted or received a time-served sentence.⁴¹⁰

As the previous studies have shown, even a short time in pretrial detention can have numerous destructive effects on defendant’s future outcomes.⁴¹¹ In a study evaluating a sample of defendants who were randomly assigned to judges in Miami-Dade, Florida and Philadelphia, Pennsylvania, researchers found that spending three days in pretrial detention had statistically significant effects across several measures (see Chart 5).⁴¹² For instance, the probability of being found guilty is 14 percentage points higher or a 24.2 percentage change from the average for defendants who are released pretrial, with a larger effect for detained defendants with no prior criminal charges in the preceding year.⁴¹³ Similar to other studies, the researchers note that the higher likelihood of conviction is largely driven by a higher probability of pleading guilty (an increase of 10.8

⁴⁰³ Emily Leslie and Nolan Pope, “The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments,” *Journal of Law and Economics*, vol. 60, (Aug. 2017).

⁴⁰⁴ *Ibid.*, p. 536.

⁴⁰⁵ Mary Phillips, “A Decade of Bail Research in New York City,” New York City Criminal Justice Agency, Inc., Aug. 2012, at 118-19, <https://www.nycja.org/publications/a-decade-of-bail-research-in-new-york-city>. Note: for nonfelony detainees held during the entire pretrial period, they were 84% more likely to be sentenced to incarceration, compared to 10% of those released. *Ibid.*, see figure 44.

⁴⁰⁶ *Ibid.*

⁴⁰⁷ *Ibid.*

⁴⁰⁸ *Ibid.* [emphasis in original].

⁴⁰⁹ Paul Heaton, Sandra Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 *Stan. L. Rev.* 711, 747 (2017).

⁴¹⁰ Mary Phillips, “A Decade of Bail Research in New York City,” New York City Criminal Justice Agency, Inc., Aug. 2012, at 118-20.

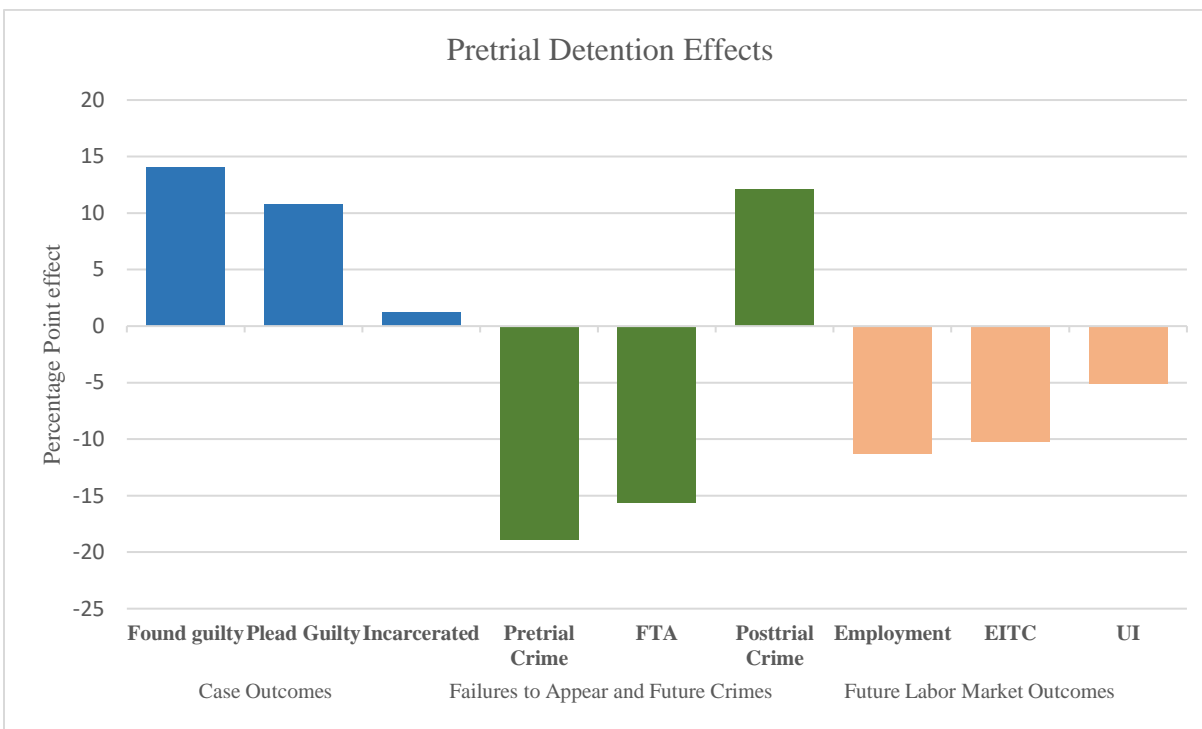
⁴¹¹ Will Dobbie, Jacob Goldin, and Crystal Yang, “The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges,” *American Economic Review*, vol. 108, no.2, 2018, <https://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.20161503>.

⁴¹² *Ibid.*

⁴¹³ *Ibid.*

percentage points).⁴¹⁴ Initial pretrial detention was found to have a small and statistically insignificant effect on posttrial incarceration, mostly likely because many defendants in this sample plead to time served and most offenses in the sample carried minimal incarceration time.⁴¹⁵

Chart 5: Pretrial Detention Effects on Case Outcomes, Future Crime, and Future Labor Market Outcomes



*EITC= Earned Income Tax Credit; UI= Unemployment Insurance

†Researchers use EITC and UI for estimates for tax filing, UI receipt and EITC receipt as measures of formal labor market sector engagement that are particularly welfare-relevant due to the sample's low-income population. Pretrial crime and FTA are measured prior to case disposition. Posttrial crime is measured in 0 to 2 years after case disposition. Employment, EITC receipt and UI receipt are measured in 3 to 4 years after case disposition.

Source: Will Dobbie, Jacob Goldin, and Crystal Yang, "The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges," *American Economic Review*, vol. 108, no.2, 2018; chart created by Commission staff.

If the purpose of pretrial detention is to increase the likelihood that a defendant will appear at the court date, an argument can be made that detention is fulfilling that goal due to the defendant's incarceration. However, if the goal of pretrial detention is to guard public safety, detention may run counter to that goal. The researchers conclude that these results suggest that pretrial detention has two critical opposing effects on future crime.⁴¹⁶ First, pretrial detention prevents new criminal

⁴¹⁴ Ibid.

⁴¹⁵ Ibid.

⁴¹⁶ Ibid.

activity prior to case disposition because the individual is detained in jail while awaiting trial.⁴¹⁷ Second, pretrial detention increases the likelihood of new crime after case disposition due to criminogenic effects (e.g., issues finding employment and/or enrolling in school, substance abuse and mental health needs) of incarceration.⁴¹⁸ This latter finding is consistent with other studies that show juvenile incarceration increases the likelihood of adult incarceration and posttrial incarceration increases the likelihood of future crime.⁴¹⁹

Risk Assessments

Court officials have used risk assessments as one tool in making pretrial release and detention determinations since the early part of the 20th Century. Originally the tools were largely clinical in nature, meaning that they relied on experts such as psychologists, social workers, probation officers, and court and judicial actors to determine if a defendant should be detained pretrial or released.⁴²⁰

As concerns grew over the increasing detainee population and the possibility that of those detained, some defendants were being detained unintentionally, actuarial risk assessment tools (i.e., computerized) were developed as a possible solution.⁴²¹ Unlike previous risk assessments, these are based on statistical models and supposedly do not rely on human judgement, and the resulting pretrial decisions are based upon mathematical determinations.⁴²² These tools are meant to aid court officials in determining a defendant's likelihood of pretrial success (i.e., returning to court and not committing any new crime, especially any new violent crime). Timothy Schnacke, Executive Director of the Center for Legal and Evidence-Based Practices, argues that "risk assessments at their core are trying to predict the risk of a defendant 'failing' through misbehavior while on pretrial release – meaning either committing another crime or failure to appear."⁴²³

⁴¹⁷ Ibid.

⁴¹⁸ Ibid.

⁴¹⁹ See Anna Aizer and Joseph Doyle, Jr. "Juvenile Incarceration, Human Capital, and Future Crime: Evidence from Randomly Assigned Judges," *Quarterly Journal of Economics*, vol. 139, no. 2, 2015; Michael Mueller-Smith, "The Criminal and Labor Market Impacts of Incarceration." Aug. 2015, <https://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2015/09/incar.pdf>.

⁴²⁰ See, e.g., Chris Baird, Theresa Healy, Kristen Johnson, Andrea Bogie, Erin Wicke Dankert, Chris Scharenbroch, "A Comparison of Risk Assessment Instruments in Juvenile Justice," National Council on Crime and Delinquency, Aug. 2013, <https://www.ncjrs.gov/pdffiles1/ojdp/grants/244477.pdf>; Matt Henry, "Risk Assessment: Explained," *The Appeal*, Mar. 25, 2019.

⁴²¹ Matt Henry, "Risk Assessment: Explained," *The Appeal*, Mar. 25, 2019.

⁴²² Matt Henry, "Risk Assessment: Explained," *The Appeal*, Mar. 25, 2019; Christopher Lowenkamp and Jay Whetzel, "The Development of an Actuarial Risk Assessment Instrument for U.S. Pretrial Services," *Federal Probation*, vol. 73, no. 2, 2009, https://www.uscourts.gov/sites/default/files/73_2_3_0.pdf; Timothy Schnacke, "Model' Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention," Center for Legal and Evidence-Based Practices, Apr., 18, 2017.

⁴²³ Timothy Schnacke, "Model' Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention," Center for Legal and Evidence-Based Practices, Apr. 18, 2017, at 89.

Since 2009, the popularity of these tools has increased, demonstrating a shift toward an individualized assessment of defendants versus basing release off the charge(s).⁴²⁴ This increase in popularity led to the development of a specific type of actuarial risk assessment tool that was based on computer algorithms where a computer calculates a set of factors to provide an overall “risk score.”⁴²⁵ These algorithmic tools are based on predictive analytics that combine court and demographic records with a questionnaire that is administered by a court official, such as a pretrial services officer.⁴²⁶

From 2012 to 2014, 261 new laws in 47 states sought to address pretrial policies and detention; and in 2014 alone, 11 laws were passed to regulate the use of risk assessment tools to help determine whether, and under what conditions, a defendant should be released.⁴²⁷ Since then, nine states have enacted laws that allow or require courts to use risk assessments to assist judges in setting bail and pretrial release conditions.⁴²⁸ Another five states passed bills intended to fund studies or the development of these tools.⁴²⁹ As the pretrial detention population has continued to increase nationally, many cities, counties, and states have also integrated the use of these computerized or algorithmic risk assessment tools to aid judges and court officials in determining bail, sentencing, and parole decisions.⁴³⁰

Some tools, however, such as the Public Safety Assessment (PSA) developed by Arnold Ventures do not use questionnaires and instead rely solely on statistical variables such as age at current arrest, current offense, prior criminal history, prior failure to appear, and prior convictions.⁴³¹ Each

⁴²⁴ See, e.g., Amber Widgery, “Trends in Pretrial Release: State Legislation,” National Conference of State Legislatures, Mar. 2015, https://www.ncsl.org/portals/1/ImageLibrary/WebImages/Criminal%20Justice/NCSL%20pretrialTrends_v05.pdf; Christopher Lowenkamp and Jay Whetzel, “The Development of an Actuarial Risk Assessment Instrument for U.S. Pretrial Services,” *Federal Probation*, vol. 73, no. 2, 2009, https://www.uscourts.gov/sites/default/files/73_2_3_0.pdf.

⁴²⁵ See, e.g., Matt Henry, “Risk Assessment: Explained,” *The Appeal*, Mar. 25, 2019; Danielle Kehl, Priscilla Guo, and Samuel Kessler, “Algorithms in the Criminal Justice System: Assessing the Use of Risk Assessments in Sentencing,” Responsive Communities Initiative, Harvard Law School, 2017.

⁴²⁶ Partnership on AI, *Report on Algorithmic Risk Assessment Tools in the U.S. Criminal Justice System*, <https://www.partnershiponai.org/report-on-machine-learning-in-risk-assessment-tools-in-the-u-s-criminal-justice-system/>; Matt Henry, “Risk Assessment: Explained,” *The Appeal*, Mar. 25, 2019, <https://theappeal.org/risk-assessment-explained/>.

⁴²⁷ Amber Widgery, “Trends in Pretrial Release: State Legislation,” National Conference of State Legislatures, Mar. 2015.

⁴²⁸ *Ibid.*

⁴²⁹ National Conference of State Legislatures, “Trends in Pretrial Release: State Legislation Update,” Apr. 2018, https://www.ncsl.org/portals/1/ImageLibrary/WebImages/Criminal%20Justice/pretrialEnactments_2017_v03.pdf.

⁴³⁰ See, e.g., Amber Widgery, “Trends in Pretrial Release: State Legislation,” National Conference of State Legislatures, Mar. 2015.

⁴³¹ According to APPR, the tool was developed by compiling case data from approximately 750,000 cases from about 300 jurisdictions across the nation. It is free to any jurisdiction that chooses to implement it and according to APPR, it is evaluated by independent researchers “to maximize its accuracy and minimize its impact on racial disparities.” See Advancing Pretrial Policy & Research, “About the Public Safety Assessment,” <https://advancingpretrial.org/psa/about/>.

of these variables is given a numerical weight that is used to assign a defendant a “risk score” that is meant to determine 1) the likelihood of that defendant not appearing to the defendant’s court date; 2) probability of a defendant engaging in new criminal activity; and 3) probability of a defendant engaging in new violent criminal activity.⁴³² These scores are usually scaled from 1 to 6 with 1 being “low-risk” or an indication of “greater likelihood of pretrial success” and 6 being “high-risk” or an indication of lesser likelihood of pretrial success.⁴³³ Further, the points assigned under the new violent criminal activity are converted to a scaled score, and then will alert the administrator to the presence or absence of a “violence flag.”⁴³⁴ While not all tools utilize the same variables, the tables below serve as generally representative of the field and demonstrates how the PSA assigns points to each new violent criminal arrest factor.

New Violent Criminal Arrest: Points		
PSA FACTOR	RESPONSE	POINTS
Current violent offense	No	0
	Yes	2
Current violent offense and 20 years old or younger	No	0
	Yes	1
Pending charge at the time of arrest	No	0
	Yes	1
Prior conviction (misdemeanor or felony)	No	0
	Yes	1
Prior violent conviction	No	0
	Yes, 1 or 2	1
	Yes, 3 or more	2

Source: Advancing Pretrial Policy & Research, “How the PSA Works”

The points reflected in the table above are an example of some of the tool’s calculations, but do not reflect the overall risk score. From these initial points, the PSA then converts the total number of new violent criminal activity to a scaled score and then to a “violence flag” that is intended to aid judges in determining the dangerousness of the defendant.

⁴³² Ibid.

⁴³³ Advancing Pretrial Policy & Research, “About the Public Safety Assessment,” <https://advancingpretrial.org/psa/factors/>.

⁴³⁴ Ibid.

New Violent Criminal Arrest: Violence Flag	
TOTAL NVCA POINTS	SCALED NVCA SCORE (VIOLENCE FLAG)
0 or 1	1 (NO)
2	2 (NO)
3	3 (NO)
4	4 (YES)
5	5 (YES)
6 or 7	6 (YES)

Source: Advancing Pretrial Policy & Research, “How the PSA Works”

Each of the variables listed above are weighted and then inputted into a model that calculates a final score (i.e., prediction) based on a combination of large data sets, but how developers determine the numerical weight of these tools is often the least transparent part of the algorithm.⁴³⁵ For instance, using the factors of: age at the time of arrest and prior misdemeanor conviction, it is difficult to independently determine how “risky” the tool will predict a defendant to be in committing a new offense while out on bail.

Proponents of these tools argue that they are beneficial because they can offer more “objective” measures regarding bail decisions that are based on data instead of relying solely on judicial discretion, and thus decrease the chance for possible judicial bias and increase consistency in judicial pretrial release decisions.⁴³⁶ Studies have shown that pretrial decisions can vary widely from judge to judge and county to county.⁴³⁷ One study noted that judges in an undisclosed jurisdiction had release rates that varied from approximately 50 percent to almost 90 percent.⁴³⁸ The authors then analyzed these judicial decisions through the simulated use of a simple risk assessment tool that only considered a defendant’s age and the prior number of failures to appear in court.⁴³⁹ They concluded that if judges had utilized their proposed model to inform who is released, then pretrial decisions would have been more consistent across cases, 30 percent fewer

⁴³⁵ See, e.g., Advancing Pretrial Policy & Research, “About the Public Safety Assessment,” <https://advancingpretrial.org/psa/factors/>; Matt Henry, “Risk Assessment: Explained,” *The Appeal*, Mar. 25, 2019, <https://theappeal.org/risk-assessment-explained/>.

⁴³⁶ See, e.g., Ed Monahan, Executive Director, NAPD Fund for Justice, Inc., Kentucky State Advisory Committee Briefing, “Bail Reform in Kentucky,” U.S. Comm’n on Civil Rights, Transcript at 19 [on file]; Bo Cowgill, “The Impact of Algorithms on Judicial Discretion: Evidence from Regression Discontinuities,” Working Paper, Dec. 5, 2018; Brian Schaefer and Tom Hughes, “Examining Judicial Pretrial Release Decisions: The Influence of Risk Assessments and Race,” *Criminology, Criminal Justice, Law & Society*, June 18, 2019.

⁴³⁷ See, e.g., Megan Stevenson, *Assessing Risk Assessment in Action*, 103 Minn. L. Rev. 303, 309 (2018), https://www.minnesotalawreview.org/wp-content/uploads/2019/01/13Stevenson_MLR.pdf; see also Kentucky State Advisory Committee Briefing, “Bail Reform in Kentucky,” U.S. Comm’n on Civil Rights, Transcript at xx-xx [waiting on final transcript].

⁴³⁸ See, e.g., Jongbin Jung, Connor Concannon, Ravi Shroff, Sharad Goel, Daniel Goldstein, “Simple rules to guide expert classifications,” *Royal Statistical Society*, vol. 183, no. 2, June 2020, <http://www.rshroff.com/uploads/6/2/3/5/62359383/simple-rules-accepted.pdf>.

⁴³⁹ *Ibid.*

defendants would be detained without a corresponding increase in pretrial misconduct, and pretrial release or detention decisions would be more transparent.⁴⁴⁰

Similarly, at a briefing of the Kentucky State Advisory Committee to the Commission, Executive Director of the NAPD Fund for Justice Ed Monahan maintained that in Kentucky, judges' discretion is being misused on a daily basis and pointed to data showing that if risk assessment recommendations had been followed, 40,000 people would have been released from jail.⁴⁴¹

While risk scores can translate to more “objective” pretrial release and detention decisions, with higher scores corresponding to stricter or no-release decisions, in most states, judges can still disregard these recommendations if they deem them too strict or too lax.⁴⁴²

Risk assessments are not without their critics. Some researchers claim that one of the main concerns of the use of algorithms to determine if a defendant should be released or detained pretrial is the lack of transparency with these tools.⁴⁴³ Critics argue that unlike standard risk assessment tools, the data that algorithmic tools utilize can operate as a “black box” on how the scores are determined, which means that court officials may not know why a defendant was placed in a specific risk category.⁴⁴⁴ Jeff Clayton, Executive Director of the American Bail Coalition, argues that:

[B]ail is the right of a presumptively innocent person to be free from jail pending trial, not the right to be labeled as risky and therefore subjected to intrusive conditions assigned by what purports to be an evidence-based, scientific computer algorithm, but in the end is merely based on value-based judgements often hidden and insulated from public view.⁴⁴⁵

In his interview with Commission staff, Clayton described the use of risk assessments as a type of “dangerousness ratchet.”⁴⁴⁶ He argues that these tools do not take into account defendants who

⁴⁴⁰ Ibid.

⁴⁴¹ Ed Monahan, Executive Director, NAPD Fund for Justice, Inc., Kentucky State Advisory Committee Briefing, “Bail Reform in Kentucky,” U.S. Comm’n on Civil Rights, Transcript at 17 [on file].

⁴⁴² See, e.g., Alex Cholas-Wood, “Understanding risk assessment instruments in criminal justice,” Brookings Institution, June 19, 2020, <https://www.brookings.edu/research/understanding-risk-assessment-instruments-in-criminal-justice/>.

⁴⁴³ Ibid.

⁴⁴⁴ Leon Digard and Elizabeth, “Justice Denied: The Harmful and Lasting Effects of Pretrial Detention,” Vera Institute of Justice, Apr. 2019 at 9; Jeffrey Clayton, “Detention, Release from Jail, and Computerized Bail Justice in California: Is it 1984 All Over Again? What Can California Learn from the Last 30 Years of Bail Reform?” 2 UCLA CRIM. JUST. L. REV. 27 (2018), <https://escholarship.org/uc/item/6p31t6hv>.

⁴⁴⁵ Jeffrey Clayton, “Detention, Release from Jail, and Computerized Bail Justice in California: Is it 1984 All Over Again? What Can California Learn from the Last 30 Years of Bail Reform?” 2 UCLA CRIM. JUST. L. REV. 27 (2018), <https://escholarship.org/uc/item/6p31t6hv>.

⁴⁴⁶ Jeff Clayton, Executive Director of the American Bail Coalition, Interview Transcript (Aug. 24, 2020) at 29:15-30:04 [on file].

may be positively contributing to society and a defendant's "risk score" generally does not decrease, but only increases, which can lead to harsher bail decisions.⁴⁴⁷

Some critics argue that bias (even implicit) can influence these tools in terms of developing the algorithm, how it is implemented, and how it is applied.⁴⁴⁸ DeAnna Hoskins, President and CEO of JustLeadership testified before the Commission explaining some of the data concerns. Hoskins posited that

the reason you see more Black males in jails based on a risk assessment tool is because our communities are over-policed, we have more interaction around probation and parole technical violations. So, all of those things are actually going to keep having high risk for African Americans and low-income communities. So, while risk assessment is better than discretion, we still need to understand the racial disparities that [the] risk assessment actually has [] come out, based on our communities and how they're policed.⁴⁴⁹

One of the most common concerns is that racial and ethnic bias are embedded in these tools due to the use of imperfect data and a criminal justice system that has a long history of contributing to systemic inequities.⁴⁵⁰

At the briefing of the Oregon State Advisory Committee to the Commission, Topo Padilla, president of the Golden State Bail Agents Association in California, argued that there is racial bias embedded in algorithms being used by risk assessment tools such as the Arnold Venture's PSA tool.⁴⁵¹

In written testimony to the Commission, the Arnold Ventures research team acknowledged these concerns, but noted:

All practitioners must acknowledge first that racial bias is inherently baked into criminal justice system data. Administrative data is the most common source for developing and administering assessments, which makes transparency and scientific scrutiny of these tools all the more critical... To address racial bias, assessments need to be transparent, subject to regular validation and refinement, and should be developed, implemented, and evaluated to identify and eliminate bias

⁴⁴⁷ Ibid.

⁴⁴⁸ See, e.g., Megan Stevenson, *Assessing Risk Assessment in Action*, 103 Minn. L. Rev. 303, 327-33 (2018), https://www.minnesotalawreview.org/wp-content/uploads/2019/01/13Stevenson_MLR.pdf.

⁴⁴⁹ DeAnna Hoskins, President & CEO, JustLeadership, testimony, *Bail Reform Briefing*, transcript p. 103.

⁴⁵⁰ See, e.g., The Brookings Institution, "AI, Predictive Analytics, and Criminal Justice," Washington, D.C., Feb. 19, 2020, Briefing Transcript, https://www.brookings.edu/wp-content/uploads/2020/02/gs_20200219_ai_justice_transcript.pdf; Jeffrey Clayton, "Detention, Release from Jail, and Computerized Bail Justice in California: Is it 1984 All Over Again? What Can California Learn from the Last 30 Years of Bail Reform?" 2 UCLA CRIM. JUST. L. REV. 27 (2018), <https://escholarship.org/uc/item/6p31t6hv>.

⁴⁵¹ Topo Padilla, president of the Golden State Bail Agents Association in California, Oregon State Advisory Committee Briefing, "Bail Practices in Oregon," U.S. Comm'n on Civil Rights, Oct. 11, 2020, Transcript at 13-14 [waiting on final transcript].

and with the input of justice involved persons and community members. Jurisdictions that choose to implement an assessment must be accountable for the integrity of assessment use.

[W]e have to recognize that a release or bail decision will still be made, and that in practice, the use of administrative data may be a required resource based on state statute to inform this decision. Without empirical evidence to inform this decision, there may be an impact on transparency, and predictive validity as it relates to accurately predicting the likelihood of missing court or experiencing a new pretrial arrest.⁴⁵²

University of Georgia Law Professor Sandra Mayson explains that:

The deep problem... is not algorithmic methodology... [it] is the nature of prediction itself. Any form of prediction that relies on data about the past will produce racial disparity if the past data shows the event that we aspire to predict – the target variable – occurring with unequal frequency across racial groups... To understand and redress disparity in prediction, it is therefore necessary to understand how and when racial disparity arises in the data that we look to as a presentation of *past* crime... [C]rime rates are a manifestation of deeper forces; racial variance in crime rates, where it exists, manifests the enduring social and economic inequality produced by centuries of racial subordination.⁴⁵³

In written testimony to the Commission, Correctional Program Specialist with the National Institute of Corrections (NIC), Lori Eville explained that the NIC supports the use of validated pretrial risk assessments to inform bail decision-making.⁴⁵⁴ She explained that these instruments “encourage informed, rational, and evidence-based bail decisions that, in turn, promote pretrial

⁴⁵² James Cadogan, Virginia Bersch, Kristin Bechtel, and Rebecca Silber, Arnold Ventures, Written Testimony for the Civil Rights Implications of Cash Bail Briefing before the U.S. Comm’n on Civil Rights, Feb. 26, 2021, pp. 6-7 (internal citations omitted) (hereinafter Ventures Statement).

⁴⁵³ Sandra Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, (2019) at 2251, 2259, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3257004 [emphasis in original].

⁴⁵⁴ Specifically, NIC supports assessments that (1) are constructed on empirical data from a pretrial defendant population, (2) transparent about its risk factors and their weighting, (3) validated to the defendant population to ensure its effectiveness in determining the likelihood of pretrial misconduct and (4) tested to ensure racial and ethnic neutrality. As stated by NAPSA Standard 2.8 (2020):

“... adding a poorly constructed or improper assessment to a bail system actually can contribute to unfair and counterproductive bail decisions. ‘Borrowing’ risk assessments from other jurisdictions with no subsequent local validation, basing assessments on subjective stakeholder opinion that is absent research, adopting tools from other criminal justice disciplines for use pretrial and accepting opaque screening criteria all are fatal—and entirely avoidable—flaws to assessing defendant risk. Most disturbing, improperly selecting or implementing a risk assessment can give poor bail practices the false veneer of being ‘evidence based.’”

Eville Statement at 9.

release, defendant court appearance, and arrest-free behavior.”⁴⁵⁵ However, the Institute recognizes some of the criticism of these tools. Eville explains:

All pretrial risk assessments use prior failures to appear, criminal convictions, and prior incarcerations as their primary risk factors, and these factors have an historic and pervasive association with racial and ethnic bias. Moreover, mitigating and aggravating factors considered in most pretrial services agency recommendations and court bail decisions (such as residence and employment) also may have some degree of bias. However, the current body of research and the consensus opinion of criminal justice practitioners strongly suggests that most pretrial assessment instruments in the public domain are neutral on race and ethnicity. Actuarial assessments cannot fully eliminate racial, ethnic, or socio-economic bias, but they can lessen that bias more effectively and consistently than clinical judgement alone.⁴⁵⁶

As such, the National Association of Pretrial Services Agencies’ 2020 *Standards on Pretrial Release* in conjunction with the NIC stated that it recommends adopting an “adjusted actuarial” risk assessment because actuarial risk assessments do not consider factors that may negatively affect a defendant’s score such as the need for mental health services, substance use or addiction, and individual characteristics that may decrease the appearance of future court appearances.⁴⁵⁷ These adjusted assessments also give agency staff the authority to override results in certain circumstances when deemed appropriate.⁴⁵⁸ Moreover, the report notes that jurisdictions can mitigate possible racial and ethnic biases by appropriately validating risk and need assessments that can provide an evidence-based assessment of criminogenic risk factors and needs, and consequently curb the overall racial bias in the criminal justice system’s decision-making process.⁴⁵⁹ While the NIC recognizes that adjusted actuarial assessments do not entirely eliminate racial and socio-economic bias, validating the assessments on defendant populations and only using them for their intended purposes prevents additional bias.⁴⁶⁰

Matt DeLisi, a criminologist who worked as a pretrial services officer before his academic career, explains in his testimony to the Commission:

[R]isk assessment tools were implemented *explicitly* because they are based on objective empirical criteria as opposed to subjective professional or clinical judgments of offender risk that were shown to be less reliable and valid. To move away from risk assessment tools would be to return to a non-scientific, subjective

⁴⁵⁵ Ibid.

⁴⁵⁶ Ibid., pp. 9-10 (internal citations omitted).

⁴⁵⁷ National Association of Pretrial Services Agencies, “Standards on Pretrial Release: Revised 2020,” (2020), p. 38, https://cdpsdocs.state.co.us/ccjj/committees/PRTF/Handout/2020_NAPSA_StandardsOnPretrialRelease.pdf.

⁴⁵⁸ Nat’l Inst. of Corr., *A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial System and Agency 2* (2017), <https://nicic.gov/framework-pretrial-justice-essential-elements-effective-pretrial-system-and-agency>.

⁴⁵⁹ National Association of Pretrial Services Agencies, “Standards on Pretrial Release: Revised 2020,” (2020).

⁴⁶⁰ National Association of Pretrial Services Agencies, “Standards on Pretrial Release: Revised 2020,” (2020), p. 34.

pretrial evaluation process. For example, a recent study compared a group of 2,631 pretrial defendants who received a risk assessment to matched control groups of defendants who did not receive an assessment. Defendants with risk assessment, where the courts could clearly see objective behavioral criteria, were more likely to receive non-financial release from jail, had higher rates of pretrial release, and spent less time in pretrial detention. Those with risk assessment were no more or less likely to fail to appear, but had slightly higher rearrest rates.⁴⁶¹

Other studies have found that while risk assessment tools have aided in reducing the overall number of individuals detained pretrial, the tools have not necessarily reduced the racial composition of the pretrial population.⁴⁶² For example, New Jersey's jail population decreased by 6,000 individuals in 2018 after passing a comprehensive reform bill the prior year, compared to the same time in 2012; however, during this same time period, the racial makeup in the state's jails remained mostly consistent.⁴⁶³

Choosing what data to utilize in the models may also raise concerns with the validity and predictive quality of the results. For instance, one of the main considerations when choosing whether to release a defendant pretrial is the likelihood that the defendant will return to court. In trying to assess "failure to appear" rates, risk assessments only give a static numerical value and cannot interrogate why a person may have missed a court date.⁴⁶⁴ Data show that individuals may miss court for a variety of reasons, such as issues with transportation, familial care, homelessness, work conflicts, or forgetting the date.⁴⁶⁵ A 2011 National Institute of Justice report found that the rate of failing to appear was significantly reduced when defendants were sent written reminders.⁴⁶⁶ Thus, using only mathematical data to predict whether a defendant is a flight risk can yield misleading results.

Nationally recognized expert in the pretrial system and director of analytics at Luminosity, Marie VanNostrand maintains that when interpreting results:

⁴⁶¹ DeLisi testimony at 7 (emphasis in original).

⁴⁶² See, e.g., Judge Glenn Grant, *Report to the Governor and the Legislature*, New Jersey Courts, 2018, <https://njcourts.gov/courts/assets/criminal/2018cjrannual.pdf>.

⁴⁶³ Ibid., p. 27. For further discussion of New Jersey's bail reform measures, see Chapter 4 of this report.

⁴⁶⁴ See, e.g., Ethan Corey and Puck Lo, "The 'Failure to Appear' Fallacy," *The Appeal*, Jan 9, 2019, <https://theappeal.org/the-failure-to-appear-fallacy/>.

⁴⁶⁵ Ibid.; Brian Bornstein, Alan Tomkins, and Elizabeth Neeley, "Reducing Courts' Failure to Appear Rate: A Procedural Justice Approach," National Institute of Justice, Office of Justice Programs, Dep't of Justice, May 2011, <https://www.ncjrs.gov/pdffiles1/nij/grants/234370.pdf>; Zach Despart, "Proposed bail lawsuit settlement includes child care, phones, rides for poor defendants," *Houston Chronicle*, Apr. 12, 2019, <https://www.houstonchronicle.com/news/houston-texas/houston/article/Proposed-bail-lawsuit-settlement-includes-child-13764225.php>.

⁴⁶⁶ Brian Bornstein, Alan Tomkins, and Elizabeth Neeley, "Reducing Courts' Failure to Appear Rate: A Procedural Justice Approach," National Institute of Justice, Office of Justice Programs, Dep't of Justice, May 2011, <https://www.ncjrs.gov/pdffiles1/nij/grants/234370.pdf>.

[J]urisdictions should be mindful that a “higher level” designation only identifies defendants that exhibit a lesser probability of success, not necessarily a likelihood of failure. For example, a study of federal defendants found that nearly 85 percent of those designated as “high risk” made all scheduled court appearances and remained arrest free pretrial.⁴⁶⁷

At the Commission’s briefing, a member of the Illinois Network for Pretrial Justice, Sharlyn Grace, explained that

most or all current risk assessment tools really look at whether or not someone has missed a court date. Most courts aren’t even able to keep data or are currently keeping data that would differentiate between the very small and rare occasions in which people are actually fleeing the jurisdiction, fleeing prosecution, compared to missing court for reasons that are most likely due to poverty or chaos or other things beyond their control []. Missing the bus, not having childcare, having to work and needing that job, having a car break down, those are going to be recorded as failures to appear in the same way that someone leaving the jurisdiction, someone with the means to leave the jurisdiction does...

And it’s important that we all understand arrests for new violent charges while people are released pretrial are extremely rare. In Cook County, it’s less than one percent of people who have been released pretrial. In fact, the rate of arrest for people who are awaiting trial on violent charges is so low that in 2019, more than two dozen data scientists and academics released an open letter raising their concerns with the predictability of that. Basically, it’s so rare that it’s impossible to accurately predict when someone is going to be rearrested for a new charge involving allegations of violence. So, I really want us to differentiate between the wide range of missed court dates and the wide range of new arrests that are happening and not sweep over those big categories so that we come to the wrong conclusions or conclusions that don’t really reflect the underlying concerns we have.⁴⁶⁸

Some cities have picked up on this potential data fallacy and have started to implement “court reminders” that are often text messages to remind individuals about upcoming court dates and others have even started offering childcare assistance for those who appear to court.⁴⁶⁹ Other

⁴⁶⁷ National Association of Pretrial Services Agencies, *Standards on Pretrial Release 5* (2020), p. 30 (citing Marie VanNostrand and Gena Keebler, “Pretrial Risk Assessment in the Federal Court.” *Federal Probation*, Vol. 72 (2), Sept. 2009).

⁴⁶⁸ Sharlyn Grace, Member, Illinois Network for Pretrial Justice, testimony, *Bail Reform Briefing*, transcript p. 107-08.

⁴⁶⁹ See, e.g., Jennifer Elek, Sara Sapia, and Susan Keilitz, “Use of Court Date Reminder Notices to Improve Court Appearance Rates,” Pretrial Justice Center for Courts, Sept. 2017, https://www.ncsc.org/data/assets/pdf_file/0015/1635/pjcc-brief-10-sept-2017-court-date-notification-

studies have shown that failure to appear rates can be reduced by providing defendants with better and more explicit information on when and where to appear, as well as reminders of their court dates.⁴⁷⁰ For example, a 2018 study found that failure to appear rates decreased by 36 percent in one jurisdiction by implementing two inexpensive changes: redesigning court date notices and sending text message reminders.⁴⁷¹

Elijah Gwynn, Co-Founder and CTO for UpTrust testified:

The most common bail reform measure we hear about at UpTrust are risk assessments. And there's nothing wrong, per se, with the idea of an assessment tool, but the current offerings, in our estimation, are frequently too narrow in scope and too focused on formalizing and automating the already structurally racist status quo. If a defendant misses court because they never received the mailed reminder or because they were rearrested because their neighborhood is already over-policed, just as they are more likely to have an unaffordable bail set, they are more likely to be considered risky by a pretrial risk assessment tool.⁴⁷²

Similarly, researchers with Arnold Ventures wrote:

Risk assessments are not a cure-all for the myriad problems of our pretrial justice system: it is critical to understand that the states and counties that have made significant progress in reducing their use of pretrial detention have done so through the adoption of pretrial risk assessment *together with other reforms*, such as using citations in lieu of arrest, early appointment of counsel, strengthening pretrial services, and case processing reforms. That holistic reform approach—not simply adopting a risk assessment alone—is what yields results.⁴⁷³

Private Bail Industry

Over the past several years, the nation has witnessed varying stages and types of pretrial reform efforts across many states to combat the growth of the jail population. This issue has also seen bipartisan efforts to reduce pretrial detention rates and bail systems to decrease their reliance on

[systems.ashx.pdf](#); Brian Cooke, Binta Zahara Diop, Alissa Fishbane, Jonathan Hayes, Aurelie Ouss, and Anuj Shah, “Using Behavioral Science to Improve Criminal Justice Outcomes,” ideas42 and University of Chicago Crime Lab, Jan. 2018, <https://www.ideas42.org/wp-content/uploads/2018/03/Using-Behavioral-Science-to-Improve-Criminal-Justice-Outcomes.pdf>; Uptrust, “Uptrust and The State of Missouri Public Defender’s Office Launch Text Message Pilot Program to Reduce Jail Population,” Aug. 13, 2019, https://www.prweb.com/releases/uptrust_and_the_state_of_missouri_public_defenders_office_launch_text_message_pilot_program_to_reduce_jail_population/prweb16500982.htm.

⁴⁷⁰ Brian Cooke, Binta Zahara Diop, Alissa Fishbane, Jonathan Hayes, Aurelie Ouss, and Anuj Shah, “Using Behavioral Science to Improve Criminal Justice Outcomes,” ideas42 and University of Chicago Crime Lab, Jan. 2018, <https://www.ideas42.org/wp-content/uploads/2018/03/Using-Behavioral-Science-to-Improve-Criminal-Justice-Outcomes.pdf>.

⁴⁷¹ Ibid.

⁴⁷² Elijah Gwynn, Co-Founder & CTO, UpTrust, testimony, *Bail Reform Briefing*, transcript p. 127.

⁴⁷³ Ventures Statement at 5 (emphasis in original)(internal citations omitted).

money bail.⁴⁷⁴ Craig Trainor argued in his written testimony that “eliminating cash bail would end a two-tiered system of justice.”⁴⁷⁵ He posits:

Why should Harvey Weinstein, a sexual super predator, be permitted pretrial liberty after forking over a million dollars but a poor kid who stole a few pints of Ben & Jerry’s ice cream be held on Rikers Island for failing to come up with \$500? As a matter of fundamental fairness, one’s bank statement should not dictate one’s liberty status.⁴⁷⁶

There are longstanding concerns regarding the connection between financial bonds and pretrial detention. During the bail reform period in the 1960s, the courts reduced the reliance on commercial money bail bond companies.⁴⁷⁷ Four states have outlawed the for-profit industry – Illinois, Kentucky, Wisconsin, and Oregon – relying instead on systems that require defendants to pay deposits to courts instead of private businesses in cases where financial bonds are imposed.⁴⁷⁸

As shown previously, from 1990 to 2009, the number of defendants who have monetary bonds imposed have increased while the amount of these bonds also increased.⁴⁷⁹ Within this decade, data show that from 1994 to 2006, the number of defendants being released on personal recognizance bonds decreased from 41 percent to 28 percent.⁴⁸⁰ Over the same period, the percentage of felony defendants released on surety bonds doubled, from 21 percent to 42 percent; and average bail amounts for this population also increased from \$25,400 to \$55,500, representing a 118 percent increase.⁴⁸¹ Moreover, the number of pretrial detainees in jails more than doubled, increasing from 50 percent to 63 percent of the total jail population.⁴⁸² The Justice Policy Institute argues that these trends can be associated with the formation of the American Bail Coalition in 1992, a national organization that lobbies for the for-profit bail industry.⁴⁸³

⁴⁷⁴ See, e.g., Marc Levin and Michael Haugen, “Open Roads and Overflowing Jails: Addressing High Rates of Rural Pretrial Incarceration,” Right on Crime and Texas Public Policy Foundation, May 2018, <https://files.texaspolicy.com/uploads/2018/08/16104511/2018-04-RR-Rural-Pretrial-Incarceration-CEJ-Levin-Haugen-1.pdf>.

⁴⁷⁵ Trainor Statement at 5.

⁴⁷⁶ Ibid., pp. 5-6 (internal citations omitted).

⁴⁷⁷ See, e.g., Timothy Schnacke, Michael Jones, and Claire Brooker, “The History of Bail and Pretrial Release,” Pretrial Justice Institute, Sept. 24, 2010, at 15.

⁴⁷⁸ Ibid.

⁴⁷⁹ See, e.g., Leon Digard and Elizabeth Swavola, “Justice Denied: The Harmful and Lasting Effects of Pretrial Detention,” Vera Institute, Apr. 2019.

⁴⁸⁰ Justice Policy Institute, “For Better or For Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice,” Sept. 2012, at 33, <http://www.justicepolicy.org/UPLOADS/JUSTICEPOLICY/DOCUMENTS/ FOR BETTER OR FOR PROFIT .PDF>.

⁴⁸¹ Ibid.

⁴⁸² Cherise Fanno Burdeen, “Jail Population Management: Elected County Officials’ Guide to Pretrial Services,” Pretrial Justice Institute, Sept. 2009, <https://www.naco.org/sites/default/files/documents/Jail%20Population%20Management%20Guide.pdf>.

⁴⁸³ American Bail Coalition, <https://ambailcoalition.org/#>.

There are more than 25,000 bail-bonds companies across the nation, but there are only about ten insurers that are responsible for underwriting the majority of the \$14 billion in bonds that are issued each year.⁴⁸⁴ Individuals and families who cannot produce enough money to secure release often turn to bail companies. These individuals and families pay a non-refundable portion (usually ten percent) of the total amount to a bail-bonds company, which then writes a bond for the full amount to the court with the promise that it will be paid if the person does not appear for court. Members of this industry assert that if bonds are utilized properly, they can be beneficial in reducing failure to appear rates and can also help to round up individuals if they skip out on appearances.⁴⁸⁵ Additionally, Executive Director of the American Bail Coalition, Jeff Clayton explained in an interview with Commission staff that the private bail industry has “an economic incentive to de-incarcerate jails” and the industry offers a mechanism for the accused to be released pretrial and can prevent unnecessary preventive detention for those defendants who have the financial means to post bond.⁴⁸⁶

One benefit of the private bail industry is that bonds agents are able to secure a defendant’s release from jail, rather than having that individual remain until the case is resolved.⁴⁸⁷ While a judicial officer is supposed to take into account a defendant’s financial ability to post bond, a bail bonds agent is under no obligation to bond any defendant.⁴⁸⁸ Those who work for the private bail industry can refuse to write a bond based on any set of attributes, stereotypes, or belief that a defendant might miss their court appearance.⁴⁸⁹ A bail bonds agent may also decide not to write a bond for low-level offenders, who are more likely to have lower bail amounts, because the premium may not be financially worthwhile.⁴⁹⁰

On the other hand, as panelist Michelle Esquenazi testified, defendants in jurisdictions that do not permit cash bail may have no alternative but to remain in jail if the judge decides against pretrial release.⁴⁹¹ She said:

⁴⁸⁴ See, e.g., Gillian 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/>; Color of Change and ACLU’s Campaign for Smart Justice, “Selling Off Our Freedom,” May 2017, https://d11gn0ip9m46ig.cloudfront.net/images/059_Bail_Report.pdf.

⁴⁸⁵ See, e.g., Justin Jouvenal, “Virginia attorney general calls for reforming state’s bond system,” *Washington Post*, Oct. 21, 2018, https://www.washingtonpost.com/local/public-safety/virginia-attorney-general-mark-herring-calls-for-reforming-states-bond-system/2018/10/21/c60c07b8-d3be-11e8-b2d2-f397227b43f0_story.html.

⁴⁸⁶ Jeff Clayton, Executive Director of the American Bail Coalition, Interview Transcript (Aug. 24, 2020) at 33:12-36:12; 11:47-12:14 [on file].

⁴⁸⁷ See, e.g., Jeff Clayton, Executive Director for the American Bond Coalition, Interview Transcript (Aug. 24, 2020) at 15:16-46 [on file].

⁴⁸⁸ Justice Policy Institute, “For Better or For Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice,” Sept. 2012.

⁴⁸⁹ *Ibid.*

⁴⁹⁰ See, e.g., Mary Phillips, “Making Bail in New York City: Commercial Bonds and Cash Bail,” New York City Criminal Justice Agency, Inc., Mar. 2010.

⁴⁹¹ Michelle Esquenazi, Transcript at 131-132.

The other side of this issue that is often overlooked is what happens to one's civil rights when denied the right to bail? In the state of New Jersey, no one has a right to bail. They actually amended their state constitution. Ed Forchion, an honorably discharged African American United States Marine, a peaceful political pothead by his own admission, was, according to him, New Jersey's first political prisoner. Ed lost everything, including the right to see his severely disabled child, who depended on dad for daily care. I offered the state of New Jersey a \$2 million bond to procure his release. They did not take it, because they could not take it. In New Jersey, you are either released on pretrial diversion, or you are held through trial, there is no middle path. Secured bail is that middle path.⁴⁹²

John Goldkamp, Professor of Criminal Justice at Temple University, argues that when it comes to issue of the private bail industry and pretrial detention, "it's really the only place in the criminal justice system where a liberty decision is governed by a profit-making businessman that will or will not take your business."⁴⁹³ Moreover, for-profit bond companies are only responsible for ensuring that a defendant appears in court and do not play a role in ensuring public safety. The International Associations of Chiefs of Police explain that "the bondsman's focus, from a purely business model, is on how much money will be made to profit the company versus broader concerns like public safety."⁴⁹⁴

Defendants and their families from low socioeconomic backgrounds are more likely to rely on the private bail industry and are more likely to accrue debt long after case disposition regardless of whether there is a conviction.⁴⁹⁵ Bail companies can often leave individuals and their families paying loan installments and fees after their cases are resolved. Bail bond contracts can also include additional terms with added fees, surveillance, and forfeiture of property if a house or other asset was used as collateral.⁴⁹⁶ For instance, in 2015 in San Francisco, Carlos Valiente was arrested on a number of charges and his bail was set at \$70,000.⁴⁹⁷ Valiente said that as a construction worker, making \$14 an hour, he was not able to afford to post bail, so he went to Aladdin Bail Bonds, California's largest bail company.⁴⁹⁸ The bail agent agreed that Valiente could be released from

⁴⁹² Ibid.

⁴⁹³ Adam Liptak, "Illegal Globally, Bail for Profit Remains in U.S." *The New York Times*, Jan. 29, 2008, <https://www.nytimes.com/2008/01/29/us/29bail.html>.

⁴⁹⁴ International Associations of Chiefs of Police, "Law Enforcement's Leadership Role in the Pretrial Release and Detention Process," 2011.

⁴⁹⁵ Gillian 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/>; Color of Change and ACLU's Campaign for Smart Justice, "Selling Off Our Freedom," May 2017, https://d11gn0ip9m46ig.cloudfront.net/images/059_Bail_Report.pdf.

⁴⁹⁶ Color of Change and ACLU's Campaign for Smart Justice, "Selling Off Our Freedom," May 2017, https://d11gn0ip9m46ig.cloudfront.net/images/059_Bail_Report.pdf.

⁴⁹⁷ Sukey Lewis, "\$2 Billion Bail Bond Industry Threatened by Lawsuit Against San Francisco," KQED, May 6, 2016, <https://www.kqed.org/news/10944775/2-billion-bail-bond-industry-threatened-by-lawsuit-against-san-francisco>.

⁴⁹⁸ Ibid.

jail if he could produce \$1,000 upfront and \$6,000 more to be paid in installments.⁴⁹⁹ Valiente's mother produced the initial \$1,000 and secured his release.⁵⁰⁰ Valiente's case was ultimately dismissed and his bail forgiven by the court, yet he still owed Aladdin more than \$6,000.⁵⁰¹

Valiente's case is far from isolated. In Maryland, the Office of the Public Defender found that over a five-year period, "more than \$75 million in bail bond premiums were charged in cases that were resolved without any finding of wrongdoing" which was more than twice the premium charged in cases resulting in conviction in district court.⁵⁰² An analysis of the private bond industry found that bond premiums in Maryland cost families more than \$250 million, and this amount does not even include interest or fees over five years.⁵⁰³ Moreover, these payments were concentrated in Maryland's poorest communities and overwhelmingly paid by Black residents.⁵⁰⁴

According to a briefing held before the Maryland State Advisory Committee to the Commission, several experts testified that the private bail industry is highly unregulated in Maryland and raised several concerns about the industry.⁵⁰⁵ These concerns included the discretion held by bond companies to send individuals to jail, at will, if the payment agreement or parole agreement is violated.⁵⁰⁶ Bond agents can also choose to send fees to collection agencies which can bring further economic hardship to individuals.⁵⁰⁷

According to the Justice Policy Institute, low-income defendants pay \$1.4 billion a year to the private bail bond industry in nonrefundable fees.⁵⁰⁸ Black women and men between the ages of 23 and 39 who were being detained pretrial had average earnings of between \$568 and \$900 a month,

⁴⁹⁹ Ibid.

⁵⁰⁰ Ibid.

⁵⁰¹ Ibid.

⁵⁰² Maryland Office of the Public Defender, "The High Cost of Bail: How Maryland's Reliance on Money Bail Jails the Poor and Costs the Community Millions," Nov. 2016, <https://university.pretrial.org/viewdocument/high-cost-of-bail-how-marylands-r>; see also, Maryland Advisory Committee to the U.S. Comm'n on Civil Rights, "Fees and Fines and Bail Reform in Maryland," Feb. 23, 2018, <https://www.usccr.gov/pubs/2018/2018-02-26-Fees-Fines-MD.pdf>.

⁵⁰³ Maryland Office of the Public Defender, "The High Cost of Bail: How Maryland's Reliance on Money Bail Jails the Poor and Costs the Community Millions," Nov. 2016, <https://university.pretrial.org/viewdocument/high-cost-of-bail-how-marylands-r>.

⁵⁰⁴ Ibid.

⁵⁰⁵ Maryland State Advisory Committee, "Bail Reform and Court Imposed Fines and Fees in Maryland," Apr. 25, 2017; see also Maryland Advisory Committee to the U.S. Comm'n on Civil Rights, "Fees and Fines and Bail Reform in Maryland," Feb. 23, 2018, at 4.

⁵⁰⁶ Maryland State Advisory Committee, "Bail Reform and Court Imposed Fines and Fees in Maryland," Apr. 25, 2017.

⁵⁰⁷ Maryland Advisory Committee to the U.S. Comm'n on Civil Rights, "Fees and Fines and Bail Reform in Maryland," Feb. 23, 2018, at 4.

⁵⁰⁸ Justice Policy Institute, "The High Price of Bail,"

http://www.justicepolicy.org/uploads/justicepolicy/documents/high_price_of_bail_-_final.pdf; see also Peter Wagner and Bernadette Rabuy, "Following the Money of Mass Incarceration," Prison Policy Initiative, Jan. 25, 2017, <https://www.prisonpolicy.org/reports/money.html>.

respectively, prior to their arrest.⁵⁰⁹ With average bail amounts for a felony arrest upward of \$10,000, amounts that most individuals and families are unable to afford, defendants assigned bail who lack financial means to cover their bail amounts are forced to turn to the bail industry or remain in jail while awaiting trial.⁵¹⁰ As discussed previously, pretrial detention can have significant effects on a defendant's trial and beyond.⁵¹¹

Similarly, the Prison Policy Institute found that “[p]eople in jail are even poorer than people in prison and are drastically poorer than their non-incarcerated counterparts.”⁵¹² For example, in 2015 dollars, individuals in jail had an average yearly income of \$15,109, prior to their incarceration, which was under half of the average income for similarly aged, non-incarcerated individuals (see Table 3 below).

Table 3: Median annual pre-incarceration incomes for people in local jails unable to bail bond, ages 23-39 in 2015 dollars, by race/ethnicity and gender

	People in jail unable to meet bail (prior to incarceration)		Non-incarcerated people	
	Men	Women	Men	Women
All	\$15,598	\$11,071	\$39,600	\$22,704
Black	\$11,275	\$9,083	\$31,284	\$23,760
Latino	\$17,449	\$12,178	\$27,720	\$14,520
White	\$18,283	\$12,954	\$43,560	\$26,136

*Figures in red represent incomes below the Census Bureau poverty line.

Source: Bernadette Rabuy and Daniel Kopf, “Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time,” May 10, 2016, <https://www.prisonpolicy.org/reports/incomejails.html>

⁵⁰⁹ Daniel Kopf and Bernadette Rabuy, “Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time,” Prison Policy Initiative, May 10, 2016, <https://www.prisonpolicy.org/reports/incomejails.html>.

⁵¹⁰ Ibid.

⁵¹¹ See, e.g., Katherine Hood and Daniel Schneider, “Bail and Pretrial Detention: Contours and Causes of Temporal and County Variation,” *RSF: The Russell Sage Foundation Journal of the Social Sciences*, vol. 5, no. 1, Feb. 2019; Megan Stevenson, “Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes,” *The Journal of Law, Economics, and Organization*, vol. 34, no. 4, 2018, <https://academic.oup.com/jleo/article/34/4/511/5100740>; Tracey Meares and Arthur Rizer, “The ‘Radical’ Notion of the Presumption of Innocence,” The Square One Project, May 2020, <https://squareonejustice.org/wp-content/uploads/2020/05/CJLJ8161-Square-One-Presumption-of-Innocence-Paper-200519-WEB.pdf>; Will Dobbie, Jacob Goldin, Crystal Yang, “The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges,” July 2016, https://scholar.princeton.edu/sites/default/files/wdobbie/files/dgy_bail_0.pdf.

⁵¹² Bernadette Rabuy and Daniel Kopf, “Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time,” May 10, 2016, <https://www.prisonpolicy.org/reports/incomejails.html>.

This means that “over 60 percent of the people unable to post bail bonds fall within the poorest third of society and 80 percent fall within the bottom half.”⁵¹³ Breaking these numbers out by demographics show that White men had the highest incomes prior to incarceration, whereas Black women had the lowest.⁵¹⁴ Income differences between incarcerated and non-incarcerated are also stark for Black men – who also have the highest likelihood of pretrial detention and incarceration – where those detained have an average income 64 percent lower than their non-incarcerated counterparts.⁵¹⁵

An additional concern is that the private bail industry has too much influence over who is detained or released pretrial.⁵¹⁶ For-profit bonds companies have to assess the risk of the defendant to pay the bond premium – since they are liable for the entire amount if the defendant fails to appear in court – therefore, if the defendant is deemed unreliable by the bond agent, the defendant will not be able to purchase a bond and secure release from jail.⁵¹⁷

At the Commission’s briefing, Michelle Esquenazi, President of the National Association of Bail Agents testified that:

Offender rights are important[,] and bail should never be designed to be punitive, we believe that. We believe that first-time offenders and persons accused of certain crimes should be subject to rehabilitation and a hand up. We do not believe in bail setting practices that serve to impugn minorities. We do not want to see anyone remain incarcerated that should have the pathway to liberty. We believe in a hybrid system of bail, in which we remain a viable part of the solution.⁵¹⁸

Alternatives to Money Bail

Theoretically, non-monetary release conditions can achieve the purpose of monetary release and some preliminary research suggest that these alternatives can work well.⁵¹⁹ Lori Eville of the National Institute of Corrections stated in her written testimony:

⁵¹³ See Bernadette Rabuy and Daniel Kopf, “Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time,” <https://www.prisonpolicy.org/reports/incomejails.html>.

⁵¹⁴ Ibid.

⁵¹⁵ Ibid.

⁵¹⁶ See, e.g., Justice Policy Institute, “For Better or For Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice,” Sept. 2012.

⁵¹⁷ Ibid.

⁵¹⁸ Michelle Esquenazi, President, National Association of Bail Agents, testimony, *Bail Reform Briefing*, transcript p. 30.

⁵¹⁹ See, e.g., Eville statement at 7; Michael Jones, “Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option,” Pretrial Justice Institute, 2013; Christopher Lowenkamp and Marie VanNostrand, “Exploring the Impact of Supervision on Pretrial Outcomes,” Arnold Ventures, Nov. 2013.

Data strongly suggest that nonfinancial types of bail—such as own recognizance release and conditional supervision—are highly effective in ensuring future court appearance and arrest-free behavior. . . . The [Arnold Ventures] study found that moderate- and high-risk defendants under supervision were more likely to appear in court and that those supervised pretrial for more than 180 days were more likely to remain arrest-free. Multivariate statistical analysis, controlling for gender, race, time at risk in the community and defendant risk, indicated that supervision significantly reduced the likelihood of failure to appear.⁵²⁰

Scholars argue that one concern is that these non-monetary options are imposed by judges with little or no evidence that the condition is necessary to avoid the risk or risks that fuel them; and therefore, non-compliance may put defendants at risk of either additional criminal charges or future pretrial detention.⁵²¹ Jenny Carroll, professor of law at the University of Alabama and Chair of the Alabama State Advisory Committee to the Commission, argues that:

[T]he reduction or eradication of money bail alone has not and will not ensure a fair and unbiased system of pretrial detention, nor will it ensure that poor and marginal defendants will benefit from pretrial release. Rather, these reforms have shifted the burden of release from paying money bail to paying fees for a laundry list of pretrial release conditions. If pretrial detention reform is to achieve meaningful results, it must address not just the most apparent barrier to release – the fee charged in the form of bail – but all barriers that promote pretrial incarceration and impose unjustified burdens on defendants awaiting trial.⁵²²

A Bureau of Justice Assistance sponsored study found that the differences in appearance rates and reoffending between individuals released on unsecured bonds and secured bonds were not statistically significant.⁵²³ In other words, unsecured bonds are arguably as effective as achieving public safety and court appearance as are secured bonds. Conversely, monetary bonds were associated with increased use of pretrial jail beds and not associated with increased court appearance rates.⁵²⁴ As Craig Trainor noted, any reform to the system of pretrial release should ensure “the full panoply of procedural safeguards” as it determines whether someone should be released or held pretrial, “such as a detention hearing with the right to counsel, the right to provide testimony, present witnesses, and offer evidence to ensure detention is warranted as the least

⁵²⁰ Lori Eville testimony at 7 (internal citations omitted).

⁵²¹ *Ibid.*

⁵²² Jenny Carroll, *Beyond Bail*, Fla. L. Rev. 1, 1 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3678992.

⁵²³ Unsecured bonds are bonds that require no upfront money to the court to secure release, but a promise made by the defendant to pay the full amount if one fails to appear. Secured bonds (either cash or surety) require defendants to pay upfront in order to be released from jail. *See, e.g.*, Michael Jones, “Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option,” Pretrial Justice Institute, 2013.

⁵²⁴ Michael Jones, “Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option,” Pretrial Justice Institute, 2013, <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=87a896e2-5ab4-8123-b044-b84fba86e131&forceDialog=0>.

restrictive condition necessary to accomplish the regulatory goal of protecting the community from dangerous persons and ensuring defendants appear in court.”⁵²⁵ Some advocates have raised concerns that many release conditions impose restrictions and violate the 1966 Federal Bail Reform Act’s⁵²⁶ mandate that the “least restrictive conditions” should be imposed for pretrial release.⁵²⁷

According to the Pretrial Justice Institute’s report, “technical violations are not by themselves criminal offenses, but instead are failures to comply with court-ordered conditions of pretrial release such as drug testing or curfews.”⁵²⁸ Yet these violations of pretrial release conditions have also been found to significantly contribute to the incarceration rate in many jurisdictions.⁵²⁹ As such, community stakeholders have argued for the need for less “intensive” or “burdensome” forms of supervision in order to break cycles of incarceration.⁵³⁰ Moreover, research suggests that less intensive forms of supervision are equally as successful in terms of defendants appearing at subsequent court dates and not reoffending when compared to more intensive forms of supervision.⁵³¹

Another, increasingly utilized, alternative to pretrial detention is requiring defendants to wear electronic monitoring bracelets. Notwithstanding the benefits to defendants of not being detained in jails as they await trial, some stakeholders argue that these devices result in the constant surveillance of defendants and can be costly or unaffordable for some.⁵³² In many jurisdictions around the country, defendants must lease the bracelets at a fee from a private company and if they cannot afford to make the payments, they will get sent back to jail.⁵³³ According to James Kilgore,

⁵²⁵ Trainor testimony at p. 6

⁵²⁶ Bail Reform Act of 1966, Pub. L. 89-465, 80 Stat. 214 (1966).

⁵²⁷ Alexa Van Brunt and Locke Bowman, “Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What’s Next,” *Journal of Criminal Law and Criminology*, vol. 108, no. 4, 2018, pp. 707-08; Wendy Sawyer and Peter Wagner, “Mass Incarceration: The Whole Pie 2020,” Prison Policy Initiative, Mar. 24, 2020, <https://www.prisonpolicy.org/reports/pie2020.html>; Tracey Meares and Arthur Rizer, “The ‘Radical’ Notion of the Presumption of Innocence,” The Square One Project, May 2020.

⁵²⁸ Pretrial Justice Institute, “Smarter Pretrial Solutions: Responding to Technical Violations,” Jan. 6, 2020, <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=514d95d4-413d-7a4f-f2e2-7fa588a297c2&forceDialog=0>.

⁵²⁹ Ibid.

⁵³⁰ Ibid.; see also, Stephany Reaves Interview Transcript (Oct. 15, 2020) at 50:01-51:11 [on file]; Wendy Sawyer, Alexi Jones, and Maddy Troilo, “Technical violations, immigration detainers, and other bad reasons to keep people in jail,” Prison Policy Initiative, Mar. 18, 2020.

⁵³¹ See, e.g., James Austin, Barry Krisberg, and Paul Litsky, “The Effectiveness of Supervised Pretrial Release,” *Crime & Delinquency*, Oct. 1, 1985; Pretrial Justice Institute, “Smarter Pretrial Solutions: Responding to Technical Violations,” Jan. 6, 2020.

⁵³² See, e.g., Eric Markowitz, “Electronic Monitoring Has Become the New Debtors Prison,” *Newsweek*, Nov. 23, 2015, <https://www.newsweek.com/2015/12/04/electronic-monitoring-has-become-new-debtors-prison-397225.html>; Jack Karp, “Ankle Monitors Are Replacing Cash Bail, But At a Cost,” *Law 360*, May 10, 2020, https://www.law360.com/access-to-justice/articles/1271391/ankle-monitors-are-replacing-cash-bail-but-at-a-cost?nl_pk=05c1a059-4d79-4ab1-92ca-07f4ed4f0409&%E2%80%A6.

⁵³³ Eric Markowitz, “Electronic Monitoring Has Become the New Debtors Prison,” *Newsweek*, Nov. 23, 2015, <https://www.newsweek.com/2015/12/04/electronic-monitoring-has-become-new-debtors-prison-397225.html>.

director of Challenging E-Carceration, defendants are being charged from \$5 to \$35 per day for the monitoring,⁵³⁴ and this does not include additional fees, such as an activation fee that can be several hundred dollars.⁵³⁵ Kilgore stated that “you have people who are sitting there making a choice about whether to pay rent or whether or not to pay their electronic monitoring fee.”⁵³⁶ While there is no national database on how often or how much the states charge defendants for the tracking, according to a study by the Pew Charitable Trusts, the use of electronic supervision from 2005 to 2015 has grown by 140 percent.⁵³⁷ Testimony to the Maryland Advisory Committee to the Commission indicated that electronic monitoring was a substantial cost savings to the county as compared to detention, but that there was no consistent rule about whether the county or the defendant paid the costs of the electronic monitoring.⁵³⁸

Proponents argue that these devices are technically voluntary, but the alternative is defendants will be sent back to jail to await trial if they cannot afford the monetary costs. Jared Keenan, criminal justice staff attorney at the ACLU of Arizona states that:

[T]hese people are being let out under threat of re-arrest should they not pay this money. And so just like the cash bail system, if you don’t have access to money, then you essentially, while presumed innocent, spend your time in jail, and that just seems sort of intuitively wrong.⁵³⁹

Critics of these devices further point to the concern that private companies profit from these defendants.⁵⁴⁰ One prison-technology company, Securus Technologies, recorded \$26.3 million in profits off its “offender monitoring systems” in 2014 and the private prison firm GEO group

⁵³⁴ Jack Karp, “Ankle Monitors Are Replacing Cash Bail, But At a Cost,” Law 360, May 10, 2020, https://www.law360.com/access-to-justice/articles/1271391/ankle-monitors-are-replacing-cash-bail-but-at-a-cost?nl_pk=05c1a059-4d79-4ab1-92ca-07f4ed4f0409&%E2%80%A6; Eric Markowitz, “Electronic Monitoring Has Become the New Debtors Prison,” *Newsweek*, Nov. 23, 2015, <https://www.newsweek.com/2015/12/04/electronic-monitoring-has-become-new-debtors-prison-397225.html>.

⁵³⁵ Eric Markowitz, “Electronic Monitoring Has Become the New Debtors Prison,” *Newsweek*, Nov. 23, 2015, <https://www.newsweek.com/2015/12/04/electronic-monitoring-has-become-new-debtors-prison-397225.html>; Jack Karp, “Ankle Monitors Are Replacing Cash Bail, But At a Cost,” Law 360, May 10, 2020, https://www.law360.com/access-to-justice/articles/1271391/ankle-monitors-are-replacing-cash-bail-but-at-a-cost?nl_pk=05c1a059-4d79-4ab1-92ca-07f4ed4f0409&%E2%80%A6.

⁵³⁶ Jack Karp, “Ankle Monitors Are Replacing Cash Bail, But At a Cost,” Law 360, May 10, 2020, https://www.law360.com/access-to-justice/articles/1271391/ankle-monitors-are-replacing-cash-bail-but-at-a-cost?nl_pk=05c1a059-4d79-4ab1-92ca-07f4ed4f0409&%E2%80%A6.

⁵³⁷ Pew Charitable Trusts, “Use of Electronic Offender-Tracking Devices Expands Sharply,” Sept. 2016, Eric Markowitz, “Electronic Monitoring Has Become the New Debtors Prison,” *Newsweek*, Nov. 23, 2015, <https://www.newsweek.com/2015/12/04/electronic-monitoring-has-become-new-debtors-prison-397225.html>.

⁵³⁸ Maryland State Advisory Committee, “Fees and Fines and Bail Reform in Maryland,” U.S. Comm’n on Civil Rights, Feb. 23, 2018, p. 4, <https://www.usccr.gov/pubs/2018/2018-02-26-Fees-Fines-MD.pdf>.

⁵³⁹ Jack Karp, “Ankle Monitors Are Replacing Cash Bail, But At a Cost,” Law 360, May 10, 2020, https://www.law360.com/access-to-justice/articles/1271391/ankle-monitors-are-replacing-cash-bail-but-at-a-cost?nl_pk=05c1a059-4d79-4ab1-92ca-07f4ed4f0409&%E2%80%A6.

⁵⁴⁰ Eric Markowitz, “Electronic Monitoring Has Become the New Debtors Prison,” *Newsweek*, Nov. 23, 2015, <https://www.newsweek.com/2015/12/04/electronic-monitoring-has-become-new-debtors-prison-397225.html>.

purchased the largest electronic provider, Behavioral Incorporated in 2011 for \$415 million.⁵⁴¹ While there is legal ambiguity regarding the constitutionality of charging offenders for monitoring, legal scholars and reform advocates both assert that the “charging of offenders for their supervision conditions is unconstitutional and illegal.”⁵⁴² Illustrating that point, a state appeals court in Arizona ruled that “counties are not authorized to shift the costs of pretrial electronic monitoring to defendants” in Arizona, especially “where petitioner is accused of certain crimes but has not yet been tried, much less convicted.”⁵⁴³

Some defendants consider these alternatives burdensome, and they prefer money bail. For example, the District of Columbia prohibits money bail, and therefore release conditions often require defendants to regularly report to supervising agents, submit to regular drug testing, or wear an electronic GPS monitoring device.⁵⁴⁴ According to Monica Lotze of Lotze Mosely LLP, some of her clients prefer the Maryland system of bail.⁵⁴⁵ Specifically, “for clients who can afford to pay, they would be much happier to post bail and be left alone to live their lives pending trial without the burden of regular drug testing, reporting, and GPS monitoring.”⁵⁴⁶

Lori Eville of the National Institute of Corrections submitted testimony questioning the effectiveness of electronic monitoring, stating:

monitoring or curfews is either scarce or dated. . . . The developing consensus within the pretrial field is that electronic monitoring should not be imposed as a stand-alone condition but rather a means to enforce compliance to other conditions.⁵⁴⁷

Additionally, community advocates have also argued that electronic monitoring can impose significant hardships and in essence incarcerate individuals in their homes, which can have detrimental effects on their lives and livelihood.⁵⁴⁸ In some cases, the use of electronic monitoring

⁵⁴¹ Ibid.

⁵⁴² Ibid.

⁵⁴³ In the *Hiskett v. Lambert* found that subsection (E) (1) under A.R.S. § 13-3967 is unconstitutional, this section states:

In addition to any of the conditions a judicial officer may impose pursuant to subsection D of this section, the judicial officer shall impose both of the following conditions on a person who is charged with a felony violation of chapter 14 or 35.1 of this title and who is released on his own recognizance or on bail: electronic monitoring where available.

See Ariz. Rev. Stat. § 13-3967. The petitioner argued in this case that the County should bear the cost of the pretrial electronic monitoring. *See Hiskett v. Lambert*, 451 P.3d 408, 411 (Ariz. Ct. App. 2019).

⁵⁴⁴ Ann Marimow, “When it comes to pretrial release, few other jurisdictions do it D.C.’s way,” *Washington Post*, July 4, 2016; *see also* David O’Boyle, “Going Against the Grain: D.C.’s No-Bail Pretrial Release System,” DC Bar Association, July 13, 2016, <https://old.dcbar.org/about-the-bar/news/dc-no-bail-release.cfm>.

⁵⁴⁵ David O’Boyle, “Going Against the Grain: D.C.’s No-Bail Pretrial Release System,” DC Bar Association, July 13, 2016, <https://old.dcbar.org/about-the-bar/news/dc-no-bail-release.cfm>.

⁵⁴⁶ Ibid.

⁵⁴⁷ Lori Eville, Correctional Program Specialist, National Institute of Corrections, Written Statement at 8.

⁵⁴⁸ *See, e.g.*, ACLU, “Lavette’s Choice,” Feb. 8, 2018, <https://www.aclu.org/blog/smart-justice/lavettes-choice>.

can increase the likelihood of an individual pleading guilty despite the charges against them.⁵⁴⁹ For instance, in one mother's case, she asserted that the heavy restrictions imposed by electronic monitoring ultimately led to her pleading guilty instead of continuing to fight the charges against her.⁵⁵⁰ She stated: "If EM [electronic monitoring] had given me more movement, I probably would have fought the case. But my kids were not getting the healing that they needed."⁵⁵¹

Similarly, Amanda Trujillo, co-founder of the Portland Freedom Fund, testified before the Oregon State Advisory Committee to the Commission explaining that for some defendants electronic monitoring can impose significant challenges.⁵⁵² She explained that:

We have folks, especially during COVID right now, even though we free them from jail, they're putting on these scam bracelets way more often than I was experiencing before. That theoretically sounds great. But if a person does not have stable housing, they don't have a life that is easily planned, those bracelets really set them up for failure.⁵⁵³

Some prosecutors who are skeptical of the use of these devices argue that judges are imposing electronic monitoring too frequently (sometimes along with a cash bond) for low-level violations or misdemeanors, and that they are unable to actually monitor these individuals. In an interview with Commission Staff, State's Attorney Kim Foxx asserted that the number of defendants on electronic monitoring has grown to about 3,400 individuals or about 83 percent of the total pretrial detainees under community supervision in Cook County,⁵⁵⁴ despite not having an effective way to monitor these individuals.⁵⁵⁵ Foxx further stated that the system has not "been able to differentiate [] those who might need additional resources or servicing or monitoring," and that:

[Y]ou will have the person who does not pose any risk walking around with the bracelet and you still have to check on them. And [for] the person who is super risky [] by the time you get to the super risky person, they may have done something else... [M]y concern is that ... we will just put everybody on the bracelet feels eerily similar to, let us just keep everybody on bail that they are [on] bonds that they can't afford. It's just morphing the problem from in the jail walls to now out in the community.⁵⁵⁶

⁵⁴⁹ Ibid.

⁵⁵⁰ Ibid.

⁵⁵¹ Ibid.

⁵⁵² Amanda Trujillo, Co-Founder of the Portland Freedom Fund, testimony before the Oregon State Advisory Committee to the U.S. Commission on Civil Rights, Briefing Transcript, Dec. 11, 2020, at 3-4.

⁵⁵³ Ibid.

⁵⁵⁴ Kim Foxx, State's Attorney for Cook County, Interview Transcript (Sept. 22, 2020) at 17:56 [on file].

⁵⁵⁵ Ibid., 19:55 [on file].

⁵⁵⁶ Ibid., 20:09-21:04 [on file].

Other alternatives have included increasing the use of “behavioral nudges” to improve pretrial systems in the United States.⁵⁵⁷ As discussed previously, some counties and states are already implementing strategies such as text message reminders for court dates that have been shown to reduce failure-to-appear rates and reduce the number of bench warrants.⁵⁵⁸

At the Commission’s briefing, Co-Founder and CTO at UpTrust, Elijah Gwynn testified to the work that his organization has been engaged in to reduce FTA rates. Gwynn explained that:

As of [February 2021], we have messaged over 200,000 individuals and have messaged them about over one million court dates. We have improved attendance by around 50 percent for the individuals we’ve reached... We discovered that, contrary to popular belief, the vast majority indigent defendants do wish to comply with the court orders during the pretrial period. However, a combination of factors, including psychological, social, and organizational challenges were the biggest issues for following through with this intention.⁵⁵⁹

Additional supports for defendants to appear in court have bipartisan support.⁵⁶⁰ Further, jurisdictions can decrease FTA rates and increase the success of pretrial defendants by utilizing evidence-based practices.⁵⁶¹ In written testimony to the Commission, Stephen Clipper wrote that:

[C]ourts should improve their ability to communicate with defendants via several methods of communication to ensure proper reminders of court dates and requirements. Courts could also make appearing in court easier considering the many obligations of daily life. Defendants could benefit from having extended court hours during the week and weekend sessions to decrease conflicts with work and/or caretaking responsibilities... Regardless of the nature of the program, a well-resourced program engaging in evidence-based best practices will perform better compared to an under-funded program that is unable to provide that same support.⁵⁶²

Lori Eville from the National Institute of Corrections in her written statement to the Commission stated that it is unclear which, if any, conditions of release are effective.⁵⁶³ She wrote:

Unfortunately, the research about individual conditions of release such as electronic surveillance and curfews is either scarce or dated. There is little evidence to

⁵⁵⁷ See, e.g., Will Dobbie and Crystal Yang, “Proposals for Improving the U.S. Pretrial System,” The Hamilton Project, Brookings Institution, Mar. 2019; Brice Cooke, Binta Zahra Diop, Alissa Fishbane, Jonathan Hayes, Aurelie Ouss, and Anuj Shah, “Using Behavioral Science to Improve Criminal Justice Outcomes: Preventing Failures to Appear in Court,” ideas42 and UrbanLabs Crime Lab, University of Chicago, 2018.

⁵⁵⁸ See, e.g., Brice Cooke, Binta Zahra Diop, Alissa Fishbane, Jonathan Hayes, Aurelie Ouss, and Anuj Shah, “Using Behavioral Science to Improve Criminal Justice Outcomes: Preventing Failures to Appear in Court,” ideas42 and UrbanLabs Crime Lab, University of Chicago, 2018.

⁵⁵⁹ Gwynn testimony, *Bail Reform Briefing*, transcript pp. 124-26.

⁵⁶⁰ See, e.g., Clipper Statement, *Bail Reform Briefing* at 2-3.

⁵⁶¹ Ibid.

⁵⁶² Clipper Statement, *Bail Reform Briefing* at 2-3.

⁵⁶³ Eville statement, *Bail Reform Briefing* at 8.

correlate electronic monitoring placements with improved pretrial outcomes. Moreover, several studies link electronic monitoring to increased technical violations by pretrial defendants. The developing consensus within the pretrial field is that electronic monitoring should not be imposed as a stand-alone condition but rather a means to enforce compliance to other conditions, such as staying away from persons and locations, curfews, and house detention. Likewise, data on the effects of other intrusive conditions such as drug testing and regular reporting are either scarce or dated.⁵⁶⁴

Some jurisdictions have moved away from the cash bail system and pretrial detention by issuing citations and release on recognizance bonds among low-risk defendants which has been shown to significantly reduce the number of individuals who miss a court date, reduce the number of defendants arrested while out on pretrial release, and decrease the rate of violent crimes by defendants on pretrial release.⁵⁶⁵ These citations are written orders that require individuals to appear at court or another government office at a specified time and date.⁵⁶⁶ All states allow for an officer to issue a citation in lieu of arrest for misdemeanor or certain low-level offenses, and at least eight states permit citations for some felonies.⁵⁶⁷ Former District of Columbia Chief of Police Peter Newsham stated in an interview with Commission staff that these citations in lieu of arrest have been successful in D.C. when handling non-violent offenses.⁵⁶⁸ Newsham explained that:

I am a hundred percent open to a cite and promise to appear... I think that's actually the way we should be handling nonviolent offenses and to a large extent, we do that here in the District of Columbia... The way it works in the District is if you are involved in a criminal act, you may be taken into a police station, but you sign a promise to appear to come in... So you're released within a matter of hours and you're released on your promise to appear in court and that happens for the majority of criminal offenses here in the District of Columbia and I don't think that creates a public safety issue. I think that's a really good process... In fact, there has been calls to expand it to additional offenses and actually during COVID, we did expand the offenses that [] would qualify the citation release... The only time somebody would actually be held overnight and presented in court is if it's a very serious offense and I think that's probably the best way to go.⁵⁶⁹

⁵⁶⁴ Ibid.

⁵⁶⁵ See, e.g., Stuart Rabner, "Chief Justice Justice: Bail Reform Puts N.J. at the Forefront of Fairness," Jan. 16, 2019, <https://www.nj.com/opinion/2017/01/nj-chief-justice-bail-reform-puts-nj-at-the-forefr.html>.

⁵⁶⁶ National Conference of State Legislatures, "Citation in Lieu of Arrest", <https://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx>.

⁵⁶⁷ See National Conference of State Legislatures, "Citation in Lieu of Arrest" for a chart and summary on state laws.

⁵⁶⁸ Peter Newsham, Chief of Police, District of Columbia, Interview Transcript (9/9/20), at 12:21- 14:06 [on file].

⁵⁶⁹ Peter Newsham, Chief of Police, District of Columbia, Interview Transcript (Sept. 9, 2020), at 12:21- 14:06 [on file].

This practice is in accordance with the NIC’s recommendation that a promising pretrial system includes issuing citations in lieu of arrest or utilizing community-based mental health, social services, and pre-booking diversion program for low-level charges as alternatives to arrest.⁵⁷⁰

Additionally, other reform advocates have found that an increase in pretrial supervision through the use of pretrial services can increase court appearances and drastically reduce pretrial misconduct.⁵⁷¹ Further, well-funded and organized pretrial service agencies can aid judges in making informed decisions regarding pretrial release. According to the International Association of Chiefs of Police (IACP), the National Association of Counties, and the American Bar Association, pretrial service agencies can offer important services and offer alternatives to pretrial detention, such as evaluating a defendant’s likelihood to appear in court and to remain crime-free while on pretrial release.⁵⁷² These programs can also aid judges in tailoring a defendant’s pretrial release conditions to reduce technical violations and “provide for public safety by monitoring defendants awaiting trial ... [and] also save tax money spent on unnecessary pretrial incarceration.”⁵⁷³

Some states have also witnessed positive outcomes by investing in pretrial services programs. For example, in 2011, the Kentucky legislature passed a comprehensive criminal justice bill that codified many of the pretrial services practices into law.⁵⁷⁴ In an evaluation of outcomes, the Justice Policy Institute found many positive results such as an increase in court appearance rates and a decrease in rearrest rates during the pretrial period.⁵⁷⁵ Kentucky’s pretrial services also serve

⁵⁷⁰ Nat’l Inst. of Corr., *A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial System and Agency 2* (2017), <https://nicic.gov/framework-pretrial-justice-essential-elements-effective-pretrial-system-and-agency>.

⁵⁷¹ Pretrial Services Agency for the District of Columbia, “Congressional Budget Justification and Performance Budget Request Fiscal Year 2017,” Pretrial Services Agency for the District of Columbia Report, 2016.

⁵⁷² International Association of Chiefs of Police, “Law Enforcement’s Leadership Role in the Pretrial Release and Detention Process,” Feb. 2011.

⁵⁷³ International Association of Chiefs of Police, “Law Enforcement’s Leadership Role in the Pretrial Release and Detention Process,” Feb. 2011, at 9.

The total cost savings of pretrial services versus pretrial incarceration amounted to a little more than \$1,050,000 per county per year [internal citations omitted]. Similarly, Maine conducted a study that demonstrated that one pretrial services staff member, who costs taxpayers \$50,000 per year saves between \$250,000 and \$1,320,000 per year on detention costs [internal citations omitted]. Lastly, the *Miami Herald* reported that Broward County, Florida, would save taxpayers approximately \$110 per defendant per day if it had a pretrial services program [internal citations omitted].” *See Ibid.*, 10.

⁵⁷⁴ HB 463, Leg., 2010-11, (Ky. 2011), <https://apps.legislature.ky.gov/law/acts/11RS/documents/0002.pdf>.

⁵⁷⁵ Justice Policy Institute, “For Better or For Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice, Sept. 2012, <http://www.justicepolicy.org/UPLOADS/JUSTICEPOLICY/DOCUMENTS/ FOR BETTER OR FOR PROFIT .PDF>.

as a successful example of positive pretrial outcomes in a system that does not allow for the private bail industry.⁵⁷⁶

A 2009 survey of pretrial services agencies found that over 300 jurisdictions had pretrial services programs.⁵⁷⁷ From 2012 to 2014, an additional six states enacted legislation that authorized or established statewide pretrial services programs.⁵⁷⁸ Data suggest that when operated effectively and properly funded, these programs may be able to reduce the need for monetary bail options by recommending supervised release for those deemed not to pose a risk or recommend detention for those who pose too great a public safety risk.⁵⁷⁹ For example, the District of Columbia's Pretrial Services Agency is one program that is often identified as a successful program that can work in a jurisdiction with little to no cash bail industry,⁵⁸⁰ which is discussed more in Chapter 4 of this report.

Other possible mechanisms to reduce the unnecessary detention of individuals awaiting trial would be to build flexibility into pretrial release conditions that could reduce the number of technical violations that ultimately lead to more detention time.⁵⁸¹ This flexibility could include courts allowing defendants to bring children to court dates, establishing day or night care facilities to accommodate defendants and their families, or allowing "off hour" courts to accommodate defendants' work schedules.⁵⁸² Additionally, pretrial services offices could offer multiple satellite locations to reduce transportation issues. Many of these reforms are relatively inexpensive, especially compared to the cost of pretrial detention, as well as possible to implement at scale.⁵⁸³

Other possible reform efforts that may be able to reduce possible discriminatory racial and income disparities in the pretrial detention population is to provide judges and other court officials feedback on detention and misconduct rates. Since most jurisdictions do not track pretrial detention rates by judge, it can be difficult for judges to evaluate their own performance and detention metrics. In an interview with Commission staff, a community stakeholder explained that there is a

⁵⁷⁶ Kentucky banned the for-profit bail industry in 1976. *Ibid.*

⁵⁷⁷ Pretrial Justice Center for Courts, "Pretrial Services & Supervision," <https://www.ncsc.org/pjcc/topics/pretrial-services>.

⁵⁷⁸ These states included: Colorado, Hawaii, Nevada, New Jersey, Vermont, and West Virginia. *Ibid.*

⁵⁷⁹ Justice Policy Institute, "For Better or For Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice, Sept. 2012, <http://www.justicepolicy.org/UPLOADS/JUSTICEPOLICY/DOCUMENTS/ FOR BETTER OR FOR PROFIT .PDF>.

⁵⁸⁰ *See, e.g., Ibid.*

⁵⁸¹ Jenny Carroll, *Beyond Bail*, Fla. L. Rev. 1, 1 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3678992. Jenny Carroll, "Beyond Bail," Florida Law Review, Forthcoming, SSRN, Aug. 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3678992.

⁵⁸² *Ibid.*

⁵⁸³ Data suggest that the total net cost of pretrial detention is between \$55,142 and \$99,124 for the marginal defendant in Miami-Dade, Florida and Philadelphia, Pennsylvania. Other estimates suggest that the total costs to county governments for pretrial detention may exceed \$9 billion per year. *See* Will Dobbie and Crystal Yang, "Proposals for Improving the U.S. Pretrial System," The Hamilton Project, Brookings Institution, Mar. 2019.

need for “judicial education” regarding the effects of pretrial detention decisions.⁵⁸⁴ She stated that judges are “so zoomed into the particular case in front of them that they haven’t pulled back to see the larger picture... they look at [pretrial decisions] case by case, instead of looking at patterns and trends and the broader role that they play in these systems.”⁵⁸⁵

Similarly, Justice Doug Herndon on the Nevada Supreme Court, testified how ongoing judicial education could be beneficial for judges and other court officials who make pretrial and bail decisions.⁵⁸⁶ He stated that it is important for judges to understand

the very real and very clear empirical research on what happens if somebody’s incarcerated for one day, three days, five days, a week, how it affects them moving out of that situation, having lost everything and/or kind of beginning on the road to being more institutionalized within the criminal justice system, how bail affects impoverished communities. All of those things that I think probably are worth at least annual education for judges, if not more than that. Not just on how to assess bail properly and how to utilize the tools properly, but how to understand what’s going on with offenders and the risk that they pose in the community.⁵⁸⁷

Some early studies have shown that feedback mechanisms for all judges can yield promising outcomes to reduce both potential racial biases and behavioral errors in decision making.⁵⁸⁸ These feedback mechanisms can come in the form of regular reports that inform judges on the status of defendants and learning what works or does not work in a courtroom, and they also offer data regarding pretrial detention rates, misconduct rates, and racial disparities in those defendants who are detained pretrial.⁵⁸⁹

⁵⁸⁴ Anonymous #1 (Sept. 22, 2020), Interview Transcript at 27:55 [on file].

⁵⁸⁵ Ibid., 28:04-29:11 [on file].

⁵⁸⁶ Judge Doug Herndon, Nevada Supreme Court, testimony, *Bail Reform Briefing*, transcript, p. 145.

⁵⁸⁷ Ibid.

⁵⁸⁸ David Arnold, Will Dobbie, and Crystal Yang, “Racial Bias in Bail Decisions,” *Quarterly Journal of Economics*, vol. 133, no. 4, 2018; Daniel Chen, Tobias Moskowitz, and Kelly Shue, “Decision Making under the Gamblers Fallacy: Evidence from Asylum Judges, Loan Officers, and Baseball Umpires,” *Quarterly Journal of Economics*, vol. 131, no. 3, 2016.

⁵⁸⁹ Will Dobbie and Crystal Yang, “Proposals for Improving the U.S. Pretrial System,” The Hamilton Project, Brookings Institution, Mar. 2019.

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Chapter 3: Federal Response

Early efforts to reform pretrial and bail outcomes generally occurred at the federal level. Major reform legislation – such as the 1966 and 1984 Bail Reform Acts – that promoted presumptive pretrial release, the use of pretrial agencies, and the inclusion of public safety as consideration in release decisions, were all federally passed reforms.⁵⁹⁰ The federal pretrial system is divided between 94 districts and is more uniform in its application of pretrial release or detention decisions compared to the states.⁵⁹¹ The federal system is more tightly regulated and private bail industry bondspersons that are licensed to sell bonds to federal defendants are more closely monitored than on the state and local level.⁵⁹² The federal court system has also adhered more closely to the reform Acts concerning pretrial release and maintain a practice of favoring presumption of release with relevant conditions based upon risk. As a result, the federal reliance on the private bail industry has reduced from one-quarter of all defendants in 1984 to less than one percent in 2007.⁵⁹³ This reduction in the utilization of cash bail has occurred without a decrease in court appearance rates nor an uptick of recidivism rates.⁵⁹⁴

In 2013, the Department of Justice implemented a new “Smart on Crime” initiative that intended to focus on reforming the federal criminal justice system.⁵⁹⁵ This initiative was intended to use federal resources for the “most significant” law enforcement priorities that included violent crime and implement several reforms to reduce long sentences for low-level, non-violent drug offenders.⁵⁹⁶ One of the mechanisms to accomplish this goal was to consider alternatives to

⁵⁹⁰ See Pub. L. 89-465, 80 Stat. 214 (1966); Pub. L. 94-473, 98 Stat. 1976 (1984).

⁵⁹¹ See, e.g., Marie VanNostrand and Gena Keebler, “Pretrial Risk Assessment in the Federal Court,” *Federal Probation*, vol. 73, no. 2, Sept. 2009, https://www.uscourts.gov/sites/default/files/73_2_1_0.pdf.

⁵⁹² See, e.g., Justice Policy Institute, “For Better or For Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice,” Sept. 2012, http://www.justicepolicy.org/uploads/justicepolicy/documents/for_better_or_for_profit.pdf.

⁵⁹³ U.S. Courts, “Table 6: Surety Bonds Imposed,” Accessed August 24, 2012. http://www.uscourts.gov/uscourts/FederalCourts/PPS/Fedprob/2007-09/pretrial_table06.html.

⁵⁹⁴ See, e.g., Marie VanNostrand and Gena Keebler, “Pretrial Risk Assessment in the Federal Court,” *Federal Probation*, vol. 73, no. 2, Sept. 2009, https://www.uscourts.gov/sites/default/files/73_2_1_0.pdf.

⁵⁹⁵ Office of the Inspector General, “Audit of the Department’s Use of Pretrial Diversion and Diversion-Based Court Programs as Alternatives to Incarceration,” U.S. Department Dep’t of Justice, July 2016, <https://oig.justice.gov/reports/2016/a1619.pdf>.

⁵⁹⁶ U.S. Dep’t of Justice, FY 2017 Budget Request At A Glance, at 6, [https://www.justice.gov/jmd/file/821916/download#:~:text=The%20DOJ%20FY%202017%20Budget,%25\)%20and%20grants%20\(7%25\).](https://www.justice.gov/jmd/file/821916/download#:~:text=The%20DOJ%20FY%202017%20Budget,%25)%20and%20grants%20(7%25).)

incarceration through pretrial diversion⁵⁹⁷ and diversion-based programs⁵⁹⁸ for appropriate defendants. According to then-Attorney General Loretta Lynch, this initiative was intended to refocus federal resources on and direct prosecutors to pursue the most substantial cases of federal interest, rather than prioritizing the sheer number of prosecutions.

The Smart on Crime policies [] bolstered prevention and reentry programs to deter crime, reduce recidivism, and create pathways of opportunity for eligible candidates . . . Considering alternatives to incarceration for low-level, non-violent offenses strengthens our justice system and places a lower financial burden on the budget. This means increased use of diversion programs, such as drug courts, that reduce taxpayer expense and have the potential to be successful at preventing recidivism.⁵⁹⁹

As discussed in the previous chapter, pretrial detention – even for a short time – is shown to significantly increase the likelihood of harsher sentences and reoffending compared to individuals who are released during the pretrial period.⁶⁰⁰ As such, one focus of the Smart on Crime initiative focused specifically on pretrial diversion.

Pretrial Diversion Program

Pretrial diversion offers eligible defendants an alternative to prosecution and into a program of supervision and services, which offenders are diverted at the pre-charge stage. The Justice Department outlined the objectives of this program as follows:

- Prevent future criminal activity;
- Save on prosecutorial and judicial resources;
- Provide a mechanism for restitution to the victim and/or community;
- Provide a period of supervision of the defendant that does not exceed 18 months.⁶⁰¹

Participants who successfully complete the program are cleared of the charges against them, or if charged, have the charges against them dismissed; unsuccessful participants are returned to

⁵⁹⁷ Pretrial diversion is traditionally initiated at the discretion of U.S. Attorney’s Offices (USAOs) and “generally involves a decision to defer prosecution in order to allow an offender the opportunity to successfully complete a period of supervision by the Probation or Pretrial Services office of the U.S. Courts.” See Office of the Inspector General, “Audit of the Department’s Use of Pretrial Diversion and Diversion-Based Court Programs as Alternatives to Incarceration,” U.S. Department Dep’t of Justice, July 2016, <https://oig.justice.gov/reports/2016/a1619.pdf>.

⁵⁹⁸ Diversion-based court programs are run by the U.S. Courts in partnership with USAOs and Probation and Pretrial Services. These programs are meant to address criminal charges that have been filed against low-level, non-violent defendants through supervision, drug testing, and treatment services. Ibid.

⁵⁹⁹ U.S. Dep’t of Justice, FY 2017 Budget Request At A Glance, at 6, [https://www.justice.gov/jmd/file/821916/download#:~:text=The%20DOJ%20FY%202017%20Budget,%25\)%20and%20grants%20\(7%25\).](https://www.justice.gov/jmd/file/821916/download#:~:text=The%20DOJ%20FY%202017%20Budget,%25)%20and%20grants%20(7%25).)

⁶⁰⁰ See discussion Chapter 2: Sentencing and Conviction Rates.

⁶⁰¹ Dep’t of Justice, “Pretrial Diversion Program,” <https://www.justice.gov/jm/jm-9-22000-pretrial-diversion-program>.

prosecution.⁶⁰² One significant difference between pretrial diversion versus diversion-based programs is that the latter *may* result in the full dismissal of charges against a defendant or result in a conviction with a sentence of probation or limited incarceration; whereas the former does not result in prosecution of a defendant and any pending criminal charges *will* be dismissed.⁶⁰³

Eligibility is determined by the U.S. Attorney who may divert any defendant who has criminal charges alleged against them and who is not:

- Accused of a defense which, under existing Department guidelines, should be diverted to the State for prosecution;
- A person with two or more prior felony convictions;
- A public official or former public official accused of an offense arising out of an alleged violation of a public trust; or
- Accused of an offense related to national security or foreign affairs.⁶⁰⁴

In 2016, the Office of the Inspector General released an audit measuring the results of the diversion programs from FY 2012 to FY 2014. The investigation found that the number of successful participants varied significantly across districts, which suggested that the use of the programs also varied significantly.⁶⁰⁵ Out of the 94 districts audited, the Southern District of California had the most successful participants (326), 44 districts had between zero and five successful participants, and 12 districts had no successful participants.⁶⁰⁶ Some of these differences may be due to the use of diversion is dependent upon local prosecutorial discretion and prosecutors are not obligated to divert an offender.⁶⁰⁷ Additionally, some U.S. Attorney's Offices may have declined accepting federal prosecution "as a matter of policy cases that would otherwise be a candidate for pretrial diversion."⁶⁰⁸

The investigators reported that the Justice Department and USAO policies did not consistently support the use of diversion programs.⁶⁰⁹ While the Justice Department's policy initiatives stated a favor of increased diversion consideration as an alternative to traditional prosecution, in practice, some districts' policies did not support the use of pretrial diversion. For instance, in November 2014, one of the examined districts used pretrial diversion infrequently and had a policy that

⁶⁰² Ibid.

⁶⁰³ Office of the Inspector General, "Audit of the Department's Use of Pretrial Diversion and Diversion-Based Court Programs as Alternatives to Incarceration," U.S. Department of Justice, July 2016, <https://oig.justice.gov/reports/2016/a1619.pdf>.

⁶⁰⁴ Dep't of Justice, "Pretrial Diversion Program," <https://www.justice.gov/jm/jm-9-22000-pretrial-diversion-program>.

⁶⁰⁵ Office of the Inspector General, "Audit of the Department's Use of Pretrial Diversion and Diversion-Based Court Programs as Alternatives to Incarceration," U.S. Department of Justice, July 2016, at 12.

⁶⁰⁶ Ibid.

⁶⁰⁷ Ibid.

⁶⁰⁸ Ibid.

⁶⁰⁹ Ibid.

limited the application of pretrial diversion more narrowly than the Justice Department's policy.⁶¹⁰ The policy stated: "pretrial diversion is discouraged and will be permitted only in exceptional circumstances."⁶¹¹ Over the audit's three-year review, the district had fewer than six successful pretrial diversion participants; and the investigators posit that this could be attributable to the district's policy and/or the exercise of its discretionary authority to decline prosecution outright in lieu of utilizing pretrial diversion, or other factors not examined.⁶¹²

The investigators also reported that the Justice Department had not consistently evaluated the effectiveness of the USAOs' use and participation of the pretrial diversion program and that USAOs did not keep sufficiently reliable data to ensure a comprehensive evaluation of the program's efficacy which they suggest may represent an underreporting of successful participants.⁶¹³ While the Inspector General report made several recommendations to the Justice Department regarding the program, due to then-Attorney General Jeff Sessions cancelling the Smart on Crime Initiative in 2017, further analysis on the success of the program was not possible.⁶¹⁴

Grants from federal agencies such as the DOJ can provide critical assistance to state and local jurisdictions to enhance public safety and reform criminal justice systems. For instance, the Bureau of Justice Assistance has awarded several grants that focus on reforming pretrial and bail practices such as the Pretrial Release Advocacy Project to the National Association of Criminal Defense Lawyers.⁶¹⁵ This grant was awarded to address the systemic challenge of unnecessary pretrial confinement through ensuring proper defense.⁶¹⁶ This grant is important because effective representation of counsel at bail hearings has shown to have significant impacts on the ability of a defendant to obtain pretrial release.⁶¹⁷

⁶¹⁰ Ibid.

⁶¹¹ Ibid., p. 17.

⁶¹² Ibid., p. 17.

⁶¹³ Office of the Inspector General, "Review of the Department's Implementation of Prosecution and Sentencing Reform Principles under the *Smart on Crime* Initiative," Dep't of Justice, June 2017, at 7, <https://oig.justice.gov/reports/2017/e1704.pdf>.

⁶¹⁴ Charles Clark, "Justice's Cancelled 'Smart on Crime' Plan Still Has Potential, Watchdog Says," *Government Executive*, June 21, 2017, <https://www.govexec.com/management/2017/06/justices-cancelled-smart-crime-plan-still-has-potential-watchdog-says/138860/>; see also, Office of the Attorney General, Memorandum For All Federal Prosecutors, May 10, 2017, <https://www.justice.gov/archives/opa/press-release/file/965896/download>.

⁶¹⁵ Bureau of Justice Assistance, *Pretrial Release Advocacy Project: Reducing Unnecessary Pretrial Confinement Through Effective Defense Representation*, 2013, <https://bja.ojp.gov/funding/awards/2013-db-bx-k015>.

⁶¹⁶ Ibid.

⁶¹⁷ Pretrial Justice Institute, "Where Pretrial Improvements are Happening," Jan. 2019, at 5, https://www.prisonpolicy.org/scans/pji/where_pretrial_improvements_are_happening_jan2019.pdf; National Right to Counsel Committee, "Don't I Need A Lawyer? Pretrial Justice and the Right to Counsel at First Judicial Bail Hearing," Mar. 2015, https://archive.constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL_3.18.15.pdf.

The Justice Department distributes over \$5 billion in grants annually to state and local governments, research institutions, and nonprofit organizations.⁶¹⁸ However, Congress has reduced grant funding over the past two decades, and especially for formula grants.⁶¹⁹ These grants can often be too small to enact significant change, especially compared to state and local assistance programs from other federal agencies.⁶²⁰ Additionally, due to these funding cuts, jurisdictions are now competing for smaller numbers of awards which can limit the Justice Department's pretrial and bail reform efforts.⁶²¹ Advocates assert that lawmakers should also work to "reconstruct the very purpose of DOJ grants to ensure that federal dollars are used to support evidence-based strategies rooted in principles of fairness and justice."⁶²²

During interviews with Commission staff, many experts stated that they do not rely on the Justice Department for guidance regarding the imposition of bail nor has the DOJ offered much support to ensure that pretrial practices are fair and equitable. Several experts and community stakeholders stated that the federal government could offer more resources and technological assistance with data collection from bail hearings which would include the collection, tracking, and monitoring of pretrial release and detention decisions, offender data and demographics, and recidivism rates.⁶²³ Assistant Chief for the Houston Police Department Wendy Baimbridge also stated that the federal government could assist local jurisdictions and states by ensuring that criminal justice reform took all stakeholders' needs and concerns into account.⁶²⁴

Lavette Mayes, advocate and organizer with the Chicago Community Bond Fund, and Stephanie Reaves, staff attorney for the Public Defender Services for D.C. indicated that the Justice Department could serve an important role in ensuring that when supervision and release conditions are set they are not excessive, and provide needed oversight to ensure that defendants' constitutional rights are upheld and there is an equitable administration of justice.⁶²⁵ As Lori Eville of the National Institute of Corrections explained that "ideally, the federal government should

⁶¹⁸ U.S. Government Publishing Office, "Oversight of the Department of Justice Grant Programs: Hearing Before the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations," June 18, 2017, <https://www.govinfo.gov/content/pkg/CHRG-115hhrg27070/html/CHRG-115hhrg27070.htm>.

⁶¹⁹ Mike Crowley and Betsy Pearl, "Reimagining Federal Grants for Public Safety and Criminal Justice Reform," Center for American Progress, Oct. 7, 2020, <https://www.americanprogress.org/issues/criminal-justice/reports/2020/10/07/491314/reimagining-federal-grants-public-safety-criminal-justice-reform/>.

⁶²⁰ See, e.g., Mike Crowley and Betsy Pearl, "Reimagining Federal Grants for Public Safety and Criminal Justice Reform," Center for American Progress, Oct. 7, 2020, <https://www.americanprogress.org/issues/criminal-justice/reports/2020/10/07/491314/reimagining-federal-grants-public-safety-criminal-justice-reform/>.

⁶²¹ Ibid.

⁶²² Ibid.

⁶²³ Glenn Grant, Acting Administrative Director of New Jersey Courts, Interview Transcript (9/2/20) at 52:21 [on file]; Peter Newsham, Chief of District of Columbia Police, Interview Transcript (9/9/20) at 19:54 [on file]; Wendy Baimbridge, Assistant Chief for the Houston Police Department, Interview Transcript (9/16/20) at 25:58 [on file] (hereafter cited as Baimbridge interview).

⁶²⁴ Baimbridge Interview Transcript (9/16/20) at 25:58 [on file].

⁶²⁵ Lavette Mayes, advocate and organizer with Chicago Community Bond Fund, Interview Transcript (9/30/20) at 1:13:37 [on file]; Stephany Reaves, Staff Attorney, Public Defender Service for the District of Columbia, Interview Transcript (10/15/20) at 46:29 [on file].

encourage stakeholder education about effective pretrial system models and best and promising practices in bail decision-making.”⁶²⁶

Office of Justice Programs

The Office of Justice Programs (OJP) in the Department of Justice provides grants, training, and technical assistance to prevent and reduce crime, offer assistance to victims and strengthen the criminal justice system.⁶²⁷ OJP is the primary funding office at the Justice Department.⁶²⁸ OJP consists of six offices that work to support local and state law enforcement, fund victim service programs, manage the sex offenders registry, address the needs of youth and children who are involved in the criminal justice system, and collect research and data on crime, crime delinquency, and offenders and victims.⁶²⁹ Advocates argue, however, that there is a lack of coordination at the federal level which has hindered some reforms on the state and local level.⁶³⁰ Stakeholders posit that one strategy to ensure that these reforms have the greatest impact would be OJP strengthening its oversight of funds to grantees. Additionally, states could also work with OJP to coordinate funds across localities and ensure that affected communities are included in shaping pretrial and bail policy.⁶³¹

According to OJP’s FY 2021 Performance Budget, between FY 2017 and 2019, the Office issued 85 grant awards that were meant to establish or expand pre-arrest or post-arrest diversion programs for individuals who commit low-level, non-violent offenses.⁶³² OJP also released a competitive grant program through the Bureau of Justice Statistics in April 2020 to aid in the data collection for funding the National Pretrial Reporting Program.⁶³³ While the Office of Justice Programs does not have dedicated programs to address pretrial systems, several initiatives and programs provide guidance and funding to related issues, which will be discussed below. These programs have had

⁶²⁶ Eville statement at 20.

⁶²⁷ See, Omnibus Crime Control and Safe Streets Act, Pub. L. 90-351, 82 Stat. 197 (codified as 34 U.S.C. § 10101)(1968) (establishing the Office of Justice Programs and assigning specific powers to the Assistant Attorney General); U.S. Dep’t of Justice, Office of Justice Programs, <https://www.ojp.gov/about>.

⁶²⁸ U.S. Dep’t of Justice, Office of Justice Programs, <https://www.ojp.gov/>.

⁶²⁹ U.S. Dep’t of Justice, Office of Justice Programs, <https://www.ojp.gov/about>.

⁶³⁰ Mike Crowley and Betsy Pearl, “Reimagining Federal Grants for Public Safety and Criminal Justice Reform,” Center for American Progress, Oct. 7, 2020, <https://www.americanprogress.org/issues/criminal-justice/reports/2020/10/07/491314/reimagining-federal-grants-public-safety-criminal-justice-reform/>.

⁶³¹ See, e.g., Mike Crowley and Betsy Pearl, “Reimagining Federal Grants for Public Safety and Criminal Justice Reform,” Center for American Progress, Oct. 7, 2020, <https://www.americanprogress.org/issues/criminal-justice/reports/2020/10/07/491314/reimagining-federal-grants-public-safety-criminal-justice-reform/>; Elizabeth Hinton, LeShae Henderson, and Cindy Reed, “An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System,” Vera Institute of Justice, 2018, <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf>.

⁶³² Office of Justice Programs, “FY 2021 Performance Budget,” U.S. Dep’t of Justice, Feb. 2020, <https://www.justice.gov/doj/page/file/1246736/download>.

⁶³³ Office of Justice Programs, “National Pretrial Reporting Program (NPRP) 2020,” U.S. Dep’t of Justice, Nov. 30, 2020, https://www.bjs.gov/content/pub/pdf/nprp2020_sol.pdf.

different levels of funding since fiscal year 2016 and some programs have been eliminated completely.

In recent years, the Office for Civil Rights at the Office of Justice Programs (OJP-OCR) has also been involved in two investigations regarding unfair bail practices in Alabama and Tennessee. In 2018, the office received an administrative Complaint from Equal Justice Under Law “alleging that pretrial bail practices in Jefferson County, Alabama has disparate impact on African American individuals.”⁶³⁴ Specifically, the Complainant alleged that the practice of relying on money bail in the county was discriminatory against Black defendants.⁶³⁵ OJP-OCR initiated an investigation of the 10th Judicial Circuit which includes Jefferson County to evaluate the district’s compliance with Title VI and the DOJ’s Title VI regulations.⁶³⁶ In April 2018, DOJ entered into the first Resolution Agreement that dealt with money bail in Jefferson County, Alabama.⁶³⁷ The reforms consist of the county expanding pretrial supervision, establishing a pretrial service agency that is devoted to providing racially neutral pretrial release guidance, and adopting a racially-neutral risk assessment tool to mitigate judicial racial bias.⁶³⁸ The Agreement also allows the Justice Department to retain oversight of Jefferson County’s reform efforts for the next three years.⁶³⁹ OJP-OCR reported that during its preliminary investigation, the office did not find evidence of intentional racial discrimination against Black individuals. Despite this finding, the 10th Judicial Circuit still chose to adopt a risk-based individualized assessment tool.⁶⁴⁰

In July 2018, OJP-OCR closed its two-year investigation into the Twentieth Judicial District of Tennessee regarding allegations of racial discrimination in the jurisdiction’s monetary bail system.⁶⁴¹ The claim alleges, among other claims, that the pretrial bail practices of the Metropolitan Government of Nashville and Davidson County, Tennessee impermissibly discriminate against Black residents. Specifically, the claim alleges that the County’s practice of

⁶³⁴ Resolution Agreement Between United States Department of Justice and Alabama Administrative Office of the Courts Jefferson County Commission, https://static1.squarespace.com/static/5aab27d96e76f3205f18a55/t/5ae0a74e562fa79909d58fff/1524672334702/15-OCR-970_Resolution-Agreement-Signed.pdf. Page 1.

⁶³⁵ Ibid.

⁶³⁶ Ibid.

⁶³⁷ Resolution Agreement Between United States Department of Justice and Alabama Administrative Office of the Courts Jefferson County Commission, https://static1.squarespace.com/static/5aab27d96e76f3205f18a55/t/5ae0a74e562fa79909d58fff/1524672334702/15-OCR-970_Resolution-Agreement-Signed.pdf.

⁶³⁸ Ibid.

⁶³⁹ Ibid.

⁶⁴⁰ Resolution Agreement Between United States Department of Justice and Alabama Administrative Office of the Courts Jefferson County Commission, https://static1.squarespace.com/static/5aab27d96e76f3205f18a55/t/5ae0a74e562fa79909d58fff/1524672334702/15-OCR-970_Resolution-Agreement-Signed.pdf. Page 2.

⁶⁴¹ U.S. Dep’t of Justice, Equal Just. Under L. v. Metro. Gov’t of Nashville & Davidson Cty. & Twentieth Jud. Dist. Of Tenn (15-OCR-970), Closure Letter, July 30, 2018, <https://static1.squarespace.com/static/5aab27d96e76f3205f18a55/t/5b80552770a6ad58d02d7c43/1535137065465/15-OCR-970+Davidson+County+Closure+Final.pdf>.

“requiring defendants to post secured money bail as a pretrial condition of release had a discriminatory effect on African Americans because they are disproportionately detained in jail prior to trial.”⁶⁴² The OJP-OCR ended its investigation without making a finding after the district on its own developed and implemented a risk assessment tool to aid judicial officers in making pretrial release decisions.⁶⁴³

In December 2017, then-Attorney General Jeff Sessions announced that he would rescind more than two dozen documents and guidances issued by the Justice Department addressing a broad range of federal laws, including one that cautioned judges not to impose fines and fees that have a pernicious effect on low-income individuals and support for local and state efforts.⁶⁴⁴ Attorney General Sessions also revoked a “Dear Colleague” letter that was jointly issued by the Office of Justice Programs, Civil Rights Division, and the Office for Access to Justice that specifically addressed concerns over indigent and low-income individuals being unnecessarily detained during the pretrial period and caught in a cycle of incarceration due to the imposition of unfair bail practices.⁶⁴⁵

Justice Reinvestment Initiative

OJP started the Justice Reinvestment Initiative (JRI) in 2010 as a public-private partnership with the Bureau of Justice Assistance (BJA) and the Pew Charitable Trusts. The initiative is meant to provide assistance to state, local, and tribal governments to analyze criminal justice data, identify factors that lead to an increase in jail and prison populations, reduce detention, improve public safety, and aid in reentry for formerly incarcerated individuals.

According to a report from the Urban Institute, multiple states enacted bail reforms through this initiative program.⁶⁴⁶ For example, West Virginia enacted a justice reinvestment reform in 2013 that among other changes, required use of pretrial risk assessments.⁶⁴⁷ The state also reported having averted costs of \$24.9 million and appropriating \$11.6 million between FY 2014 and 2017, most of which was used to support the expansion of substance abuse treatment services. And overall, the state saw a 15.1 percent decrease in the state’s prison population in 2016 compared to 2012.⁶⁴⁸ Ohio also enacted a statute in 2011 under JRI which was used to expand the eligibility for pretrial

⁶⁴² Ibid.

⁶⁴³ Ibid.

⁶⁴⁴ See, e.g., U.S. Commission on Civil Rights, “Letter to Attorney General Jeff Sessions,” Feb. 12, 2018, <https://www.usccr.gov/press/2018/02-14.pdf>; Charlie Savage, “Justice Dept. Revokes 25 Legal Guidance Documents Dating to 1975,” *New York Times*, Dec. 21, 2017, <https://www.nytimes.com/2017/12/21/us/politics/justice-dept-guidance-documents.html>.

⁶⁴⁵ U.S. Dep’t of Justice, “Dear Colleague,” Office of Justice Programs, Civil Rights Division, and Office for Access to Justice, Mar. 14, 2016, <https://www.justice.gov/opa/file/832541/download>.

⁶⁴⁶ Urban Institute, “Justice Reinvestment Initiative State Data Tracker,” <https://apps.urban.org/features/justice-reinvestment/>.

⁶⁴⁷ Ibid.

⁶⁴⁸ Urban Institute, “Justice Reinvestment Initiative State Data Tracker,” <https://apps.urban.org/features/justice-reinvestment/>.

diversion among other changes. And while the state has not documented any averted costs, there was an approximate 1 percent decrease in the prison population in 2016 from 2010.⁶⁴⁹ In 2011, through a JRI grant, Kentucky enacted a new law that overhauled the state’s pretrial system and strengthened community supervision, among other changes. The state, however, saw an overall 10.7 percent increase in the prison population in 2016 from 2010.⁶⁵⁰

In an interview with Commission staff, Director for Special Justice Initiatives with Alliance for Justice Myesha Braden explained that the guidance and grants from OJP related to bail systems have been particularly helpful for local jurisdictions. She stated that:

[T]here were excellent grants coming out of the Office of Justice Programs that were designed to help local jurisdictions trying to think differently about their bail system. You have instructions coming out of DOJ reminding people that the purpose of bail is [] to return people to court and to protect the public, and not to punish people as bail was being used. So that legal guidance, telling people what their legal obligations were, combined with grants to help jurisdictions developing programs, was crucial. But of course, as things got started, they ended ... [when Attorney General] Sessions rolled back all of that guidance [in 2017].⁶⁵¹

Office for Access to Justice

Another office established within the Department of Justice intended to address issues in the criminal justice system is the Office for Access to Justice (ATJ).⁶⁵² Then-Attorney General Eric Holder established the office in March 2010 to “address growing concerns in the criminal and civil justice systems, and to help deliver outcomes that are fair and accessible to all, regardless of wealth and status.”⁶⁵³ One of its main goals was to make legal aid accessible and improve legal resources for indigent defendants in civil, criminal, and tribal courts.⁶⁵⁴ Notably, the department worked on several measures addressing the equitable administration of justice and issued guidance regarding topics like court fines and fees and juvenile justice. During the office’s existence between 2010 and 2018, ATJ worked internally, across federal agencies, and with various stakeholders in an effort to address a defendant’s right to counsel.⁶⁵⁵

⁶⁴⁹ Ibid.

⁶⁵⁰ Ibid.

⁶⁵¹ Myesha Braden, Director for Special Justice Initiatives with Alliance for Justice, Interview Transcript (8/25/20) at 42:12-26 [on file]; *see also*, U.S. Comm’n on Civil Rights, *Are Rights A Reality? Evaluating Federal Civil Rights Enforcement*, pp. 134-141 (discussing rescission of DOJ guidance documents during fiscal years 2016-2018).

⁶⁵² 28 C.F.R. § 0.33 (“The principal responsibilities of the Office shall be to plan, develop, and coordinate the implementation of access to justice policy initiatives of high priority to the Department and the executive branch, including in the areas of criminal indigent defense and civil legal aid.”).

⁶⁵³ Office of Justice Programs, “FY 2017 Performance Budget,” U.S. Dep’t of Justice, Feb. 2016.

⁶⁵⁴ 28 C.F.R. § 0.33.

⁶⁵⁵ Deputy Attorney General Rosenstein Delivers Remarks at the Right to Counsel National Consortium Third Annual Meeting, November 2, 2017, justice.gov.

ATJ worked closely with the Department’s Civil Rights Division (CRT) to file statements of interest and amicus briefs in cases addressing bail and other criminal justice issues. For example, in 2015, ATJ and the Civil Rights Division at the Justice Department filed a Statement of Interest in the lawsuit, *Jones ex rel. Varden v. City of Clanton*,⁶⁵⁶ alleging that detaining individuals solely due to their inability to pay a cash bond violates the Constitution.⁶⁵⁷ The Statement maintains that “any bail or bond scheme that mandates payment of pre-fixed amounts for different offenses in order to gain pre-trial release, without regard for indigence, not only violates the Fourteenth Amendment’s Equal Protection Clause, but also constitutes bad public policy.”⁶⁵⁸ The Statement advocated that the courts impose individualized bail conditions based on a determination if a defendant is a threat to public safety or a flight risk, and these conditions should not be determined on a defendant’s ability to pay.⁶⁵⁹ In a press release, then-Acting Assistant Attorney General Vanita Gupta stated that “[t]he criminal justice system should not work differently for the indigent and the wealthy. Bail practices that create a two-tiered system of justice by treating the indigent and the wealthy differently undermine fundamental fairness in our nation’s criminal justice system.”⁶⁶⁰

The case was subsequently settled in September 2015.⁶⁶¹ The court cited precedent that prohibits “punishing a person for his poverty” and that the use of bail schemes, like the one used by the city of Clanton, Alabama,

result in the unnecessary pre-trial detention of people whom our system of justice presumes to be innocent [and] has a detrimental impact on the individual. It often means the loss of a job; it disrupts family life ... It can also impede the preparation of one’s defense ... it can induce even the innocent to plead guilty so that they may secure a quicker release ... [and may] result in a period of detention that exceeds the expected sentence.⁶⁶²

The nonprofit organization Equal Justice Under Law filed the class action lawsuit in *Jones ex rel. Varden* and filed similar actions in Mississippi⁶⁶³ and Missouri;⁶⁶⁴ each of the federal district courts

⁶⁵⁶ *Jones ex rel. Varden v. City of Clanton*, No. 2:15-cv-00034-MHT, 2015 WL 5387219 (M.D. Ala. 2015).

⁶⁵⁷ Statement of Interest of the United States, *Varden, et al. v. The City of Clanton*, No. 2:15-cv-00034-MHT-WC (M.D. Ala. 2015), <https://www.justice.gov/crt/file/761266/download>.

⁶⁵⁸ *Id.*

⁶⁵⁹ *Id.*

⁶⁶⁰ U.S. Dep’t of Justice, “Department of Justice Files Statement of Interest in Clanton, Alabama, Bond Case,” Feb. 13, 2015, <https://www.justice.gov/opa/pr/department-justice-files-statement-interest-clanton-alabama-bond-case>.

⁶⁶¹ *Jones ex rel. Varden v. City of Clanton*, No. 2:15-cv-00034-MHT, 2015 WL 5387219 (M.D. Ala. 2015).

⁶⁶² See *Varden v. City of Clanton*, No. 2:15-cv-00034-MHT at 10 (M.D. Ala. 2015),) (Citing *Barker v. Wingo*, 407 U.S. 514, 532 (1972) and “How the Pretrial Process Contributes to Wrongful Convictions,” 42 Am.Crim. L.Rev. 1123, 1154 (2005).

⁶⁶³ See *Thompson v. Moss Point, Mississippi*, No. 1:15-CV-182 LG-RHW, 2015 WL 10322003 (S.D. Miss. 2015).

⁶⁶⁴ See *Pierce v. City of Velda City*, No. 4:15-cv-570-HEA, 2015 WL 10013006 (E.D. Mo. 2015).

overseeing those cases condemned the money bail system for indigent defendants that resulted in policy changes in Louisiana and Montgomery, Alabama.⁶⁶⁵

In 2016, then-Director of ATJ, Lisa Foster also issued remarks at the ABA's 11th Annual Summit on Public Defense noting how the current system that relies upon money bail "exacerbates and perpetuates poverty because of course only people who cannot afford the bail assessed or to post a bond – people who are already poor – are held in custody pretrial."⁶⁶⁶ She stated that early in the creation of ATJ the department convened the National Symposium on Pretrial Justice in 2011 and began to fund the Pretrial Justice Working Group as a way to possibly mitigate some of these disparities. In 2014, the department also funded Smart Pretrial grants program which were the first project on pretrial issues supported by the Justice Department in 30 years.⁶⁶⁷

In 2018, then-Attorney General Jeff Sessions closed the Office for Access to Justice and its charge was subsumed by the Office of Legal Policy at the Justice Department.⁶⁶⁸ In response to the closure of ATJ, the Commission issued a letter stating its concern that

the work of the Office in convening stakeholders, issuing guidance, litigating noncompliance, and serving as a central authority will end without dedicated staff. Ceasing that work risks ending, in practical terms, the mission of the Department of Justice itself for many millions of low-income Americans.... Thus, the Commission urges Attorney General Sessions to immediately shift resources back to the Office and to rededicate staff to the important mission of access to justice.⁶⁶⁹

On May 18, 2021, President Biden issued a Memorandum on Restoring the Department of Justice's Access-to-Justice Function and Reinvigorating the White House Legal Aid Interagency Roundtable.⁶⁷⁰ Additionally, on the same day, the Justice Department launched a review to reinvigorate the agency's commitment to access to justice.⁶⁷¹

⁶⁶⁵ David Reutter, "Efforts to End 'Scourge of Money Bail' Meeting with Success," Dec. 12, 2017,

<https://www.prisonlegalnews.org/news/2017/dec/12/efforts-end-scourge-money-bail-meeting-success/>.

⁶⁶⁶ U.S. Dep't of Justice, "Director Lisa Foster of the Office for Access to Justice Delivers Remarks at ABA's 11th Annual Summit on Public Defense," Feb. 6, 2016, <https://www.justice.gov/opa/speech/director-lisa-foster-office-access-justice-delivers-remarks-aba-s-11th-annual-summit>.

⁶⁶⁷ Ibid.

⁶⁶⁸ U.S. Dep't of Justice, Access to Justice, Oct. 24, 2018, <https://www.justice.gov/olp/access-justice#:~:text=OLP>.

⁶⁶⁹ The U.S. Commission on Civil Rights Highlights the Need for the Department of Justice to Reopen the Office for Access to Justice, Mar. 16, 2018, <https://www.usccr.gov/press/2018/03-16-statement-DOJ.pdf>.

⁶⁷⁰ See The White House Briefing Room, "Memorandum on Restoring the Department of Justice's Access-to-Justice Function and Reinvigorating the White House Legal Aid Interagency Roundtable," May 18, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/18/memorandum-on-restoring-the-department-of-justices-access-to-justice-function-and-reinvigorating-the-white-house-legal-aid-interagency-roundtable/>.

⁶⁷¹ U.S. Dep't of Justice, "Attorney General Launches Review to Reinvigorate the Justice Department's Commitment to Access to Justice," May 18, 2021, <https://www.justice.gov/opa/pr/attorney-general-launches-review-reinvigorate-justice-department-s-commitment-access-justice>.

Civil Rights Division

In December 2015, the Department of Justice convened criminal justice experts to address the criminalization of poverty and the use of unfair bail practices.⁶⁷² The Justice Department noted that the agency had been working on several reform efforts over the past several years. For instance, in March 2015 the Civil Rights Division (CRT) released the Ferguson Report which was an investigation of the Ferguson, Missouri Police Department following the death of Michael Brown in August of 2014.⁶⁷³ In addition to finding a pattern or practice of unconstitutional policing practices and intentional racial discrimination, CRT also found the judges imposed unlawful bail practices that resulted in unnecessary incarceration of poor residents.⁶⁷⁴ For instance, investigators found that bond practices were “erratic,” “unclear and inconsistent.”⁶⁷⁵ Investigators found that the city’s bond system resulted in individuals being erroneously arrested and paying bonds that were not recorded.

Documents describe officers finding hundred-dollar bills in their pockets that were given to them for bond payment and not remembering which jail detainee provided them; bond paperwork being found on the floor; and individuals being arrested after their bonds had been accepted because the corresponding warrants were never cancelled.⁶⁷⁶

The report also noted that bond amounts were most often set by court staff and rarely reviewed by municipal judges; and bond amounts did not adhere to bond schedules and varied widely. Investigators found that in a number of cases, the bond amount “far exceeded” the amount of the underlying fine. Moreover, the report revealed that these excessive fees were not grounded in the need for public safety.

According to the report, “longstanding court rules provide for a person arrested pursuant to an arrest warrant be held up to 72 hours before being released without bond... [and] [r]ecords show that individuals are routinely held for 72 hours.”⁶⁷⁷ The report also noted that the court had not been tracking the length of time an individual was detained pretrial or other meaningful data information regarding detainees until April 2014.⁶⁷⁸ Data from April 2014 to September 2014 alone, showed that 77 individuals were detained in jail for longer than two days, and many reached and even exceeded the 72-hour threshold. Of these 77 individuals, 95 percent (73) were Black

⁶⁷² U.S. Dep’t of Justice, “Fact Sheet on White House and Justice Department Convening – A Cycle of Incarceration: Prison, Debt, and Bail Practices,” Dec. 3, 2015, <https://www.justice.gov/opa/pr/fact-sheet-white-house-and-justice-department-convening-cycle-incarceration-prison-debt-and>.

⁶⁷³ U.S. Dep’t of Justice, “Investigation of the Ferguson Police Department,” Mar. 4, 2015, [justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

⁶⁷⁴ Ibid.

⁶⁷⁵ Ibid., p. 59.

⁶⁷⁶ Ibid.

⁶⁷⁷ U.S. Dep’t of Justice, “Investigation of the Ferguson Police Department,” Mar. 4, 2015, p. 60.

⁶⁷⁸ Ibid.

individuals.⁶⁷⁹ Investigators found that it was not uncommon for individuals charged with minor violations (e.g., parking code violations) to be arrested and detained due to not being able to afford bail even past the 72-hour mark.⁶⁸⁰

As mentioned above, working with ATJ, the Civil Rights Division also issued numerous briefs and statements of interest to protect the right of poor individuals in criminal proceedings,⁶⁸¹ condemn unconstitutional bail practices,⁶⁸² promote access to counsel, and end the criminalization of homelessness.⁶⁸³ Additionally, CRT issued a fact sheet in conjunction with a White House Council of Economic Advisors brief finding that the imposition of money bail has a disproportionate impact on poor individuals. The department noted that setting monetary bonds without financial consideration can “result in detaining the poorest defendants rather than the most dangerous.”⁶⁸⁴ For instance, in 2010 a study from New York found that nearly 80 percent of individuals who are arrested were unable to post bail for amounts less than \$500.⁶⁸⁵ The department also noted that the increased imposition of monetary bonds has contributed to a 60 percent increase in the number of un-convicted inmates in jails between 1996 and 2014.⁶⁸⁶

According to the CRT section’s website, it has filed two briefs in *Walker v. City of Calhoun* and one in *Daves v. Dallas County* regarding the unconstitutional imposition of bail.⁶⁸⁷ In one example, an amicus brief regarding a lawsuit challenging the bail practices in Georgia, the DOJ explained: “bail practice violates the Fourteenth Amendment if, without consideration of ability to pay and alternative methods of assuring appearance at trial, it results in the prolonged pretrial detention of indigent arrestees.”⁶⁸⁸ The brief continues, citing the Supreme Court decision in *Griffin v. Illinois*, that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”⁶⁸⁹ The Eleventh Circuit, in a reversal of a lower court’s decision, concluded that

⁶⁷⁹ Ibid.

⁶⁸⁰ U.S. Dep’t of Justice, “Investigation of the Ferguson Police Department,” Mar. 4, 2015, p. 60.

⁶⁸¹ Statement of Interest of the United States, *Varden, et al. v. The City of Clanton*, No. 2:15-cv-34-MHT-WC, Feb. 13, 2015, <https://www.justice.gov/crt/file/761266/download>.

⁶⁸² U.S. Dep’t of Justice, “Department of Justice Files Statement of Interest in Clanton, Alabama, Bond Case,” Feb. 13, 2015, <https://www.justice.gov/opa/pr/department-justice-files-statement-interest-clanton-alabama-bond-case>.

⁶⁸³ U.S. Dep’t of Justice, “Justice Department Files Brief to Address the Criminalization of Homelessness,” Aug. 6, 2015, <https://www.justice.gov/opa/pr/justice-department-files-brief-address-criminalization-homelessness>.

⁶⁸⁴ U.S. Dep’t of Justice, “Fact Sheet on White House and Justice Department Convening – A Cycle of Incarceration: Prison, Debt and Bail Practices,” Dec. 3, 2015, <https://www.justice.gov/opa/pr/fact-sheet-white-house-and-justice-department-convening-cycle-incarceration-prison-debt-and>.

⁶⁸⁵ Ibid.

⁶⁸⁶ Ibid.

⁶⁸⁷ The first *Walker* brief was filed in 2016 in conjunction with the ATJ and the local U.S. Attorney’s Office. The second brief was filed in 2017, followed by *Daves* in 2021. See U.S. Dep’t of Justice, “Appellate Briefs and Opinions,” Apr. 12, 2021, <https://www.justice.gov/crt/appellate-briefs-and-opinions-14>.

⁶⁸⁸ U.S. Dep’t of Justice, Amicus Brief, *Walker v. City of Calhoun*, No. 17-13139-GG, (11th Cir. N.D. GA), Sept. 13, 2017, at 14, <https://www.justice.gov/crt/case-document/walker-v-calhoun-brief-amicus>.

⁶⁸⁹ *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (plurality opinion).

under Supreme Court precedent, “indigence determination for purposes of setting bail are presumptively constitutional if made within 48 hours of arrest.”⁶⁹⁰

National Institute of Corrections

The National Institute of Corrections (NIC) is located within the Federal Bureau of Prisons, a branch of the Justice Department and was created in 1974 to provide specialized services to corrections, responding directly to the needs of state and local adult corrections, the Federal Bureau of Prisons, the Department of Justice, Congress, and other federal agencies.⁶⁹¹ The NIC has four main divisions: community services, academy, prisons, and jails.

Specifically, regarding pretrial and bail practices, in 2008, the NIC launched the Evidence-Based Decision Making (EBDM) initiative with its cooperative agreement awardee, the Center for Effective Public Policy. One goal of this initiative was to promote the use of evidence-based decision making at the pretrial level.⁶⁹² To accomplish this goal, the initiative promoted the use of risk assessment tools rather than relying solely on judicial discretion to predict the defender risk.⁶⁹³

Since 2011, the NIC has provided technical assistance on the creation of assessment tools and in several states, including Colorado, Indiana, Minnesota, Oregon, Virginia, and Wisconsin.⁶⁹⁴ The NIC is also working within several states to further develop plans to build EBDM capacity at the individual, agency, and system levels.⁶⁹⁵

In a 2017 report, the NIC published a pretrial justice study, which included recommendations for the foundation of bail and pretrial reform.⁶⁹⁶ Some key recommendations include:

- Jurisdictions should implement evidence-based risk assessment to determine pretrial releases (with specific emphasis on risk of court non-appearance and risk of rearrest).⁶⁹⁷
- A proper pretrial legal framework should (1) presume nonfinancial release on the least restrictive conditions necessary to ensure court appearance and public safety, (2) prohibit/restrict the use of secured financial conditions, and (3) include provisions for

⁶⁹⁰ *Walker v. City of Calhoun*, GA, 901 F.3d 1245 (2018).

⁶⁹¹ Nat’l Inst. of Corr., “History,” <https://nicic.gov/history-of-nic>; See also, 18 U.S.C.A. § 4351.

⁶⁹² Nat’l Inst. of Corr., *A Framework for Evidence-Based Decision Making in Local Criminal Justice Systems* (2010), <https://s3.amazonaws.com/static.nicic.gov/Library/024372.pdf>.

⁶⁹³ *Ibid.*, p. 13.

⁶⁹⁴ Nat’l Inst. of Corr., *Evidence-Based Decision Making, Phase III: Implementation*, <https://info.nicic.gov/ebdm/node/37>.

⁶⁹⁵ Nat’l Inst. of Corr., *Evidence-Based Decision Making, Phase V: Building EBDM Capacity at the Individual, Agency, and System Levels*, <https://info.nicic.gov/ebdm/node/39>.

⁶⁹⁶ Nat’l Inst. of Corr., *A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial System and Agency* (2017), <https://nicic.gov/framework-pretrial-justice-essential-elements-effective-pretrial-system-and-agency>.

⁶⁹⁷ *Ibid.*, pp. 6-7.

detention without bail for a clearly defined and limited population of defendants who pose an unmanageable risk to public safety.⁶⁹⁸

- Effective pretrial justice systems should maximize a defendant’s possibility for release by (1) using alternatives to arrest when appropriate (such as issuing citations for low-level offenders or by utilizing crisis intervention teams to respond to mental health emergencies) and (2) considering delegating release authority to pretrial services staff.⁶⁹⁹
- Experienced prosecutors should “screen arrest filings before initial appearance to determine the most appropriate charge or action.”⁷⁰⁰
- Defendant should have “effective counsel at the first appearance before a judicial officer to help ensure fair and appropriate bail decisions.”⁷⁰¹
- A jurisdiction’s operational pretrial functions (including risk assessment, release recommendations, supervision, compliance monitoring, and performance measurement) should be consolidated under a single, independent pretrial services agency.⁷⁰²

In 2020, the National Association of Pretrial Services Agencies (NAPSA) – with funding and in collaboration with NIC – updated its 2004 *Standards on Pretrial Release* that outlines what the agency argues are the necessary components of an effective, legal, and evidence-based bail system and practical guidance for state and local stakeholders such as:

- An array of options should be available to law enforcement before the initial court appearance to facilitate release of lower-risk defendants or as choices besides traditional arrest and case processing when appropriate.
- Bail statutes should include (1) a presumption for nonfinancial release; (2) the exclusion of financial conditions; (3) and pretrial detention for the limited number of defendants who present an unmanageable risk to commit a violent crime or to willfully fail to appear at court.
- An experienced prosecutor should review all cases before the initial court appearance.
- Jurisdictions should ensure that defendants are represented by counsel at the initial pretrial court appearance and all subsequent court appearances.
- All jurisdictions should establish a dedicated pretrial services agency (PSA).
- Stakeholders making bail decisions should use validated risk assessments to inform those decisions.
- Pretrial supervision should be individualized to a defendant’s assessed risk level and risk factors and based on the least restrictive conditions necessary to reasonably assure the defendant’s future court appearance and arrest-free behavior.

⁶⁹⁸ Ibid., p. 10 (pointing to Washington D.C.’s system as an example of the relationship between preventative detention and restrictions on money bail).

⁶⁹⁹ Ibid., pp. 20-21.

⁷⁰⁰ Ibid., p. 24.

⁷⁰¹ Ibid., p. 26.

⁷⁰² Ibid., p. 33.

- Jurisdictions should engage in performance measurement and feedback of pretrial system practices.⁷⁰³

The 2020 edition also includes the NAPSA’s position on the need to ban the use of cash bail as a requirement of pretrial supervision or to achieve detention.⁷⁰⁴

Lori Eville, Correctional Program Specialist with the NIC, explains that the agency supports the research and data showing that cash bail systems have a clear correlation with the racial wealth gap in the United States. Further, Eville writes:

The consensus among justice practitioners is that cash-based bail systems not only violate individual rights, but they do nothing to better promote pretrial release, court appearance, or public safety. Better, more legal nonfinancial alternatives exist, and their application across America’s courts is among the most important challenges facing us today.⁷⁰⁵

Recommendations

At the Commission’s briefing on the civil rights implications of bail reform, many panelists offered recommendations on what the federal government can do to ensure the fair and equitable administration of justice for all defendants. Many of these recommendations focused on additional funding for state and local jurisdictions and more funding into pretrial diversion programs and pretrial services.

For example, Rafael Mangual, Fellow and Deputy Director with the Manhattan Institute, posited that the federal government could provide “better funding [to the] criminal justice system, so that [jurisdictions] can afford more prosecutors, more judges, and more public defenders.”⁷⁰⁶ He asserted that this “is the most direct route to shortening pretrial detention periods, as well as to ensur[e] that truly speedy trials become the norm.”⁷⁰⁷ Similarly, Resident Senior Fellow at R Street Institute, Lars Trautman stated that the federal government can take an affirmative role in reforming pretrial and bail systems by expanding and/or creating additional grant programs that are available to local and state jurisdictions.⁷⁰⁸

⁷⁰³ NAPSA, *Standards on Pretrial Release 5* (2020), pp. 18-36.

<https://napsa.org/eweb/DynamicPage.aspx?Site=napsa&WebCode=standards>.

⁷⁰⁴ See National Association of Pretrial Services Agencies (2020). *Standards on Pretrial Release: Revised 2020*. Washington, D.C.: NAPSA. National Association of Pretrial Services Agencies. (2004). *Standards on Pretrial Release, Third Edition*. Washington, D.C.: NAPSA; *see also*, Eville Statement at 2.

⁷⁰⁵ Eville Statement at 20.

⁷⁰⁶ Rafael Mangual, Fellow & Deputy Director, Manhattan Institute, testimony, *Bail Reform Briefing*, transcript p. 20.

⁷⁰⁷ *Ibid*.

⁷⁰⁸ Lars Trautman, Resident Senior Fellow, R Street Institute, testimony, *Bail Reform Briefing*, transcript p. 30.

This sentiment was echoed by Erika Maye, Deputy Senior Campaigns Director for Criminal Justice at Color of Change, who offered the recommendation that the

federal government can advance sound systemic reforms through issuing guidance to states and overhauling the DOJ's grant-making strategy, conditioning grants, and increasing funding to jurisdictions ending money bail and replacing it with tools that don't further perpetuate racial bias in the criminal justice system.⁷⁰⁹

Kanya Bennett, Senior Policy Counsel & Legislative Coalition Manager with The Bail Project while agreeing with fellow panelists that the federal government could offer more financial assistance to state and local jurisdictions, argued that the federal government should focus those funds

into states and localities that want to, first, eliminate cash bail, making release on recognizance the norm. [S]econd, make pretrial detention the rare exception, used only when absolutely necessary to prevent imminent violence or willful flight. [T]hird, provide individualized hearings with robust due process protections in the limited instances when pretrial detention is sought. And finally, establish a community-based infrastructure for pretrial support to ensure return to court and prevent future encounters with the criminal legal system.⁷¹⁰

Vice President of Advocacy and Partnerships at the Vera Institute, Insha Rahman made similar recommendations and laid out three reform measures that address some of the bipartisan efforts that have been underway. She offered three reform measures that the federal government could enact and lead the way for states to follow.

First and foremost, the federal government can implement mandatory release without bail and without onerous conditions for the vast majority of people arrested. Second, the federal government can help to incentivize and build-out community-based supportive systems of pretrial release. Third, and this is important, the federal government can eliminate failure to appear as a basis to detain and tighten the standard for risk to public safety, so that public safety is no longer such a broad concept that sweeps in all sorts of conduct, including conduct that is not actually harmful or dangerous.⁷¹¹

Panelists also offered recommendations for the federal government that included additional enforcement mechanisms from the Justice Department and issuing guidance to local and state jurisdictions. For example, Lars Trautman suggested that the DOJ, "which has incredible research and technical expertise that it can provide to these local jurisdictions. It can also step in in a

⁷⁰⁹ Erika Maye, Deputy Senior Campaigns Director for Criminal Justice, Color of Change, testimony, *Bail Reform Briefing*, transcript p. 123.

⁷¹⁰ Kanya Bennett, Senior Policy Counsel & Legislative Coalition Manager with The Bail Project, testimony, *Bail Reform Briefing*, transcript p. 25.

⁷¹¹ Insha Rahman, Vice President of Advocacy and Partnerships, Vera Institute, testimony, *Bail Reform Briefing*, transcript p.14.

monitoring and compliance role, their Civil Rights Division, to help curb some of the worst abuses that we see.”⁷¹²

Insha Rahman suggested that the DOJ could issue a Dear Colleague letter that encouraged states to expand mandatory release.⁷¹³ She pointed to Kentucky as an example that successfully implemented this reform in the early part of 2020. As a result, the state’s jail population decreased by 25 percent without having a correlative increase in crime rates.⁷¹⁴ Rahman stated that expanding mandatory release options:

doesn’t cost the state anything; it’s actually saving counties money because there are fewer people behind bars in local jails. That’s a way to free up some resources at the local level because it is the states and localities that are paying for our pretrial system, as well as our jails, which are the most expensive part of the pretrial system.⁷¹⁵

Moreover, Erika Maye testified that the federal government could also support pretrial and bail reform by working with Congress to pass legislation such as the No Money Bail Act.⁷¹⁶ This legislation proposes to ban the use of cash bail in federal criminal cases and withhold Justice Assistance Grants to states that continue to utilize cash bail at the state and local level.⁷¹⁷

Lori Eville added that:

Ideally, the federal government should encourage stakeholder education about effective pretrial system models and best and promising practices in bail decision-making... The federal system also can encourage state and local efforts by targeting funding to localities willing to address disparity in their pretrial systems. An example of this support was a bill introduced in Congress in 2017 by then-Senator Kamala Harris (D- CA) and Senator Rand Paul (R-KY). The Pretrial Integrity and Safety Act of 2017 (Act. S.1593)⁷¹⁸ would provide grants to states and Indian tribes to replace secured money bail systems.⁷¹⁹

⁷¹² Trautman testimony, *Bail Reform Briefing*, transcript p. 30.

⁷¹³ Rahman testimony, *Bail Reform Briefing*, transcript p. 59.

⁷¹⁴ *Ibid.*

⁷¹⁵ *Ibid.*

⁷¹⁶ No Money Bail Act of 2021, H.R. 1249, 117th Cong. (1st Sess. 2021); *see also*, Maye testimony, *Bail Reform Briefing*, transcript p. 123.

⁷¹⁷ No Money Bail Act of 2021, H.R. 1249, 117th Cong. (1st Sess. 2021).

⁷¹⁸ Pretrial Integrity and Safety Act of 2017, S. 1593, 115th Cong. (1st Sess. 2017).

⁷¹⁹ Eville Statement at 18.

Chapter 4: State and Local Reforms

While the previous chapter discussed the role of the federal government regarding pretrial and bail practices, many of the policies that shape bail practices are enacted at state and local levels. Over the past several years, many state legislatures have enacted laws that are meant to address all aspects of the pretrial process, such as release eligibility, release conditions, imposition of bail, pretrial diversion programs, and the role of the private bail industry.⁷²⁰

Relevant State Policies on Pretrial Release

A majority of states have bail policies that favor releasing defendants – all but a specified few – pretrial on personal recognizance.⁷²¹ State constitutions and other statutes specify which defendants may be barred for release and detained before trial. Most often, these defendants are those charged with capital offenses.⁷²² Other common trends in state policies may deny release to defendants charged with violent and sex crimes, when the victim is a child or family member, or if the defendant has prior convictions for certain serious offenses.⁷²³

Some states also may deny defendants who have been charged with serious drug or alcohol offenses, such as drug trafficking or driving under the influence causing serious injury.⁷²⁴ Even with these statutes in place, state statutes generally provide that a judge can decide whether a defendant will be released or detained pretrial. For instance, for a defendant to be denied bail, a judge must find that “the proof is evident or the presumption great” or a judge determines that there are no release conditions that can reasonably assure that a defendant will appear at court or if the defendant poses a danger to themselves or the community (see Appendix A for table on state laws and statute).⁷²⁵

Other states, such as New Mexico have changed their bail setting policies. The New Mexico Supreme Court ruled that a \$250,000 financial condition resulting in the detention of an otherwise bailable defendant accused of murder was arbitrary, unsupported by the evidence against the

⁷²⁰ National Conference of State Legislatures, “Pretrial Policy: State Laws,” <https://www.ncsl.org/research/civil-and-criminal-justice/pretrial-policy-state-laws.aspx>.

⁷²¹ National Conference of State Legislatures, “Pretrial Release: Guidance for Courts,” 2020, <https://www.ncsl.org/research/civil-and-criminal-justice/guidance-for-setting-release-conditions/default.aspx>.

⁷²² Ibid.

⁷²³ National Conference of State Legislatures, “Pretrial Detention,” June 7, 2013, <https://www.ncsl.org/research/civil-and-criminal-justice/pretrial-detention.aspx#Review>.

⁷²⁴ Ibid.

⁷²⁵ U.S. Const. Amend. VIII.

defendant, and unlawful and thus, ordered the defendant to be released on non-monetary conditions.⁷²⁶ The Court wrote:

We understand that this case may not be an isolated instance and that other judges may be imposing bonds based solely on the nature of the charged offense without regard to individual determinations of flight risk or continued danger to the community. We also recognize that some members of the public may have the mistaken impression that money bonds should be imposed based solely on the nature of the charged crime or that the courts should deny bond altogether to one accused of a serious crime. We are not oblivious to the pressures on our judges who face election difficulties, media attacks, and other adverse consequences if they faithfully honor the rule of law when it dictates an action that is not politically popular, particularly when there is no way to absolutely guarantee that any defendant released on any pretrial conditions will not commit another offense.

The inescapable reality is that no judge can predict the future with certainty or guarantee that a person will appear in court or refrain from committing future crimes. In every case, a defendant may commit an offense while out on bond, just as any person who has never committed a crime may commit one. As Justices Jackson and Frankfurter explained in reversing a high bond set by a federal district court, “Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice.”⁷²⁷

Some states allow judicial officers to detain defendants pretrial for non-capital offenses. For example, California allows judges to deny bail for defendants who are charged with a felony involving violence or sexual assault, when there is strong evidence of guilt, and there is a “substantial likelihood” that the defendant would cause “substantial bodily harm” to another individual if released.⁷²⁸ Similarly, Missouri law allows a judicial officer to deny bail to a defendant who “poses a danger” to a victim, the community, or any other individual.⁷²⁹

According to the National Conference of State Legislatures, more than half of the states provide a presumption in favor of releasing defendants on personal recognizance or an unsecured appearance bond (see Appendix A).⁷³⁰ Personal recognizance is a written promise made by the defendant to appear in court, whereas, when mandating an unsecured appearance bond the court sets a monetary bail amount, but payment to the court is only required if the defendant fails to appear.⁷³¹

⁷²⁶ See *State v. Brown*, 338 P.3d 1276, 1278 (N.M. 2014).

⁷²⁷ *Id.* at 1292-93 (internal citations omitted).

⁷²⁸ Cal. Const., Art. I, § 12(b).

⁷²⁹ MO Const., Art. I § 32 (2).

⁷³⁰ National Conference of State Legislatures, “Pretrial Release: Guidance for Courts,” 2020, <https://www.ncsl.org/research/civil-and-criminal-justice/guidance-for-setting-release-conditions/default.aspx>.

⁷³¹ American Bar Association, “Pretrial Release,” https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk/.

Nearly half of the states and the District of Columbia expressly require the courts to release defendants pretrial by imposing the least restrictive condition – or combination of conditions— to ensure appearance and safety.⁷³² Four states—Iowa, Minnesota, Nebraska, and South Dakota—require judges to impose conditions of release as outlined in statute.⁷³³ Statutes in these states provide that if the court determines release on personal recognizance or an unsecured appearance bond will not reasonably assure court appearance or safety, then the court must require supervision by a person or organization. If that primary condition does not provide adequate assurance, the court can impose a combination of other enumerated conditions that include restrictions on travel, association or residence; house arrest; night reporting; or financial bond.⁷³⁴ (See Appendix A for table on state laws regarding release.)

Eighteen states and the District of Columbia require a hearing to determine if a defendant will be detained or released pretrial.⁷³⁵ These preliminary hearings are intended to provide the judge an opportunity to consider information that is presented by the prosecution and the defense; and these hearings generally occur shortly after arrest.⁷³⁶ Twelve states have specific time frames for conducting these hearings. For example, Massachusetts state law requires that a hearing be conducted at the defendant’s first court appearance, unless a continuance is issued. The state law further states that a continuance cannot exceed a maximum of seven days for the defense and a maximum of three days for the prosecutor.⁷³⁷ Eight states and D.C. further enumerate procedural rights for defendants which include the right to counsel, right to be present at the hearing, the opportunity to testify, and to present and cross-examine witnesses.⁷³⁸ Some states have placed limitations on the pretrial detention of defendants. Judges generally maintain the authority to review and amend conditions regarding pretrial release during any point prior to trial if they deem appropriate. Fourteen states and D.C., however, require courts to review the conditions of defendants who have been granted release but remain in jail because they are unable to meet those conditions.⁷³⁹

Many states have or are in the process of implementing reforms regarding pretrial detention. For example, the Indiana Supreme Court implemented a rule that became effective January 2020. The rule states that “if an arrestee does not present a substantial risk of flight or danger to self or others,

⁷³² National Conference of State Legislatures, “Pretrial Release: Guidance for Courts,” 2020, <https://www.ncsl.org/research/civil-and-criminal-justice/guidance-for-setting-release-conditions/default.aspx>.

⁷³³ National Conference of State Legislatures, “Pretrial Release: Guidance for Courts,” 2020, <https://www.ncsl.org/research/civil-and-criminal-justice/guidance-for-setting-release-conditions/default.aspx>.

⁷³⁴ Ibid.

⁷³⁵ National Conference of State Legislature, “Pretrial Detention,” June 7, 2013, <https://www.ncsl.org/research/civil-and-criminal-justice/pretrial-detention.aspx>.

⁷³⁶ Ibid.

⁷³⁷ Ibid.

⁷³⁸ Ibid.

⁷³⁹ Ibid.

the court should release the arrestee without money bail or surety”⁷⁴⁰ unless the charge is murder or treason, or the defendant is released under supervision. The court specified that in cases where a defendant “presents a substantial risk of flight or danger to self or other persons or to the public” then the court should utilize an evidence-based assessment.⁷⁴¹ It has been piloted in 11 counties in Indiana since 2016, and some reform advocates have raised concerns if there is adequate funding being allocated to properly implement these reforms and if concerns regarding racial bias are being adequately addressed.⁷⁴²

Similar bills include Colorado’s HB 1225 that requires courts to release defendants on personal recognizance charged with misdemeanors, comparable municipal offenses, or traffic offenses.⁷⁴³ The law also permits the release of a defendant in accordance with local pretrial release policies that include those requiring monetary payment as a condition of release, if the defendant is first informed that they are entitled to release on a personal recognizance bond. The law further permits the issuance of monetary conditions for persons who have failed to appear in court as a condition of release.⁷⁴⁴

Trends in State Pretrial Policies

Since 2012, every state legislature has addressed some aspect of pretrial policy, resulting in nearly 700 new enactments by 2018.⁷⁴⁵ In 2017 alone, state lawmakers in 46 states and the District of Columbia enacted 182 new pretrial laws, which was an almost 50 percent increase compared to the previous two years.⁷⁴⁶ Some of these new laws focused on how to divert individuals from jail, develop intervention strategies, and increase support programs. For example, these diversion reforms may work to assist individuals with mental health disorders by instructing law enforcement to place an individual who is suffering a mental health emergency in a treatment facility rather than jail or establishing crisis intervention protocols.⁷⁴⁷ Several legislatures have also limited the imposition of monetary bond conditions in pretrial release decisions. For instance, Connecticut eliminated the use of money bonds in misdemeanor cases unless the defendant has a

⁷⁴⁰ Indiana Supreme Court, Order Adopting Criminal Rule 26, No. 94S00-1602-MS-86, Sept. 7, 2016, <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=69f87ec9-4104-d2f4-e629-794edffdac71&forceDialog=0>.

⁷⁴¹ *Ibid.*

⁷⁴² Pretrial Justice Institute, “What’s Happening in Pretrial Justice?” Feb. 2020 [on file].

⁷⁴³ No Monetary Bail For Certain Low-level Offenses, H.B. 19-1225, 73rd Gen. Assemb., Reg. Sess. (Colo. 2019) (Codified as Colo. Rev. Stat. Ann. § 16-4-113 (West)).

⁷⁴⁴ *Id.*; Pretrial Justice Institute, “What’s Happening in Pretrial Justice?” Feb. 2020.

⁷⁴⁵ National Conference of State Legislatures, “Trends in Pretrial Release: State Legislation Update,” Apr. 2018, https://www.ncsl.org/portals/1/ImageLibrary/WebImages/Criminal%20Justice/pretrialEnactments_2017_v03.pdf.

⁷⁴⁶ *Ibid.*

⁷⁴⁷ *Ibid.*

history of not appearing at court or is accused of particular crimes.⁷⁴⁸ The state also prohibits judges from imposing cash-only bonds in those cases.⁷⁴⁹

Four states enacted or revised their “second-look” provisions, which require that a defendant receive a prompt bail review hearing if the individual has been detained due to the inability to post bail.⁷⁵⁰ Conversely, other states have also modified their laws on bail eligibility. Ten states enacted laws that expanded which defendants could be held in pretrial detention.⁷⁵¹ These policies apply mostly to defendants accused of violent crimes and generally require temporary holds or hearings prior to release or prohibited use of personal recognizance.⁷⁵²

More recently, several other states implemented broad pretrial reforms. For instance, Indiana enacted a new rule that went into effect on January 1, 2020, which states that: “if an arrestee does not present a substantial risk of flight or danger to self or others, the court should release the arrestee without money bail or surety” unless the charge is murder or treason, or the defendant is on supervised release.⁷⁵³ For those who are a flight risk or pose a danger to the public, the court is instructed to use an evidence-based assessment.⁷⁵⁴

Other states have also implemented jail diversion and pretrial programs. For example, in Montana, jail diversion programs from July 2018 to August 2019, across five counties showed that 97 percent of defendants who were released from jail attended all court dates, and 95 percent had not been re-arrested.⁷⁵⁵ The state court administrator, Beth McLaughlin stated: “generally what we’re seeing is good news. If they’re monitored and they’re receiving court reminders and they’re doing check-in with pretrial service officers, they can be successful during that pretrial period.”⁷⁵⁶ Similarly, three jurisdictions in North Dakota are pilot testing programs to increase the number of defendants who are released pretrial; and in Pima County, Arizona, the state is implementing a program to

⁷⁴⁸ State of Connecticut, Pub. Act No. 17-145, HB 7044: An Act Concerning Pretrial Justice Reform, <https://cga.ct.gov/2017/act/pa/pdf/2017PA-00145-R00HB-07044-PA.pdf>.

⁷⁴⁹ *Id.*

⁷⁵⁰ These states include Connecticut, Illinois, Maryland, and Texas. See National Conference of State Legislatures, “Trends in Pretrial Release: State Legislation Update,” Apr. 2018,

https://www.ncsl.org/portals/1/ImageLibrary/WebImages/Criminal%20Justice/pretrialEnactments_2017_v03.pdf.

⁷⁵¹ National Conference of State Legislatures, “Trends in Pretrial Release: State Legislation Update,” Apr. 2018, https://www.ncsl.org/portals/1/ImageLibrary/WebImages/Criminal%20Justice/pretrialEnactments_2017_v03.pdf.

⁷⁵² National Conference of State Legislatures, “Trends in Pretrial Release: State Legislation Update,” Apr. 2018, https://www.ncsl.org/portals/1/ImageLibrary/WebImages/Criminal%20Justice/pretrialEnactments_2017_v03.pdf.

⁷⁵³ Indiana Supreme Court, Criminal Rule 26, No. 94S00-1602-MS-86, Filed Sept. 7, 2016, <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=69f87ec9-4104-d2f4-e629-794edffdac71&forceDialog=0>.

⁷⁵⁴ *Id.*

⁷⁵⁵ Pretrial Justice Institute, “What’s Happening in Pretrial Justice,” Feb. 2020 [on file]; see also, Montana Department of Corrections, FY 2017-19 [on file].

⁷⁵⁶ Holly Michels, “Data: Those diverted from jail show up for court, remain law-abiding while awaiting trial,” *Independent Record*, Nov. 20, 2019, https://helenair.com/news/state-and-regional/govt-and-politics/data-those-diverted-from-jail-show-up-for-court-remain-law-abiding-while-awaiting-trial/article_b3cbec14-4265-5a4a-8e67-6bef1382f45d.html.

conduct pretrial assessments, behavioral health screenings, and to facilitate the release of misdemeanor defendants without booking them into jail.⁷⁵⁷

Local and state pretrial reforms can be instituted by various criminal justice stakeholders (e.g., prosecutors, public defenders, judiciaries, or legislatures).⁷⁵⁸ In recent years, several jurisdictions saw prosecutor-led changes. For instance in Prince George's County, Maryland, State's Attorney Aisha Braveboy announced that her office will no longer seek money bonds as conditions for release for low-level crimes.⁷⁵⁹ Braveboy stated that while this initiative will not eliminate the use of money bail in the county, she hopes this initiative will demonstrate to other decision-makers that alternatives to monetary bail are possible.⁷⁶⁰ In Berkshire County, Massachusetts, District Attorney Andrea Harrington noted that a 2015 study found the median bail amount for Black defendants in the county was five times higher than the median bail amount for White defendants.⁷⁶¹ In response, Harrington stated that she implement reform policies to "replace the unjust and ineffective use of cash bail with a safer and more equitable model."⁷⁶² This will include prosecutors seeking bail only if the defendant poses a flight risk and no other release conditions can ensure their appearance in court. The new model will also track bail data that will help ensure transparency and consistency to reduce discriminatory and provide more funding for pretrial services, similar to the District of Columbia's pretrial supervision program. Harrington stated that she will also work to implement other reform mechanisms such as developing text message services to remind defendants of upcoming court dates to ensure defendants' appearance. Harrington asserted that "[a] wealth-based cash bail system is unfair and un-American. Detaining people pretrial who pose no danger to the community based solely on their financial condition not only erodes the presumption of innocence but also undermines the integrity of the criminal justice system."⁷⁶³

In Philadelphia, District Attorney Larry Krasner implemented a No-Cash-Bail reform policy in 2018.⁷⁶⁴ Under this policy, Krasner's office stopped recommending monetary bonds for defendants

⁷⁵⁷ Pretrial Justice Institute, "What's Happening in Pretrial Justice," Feb. 2020 [on file].

⁷⁵⁸ For a more comprehensive list of changes by state, see Appendix B.

⁷⁵⁹ Lynh Bui, "Prosecutors in Prince George's will no longer recommend cash bail for defendants," *Washington Post*, Sept. 15, 2019, https://www.washingtonpost.com/local/public-safety/prosecutors-in-prince-georges-will-no-longer-recommend-cash-bail-for-defendants/2019/09/15/27a1f274-d4bf-11e9-9343-40db57cf6abd_story.html.

⁷⁶⁰ *Ibid.*

⁷⁶¹ Andrea Harrington, "Smart bail reform in Berkshire County," *The Berkshire Eagle*, Feb. 22, 2019, https://www.berkshireeagle.com/opinion/columnists/andrea-harrington-smart-bail-reform-in-berkshire-county/article_0affc093-b612-587a-914d-4750d899909c.html.

⁷⁶² Andrea Harrington, "Smart bail reform in Berkshire County," *The Berkshire Eagle*, Feb. 22, 2019, https://www.berkshireeagle.com/opinion/columnists/andrea-harrington-smart-bail-reform-in-berkshire-county/article_0affc093-b612-587a-914d-4750d899909c.html.

⁷⁶³ *Ibid.*

⁷⁶⁴ See, e.g., Samantha Melamed, "Philly DA Larry Krasner stopped seeking bail for low-level crimes. Here's what happened next." *The Philadelphia Inquirer*, Feb. 19, 2019, <https://www.inquirer.com/news/philly-district-attorney-larry-krasner-money-bail-criminal-justice-reform-incarceration-20190219.html>.

accused of various misdemeanors and felony offenses.⁷⁶⁵ Researchers evaluating cases where the initial bail hearing occurred in the six months before or the five months after the policy's implementation found that it led to a 22 percent increase in the likelihood of a defendant being released on personal recognizance (i.e., no cash bail or supervisory release conditions), but did not have an effect on pretrial detention.⁷⁶⁶ The researchers assert that the use of monetary bail and pretrial supervision are not necessary to incentivize better behavior for released defendants. They found that the decrease in the use of monetary bail led to no change in failure-to-appear rates or in recidivism, which suggests that reductions in the imposition of financial bonds may be possible without significant adverse effects.⁷⁶⁷

Some examples of judiciary-led changes include the Quorum Court of Washington County, Arkansas hiring an ombudsman to help the county strategize alternatives to incarceration in 2019.⁷⁶⁸ The ombudsman successfully passed a resolution stating that criminal justice agencies in the county should “adopt the principle that no person should be detained in the Washington County Detention Center awaiting trial solely because of their inability to obtain pre-trial release through traditional bail/bond.”⁷⁶⁹ Similarly, in Broward County, Florida, the 17th Circuit Court in 2018 released new rules for misdemeanor defendants.⁷⁷⁰ The rule states that “the presumption shall be in favor of release on non-monetary release conditions, including release on the defendant’s own recognizance.”⁷⁷¹ The rule also had support from the county’s state’s attorney, sheriff, and public defenders.⁷⁷²

In a similar direction, the Chief Justice of Missouri’s Supreme Court mandated that the judiciary evaluate pretrial reform measures. Specifically, the state’s Supreme Court released new court rules to reduce the use of money bail, thereby decreasing disparities among pretrial detainees.⁷⁷³ The new rules took effect July 1, 2019, and state that the court will release a defendant on their own recognizance and the court will not impose any release condition or combination of conditions unless necessary to ensure the appearance at court or safety of the community.⁷⁷⁴ In response, some Missouri lawmakers have requested the state Supreme Court undo these new rules, complaining

⁷⁶⁵ Ibid.

⁷⁶⁶ Aurelie Ouss and Megan Stevenson, “Bail, Jail, and Pretrial Misconduct: The Influence of Prosecutors,” *SSRN*, June 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335138.

⁷⁶⁷ Ibid.

⁷⁶⁸ Tom Sissom, “Washington County officials seek options to incarceration,” *Northwest Arkansas Democrat Gazette*, July 19, 2019, <https://www.nwaonline.com/news/2019/jul/19/washington-county-officials-seek-option/>.

⁷⁶⁹ Tom Sissom, “Washington County officials endorse plan to help people make bail,” *Arkansas Democrat Gazette*, Aug. 16, 2019, <https://www.arkansasonline.com/news/2019/aug/16/washington-county-officials-endorse-pla/>.

⁷⁷⁰ Administrative Order No. 2019-57-Crim, 17th Circuit Court, Broward County, Florida, Aug. 2018, at 5, <http://www.17th.flcourts.org/wp-content/uploads/2019/08/2019-57-Crim.pdf>.

⁷⁷¹ Ibid.

⁷⁷² Pretrial Justice Institute, “What’s Happening in Pretrial Justice,” Feb. 2020 [on file].

⁷⁷³ Missouri Courts, Rule 33.01 Misdemeanors or Felonies – Right to Release – Conditions, Feb. 13, 2019, <https://www.courts.mo.gov/page.jsp?id=137015>.

⁷⁷⁴ *Id.*

that they go too far.⁷⁷⁵ The effort is led by Representative Justin Hill who asserted that “individuals who are potentially dangerous or have a history of failing to appear for court are being released on recognizance – with no conditions at all – because the rules that went into effect in July make it too difficult for judges to impose bail.”⁷⁷⁶

State and Local Level Reform Evaluation

As a component to the Commission’s investigation into national bail reform measures, staff conducted an in-depth investigation into four jurisdictions that have either implemented reforms to their pretrial and bail systems or are in the process of enacting reforms. These four jurisdictions are New Jersey, Texas, Illinois, and the District of Columbia. As a component of this evaluation, staff conducted 19 qualitative interviews with stakeholders from the four of these six jurisdictions. These stakeholders included legislators, judges, law enforcement representatives, prosecutors and public defenders, and community advocates. After the investigation of the original four jurisdictions, the Commission chose to add two additional jurisdictions for analysis: New York and Nevada. The below section discusses all six of these jurisdiction’s reform efforts and the results of these reforms to the pretrial population.

These jurisdictions have their own challenges regarding pretrial justice. For states like New Jersey, which has a unified statewide court system, reform efforts can be implemented more easily across the state. For instance, the Attorney General of New Jersey is the chief law enforcement officer for the entire state, county prosecutors are appointed and must follow the directives from the Attorney General, and there is one centralized public defender’s office.⁷⁷⁷ Compared to states like Texas, which has a more segmented, county-based system that can result in more patchwork reform efforts across counties.⁷⁷⁸ For these types of systems, even when legislative policies are made at the state level, local judges have wide discretion in designing and implementing pretrial procedures and conditions of release.

⁷⁷⁵ Associated Press, “Lawmakers slam Missouri Supreme Court over bail rules,” Jan. 25, 2020, <https://www.ktlo.com/2020/01/25/lawmakers-slam-missouri-supreme-court-over-bail-rules/>.

⁷⁷⁶ Ibid.

⁷⁷⁷ See Glenn Grant, Acting Administrative Director of New Jersey Courts, Interview Transcript (9/2/20) at 15:32-15:43 [on file].

⁷⁷⁸ See, e.g., Glenn Grant, Acting Administrative Director of New Jersey Courts, Interview Transcript (9/2/20) at 16:19-38 [on file].

Many criminal justice stakeholders cite the District of Columbia as a positive example of how to essentially eliminate the use of cash bail and decrease the number of pretrial detainees, without sacrificing public safety or court appearance rates.⁷⁷⁹

All six jurisdictions closely evaluated in this report are racially and ethnically diverse and are dissimilar from each other with respect to regional composition (e.g., D.C. is a densely populated city, whereas Texas has large cities plus expansive rural areas) while also similar enough to offer comparison. For instance, Chicago, Illinois is the third largest city in the nation and located in Cook County, which is the second largest county in the U.S.⁷⁸⁰ Similarly, Houston, Texas is the fourth largest city in the nation and is located in Harris County, which is the third largest county in the U.S.⁷⁸¹ Cook County Jail also has the third largest inmate population and is the largest single-site facility in the nation, comprising of 96 acres and eight city blocks.⁷⁸²

The six jurisdictions offer different insights regarding drivers for their reforms. For instance, New Jersey's reforms largely occurred through the judiciary,⁷⁸³ whereas Texas reforms have been more the result from litigation.⁷⁸⁴

As of 2019, at least 22 states and the District of Columbia authorized preventive detention of at least some persons arrested for specified serious criminal offenses.⁷⁸⁵ The District of Columbia was the first jurisdiction outside of the federal system to institute preventive detention in 1970.⁷⁸⁶ New Jersey initiated its preventive detention program through amendments to its state constitution in 2014,⁷⁸⁷ and in 2017 the state overhauled its pretrial justice system.⁷⁸⁸ In 1963, Illinois became

⁷⁷⁹ Kenneally Interview Transcript (8/27/20) at 30:49 [on file]; Ogg Interview Transcript (9/14/20) at 37:29 [on file]; Scotti Interview Transcript (8/28/20) at 22:52 [on file]; Braden Interview Transcript (8/25/20) at 29:14 [on file]; *see also*, Colin Doyle, Chiraag Bains, and Brook Hopkins, "Bail Reform: A Guide for State and Local Policymakers," Criminal Justice Policy Program at Harvard Law School, Feb. 2019, <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=9a804d1d-f9be-e0f0-b7cd-cf487ec70339&forceDialog=0>.

⁷⁸⁰ World Population Review, The 200 Largest Cities in the United States by Population 2020, <https://worldpopulationreview.com/us-cities>; Erin Duffin, "Largest Counties in the U.S. 2019," <https://www.statista.com/statistics/241702/largest-counties-in-the-us/>.

⁷⁸¹ *Ibid.*; Erin Duffin, "Largest Counties in the U.S. 2019," <https://www.statista.com/statistics/241702/largest-counties-in-the-us/>.

⁷⁸² A single-site facility means that the jail complex is at one location. The Cook County Jail is comprised of multiple buildings which are all physically located on the same premises, managed by the same licensee, components of a single correctional program, and have a common address. *See* Cook County Sheriff's Office, Corrections, <https://www.cookcountysheriff.org/cook-county-department-of-corrections/>.

⁷⁸³ *See, e.g.*, New Jersey Courts, Criminal Justice Reform Information Center, <https://njcourts.gov/courts/criminal/reform.html>.

⁷⁸⁴ *See, e.g.*, Texas Tribune, "The 2019 legislative session is over. Here are the big bills that passed – and the ones that failed." June 17, 2019, https://apps.texastribune.org/features/2019/texas-legislature-bills-to-watch/?_ga=2.263746828.1237216751.1560335554-1582857170.1559128011.

⁷⁸⁵ National Center for State Courts, "Pretrial Preventive Detention," Feb. 2020.

⁷⁸⁶ L. No. District of Columbia court reform and criminal procedure act of 1970, Pub. 91-358, 91-358, 84 Stat. 473 (codified at D.C. Code Ann. §§ 23-1321-1332); (1970).

⁷⁸⁷ N.J. Stat. Ann. § 2A:162-15 (West).

⁷⁸⁸ S.B. 946, 216th Leg., 1st Annual Sess. (NJ 2014); Codified at N.J. Stat. Ann. § 2A:162-15 (West).

one of the first states to eliminate the private bail industry;⁷⁸⁹ and while stakeholders have pushed for additional or different reforms following this landmark legislation, only some parts of the state implemented later reform measures. In 2017, after the combination of litigation and community support for pretrial justice reform, Cook County's Chief Justice announced a judicial order that dramatically altered the county's pretrial process.⁷⁹⁰ Texas has also implemented several reform efforts over the past several years, notably following litigation in Harris County.⁷⁹¹

New Jersey

New Jersey enacted bail reform legislation that went into effect on January 1, 2017.⁷⁹² Prior to this implementation in 2013, the Drug Policy Alliance released a report in which it found that 12 percent of the jail population in New Jersey was incarcerated because they could not afford a bail of \$2,500 or less; and of these, about 800 defendants were being detained because they could not afford a bail of \$500.⁷⁹³ Additionally, 75 percent of the 15,000 individuals in New Jersey jails were not convicted of a crime, but rather awaiting either sentencing or trial.⁷⁹⁴

Former New Jersey State Director of the Drug Policy Alliance, Roseanne Scotti, explained in an interview with Commission staff that many defendants were being detained pretrial, often for drug offenses,

but one of the things that jumped out as we looked at the data from a few counties was just the number of people who were in the jail who had been there for fairly long periods of time who were pretrial, and who you know, did not seem to have serious offenses [] and did not have detainers for other counties or anything [] that would require any kind of pretrial detention.⁷⁹⁵

⁷⁸⁹ Alexa Van Brunt and Locke E. Bowman, "Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next," *Journal of Criminal Law and Criminology*, vol. 108, no. 4, Fall 2018, at 715 (citing *Schilb v. Kuebel*, 404 U.S. 357, 359 (1971)).

⁷⁹⁰ Bail Reform Act, S.B. 2034, 100th Gen. Assemb., 1st Sess. (IL 2017); Gen. Ord. Cook Co. Cir. Ct. 18.8A (eff. Sept. 18, 2017).

⁷⁹¹ See Memorandum and Opinion Approving the Proposed Consent Decree and Settlement Agreement and Granting the Motion to Authorize Compensation of Class Counsel, *O'Donnell v. Harris County*, No. 16-cv-01414, (S.D. Tex. 2019); See Consent decree, *O'Donnell v. Harris County*, No. 16-cv-01414, (S.D. Tex. 2019.).

⁷⁹² S.B. 946, 216th Leg., 1st Annual Sess. (NJ 2014) Codified at N.J. Stat. Ann. § 2A:162-15 (West).

⁷⁹³ Marie VanNostrand, "New Jersey Jail Population Analysis," Luminosity in partnership with the Drug Policy Alliance, at 13-4, https://www.drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf.

⁷⁹⁴ *Ibid.*, p. 11.

⁷⁹⁵ Roseanne Scotti, New Jersey State Director of the Drug Policy Alliance, Interview Transcript at 9:57-10:39 [on file].

The 2013 Drug Policy Alliance report also found that the average incarceration length for pretrial detention was more than 10 months.⁷⁹⁶ The report concluded that a large number and percentage of pretrial detainees were in jail due to three factors:

1. 41 percent of the total active pending cases in the Municipal Court were due to backlog, 53 percent in the Superior Court criminal cases pre-indictment were due to backlog, and 45 percent of the criminal cases post-indictment were considered to be due to backlog;
2. Inmates who had been indicted but not yet had a trial had been in custody on average 314 days (as of the day the jail snapshot was taken in June 2012); and,
3. 12 percent of the entire jail population was held in custody solely due to an inability to pay \$2,500 or less to secure their release pending disposition.⁷⁹⁷

In an interview with Commission staff, Scotti stated that:

[W]e found that 40 percent of the folks who were [] in jail pretrial were there solely because they did not have enough money to pay off nominal amount of bail. So again, it wasn't like they were waiting for a spot in drug court, or they, you know had to go to another county, you know for another charge or anything like that. They were just basically poor.⁷⁹⁸

In June of 2013, three months after the Drug Policy Alliance report issued, the state's Chief Justice commissioned a Joint Committee on Criminal Justice (Committee) to investigate the state's bail system and propose reforms. The Committee issued a publication that identified several issues with the state's current bail system.⁷⁹⁹ First, the report noted that the pretrial system was largely resource-based, meaning that release was contingent on a defendant's ability to post bail.⁸⁰⁰ Many of the defendants who were being detained pretrial were those with less serious charges that posed little danger to the community, were unlikely to abscond before their court date, and purely on the fact that they could not post even modest amounts of bail.⁸⁰¹ Moreover, defendants with more serious charges were being released pretrial because they had access to financial resources that allowed them to post bail, despite concerns that they posed a danger to the community or were likely to abscond.⁸⁰²

⁷⁹⁶ Marie VanNostrand, "New Jersey Jail Population Analysis," Luminosity in partnership with the Drug Policy Alliance, at 12.

⁷⁹⁷ Marie VanNostrand, "New Jersey Jail Population Analysis," Luminosity in partnership with the Drug Policy Alliance, at 14, https://www.drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf.

⁷⁹⁸ Roseanne Scotti, New Jersey State Director of the Drug Policy Alliance, Interview Transcript at 13:24-53 [on file].

⁷⁹⁹ Report of the Joint Committee on Criminal Justice, Mar. 10, 2014, <https://www.njcourts.gov/courts/assets/criminal/finalreport3202014.pdf>

⁸⁰⁰ *Ibid.*, p. 11.

⁸⁰¹ *Ibid.*, p. 2.

⁸⁰² *Ibid.*, p 2. The report notes that New Jersey's Constitution mandates that bail be set for all defendants, thus judges have no authority to detain even the most dangerous or violent individuals. *Ibid.*

Second, the report noted that in some cases, defendants who were being detained could spend over a year in jail awaiting their court date despite the fact that they are presumed innocent.⁸⁰³ This delay raised concerns that the state's system violated individuals' Sixth Amendment right to a speedy trial.⁸⁰⁴ The Committee also recommended that New Jersey implement a "speedy trial act" to ensure that defendants are brought to trial in a specific time period.⁸⁰⁵ In an interview with Commission staff, Acting Administrative Director of New Jersey Courts Judge Glenn Grant explained that:

[W]e have always had a speedy trial requirement in New Jersey, but there [were] no teeth to it and the statute actually resulted in [] prosecutors having 90 days to indict and then another hundred and seventy days after the indictment to move to trial, and they created a series of exclusionary factors where the time would be tolled based upon certain factors.⁸⁰⁶

As such, the Committee recommended a statutory change from a resource-based model of bail to a risk-based system.⁸⁰⁷ The latter gives judges the ability to consider the dangerousness of a defendant when determining whether to release or detain a particular individual, and thus works to protect public safety; and eliminating financial conditions for bail would help protect the defendant's due process right, thus making the bail system more equitable.⁸⁰⁸

Joseph Krakora, Public Defender for the State of New Jersey, explained that there was a general consensus among stakeholders which resulted in "such a successful transition to a new system."⁸⁰⁹ Krakora stated that:

[E]very stakeholder in the system agreed that this change needed to happen, even for different reasons. From our point of view, it was important to get people charged with low-level offenses, held because they were poor, out of jail. For the law enforcement community, the ability to detain high-risk defendants without bail was important.⁸¹⁰

In an interview with Commission staff, Acting Administrative Director Judge Glenn Grant explained that this buy-in from stakeholders was an essential component to the reform efforts. He explained that

⁸⁰³ Report of the Joint Committee on Criminal Justice, Mar. 10, 2014, <https://www.njcourts.gov/courts/assets/criminal/finalreport3202014.pdf>, at 1.

⁸⁰⁴ *Ibid.*, p. 4.

⁸⁰⁵ *Ibid.*, p. 5.

⁸⁰⁶ Glenn Grant, Acting Administrative Director of New Jersey Courts, Interview Transcript at 14:22 [on file].

⁸⁰⁷ Report of the Joint Committee on Criminal Justice, Mar. 10, 2014, at 8.

⁸⁰⁸ *Ibid.*

⁸⁰⁹ Diana Dabruzzo, "New Jersey Set Out to Reform Its Cash Bail System. Now, the Results Are In." Arnold Ventures, Nov. 14, 2019, <https://www.arnoldventures.org/stories/new-jersey-set-out-to-reform-its-cash-bail-system-now-the-results-are-in/>.

⁸¹⁰ *Ibid.*

having at least the law enforcement community recogniz[e] that they needed to have a clearer path to detain high-risk individuals and [] the advocacy groups and legislative members [] saying you need something to deal with the inequity of money determining whether one is released or detained pretrial. They really came together probably in 2015, where my boss, the Chief Justice [] pulled together a statewide committee task force to look at efforts to improve criminal justice reforms ... It included representatives from the legislature to the governor's office, attorney general's office, public defender's office, outside counsel, defense counsel, county prosecutors, the ACLU, and others to explore ways to improve the criminal justice system in New Jersey.⁸¹¹

Krakora described the process in an interview with Commission staff, stating that:

[W]e really did literally like a traveling road show around the state where we would go to every county into a big auditorium or courtroom and have all the stakeholders from that county would come in, and we would talk about how the new system was going to work. It's pretty remarkable, because we made it change everything. I mean literally when the clock struck midnight on January 1st, the entire world changed.⁸¹²

As a result of these efforts, New Jersey passed the New Jersey Criminal Justice Reform Act on January 1, 2017, which effectively eliminated the imposition of monetary bail in New Jersey.⁸¹³

The current system now entitles all defendants to a presumption of release, besides those facing life imprisonment.⁸¹⁴ In order to detain a defendant pretrial, a prosecutor must present the judge convincing evidence that no conditions could protect the public or ensure the defendant's appearance in court. Conversely, the defendant's attorney has the right to preview the state's case and call and cross examine witnesses.⁸¹⁵ Under the new system, after an individual is arrested, the individual can be detained for a maximum of 48 hours before a judge is to decide whether the individual will be released or detained. Joseph Krakora explained that under the new system, the

majority of defendants are released on that first day ... generally the state's not moving for detention, except on the more serious cases with the defendants with the longer records as a general proposition. The result of this, since the law went

⁸¹¹ Glenn Grant, Acting Administrative Director of New Jersey Courts, Interview Transcript at 10:31-11:27 [on file].

⁸¹² Joseph Krakora, Public Defender for the State of New Jersey, Interview Transcript at 12:16-49 [on file].

⁸¹³ Codified in NJ ST 2A:162-15 et al.

⁸¹⁴ ACLU New Jersey, "Pretrial Justice Reform," [https://www.aclu-nj.org/theissues/criminaljustice/pretrial-justice-reform#:~:text=The%20New%20Jersey%20Criminal%20Justice,a%20danger%20to%20their%20community](https://www.aclu-nj.org/theissues/criminaljustice/pretrial-justice-reform#:~:text=The%20New%20Jersey%20Criminal%20Justice,a%20danger%20to%20their%20community; see also, Report to the Governor and the Legislature, Jan. 1 – Dec. 31, 2019, Criminal Justice Reform, New Jersey Judiciary at 19, https://njcourts.gov/courts/assets/criminal/cjrannualreport2019.pdf?c=kHC); *see also*, Report to the Governor and the Legislature, Jan. 1 – Dec. 31, 2019, Criminal Justice Reform, New Jersey Judiciary at 19, <https://njcourts.gov/courts/assets/criminal/cjrannualreport2019.pdf?c=kHC>.

⁸¹⁵ ACLU New Jersey, "Pretrial Justice Reform," <https://www.aclu-nj.org/theissues/criminaljustice/pretrial-justice-reform#:~:text=The%20New%20Jersey%20Criminal%20Justice,a%20danger%20to%20their%20community>.

into effect, is a dramatic decrease in the county jail population, as much as 40 percent.⁸¹⁶

Additionally, the new system relies in part on the Public Safety Assessment (PSA) tool, described above, that identifies nine factors that predict whether a defendant will be arrested again while out on bail and the likelihood of them returning to court.⁸¹⁷ As discussed in Chapter 2, some reform advocates have raised concerns that the PSA risk assessment tool may be racially biased, based on concerns of racial bias in similar predictive algorithmic tools,⁸¹⁸ and the New Jersey chapter of the ACLU is continuing to monitor the ongoing use and impact of the tool based on these concerns.⁸¹⁹ Court data show that from January 1, 2016 through 2017, there was a 20.3 percent decline in the pretrial jail population and the detention rate fell 35.7 percent; however, court data show that despite the decrease in the pretrial population, racial disparities continue to exist.⁸²⁰

One of the concerns for counties under the new law was the additional financial resources, such as courts being open on weekends and holidays and hiring additional law enforcement and prosecutors, needed to ensure the 48-hour deadline is met.⁸²¹ For example, in Atlantic County in 2017, the county spent \$700,000 on adherence to the new law since the county needed to hire an additional sheriff's deputy and two assistant county prosecutors.⁸²²

The private bail industry has also been largely impacted by the passage of the New Jersey Criminal Justice Reform Act.⁸²³ Christopher Blaylock, a private bail business owner in Gloucester County, stated that he has closed two of his three businesses and other bond agents across the state have had similar issues.⁸²⁴ Blaylock explained that the reform bill has “totally devastated the business

⁸¹⁶ Krakora Interview Transcript at 19:52 [on file].

⁸¹⁷ The nine risk factors are: age at current arrest, current violent offense, pending charge at the time of offense, prior disorderly persons conviction, prior indictable conviction, prior violent conviction, prior failure to appear pretrial in past two years, prior failure to appear pretrial older than two years, and prior sentence to incarceration. *See* Public Safety Assessment, New Jersey Risk Factor Definitions, Dec. 2018, <https://njcourts.gov/courts/assets/criminal/psariskfactor.pdf>.

⁸¹⁸ *See, e.g.*, Sandra Mayson, “Bias In, Bias Out,” *Yale Law Journal*, vol. 128, no. 8, June 2019, https://www.yalelawjournal.org/pdf/Mayson_p5g2tz2m.pdf.

⁸¹⁹ ACLU New Jersey, “Pretrial Justice Reform,” <https://www.aclu-nj.org/theissues/criminaljustice/pretrial-justice-reform#:~:text=The%20New%20Jersey%20Criminal%20Justice,a%20danger%20to%20their%20community>.

⁸²⁰ *Ibid.*

⁸²¹ *See, e.g.*, John DeRosier, “Bail reform drops jail population by 20 percent, has come with growing pains,” *Press of Atlantic City*, Feb. 16, 2018, https://pressofatlanticcity.com/news/bail-reform-drops-jail-population-by-20-percent-has-come-with-growing-pains/article_00b28df6-c035-5917-ac69-2ddacc57c1c2.html.

⁸²² *Ibid.*

⁸²³ John DeRosier, “Bail reform drops jail population by 20 percent, has come with growing pains,” *Press of Atlantic City*, Feb. 16, 2018, https://pressofatlanticcity.com/news/bail-reform-drops-jail-population-by-20-percent-has-come-with-growing-pains/article_00b28df6-c035-5917-ac69-2ddacc57c1c2.html; Michaelangelo Conte, “Bail reform is killing our business, bail bondsman say,” *The Jersey Journal*, Jan. 16, 2019, nj.com/hudson/2017/01/nj_bail_reform_leaves_bail_bondsmen_in_a_tight_spo.html; *see* Codified in NJ ST 2A:162-15 et al.

⁸²⁴ John DeRosier, “Bail reform drops jail population by 20 percent, has come with growing pains,” *Press of Atlantic City*, Feb. 16, 2018, https://pressofatlanticcity.com/news/bail-reform-drops-jail-population-by-20-percent-has-come-with-growing-pains/article_00b28df6-c035-5917-ac69-2ddacc57c1c2.html.

because it's virtually gotten rid of all monetary bail. We expected that our business would fall about 40 percent because of the changes, but it's been closer to 90 percent. We had no idea it would be to this extent."⁸²⁵ Other bail bonds agents have commented that due to the decrease of business they no longer "have the means and the income to catch [defendants who fail to appear at court] or monitor them anymore. Once they get the word on the street, I think people will stop showing up in court... It's really scary the types of defendants that are being released on their own recognizance."⁸²⁶

Conversely, Acting Administrative Director of the New Jersey Courts, Judge Glenn Grant asserted that there was widespread misinformation being spread about the outcome and consequences of the bail reform legislation. He explained that reform

doesn't happen unless there is recognition by society ... that there's a need for change, there's a need to improve how we respond to individuals charged with criminal wrongdoing. If you are calibrating this correctly, if you are balancing society's need for safety while also recognizing the strong constitutional foundations of presumption of innocence, you are able to hopefully create a system where you will not see the kinds of fears that are being alleged by the bail industry.⁸²⁷

Early New Jersey court data suggest that neither of the principal concerns about bail reform – that released defendants will commit new crimes or that they will fail to appear for court dates -- has come to fruition following the reforms in that state. Initial data comparing pre- and post-reform show that the number of defendants released during the pretrial period and charged with a new indictable crime did not substantially increase and remained relatively low (at 13.7 percent)⁸²⁸ and the rate of appearance in court slightly decreased by 3.3 percent (92.7 in 2014 to 89.4 in 2017).⁸²⁹ Data from 2019 show similar results with the rate of alleged new criminal activity for those defendants who were released pretrial remained nearly the same rate as for those defendants under the previous bail system.⁸³⁰

⁸²⁵ John DeRosier, "Bail reform drops jail population by 20 percent, has come with growing pains," *Press of Atlantic City*, Feb. 16, 2018.

⁸²⁶ Michaelangelo Conte, "Bail reform is killing our business, bail bondsman say," *The Jersey Journal*, Jan. 16, 2019, [nj.com/hudson/2017/01/nj_bail_reform_leaves_bail_bondsmen_in_a_tight_spo.html](https://www.nj.com/hudson/2017/01/nj_bail_reform_leaves_bail_bondsmen_in_a_tight_spo.html).

⁸²⁷ Diana Dabruzzo, "New Jersey Set Out to Reform Its Cash Bail System. Now, the Results Are In." Arnold Ventures, Nov. 14, 2019, <https://www.arnoldventures.org/stories/new-jersey-set-out-to-reform-its-cash-bail-system-now-the-results-are-in/>.

⁸²⁸ Report to the Governor and the Legislature, Jan. 1 – Dec. 31, 2018, Criminal Justice Reform, New Jersey Judiciary, at 5, <https://njcourts.gov/courts/assets/criminal/2018cjrannual.pdf?c=taP>.

⁸²⁹ *Ibid.*, p. 14.

⁸³⁰ Report to the Governor and the Legislature, Jan. 1 – Dec. 31, 2019, Criminal Justice Reform, New Jersey Judiciary, at 5, <https://njcourts.gov/courts/assets/criminal/cjrannualreport2019.pdf?c=kHC>.

For those defendants who are arrested under a complaint-warrant,⁸³¹ the Criminal Justice Act requires that a risk assessment is completed by a pretrial services agent and a judge must make a release decision within 48 hours of an arrest.⁸³² A defendant must be released from jail unless the prosecutor files a motion to detain.⁸³³ In 2017, a majority of the defendants (81.3 percent) were released within 24 hours and 99.5 percent were released within 24 hours, when no motions were filed.⁸³⁴ In 2019, prosecutors filed fewer detention motions than the previous year: in 2018 prosecutors filed in 49 percent of cases with complaint-warrants, which decreased to 46 percent.⁸³⁵

New Jersey's reform efforts have also been successful in reducing the overall jail population. In 2012, there were 15,006 individuals in jails, by 2019, the jail population was reduced to 7,937 individuals.⁸³⁶ In the first year of the reform, the state witnessed a 20.3 percent decline in its pretrial jail population and the pretrial detention rate fell almost 36 percent compared to the 2015 rate.⁸³⁷ By December 2018, the state's pretrial jail population decreased to 4,995 individuals, a 43.9 percent decrease in the pretrial jail population since December 31, 2015 (see Chart 6).⁸³⁸ The number of defendants who were released pretrial on personal recognizance also increased by 455

⁸³¹ In criminal cases, police can issue a complaint-summons that does not require an arrest or a complaint-warrant that requires an arrest. The latter then requires the court to find probable cause that there was a crime committed and the defendant was the one who committed the crime. Under the new bail law, the choice has taken on increased significance.

The issuance of a complaint-warrant is the triggering event for many of the provisions of the new law defining the universe of so-called "eligible defendants" under the statute. One of the significant practical consequences of the initial charging decision is that when a complaint-warrant is issued by a judge or other authorized judicial officer, the defendant must be taken to a county jail, where he or she will be held for up to 48 hours... The decision whether to charge by complaint-warrant rather than complaint-summons has other legally significant consequences besides the initial incarceration of the defendant pending completion of the recommendation process conducted by the pretrial services program. A prosecutor cannot file a motion to have the defendant preventively detained pending trial unless the defendant has been charged by complaint-warrant. So too, if the defendant is charged by complaint-summons rather than complaint-warrant and thereafter commits a new crime while on pretrial release, the prosecutor cannot move pursuant to N.J.S.A. 2A:162-24 to revoke release and hold defendant preventively on that initial charge (internal citations omitted).

See Attorney General Directive, "Determining Whether to Charge by Complaint-Summons or Complaint-Warrant," at 28, https://www.nj.gov/oag/dcj/agguide/directives/ag-directive-2016-6_Redline.pdf.

⁸³² Report to the Governor and the Legislature, Jan. 1 – Dec. 31, 2018, Criminal Justice Reform, New Jersey Judiciary, at 5, <https://njcourts.gov/courts/assets/criminal/2018cjrannual.pdf?c=taP>.

⁸³³ Ibid.

⁸³⁴ Report to the Governor and the Legislature, Jan. 1 – Dec. 31, 2018, Criminal Justice Reform, New Jersey Judiciary, at 5, <https://njcourts.gov/courts/assets/criminal/2018cjrannual.pdf?c=taP>.

⁸³⁵ Report to the Governor and the Legislature, Jan. 1 – Dec. 31, 2019, Criminal Justice Reform, New Jersey Judiciary, at 27.

⁸³⁶ Ibid., p. 16.

⁸³⁷ New Jersey Courts, Preliminary Statistical Report, Jan. 1- Dec. 31, 2017, <https://www.njcourts.gov/courts/assets/criminal/cjrreport.pdf>.

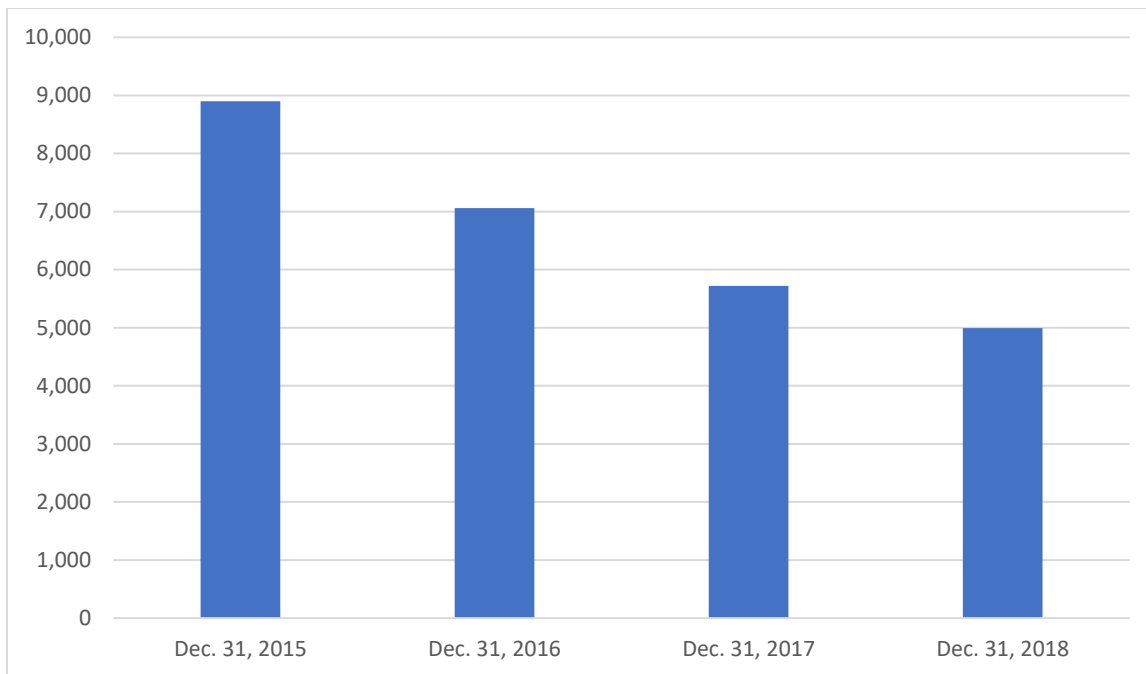
⁸³⁸ New Jersey Courts, 2019 Annual Report: Report of the Administrative Director of the Courts," July 1, 2018-June 30, 2019, at 19.

individuals.⁸³⁹ Moreover, the average amount of time defendants spent in jail during pretrial in 2018 also decreased from the previous year (37.2 to 34.7 days, respectively).⁸⁴⁰ By 2019, monetary bail was nearly eliminated for all eligible defendants under the criminal justice reform bill.⁸⁴¹

⁸³⁹ Note: these data are for defendants New Jersey Judiciary, Detention Motions for Criminal Justice Reform Eligible Defendants,” 2018, Chart E, <https://njcourts.gov/courts/assets/criminal/cjrreport2018.pdf>

⁸⁴⁰ Report to the Governor and the Legislature, Jan. 1 – Dec. 31, 2019, Criminal Justice Reform, New Jersey Judiciary, at 14, <https://njcourts.gov/courts/assets/criminal/cjrannualreport2019.pdf?c=kHC>.

⁸⁴¹ The Criminal Justice Reform (CJR) statute defines an eligible defendant as “a person for whom a complaint-warrant is issued for an initial charge involving an indictable offense or disorderly person offense.” *See* Report to the Governor and the Legislature, Jan. 1 – Dec. 31, 2019, Criminal Justice Reform, New Jersey Judiciary, at 10, <https://njcourts.gov/courts/assets/criminal/cjrannualreport2019.pdf?c=kHC>.

Chart 6: Pretrial Jail Population

Source: New Jersey Courts, 2019 Annual Report: Report of the Administrative Director of the Courts,” July 1, 2018-June 30, 2019

The percentage of individuals held in jail pretrial due to low amounts of bail (\$2,500 or less) also decreased. In 2012, this population constituted 12 percent and was reduced to 2.4 percent by October 2019.⁸⁴² The majority (75.4 percent) of pretrial detainees were those awaiting case resolution in either Superior or Municipal Court.⁸⁴³ Another 12.8 percent were awaiting sentencing, while the remaining 11.8 percent were being detained for other reasons, such as parole or probation violations and immigration-related detention.⁸⁴⁴ Judge Glenn Grant, Acting Administrative Director of the New Jersey Courts, explained that:

New Jersey’s jail population looks very different today.... The state’s jails now largely include those defendants who present a significant risk of flight or danger to the community. Low-risk defendants who lack the financial resources to post bail are now released back into the community without having to suffer the spiraling, lifechanging consequences of being detained for weeks and months while presumed innocent.⁸⁴⁵

⁸⁴² Report to the Governor and the Legislature, Jan. 1 – Dec. 31, 2019, Criminal Justice Reform, New Jersey Judiciary, at 17.

⁸⁴³ *Ibid.*, p. 18.

⁸⁴⁴ *Ibid.*, p. 18.

⁸⁴⁵ Report to the Governor and the Legislature, Jan. 1 – Dec. 31, 2019, Criminal Justice Reform, New Jersey Judiciary, at 19.

Overall, the rate of pretrial detention for all defendants – including those released on a summons – was 5.7 percent in 2019, approximately a 1 percent decrease from 2018.⁸⁴⁶ This means that 94.3 percent of all defendants were released pretrial in 2019.⁸⁴⁷

Critics of the reform contend that the Criminal Justice Act increases the possibility that dangerous defendants could be set free.⁸⁴⁸ Under the new risk-based system, however, judges have more tools available to distinguish between the “dangerousness” of a defendant and assessing an individual’s ability to post bond.⁸⁴⁹ The changes in the pretrial jail population have largely been due to law enforcement issuing almost 20 percent more “complaint-summons”⁸⁵⁰ in 2017 compared to 2015, which equates to fewer lower-risk defendants going to jail.⁸⁵¹ 2018 data show that the percentage of defendants being issued complaint-summons versus complaint-warrants have remained relatively stable from the previous year, with a slight decrease in the percentage of summons (70.9 to 68.4 percent, respectively) and a slight increase in the percentage of defendants of warrants (29.1 to 31.6 percent, respectively).⁸⁵² Moreover, 2018 data show that of the defendants arrested and released pretrial, fewer than 1 percent (0.4%) were charged with a serious offense that would mandate no early release from prison upon conviction, which was a decrease from 1.6 percent of defendants in 2017.⁸⁵³

While the state has been successful in reducing the overall jail population as a result of the passage of the 2017 Bail Reform Act, the racial and ethnic demographics of the jail population have not changed significantly.⁸⁵⁴ As seen below, Chart 7 shows that Black defendants continue to make up the majority of the jail population across all three years. Similarly, the majority of inmates are

⁸⁴⁶ Ibid., p. 29.

⁸⁴⁷ Ibid., p. 30.

⁸⁴⁸ See, e.g., John DeRosier, “Bail reform drops jail population by 20 percent, has come with growing pains,” *Press of Atlantic City*, Feb. 16, 2018, https://pressofatlanticcity.com/news/bail-reform-drops-jail-population-by-20-percent-has-come-with-growing-pains/article_00b28df6-c035-5917-ac69-2ddacc57c1c2.html; Michaelangelo Conte, “Bail reform is killing our business, bail bondsmen say,” *The Jersey Journal*, Jan. 16, 2019, https://www.nj.com/hudson/2017/01/nj_bail_reform_leaves_bail_bondsmen_in_a_tight_spo.html.

⁸⁴⁹ Report of the Joint Committee on Criminal Justice, Mar. 10, 2014, <https://www.njcourts.gov/courts/assets/criminal/finalreport3202014.pdf>; see also, Report to the Governor and the Legislature, Jan. 1 – Dec. 31, 2018, Criminal Justice Reform, New Jersey Judiciary, at 3, <https://njcourts.gov/courts/assets/criminal/2018cjrannual.pdf?c=taP>.

⁸⁵⁰ In New Jersey, a defendant can be charged with a crime or offense in two ways: law enforcement has the discretion to issue a “complaint-summons” that list a court date to appear or officers can obtain a “complaint-warrant” from a judicial officer that directs that the defendant will be sent to jail. Only this latter category of defendants are considered “eligible defendants” under the provisions of the criminal justice reform law. See Report to the Governor and the Legislature, Jan. 1 – Dec. 31, 2018, Criminal Justice Reform, New Jersey Judiciary, at 5.

⁸⁵¹ Report to the Governor and the Legislature, Jan. 1 – Dec. 31, 2018, Criminal Justice Reform, New Jersey Judiciary, at 5, <https://njcourts.gov/courts/assets/criminal/2018cjrannual.pdf?c=taP>.

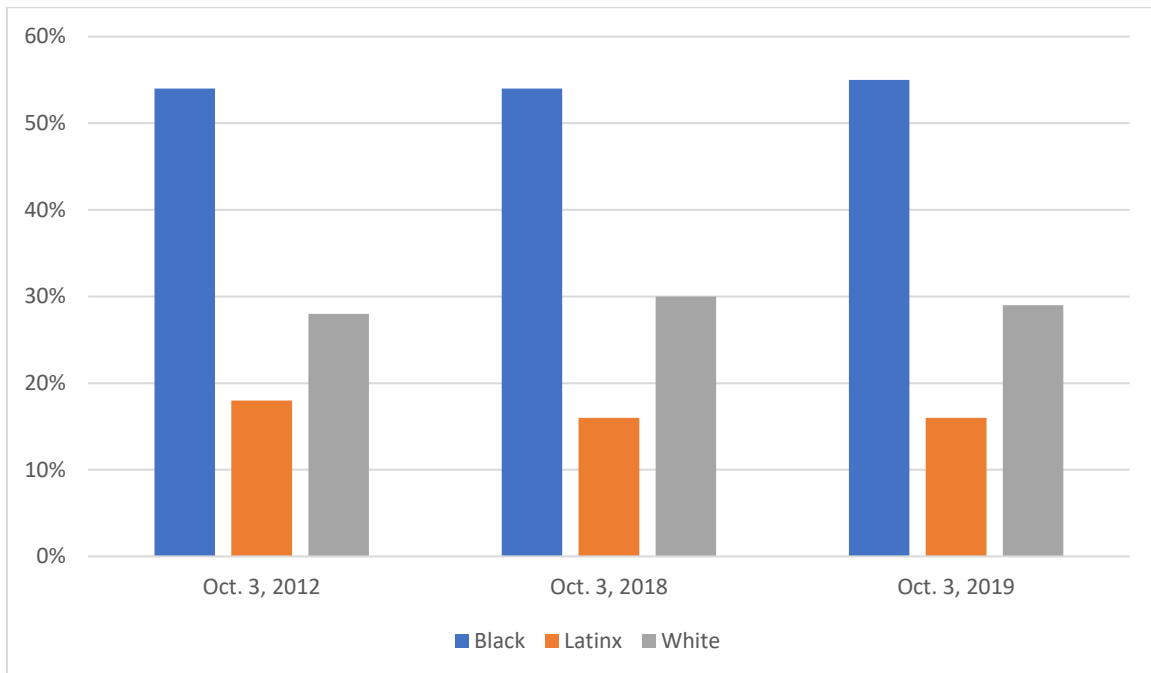
⁸⁵² Report to the Governor and the Legislature, Jan. 1 – Dec. 31, 2019, Criminal Justice Reform, New Jersey Judiciary, at 12, <https://njcourts.gov/courts/assets/criminal/cjrannualreport2019.pdf?c=kHC>.

⁸⁵³ Report to the Governor and the Legislature, Jan. 1 – Dec. 31, 2019, Criminal Justice Reform, New Jersey Judiciary, at 5-6, <https://njcourts.gov/courts/assets/criminal/cjrannualreport2019.pdf?c=kHC>.

⁸⁵⁴ Report to the Governor and the Legislature, Jan. 1 – Dec. 31, 2019, Criminal Justice Reform, New Jersey Judiciary, at 21, <https://njcourts.gov/courts/assets/criminal/cjrannualreport2019.pdf?c=kHC>.

male (89.4%) which has remained consistent across the three years and the demographic distribution is consistent across racial and ethnic groups.⁸⁵⁵

Chart 7: Jail Population by Race and Ethnicity (Oct. 3, 2012, 2018, 2019)



Source: Report to the Governor and the Legislature, Jan. 1 – Dec. 31, 2019, Criminal Justice Reform, New Jersey Judiciary.

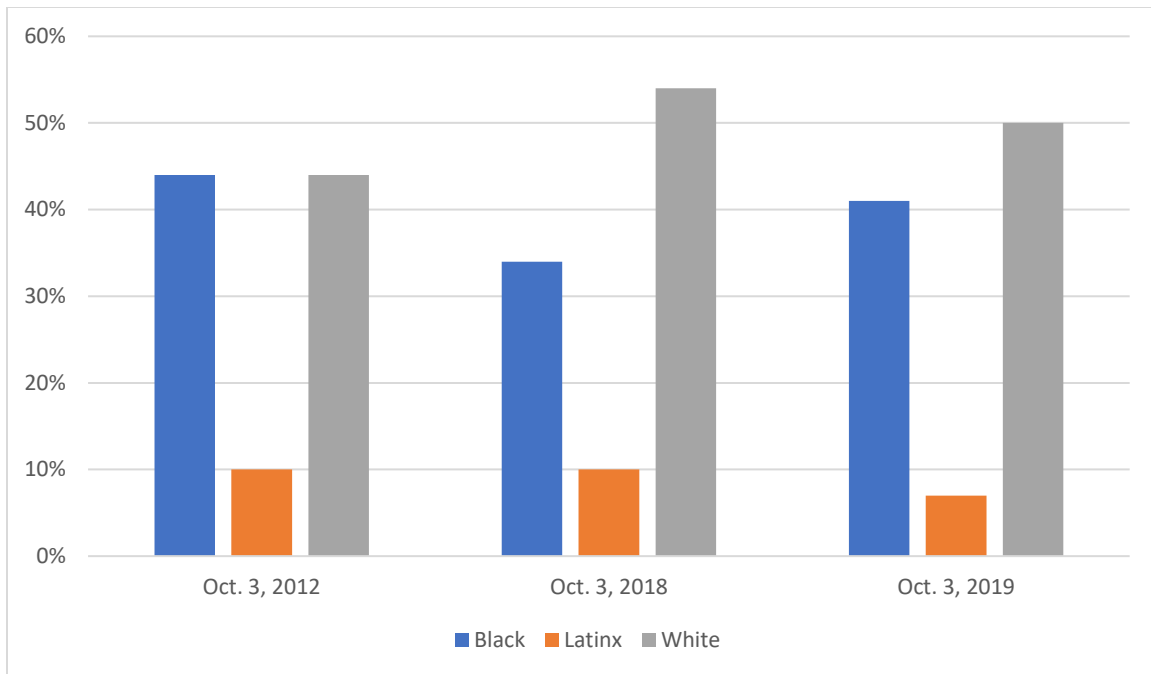
The demographics for women in jail have shown more fluctuations, however.⁸⁵⁶ For example, Black women represented 44 percent of the female inmate population in 2012, which dropped to 34 percent in 2018, and increased again in 2019 to 41 percent. White women constituted 44 percent of the female jail population in 2012, but increased to 54 percent in 2018, and decreased again in 2019 to 50 percent (see Chart 8).⁸⁵⁷

Chart 8: Female Jail Population by Race and Ethnicity (Oct. 3, 2012, 2018, 2019)

⁸⁵⁵ Ibid.

⁸⁵⁶ Ibid., pp. 21-22.

⁸⁵⁷ Ibid., p. 22.



Source: Report to the Governor and the Legislature, Jan. 1 – Dec. 31, 2019, Criminal Justice Reform, New Jersey Judiciary.

Moreover, Black defendants are more likely to be charged with complaint-warrants and are likely to spend more time awaiting case disposition than similar White defendants.⁸⁵⁸ For example, White individuals were issued summons in 73.2 percent of cases and issued warrants in 26.8 percent of cases in 2019. By comparison, Black individuals were issued summons in 61.8 percent of cases and issued warrants in 38.2 percent of case that same year.⁸⁵⁹ While the Black community represents 14.1 percent of the state’s population,⁸⁶⁰ Black defendants make up 55 percent of the total jail population.⁸⁶¹

In an interview with Commission staff, Judge Glenn Grant, Acting Administrative Director of the New Jersey Courts, explained that 2018 jail demographics showed that approximately 3,000 fewer Black individuals and 1,300 fewer Latinx individuals were incarcerated compared to 2013.⁸⁶² While these numbers are a notable decrease, Judge Grant stated that:

⁸⁵⁸ Report to the Governor and the Legislature, Jan. 1 – Dec. 31, 2019, Criminal Justice Reform, New Jersey Judiciary, at 13.

⁸⁵⁹ *Ibid.*

⁸⁶⁰ *Ibid.*, p. 12.

⁸⁶¹ *Ibid.*, p. 21.

⁸⁶² Glenn Grant, Acting Administrative Director of New Jersey Courts, Interview Transcript at 41:44-59 [on file]; *see also*, Report to the Governor and the Legislature, Jan. 1 – Dec. 31, 2018, Criminal Justice Reform, New Jersey Judiciary.

[W]hile we have not necessarily addressed all of the racial equity questions, I think one of the things [] that we have to recognize is the race equity issues start at the law enforcement level. Those people here in the county jail are people that have been arrested by law enforcement. So there needs to be a continued investigation and analysis of what's happening on the prosecutorial side [and] what's happening on the law enforcement side, because that becomes the pool of individuals that hit your county jail... I think if you only look at the question on the back end you have done a disservice to the broader issue that needs to be analyzed, you know, so that I think is a critical element as we talk about the continuous conversation on bail justice reform.⁸⁶³

In 2020, New Jersey also passed a new law mandating the attorney general to “collect, record, and analyze data” regarding the demographic characteristics of individuals who are incarcerated in the state’s jail and prison populations.⁸⁶⁴ The bipartisan law also requires that the attorney general collect information regarding case resolution and release annual summaries detailing inmate data.⁸⁶⁵

Director of national engagement and field operations at Measures for Justice Mikaela Rabinowitz claims that this law could serve as a national model for data collection, especially due to the decentralized nature of data collection in the criminal justice system.⁸⁶⁶ Rabinowitz explained that:

Any policy question you’re going to have about the criminal justice system, whether it’s about incarceration, about prosecution, about racial disparities, about violent crime, all of that is going to require knowing what's happening in each different part of the system, and so this is amazing for that.⁸⁶⁷

One of the primary sponsors of the bill, Republican Senator Tom Kean stated that:

All New Jersey residents deserve equal protection under the law [and] [c]ollecting criminal justice data in a consistent and uniform matter will give policymakers and the public a more detailed and accurate understanding of how the law is being applied and enforced in New Jersey.⁸⁶⁸

⁸⁶³ Glenn Grant, Acting Administrative Director of New Jersey Courts, Interview Transcript at 42:10-52 [on file].

⁸⁶⁴ New Jersey, S2638, A1076 (1R) 2020-2021, <https://www.njleg.state.nj.us/bills/BillView.asp?BillNumber=A1076>; see also, Bill Wichert, “NJ Criminal Justice Data Law Could Spur Reforms Elsewhere,” *Law360*, Nov. 15, 2020, <https://www.law360.com/access-to-justice/articles/1328633>.

⁸⁶⁵ New Jersey, S2638, A1076 (1R) 2020-2021, <https://www.njleg.state.nj.us/bills/BillView.asp?BillNumber=A1076>.

⁸⁶⁶ Bill Wichert, “NJ Criminal Justice Data Law Could Spur Reforms Elsewhere,” *Law360*, Nov. 15, 2020, <https://www.law360.com/access-to-justice/articles/1328633>.

⁸⁶⁷ *Ibid.*

⁸⁶⁸ Ashley Balcerzak and Stacey Barchenger, “NJ lawmakers voted on dozens of police reform, criminal justice bills. Here’s what happened,” *North Jersey*, Jul. 31, 2020, <https://www.northjersey.com/story/news/new-jersey/2020/07/30/here-police-reform-criminal-justice-bills-nj-lawmakers-voting/5536801002/>.

Moreover, as discussed above, Judge Grant stated that while New Jersey has been able to successfully decrease the size of the state's jail population, there is still a need to assess the continued racial disparities among the pretrial population.⁸⁶⁹ According to Rutgers law professor, Laura Cohen, this new law may also be able to “undo the decades or even centuries of racially disparate prosecution and sentencing in our state” since it will provide the much needed data on warrants, arrests, charges, dismissed or downgraded charges, plea agreements, among other data points.⁸⁷⁰

Illinois

In 2017, the Illinois State Legislature passed the 2017 Bail Reform Act, which established a right to counsel at bail hearings, required judges to set the least restrictive conditions possible for pretrial release, and allowed people charged with certain crimes to have their bond reconsidered if they were unable to pay the original amount.⁸⁷¹

In an interview with Commission staff, State's Attorney for Cook County Kim Foxx explained that she supported the 2017 Act due to the

realization that the bail process had been perverted over time and that it wasn't a matter of public safety anymore, that we were not able to demonstrate or show that people were being saved by people being detained pretrial. It also was perverted in that truly people who were not of means and who were not a threat and were more likely to be detained than people who had money in more violent offenses. And, so, I think it was incumbent upon me to, as a prosecutor, to say in the interest of public safety, the existing system is not making us safer. And in addition to that, [] as someone who was looking at [] wrongful convictions in our office. One of the things that I felt wasn't getting highlighted was the incentive that some people had to plead guilty to crimes even if they did not commit them to get out of jail because they were sitting pretrial. So those were my biggest reasons for being an advocate.⁸⁷²

In addition to passing the 2017 Bail Reform Act, the Illinois Supreme Court established a Commission on Pretrial Practices in 2017, which was charged with conducting a comprehensive review of the state's pretrial detention system and making recommendations for amendments to state laws in a report that was released in April 2020.⁸⁷³ After a two-year investigation studying pretrial best practices, the Commission on Pretrial Practices made recommendations to modify

⁸⁶⁹ Glenn Grant, Acting Administrative Director of New Jersey Courts, Interview Transcript at 42:10-52 [on file].

⁸⁷⁰ Bill Wichert, “NJ Criminal Justice Data Law Could Spur Reforms Elsewhere,” *Law360*, Nov. 15, 2020, <https://www.law360.com/access-to-justice/articles/1328633>.

⁸⁷¹ Bail Reform Act, S.B. 2034, 100th Gen. Assembly, 1st Sess. (IL 2017).

⁸⁷² Kim Foxx, State's Attorney for Cook County, Illinois, Interview Transcript at 12:39-13:45 [on file].

⁸⁷³ Supreme Court Commission on Pretrial Practices Final Report, Apr. 2020, <https://courts.illinois.gov/Probation/FinalReport.pdf>.

state laws, Supreme Court rules and policies, and the practices, procedures, and systems that are utilized in circuit courts in Illinois. Some of these recommendations include:

- jail diversion programs for individuals with behavioral, mental, and/or substance abuse issues;
- increasing the use of citations in lieu of arrest;
- bail decisions favoring nonfinancial release conditions and defendants are not to be detained due to their inability to post bail;
- pretrial detention is intended for those charged with defined “violent” offenses;
- if a defendant is detained at the initial court appearance, they are entitled to a full pretrial detention hearing within three days and brought to trial within 90 days;
- a pretrial risk assessment tool shall be one of the factors used when considering pretrial decisions;
- pretrial release conditions shall not be punitive (e.g., community service, restitution) and should be based upon the least restrictive means;
- electronic monitoring should be limited and specific; and
- pretrial service agencies are to implement a system of court date reminders and these reminders should be provided 1-3 days prior to scheduled court appearance.⁸⁷⁴

Some critics of the state’s 2017 reform efforts said that the Act did not go far enough in undoing the collateral damage suffered by people incarcerated pretrial due to the inability to post bond, and community organizations have advocated for stronger reform measures.⁸⁷⁵ Conversely, opponents to the Act have argued that the bill went too far and the reforms utilize a “one-size fits all” policy that cannot work in smaller counties outside of Cook County.⁸⁷⁶ As such, another bill was introduced, HB 221, known as the Bail Reform Opt Out bill, which would allow any county with a population of less than three million people to opt out of the 2017 Act and establish their own process for money bail.⁸⁷⁷ In an interview with Commission staff, Patrick Kenneally, McHenry County State’s Attorney, explained his concerns:

We got to remember in a place like McHenry County, and we’re not Chicago ... our population probably more resembles Iowa [] then it does the city of Chicago,

⁸⁷⁴ *Ibid.*, pp. 5-11.

⁸⁷⁵ Coalition to End Money Bond, “Pursuing Pretrial Freedom: The Urgent Need for Bond Reform in Illinois,” June 17, 2019, at 4, <http://endmoneybond.org/wp-content/uploads/2019/06/final-cemb-report.pdf>.

⁸⁷⁶ Patrick Kenneally, McHenry County State’s Attorney, Interview Transcript at 10:07-11:03 [on file]; HB 0221, 101st Gen.Assemb. (IL 2019-2020), <http://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=108&GA=101&DocTypeId=HB&DocNum=221&GAID=15&LegID=114122&SpecSess=&Session=>

⁸⁷⁷ HB 0221, 101st Gen. Assemb. (IL 2019-2020), <http://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=108&GA=101&DocTypeId=HB&DocNum=221&GAID=15&LegID=114122&SpecSess=&Session=>

it's just a totally different animal. And so, when you have kind of this one fits all bond model, it creates problems.⁸⁷⁸

Kenneally argued that for smaller and more rural counties that have less resources it may be more difficult to implement non-monetary release conditions and these districts may have different concerns than larger urban districts. He posits that a “hold/no hold” system that is predominately based on risk would be a better system than what the Bail Reform Act was proposing.⁸⁷⁹

According to Sharlyn Grace, a member of the Illinois Network for Pretrial Justice, testified at the Commission’s briefing that others opposed reform measures due to state and local government’s reliance upon monetary bail. She explained:

We have no private bail bonds industry in Illinois because it was eliminated in 1963 in the first wave of bail reform. But, instead, people pay money to the courts. And in 2017, when we first began introducing legislation to end money bail, it was in fact the court clerks who were our biggest opposition, because, not based on ethics or legality, but on their need for revenue, they could not give up the money being generated by money bail. And one of the reports that was referenced earlier today, the *Dollars and Sense* report evaluating the reforms in Cook County, found that just a 50 percent reduction in the use of money bonds in Cook County saved families \$31.4 million in bail payments.⁸⁸⁰

Additional legislation was also introduced in the 2019-2020 session that sought to end the use of money bail through the Equal Justice For All Act, HB 3347.⁸⁸¹ As of June 2020, HB 3347 is in the Illinois House Judiciary Committee. Illinois Governor J. B. Pritzker has stated support for ending cash bonds and believes it will aid the state in reducing its 40,000-inmate prison population.⁸⁸² Pritzker stated that “judges can make the decision about whether somebody is a menace to the community, if they’re let out on bail. We need to put a system in place that has a standard for a judge to use to make those decisions.”⁸⁸³ HB 3347 would prohibit the use of money bond and require courts to provide pretrial services.⁸⁸⁴ Additionally, HB 2689, the Pretrial Data Act, would require counties to track bond decisions, jail population information, and the revenue received from bonds paid.⁸⁸⁵

⁸⁷⁸ Patrick Kenneally, McHenry County State’s Attorney, Interview Transcript at 10:07-10:18 [on file].

⁸⁷⁹ *Ibid.*, 12:43-14:13 [on file].

⁸⁸⁰ Grace testimony, *Bail Reform Briefing*, transcript p. 83.

⁸⁸¹ Abolish Monetary Bail, H.B. 3347, 101st Gen. Assemb., 1st Sess. (IL 2019).

⁸⁸² Tim Shelley, “Pritzker Wants to End Cash Bonds, Mandatory Minimum Prison Sentences, Jan. 9, 2020, https://www.wglt.org/post/pritzker-wants-end-cash-bonds-mandatory-minimum-prison-sentences?fbclid=IwAR3qrrE21z3EsvJSXEqUaa3IT6LGDsrgQICrDkBCkfcP_bllJ8rT_fwopB4#stream/0.

⁸⁸³ Staff, “Ending cash bail at top of Pritzker’s 2020 legislative agenda,” *ABC7 News*, Jan. 9, 2020, <https://abc7chicago.com/5830854/>.

⁸⁸⁴ Abolish Monetary Bail, H.B. 3347, 101st Gen. Assemb., 1st Sess. (IL 2019).

⁸⁸⁵ ICJIA-Pretrial Reporting, H.B. 2689, 101st Gen. Assemb., 1st Sess. IL 2019).

In an interview with Commission staff, Illinois Senator Robert Peters explained that he is sponsoring additional legislation, known as the Pretrial Fairness Act.⁸⁸⁶ In his interview, Peters explained that the proposed legislation seeks to abolish cash bail and to narrow the offenses that require detention. The legislation is intended

to make it so that when it comes to detaining someone, it's because the prosecutor was able to prove that the person is a threat to other people... let us put all our energy on people who are a threat to other people. A threat to society, someone who's really a threat to police [] like not just speculated. But all of this is based off of some level of evidence.⁸⁸⁷

Additionally, Peters is proposing to establish statewide data infrastructure and transparency systems that can track what different counties are doing regarding their respective pretrial practices and increase accountability in the criminal justice system.⁸⁸⁸

In January 2021, Illinois passed unprecedented bail reform legislation.⁸⁸⁹ It is the first statewide legislation that eliminates money bail and significantly reduces the ability for court officials to impose pretrial detention. This legislation is unique, because while New Jersey and the District of Columbia have essentially ended cash bail in practice, neither have eliminated the practice by signing it into law.⁸⁹⁰

Additionally, this law is unique in setting parameters on how defendants are determined to be “dangerous” or a “public safety risk.”⁸⁹¹ Unlike other states where individuals can be detained pretrial under a generalized danger to another person or the community standard,⁸⁹² Illinois has become the first jurisdiction to define dangerous only to those facing certain charges where a judge finds a “specific, real, and present threat” to another person.⁸⁹³ This specificity is significant because it may be able to mitigate possible explicit or implicit biases against Black and brown defendants who are more likely to be deemed “dangerous” compared to White defendants.⁸⁹⁴

⁸⁸⁶ Chicago Council of Lawyers, “Pretrial Fairness Act – Beyond Ending Money Bail,” Jan. 29, 2020, <http://chicagocouncil.org/pfa-beyond-ending-money-bond/>.

⁸⁸⁷ Robert Peters, Illinois State Senator, Interview Transcript at 0:38-1:22 [on file].

⁸⁸⁸ Ibid.

⁸⁸⁹ Bail Reform Act, S.B. 2034, 100th Gen. Assemb., 1st Sess. (IL 2017).

⁸⁹⁰ Insha Rahman, Alison Shih, and Sam Feineh, “Black and Grassroots Advocates Help Illinois Make History with Bill to End Money Bail,” Jan. 29, 2021, <https://www.vera.org/blog/black-and-grassroots-advocates-help-illinois-make-history-with-bill-to-end-money-bail>.

⁸⁹¹ Bail Reform Act, S.B. 2034, 100th Gen. Assemb., 1st Sess. (IL 2017).

⁸⁹² District of Columbia Reform and Criminal Procedure Act of 1970 (Pub. L. No. 91-358, 84 Stat. 473 (1970) (codified at D.C. Code Ann. §§ 23-1321-1332); *see also*, Timothy Schnacke, “Changing Bail Laws: Moving From Charge to ‘Risk:’ Guidance for Jurisdictions Seeking to Change Pretrial Release and Detention Laws,” Center for Legal and Evidence-Based Practices, Sept. 23, 2018, http://www.clebp.org/images/Changing_Bail_Laws_9-23-2018_TRS_.pdf.

⁸⁹³ *See* H.B. 3653, 101st Gen. Assemb., 2nd Sess. (IL 2021).

⁸⁹⁴ *See, e.g.*, David Arnold, Will Dobbie, and Crystal Yang, “Racial Bias in Bail Decisions,” *Quarterly Journal of Economics*, vol. 133, no. 4, May 2018, https://scholar.harvard.edu/files/cyang/files/adv_racialbias.pdf.

Specifically, the 2021 bill states:

- Detention should only be imposed when it is determined that the defendant poses a specific, real, and present threat to a person, or has a likelihood of willful flight.
- If the court decided to detain the defendant, the court must make a written finding as to why less restrictive conditions would not assure safety to the community and the defendant's appearance in court.
- At each hearing, the judge must find that the continued detention or conditions imposed are necessary to avoid a specific, real, and present threat to any person or willful flight from prosecution.⁸⁹⁵

The 2021 bill built off some of the efforts to reduce the pretrial jail population in 2017. As a component of that bill, Chief Judge Timothy Evans instructed judges in Cook County that “there shall be a presumption that any conditions of release imposed shall be non-monetary in nature...” and should utilize the least restrictive conditions to “reasonably assure” that a defendant will appear at court and ensure that the defendant does not pose a threat to the community.⁸⁹⁶ Further, the court should consider an individual’s social and economic circumstances when considering pretrial release conditions.⁸⁹⁷ In this order, Judge Evans also instructed that judges focus on detaining individuals who posed a safety risk if released and favor releasing others. The order, General Order (G.O.) 18.8A, went into effect on September 18, 2017.⁸⁹⁸

Since the release of Evans’ General Order in 2017, courts have shifted the types of bonds assigned to felony defendants.⁸⁹⁹ In Illinois, there are several types of bonds that judges can impose: individual recognizance bonds (I-bonds) where defendants are released with the promise to return to court and comply with all bail conditions; deposit bonds (D-bonds) where defendants must pay 10 percent of the bail amount; cash bonds (C-bonds) where defendants must pay the full value of the bail; and no bail where defendants are denied bail and order to remain in jail.⁹⁰⁰ In addition to bonds, judges may also impose court-ordered electronic monitoring (EM) that is supervised by the Sheriff’s department.⁹⁰¹ Court data show that comparing 15 months pre- and post-order there was a substantial increase in the number of I-bonds and a decrease in the use of both D- and C-bonds (see Chart 9 below).⁹⁰² Thus, showing a reduction on the reliance of both D- and C-bonds (i.e., cash bonds) for felony defendants.

⁸⁹⁵ Bail Reform Act, S.B. 2034, 100th Gen. Assemb., 1st Sess. (IL 2017).

⁸⁹⁶ Gen. Ord. Cook Cty. Cir. Ct. 18.8A (eff. Sept. 18, 2017)

⁸⁹⁷ *Ibid.*

⁸⁹⁸ *Ibid.*

⁸⁹⁹ See Office of the Chief Justice, *Bail Reform in Cook County: An Examination of General Order 18.8A and Bail in Felony Cases*, Circuit Court of Cook County, State of Illinois, May 2019, <http://www.cookcountycourt.org/Portals/0/Statistics/Bail%20Reform/Bail%20Reform%20Report%20FINAL%20-%20Published%2005.9.19.pdf>.

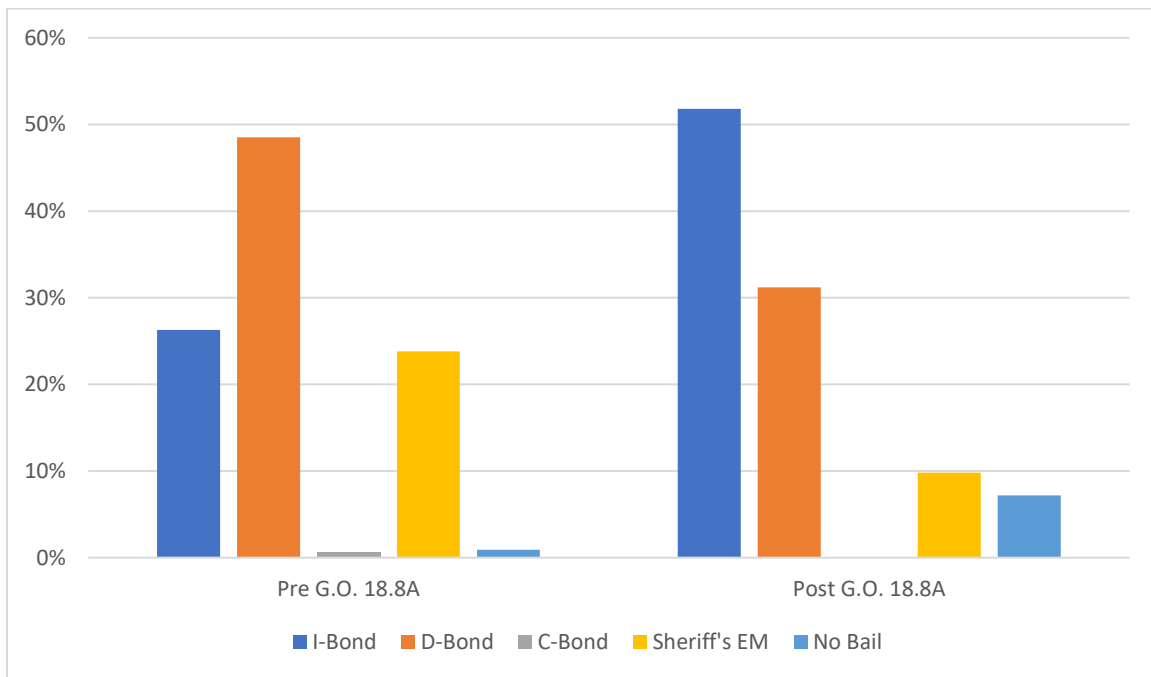
⁹⁰⁰ *Ibid.*

⁹⁰¹ *Ibid.*

⁹⁰² See *supra* note 900.

By January 2019, judges had nearly doubled the use I-bonds, increasing from 26.3 percent to 51.8 percent. The cases in which Sheriff’s EM was imposed also decreased 14 percentage points (from 23.8 to 9.8 percent); however, no-bail orders increased eight-fold from 0.9 percent to 7.2 percent.⁹⁰³ While the rate of increase in I-bonds was apparent across all racial and ethnic groups, the largest increase was for Black defendants (117.3 percent), followed by defendants classified as “Other”⁹⁰⁴ (111.2 percent), Latinx defendants (80.2 percent), and White defendants (51.8 percent).⁹⁰⁵

Chart 9: Initial Felony Bail Orders: Pre- vs. Post-Implementation of General Order 18.8A



Source: Office of the Chief Justice, *Bail Reform in Cook County: An Examination of General Order 18.8A and Bail in Felony Cases*, Circuit Court of Cook County, State of Illinois, May 2019.

⁹⁰³ See Office of the Chief Justice, *Bail Reform in Cook County: An Examination of General Order 18.8A and Bail in Felony Cases*, Circuit Court of Cook County, State of Illinois, May 2019, at 11, <http://www.cookcountycourt.org/Portals/0/Statistics/Bail%20Reform/Bail%20Reform%20Report%20FINAL%20-%20Published%2005.9.19.pdf>.

⁹⁰⁴ Note: The report’s dataset records racial and ethnic data separately. For race, defendants may report: Black, White, Asian, Pacific Islander, or Alaskan Native. For ethnicity: they may report that they are Latino or non-Latino. The report combines the low frequency race categories of Asian (n=336), Pacific Islander (n=93), Alaskan Native (n=30) into “Other.” Defendants whose race information was missing (n=600) were also categorized as Other. A combined Race and Ethnicity variable was created to indicate whether defendants were White and not Latino (White, Non-Latino), White of Latino ethnicity (White, Latino), Black, or Other Race. Black-Latino (n=365) and Black, non-Latino (n=39,912) are combined into a single category. White, non-Latino defendants reported race as white and ethnicity as not Hispanic or Latino. White, Latino defendants reported race as white and ethnicity as Hispanic or Latino. *Ibid.*, p. 6.

⁹⁰⁵ *Ibid.*, p. 12.

Similarly, the likelihood of an individual being released pretrial increased across all racial and ethnic groups post-implementation of General Order (G.O.) 18.8A.⁹⁰⁶ For example, prior to the order, Latinx defendants were released at a rate of 77.9 percent, which increased to 84.6 percent after implementation.⁹⁰⁷ The racial grouping of defendants categorized as “Other” had the highest increase of pretrial release at 12 percentage points, followed by Black defendants at 10 percentage points, followed by Latinx defendants at 6.7 percentage points, and White defendants at 6.3 percentage points.⁹⁰⁸

Moreover, despite the increase in the use of I-bonds and defendants being released pretrial, more than 99 percent of released defendants did not commit a new violent offense during their pretrial period; and court appearance rates marginally increased for all defendants out on pretrial release.⁹⁰⁹ Further, during the post-G.O. period of January to June 2018, violent crimes reported in Chicago decreased by almost 8 percent compared to the same period in 2017.⁹¹⁰

Data further show that the amount of money that people were required to pay to secure release also decreased. The average bond amount post-implementation was \$1000, which was one-fifth of the bond amount prior to the order.⁹¹¹ As a result of these changes, the number of individuals in the Cook County jail decreased from 7,443 to 5,799 between September 2017 and December 2018 which represents more than a 57 percent decrease from 2014, in which the confined jail population was 10,064 individuals.⁹¹²

While critics of pretrial release reforms raise concerns that defendants are less likely to appear in court, this does not appear to be the case among all groups of defendants when comparing hearings pre- and post-implementation of the General Order (see table below). Court appearances increased for male defendants, Black and Latinx defendants, and defendants over the age of 26, with the largest increase being for defendants aged 26-35 (+1.6).⁹¹³ However, court appearance decreased among some groups after the General Order implementation, such as women and White

⁹⁰⁶ Ibid., p. 25.

⁹⁰⁷ Ibid.

⁹⁰⁸ Ibid., see Table 4B.

⁹⁰⁹ Ibid., pp. 32, 36.

⁹¹⁰ See FBI, 2018 Crime in the United States, January to June 2017-2018, <https://ucr.fbi.gov/crime-in-the-u.s/2018/preliminary-report/tables/table-4/state-cuts/table-4-illinois-through-missouri.xls>.

⁹¹¹ Office of the Chief Justice, *Bail Reform in Cook County: An Examination of General Order 18.8A and Bail in Felony Cases*, Circuit Court of Cook County, State of Illinois, May 2019, at 2.

It should be noted, however, that despite this decrease in bail amount, data show that paying a bond of \$1000 can still be unattainable for many defendants. See, e.g., Coalition to End Money Bond, “Shifting Sands: An Investigation Into the First Year of Bond Reform in Cook County,” Sept. 18, 2018, <https://chicagobond.org/wp-content/uploads/2018/10/shiftingsands.pdf>.

⁹¹² Office of the Chief Justice, *Bail Reform in Cook County: An Examination of General Order 18.8A and Bail in Felony Cases*, Circuit Court of Cook County, State of Illinois, May 2019, at 1.

⁹¹³ Office of the Chief Justice, *Bail Reform in Cook County: An Examination of General Order 18.8A and Bail in Felony Cases*, Circuit Court of Cook County, State of Illinois, May 2019.

defendants. The largest decreases were among defendants who were 25 years or younger (-2.5) and defendants in the racial/ethnic category of “Other” (-1.8).⁹¹⁴

The table below also shows that demographic characteristics have remained generally consistent pre- and post- General Order with male defendants appearing at bail hearings accounted for almost 90 percent, Black individuals consisted about 70 percent, and about 60 percent were under the age of 35.⁹¹⁵

⁹¹⁴ Office of the Chief Justice, *Bail Reform in Cook County: An Examination of General Order 18.8A and Bail in Felony Cases*, Circuit Court of Cook County, State of Illinois, May 2019.

⁹¹⁵ Office of the Chief Justice, *Bail Reform in Cook County: An Examination of General Order 18.8A and Bail in Felony Cases*, Circuit Court of Cook County, State of Illinois, May 2019, at 8.

Table 4: Initial Felony Bail Hearing Cases by Defendant Demographics: Pre- vs. Post-Implementation of G.O. 18.8A

Defendant Demographics		Pre G.O. 18.8A		Post G.O. 18.8A	
		Felony Defendants	Percent	Felony Defendants	Percent
Gender	Male	25,013	87.6%	26,894	88.4%
	Female	3,534	12.4%	3,538	11.6%
	Total	28,547	100.0%	30,432	100.0%
Race/Ethnicity	Black	19,264	67.5%	21,013	69.0%
	Latinx	4,561	16.0%	5,041	16.6%
	White	3,952	13.8%	4,089	13.4%
	Other ¹	770	2.7%	289	0.9%
	Total	28,547	100.0%	30,432	100.0%
Age Category	25 or younger	9,633	33.7%	9,503	31.2%
	26-35	8,207	28.7%	9,235	30.3%
	36-45	4,908	17.2%	5,279	17.3%
	46+	5,799	20.3%	6,415	21.1%
	Total	28,547	100.0%	30,432	100.0%

¹ Other race/ethnicity includes Asian (n=336), Pacific Islander (n=93), Alaskan Native (n=30), and missing race (n=600)

Source: Office of the Chief Justice, *Bail Reform in Cook County: An Examination of General Order 18.8A and Bail in Felony Cases*, Circuit Court of Cook County, State of Illinois, May 2019.

Further, court data show that 8 of 10 felony defendants who appeared in court and were released during the pretrial period did not commit any new criminal activity during this time.⁹¹⁶ Similarly, even for felony defendants who were flagged with a possible violence risk factor under the PSA

⁹¹⁶ Ibid., p. 32

but secured pretrial release, less than 1 percent of these individuals committed a new violent offense while on pretrial release.⁹¹⁷

Jail demographic data show that the composition of the total jail population has remained relatively consistent over the past several years, despite the declining numbers. In 2018, approximately 23,000 individuals were in local jails, and pretrial practices across the state largely contributed to this increasing number.⁹¹⁸ Of the total incarcerated population (which includes both prisons and jails) Black and Native American defendants are overrepresented and White defendants are underrepresented.⁹¹⁹ According to the Vera Institute, Black people were incarcerated in jails at 6.9 times the rate of White people, and Native American people were incarcerated at 2.2 times the rate of White people.⁹²⁰

Isolating Cook County, which is the most populous county in Illinois, shows similar trends (see Chart 10 below). As of October 1, 2020, the jail population decreased to 5,314 confined individuals or by 26.4 percent from October 1, 2017.⁹²¹ Specifically regarding the pretrial population, as of September 30, 2019 (latest data available), 5,426 individuals were detained pretrial, constituting the vast majority of the confined jail population at that time (5,907).⁹²² From July to September 2019, for defendants released pretrial, about half (51.6 percent) received an I-bond. Of the defendants released pretrial between October 1, 2017 and September 30, 2019, 83 percent successfully appeared at their court dates, and 82.2 percent were not charged with a new offense during the pretrial period.⁹²³

⁹¹⁷ Ibid., p. 35.

⁹¹⁸ Alexi Jones, “Illinois Profile,” Prison Policy Initiative, 2018, <https://www.prisonpolicy.org/profiles/IL.html>.

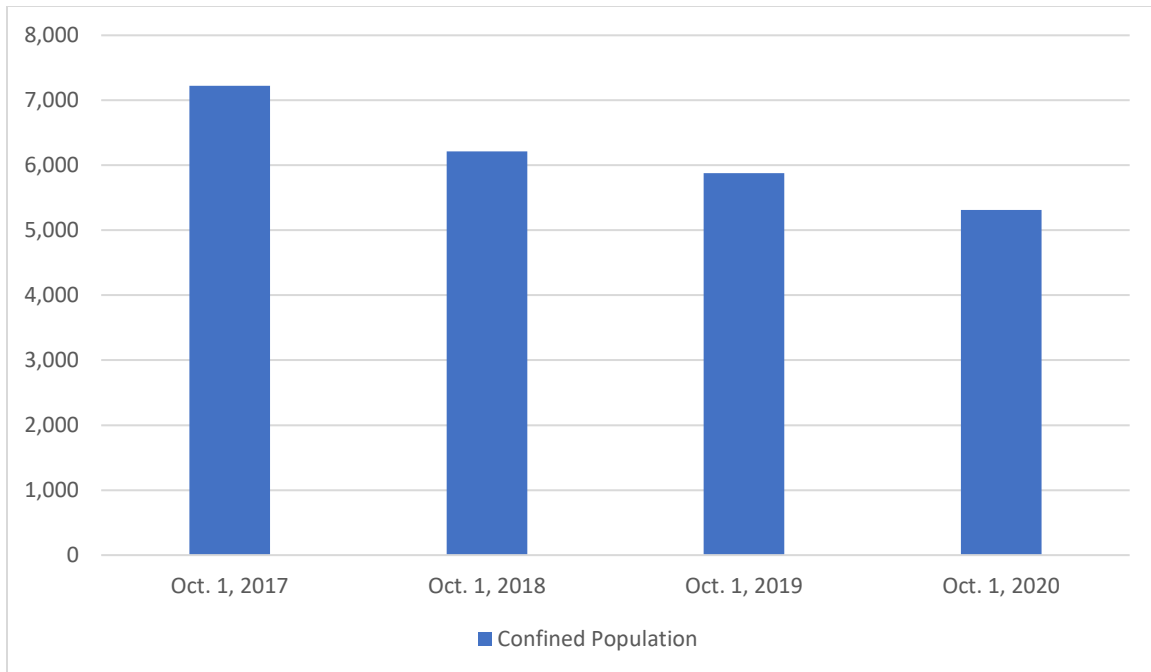
⁹¹⁹ Ibid.

⁹²⁰ Vera Institute of Justice, “Incarceration Trends in Illinois,” <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-illinois.pdf>.

⁹²¹ Cook County, Sheriff’s Office Data, <https://www.cookcountysheriff.org/data/2020/10/>.

⁹²² State of Illinois, Circuit Court of Cook County, Model Bond Court Initiative, 2019 Q3 Model Bond Court Dashboard, <http://www.cookcountycourt.org/Portals/0/Chief%20Judge/Model%20Bond%20Court/Q3%202019/2019%20Q3%20MBC%20Public%20Facing%20Dashboard%2011.15.19.pdf>; Cook County, Sheriff’s Office Data, https://www.cookcountysheriff.org/wp-content/uploads/2019/09/CCSO_BIU_CommunicationsCCDOC_v1_2019_09_30.pdf

⁹²³ Ibid.

Chart 10: Jail Population, Cook County (Oct. 1 2017-2020)

Source: Cook County, Sheriff's Office Data; chart created by Commission staff

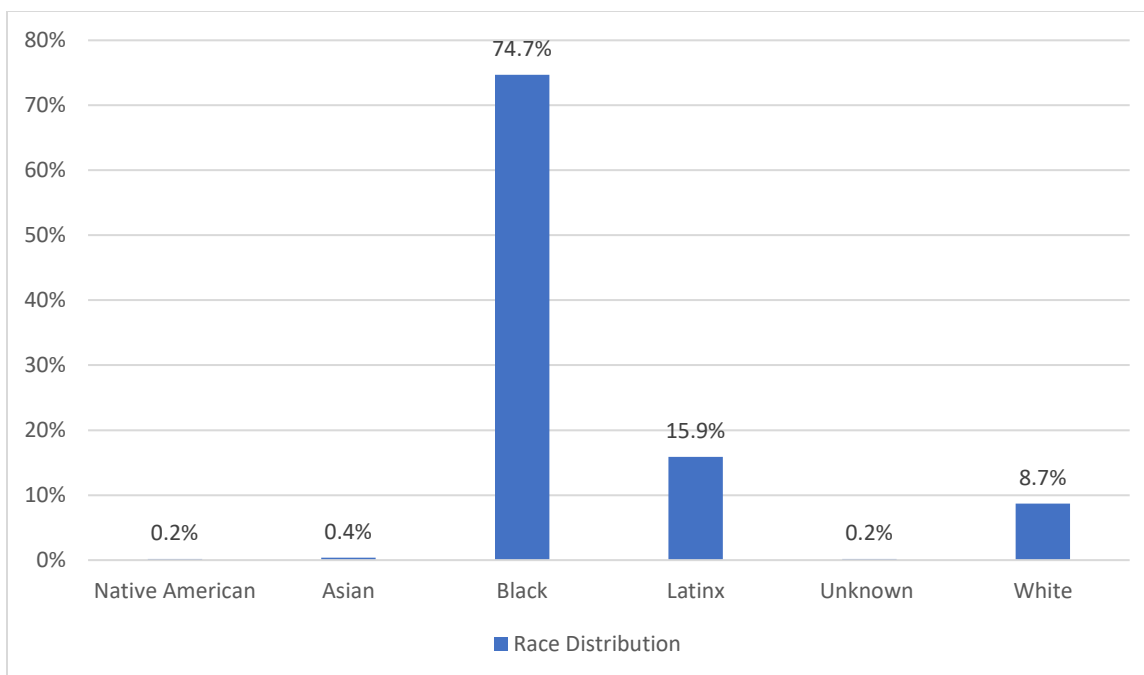
While the overall jail population has been declining, as of October 2020, Black individuals are still overrepresented with 74.7 percent of the confined population in the Cook County Jail⁹²⁴ despite making up 23.8 percent of county residents and 14.6 percent of state residents (see Chart 11).⁹²⁵ Black residents of the county are also more likely to remain detained pretrial due to the inability to post bail and be held without bond.⁹²⁶ Moreover, the percentage of Black and Latinx individuals detained pretrial on money bonds has not changed since the implementation of General Order 18.8A.⁹²⁷

⁹²⁴ Cook County Sheriff's Office, https://www.cookcountysheriff.org/wp-content/uploads/2020/10/CCSO_BIU_CommunicationsCCDOC_v1_2020_10_01.pdf

⁹²⁵ U.S. Census Bureau, Cook County, Illinois, Population Estimates as of July 1, 2019, <https://www.census.gov/quickfacts/fact/table/cookcountyillinois/PST120219>; U.S. Census Bureau, Illinois, Population Estimates as of July 1, 2019, <https://www.census.gov/quickfacts/IL>.

⁹²⁶ Coalition to End Money Bond, "Shifting Sands," Sept. 18, 2018, <https://chicagobond.org/wp-content/uploads/2018/10/shiftingsands.pdf>.

⁹²⁷ Ibid., p. 9.

Chart 11: Cook County Jail Population by Race/Ethnicity, Oct. 2020

Source: Cook County Sheriff Data; chart created by Commission staff

While the General Order was intended to ensure that monetary bonds, when imposed, were affordable by defendants, the Chicago Community Bond Fund (CCBF) asserts that it has not had the desired effect.⁹²⁸ From June 2017 to July 2018, 1,606 individuals have contacted CCBF to request the organization's aid in paying a monetary bond.⁹²⁹ The organization states that since the Order was implemented, the rate of requests is approximately the same as before the Order took effect.⁹³⁰ Moreover, 55 percent of people that contacted CCBF (877 people) were incarcerated solely due to their inability to post bond after the implementation of Order 18.8A.⁹³¹ The organization notes that it has witnessed a general decrease in the amount of bond imposed; however, the average amount requested post-implementation is still over \$80,000 which requires that a defendant pay \$8000 to secure release.⁹³²

⁹²⁸ Ibid.

⁹²⁹ Ibid., p. 12.

⁹³⁰ Ibid.

⁹³¹ Ibid.

⁹³² Ibid., p. 13.

While there are many health and well-being concerns regarding the incarcerated population,⁹³³ the need to reduce the overall jail population became a public health necessity in 2020 due to the coronavirus pandemic.⁹³⁴ In April 2020, the Cook County Jail was the nation's largest-known source of COVID-19 infections.⁹³⁵ Similar to other counties around the nation, the county's jail has struggled to implement adequate public health and safety measures for inmates and jail staffers.⁹³⁶ These health concerns have led to the release of thousands of inmates across the country, many of whom were pretrial detainees.⁹³⁷ In March 2020, a Cook County Judge Leroy Martin ordered the expedited release of specific inmates, which include individuals detained on unaffordable cash bonds, individuals who are medically vulnerable, individuals incarcerated on a probation or parole violation, and individuals charged with low-level felonies.⁹³⁸

Cook County Sheriff Tom Dart explained that while the jail has been able to release several hundred inmates who were detainees or convicted of nonviolent crimes, about 86 percent of the remaining inmates are being held on charges related to violent crimes and are more risky to release.⁹³⁹ Therefore, Dart has attempted to implement health protocols, such as overriding the prohibition on hand sanitizer (due to its high alcohol content) and ensured that inmates have sufficient access to soap and bleach for cleaning.⁹⁴⁰ But community advocates, inmates, and

⁹³³ See, e.g., U.S. Commission on Civil Rights, *Women in Prison: Seeking Justice Behind Bars*, Executive Summary at 3, Feb. 2020; Emily Leslie and Nolan Pope, "The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments," *Journal of Law and Economics*, vol. 60, (Aug. 2017), http://econweb.umd.edu/~poppe/pretrial_paper.pdf; Paul Heaton, Sandra Mayson, and Megan Stevenson, "The Downstream consequences of Misdemeanor Pretrial Detention," *Stanford Law Review*, vol. 69, Mar. 2017; Jennifer Gonnerman, "Before the Law," *The New Yorker*, Sept. 29, 2014, <https://www.newyorker.com/magazine/2014/10/06/before-the-law>.

⁹³⁴ See, e.g., Timothy Williams, Libby Seline, and Rebecca Griesbach, "Coronavirus Cases Rise Sharply in Prisons Even as They Plateau Nationwide," *New York Times*, June 30, 2020, <https://www.nytimes.com/2020/06/16/us/coronavirus-inmates-prisons-jails.html>.

⁹³⁵ Timothy Williams and Danielle Ivory, "Chicago's Jail Is Top U.S. Hot Spot as Virus Spreads Behind Bars," Apr. 23, 2020, <https://www.nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html>.

⁹³⁶ Timothy Williams and Danielle Ivory, "Chicago's Jail Is Top U.S. Hot Spot as Virus Spreads Behind Bars," Apr. 23, 2020, <https://www.nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html>; see also, Yousur Al-Hlou, Kassie Bracken, Leslye Davis, and Emily Rhyne, "How Coronavirus at Rikers Puts All of N.Y.C. at Risk," *New York Times*, Apr. 8, 2020, <https://www.nytimes.com/video/us/100000007059873/coronavirus-rikers-island.html>; Kelsey Kauffman, "Why Jails Are Key to 'Flattening the Curve' of Coronavirus," *The Appeal*, Mar. 13, 2020, https://theappeal.org/jails-coronavirus-covid-19-pandemic-flattening-curve/?fbclid=IwAR1K9cf0ardpNwIfxtzjLlegqusQ4l_ZpY1MEuagMfcngsttzMi5aG1KnCQ; Emily Widra, "What do we know about the spread – and toll – of the coronavirus in state prisons?" *Prison Policy Initiative*, June 24, 2020, <https://www.prisonpolicy.org/blog/2020/06/24/covidrates/>.

⁹³⁷ See, e.g., Prison Policy Initiative, "Responses to the COVID-19 pandemic," Nov. 18, 2020, <https://www.prisonpolicy.org/virus/virusresponse.html>.

⁹³⁸ See Adam Sheppard, "The Pandemic's Effect on Criminal Law," Sept. 2020, <https://www.thesheppardlawfirm.com/wp-content/uploads/sites/1401222/2020/09/PandemicsEffectOnCriminalLaw.pdf>; Complaint at 27, *Money v. Pritzker*, 453 F. Supp. 3d 1103 (N.D. Ill. 2020)(No. 1:20-cv-02093).

⁹³⁹ Timothy Williams and Danielle Ivory, "Chicago's Jail Is Top U.S. Hot Spot as Virus Spreads Behind Bars," Apr. 23, 2020, <https://www.nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html>.

⁹⁴⁰ Timothy Williams and Danielle Ivory, "Chicago's Jail Is Top U.S. Hot Spot as Virus Spreads Behind Bars," Apr. 23, 2020, <https://www.nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html>.

inmates' family members remain concerned about the health of the confined population, especially for older inmates and those who have chronic health conditions that puts them at higher risk to the coronavirus.⁹⁴¹ In response, community advocates, civil rights attorneys, and current inmates have filed a federal lawsuit seeking early release of those inmates most vulnerable to the pandemic.⁹⁴² The lawsuit claims that the state of Illinois was negligent in not adhering to strict COVID-19 safety measures for vulnerable inmates, specifically pointing to the conditions within the jail and the potential for exposure and spread among inmates, officers, and staff.⁹⁴³ The plaintiffs in the case also allege that Governor Pritzker violated the inmates due process rights by not providing a substantive process to evaluate eligible individuals (i.e., those who posed no safety risk to the public) for release in order to reduce the health risks related to COVID-19.⁹⁴⁴

The overall reduction of the jail population has economically benefited the county as well. The estimated cost to house an inmate in the Cook County Jail is an estimated \$142 a day; thus a 42 percent reduction of the jail population has saved taxpayers millions of dollars.⁹⁴⁵ In the Chief Justice's report, he notes that these savings "could create a substantial pool of money for justice reinvestment to address the unmet needs in the community for the criminal justice population, including assistance with employment, housing, substance use treatment, and mental health services."⁹⁴⁶ As such, this reinvestment in services and programs can help reduce barriers and break the cycle of criminal justice involvement.⁹⁴⁷ Senator Peters in his interview spoke to the need for his state to divest from "systems of incarceration" that include reforming the pretrial and bail system as well as rolling back the militarization of police forces and the oversurveillance of communities of color in the state.⁹⁴⁸ The Senator instead suggests a reinvestment in "systems of care," especially as "we head to this post-COVID world" which includes additional funding for mental health and treatment centers.⁹⁴⁹

Texas

In contrast with reform efforts in the other three jurisdictions examined, bail reform in Texas has proceeded primarily through litigation.⁹⁵⁰ Texas Supreme Court Chief Justice Nathan Hecht called for legislators to pass bipartisan bail reform measures across the state, stating that "it is time – it's

⁹⁴¹ *Ibid.*

⁹⁴² *Money v. Pritzker*, 453 F. Supp. 3d 1103 (N.D. Ill. 2020)(No. 1:20-cv-02093), <https://www.uplcchicago.org/what-we-do/prison/richard-amended-complaint.html>.

⁹⁴³ *Id.*

⁹⁴⁴ Complaint at 44, *Money v. Pritzker*, 453 F. Supp. 3d 1103 (N.D. Ill. 2020)(No. 1:20-cv-02093).

⁹⁴⁵ Office of the Chief Justice, *Bail Reform in Cook County: An Examination of General Order 18.8A and Bail in Felony Cases*, Circuit Court of Cook County, State of Illinois, May 2019, at 2.

⁹⁴⁶ *Ibid.*

⁹⁴⁷ *Ibid.*

⁹⁴⁸ Robert Peters, Illinois State Senator, Interview Transcript at 12:47, 29:56-30:36 [on file].

⁹⁴⁹ *Ibid.*, 30:12-30:20 [on file].

⁹⁵⁰ *See, e.g.*, Texas Supreme Court Chief Justice Judge Nathan Hecht, Interview Transcript at 7:12-14:35 [on file].

actually past time – to ensure that defendants who pose no risk to the public are not jailed, and that those who do are.”⁹⁵¹

Texas also has additional struggles when it comes to bail reform due to the size of its criminal justice system. In 2018, Texas had an incarceration rate of 891 per 100,000 people (which includes prison and jail populations, juvenile justice facilities, and immigration detention).⁹⁵² This incarceration rate is higher than many Western democracies;⁹⁵³ and the growth of the pretrial detention has been a large contributing factor.⁹⁵⁴ Since 1970, the total jail population in Texas increased 509 percent; and like other jurisdictions, one of the main causes is due to the increased number of pretrial detainees.⁹⁵⁵ In 1994, Texas’ pretrial detainees constituted about 33 percent of the overall jail population – better than the national average; but, by 2016, pretrial detainees made up close to 74 percent of the jail population.⁹⁵⁶ Over the similar time period, the frequency of the financial bonds being imposed with supervision conditions increased sharply, rising from less than three percent (243 cases in 1994) to over 60 percent (5,112 cases in 2004).⁹⁵⁷ Of those individuals who were released on financial conditions and also required supervision by Pretrial Services, the largest increase occurred for those accused of misdemeanors with an increase of more than 30,000 percent.⁹⁵⁸

In May of 2016, Civil Rights Corps filed *O’Donnell v. Harris County*, challenging the bail system in Harris County as being unconstitutional due to the county failing to make an inquiry into the plaintiff’s ability to pay.⁹⁵⁹ Maranda O’Donnell, the lead plaintiff in the case stated:

I, Maranda Lynn O’Donnell, am a 22-year-old woman. I was arrested yesterday for a misdemeanor offense... I was never asked if I could afford my bail. I have one 4-year-old daughter... I live paycheck to paycheck[.] I’m worried about whether my job will still be there when I get out. I cannot afford to buy my release from jail.⁹⁶⁰

⁹⁵¹ Emma Platoff and Jolie McCullough, “Texas Supreme Court Chief Justice Nathan Hecht calls for nonpartisan judicial elections, bail reform,” *Texas Tribune*, Feb. 6, 2019, <https://www.texastribune.org/2019/02/06/texas-supreme-court-judicial-elections-bail-reform-nathan-hecht/>.

⁹⁵² Prison Policy Initiative, Texas profile, <https://www.prisonpolicy.org/profiles/TX.html>.

⁹⁵³ Ibid.

⁹⁵⁴ Ibid.

⁹⁵⁵ Vera Institute, “Incarceration Trends in Texas,” <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-texas.pdf>.

⁹⁵⁶ Marc Levin and Michael Haugen, “Open Roads and Overflowing Jails: Addressing High Rates of Rural Pretrial Incarceration,” Right on Crime and Texas Public Policy Foundation, May 2018, at 9.

⁹⁵⁷ Justice Policy Institute, “For Better or For Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice,” Sept. 2012, http://www.justicepolicy.org/uploads/justicepolicy/documents/for_better_or_for_profit.pdf.

⁹⁵⁸ Ibid.

⁹⁵⁹ *O’Donnell v. Harris Cty.*, Case No. 4:16-cv-1414, (S.D. Texas, 2016), <https://www.clearinghouse.net/chDocs/public/CJ-TX-0010-0002.pdf>.

⁹⁶⁰ See Memorandum and Opinion Approving the Proposed Consent Decree and Settlement Agreement and Granting the Motion to Authorize Compensation of Class Counsel, *O’Donnell v. Harris Cty.*, No. 16-cv-01414, (S.D. Tex. 2019).

The complaint noted that on a typical night, 500 people arrested for misdemeanors were detained in the Harris County Jail.⁹⁶¹ The complaint highlighted that between 2009 and 2015, fifty-five people who could not afford bail, died in Harris County Jail while awaiting trial.⁹⁶² As other studies have shown, being detained pretrial can have serious consequences. For instance, a 2017 study of almost 381,000 misdemeanor cases in Harris County found that defendants who were detained pretrial were 25 percent more likely to plead guilty compared to similarly situated defendants who were able to secure release.⁹⁶³ The study also found that those who were detained pretrial were also 25 percent more likely to be convicted than similarly situated defendants who were able to afford bail and were released, and 43 percent more likely to be sentenced with twice as long average sentences.⁹⁶⁴

In the *O'Donnell* case, the court credited a 2011 study, a Federal District Court found that Harris County's misdemeanor pretrial practices exacerbated racial disparities within the jail population. The study found that 45 percent of Black misdemeanor defendants were able to secure pretrial release, compared to 52 percent of Latinx defendants, and 70 percent of white defendants.⁹⁶⁵ This led the District Court to conclude that: "Harris County's [bail] policy and practice violates the Equal Protection and Due Process Clauses to the United States Constitution."⁹⁶⁶ The *O'Donnell* class action lawsuit challenged the constitutionality of Harris County's bail practices for misdemeanor offenses, and resulted in a consent decree that included amending the county's bail policies (Local Rule 9)⁹⁶⁷ that established several changes.⁹⁶⁸ Some of these changes included:

⁹⁶¹ Class Action Complaint at 2, *O'Donnell v. Harris Cty.*, 4:16-cv-01414 (S.D. Tex. 2016).

⁹⁶² Brandon Garrett and Sandra Guerra Thompson, *Monitoring Pretrial Reforms in Harris County: First Sixth Month Report of the Court-Appointed Monitor*, Sept. 3, 2020, <https://www.courtlistener.com/recap/gov.uscourts.txsd.1360805/gov.uscourts.txsd.1360805.722.1.pdf>.

⁹⁶³ *Ibid.*

⁹⁶⁴ Paul Heaton, Sandra Mayson, and Megan Stevenson, "The Downstream Consequences of Misdemeanor Pretrial Detention," 69 *Stan. L. Rev.* 711, 736 (2017). The researchers define pretrial detainees as any individual who was unable to post bond within the first seven days following the bail hearing. *Ibid.*

⁹⁶⁵ See *O'Donnell v. Harris Cty.*, 251 F. Supp. 3d 1052.

⁹⁶⁶ Memorandum and Order Certifying Class, *O'Donnell v. Harris Cty.*, 251 F.Supp.3d 1052, 1059 (S.D. Tex. 2017).

⁹⁶⁷ Harris County's Local Rule 9 provides that "[a]ll misdemeanor arrestees must be released on a personal bond or on non-financial conditions as soon as practicable after arrest, except," individuals arrested:

and charged with domestic violence, violating a protective order in a domestic violence case, or making a terroristic threat against a family or household member;
and charged with assault;
and charged with a second or subsequent driving-under-the-influence offense;
and charged with a new offense while on pretrial release;
on a warrant issued after a bond revocation or bond forfeiture;
or individuals arrested while on any type of community supervision for a Class A or B misdemeanor or a felony."

Ibid., p. 10 (citing sections of the Texas Penal Code), <https://www.txs.uscourts.gov/sites/txs/files/16-1414%2C%20final%20approval%20order%20%28Docketed%29.pdf>; see also, Harris County Criminal Courts at Law, Rules of Court, Apr. 22, 2020, at 17-23, <http://www.ccl.hctx.net/attorneys/rules/Rules.pdf>.

⁹⁶⁸ Harris County Criminal Courts at Law, Rules of Court, Apr. 22, 2020, at 17, <http://www.ccl.hctx.net/attorneys/rules/Rules.pdf>.

establishing a right to counsel at bail hearings, eliminating the use of a secured money bail schedule, promoting pretrial release through other programs intended to increase court appearance (such as court date reminders and consideration of mitigating causes of failures to appear), data collection, and continued training.⁹⁶⁹ The amended rule took effect on February 16, 2019.⁹⁷⁰

Another study showed that in Harris County, more than 50 percent of individuals accused of misdemeanors from 2008 to 2013 were detained pretrial; and those detained had an average bail amount of \$2,786.⁹⁷¹ Despite Harris County's changes to its bail system, Chief Judge for the Southern District of Texas Lee Rosenthal stated that reform measures were not enough and ordered that defendants be released on personal recognizance after 24 hours if they could not post bail. In her opinion, Rosenthal maintained that "money-based pretrial systems exacerbate the racial disparities in pretrial detention and posttrial outcomes."⁹⁷²

In an interview with Commission staff, Sheriff of Harris County Ed Gonzalez stated that he believed the county's bail system was "unconstitutional" and "antiquated" and wants a system that "moves towards a more intentional-based system of corrections. One that looks at other factors other than just money."⁹⁷³ Gonzalez maintained that a cash-based system does not consider the risk or dangerousness a defendant poses to the public:

We have approximately a thousand people with a bond that's \$10,000 or less. That bond amount has already agreed upon by [] the different parties, the partners, and if that person had approximately \$100 they would probably be out [] and so the fact that risk isn't a factor there and if they had the \$1,000 they would be out.⁹⁷⁴

After three years of litigation, the *O'Donnell* case reached a settlement, which consisted of the above changes to the county's bail system and a consent decree approved on November 21, 2019,⁹⁷⁵ marking a significant step in bail reform in Texas.⁹⁷⁶ Six months into the consent decree, independent reform monitors have found that "many more people are released promptly, cash bonds amounts are vastly reduced except in cases where they will be public safety concerns ...

⁹⁶⁹ See Consent decree, *O'Donnell v. Harris Cty.*, Case No. 16-cv-01414, 2019, at 16-51. (S.D. Tex. 2016).

⁹⁷⁰ Memorandum and Opinion, *O'Donnell v. Harris County, Texas*, No. 16-cv-01414, at 6-7 (S.D. Tex. 2019).

⁹⁷¹ Paul Heaton, Sandra Mayson, and Megan Stevenson, "The Downstream Consequences of Misdemeanor Pretrial Detention," 69 *Stan. L. Rev.* 711. 716 (2017).

⁹⁷² Memorandum and Opinion Setting Out Findings of Fact and Conclusions of Law, *O'Donnell v. Harris Cty.*, Civil Action No. H-16-1414, at 114 (S.D. Tex. 2017) https://www.govinfo.gov/content/pkg/USCOURTS-txsd-4_16-cv-01414/pdf/USCOURTS-txsd-4_16-cv-01414-5.pdf.

⁹⁷³ Ed Gonzalez, Sheriff for Harris County, Interview Transcript (11/5/2020) at 8:11-53 [on file].

⁹⁷⁴ Ed Gonzalez, Sheriff for Harris County, Interview Transcript (11/5/2020) at 9:25-10:36 [on file].

⁹⁷⁵ See Consent decree, *O'Donnell v. Harris Cty.*, Case No. 16-cv-01414, 2019, at 16-51. (S.D. Tex. 2016).

⁹⁷⁶ Civil Rights Corps, "Harris County, TX: Bail," <https://www.civilrightscorps.org/work/wealth-based-detention/harris-county-tx-bail>.

[and] there has been no change in reoffending. This misdemeanor bail reform is working as intended, and there are real results.”⁹⁷⁷

In the first report tracking Harris County’s reform efforts, released in partnership with Duke University, the University of Houston, and Texas A&M University, researchers found that in 270 cases (out of the 579 cases reviewed) judges granted defendants personal or general bonds⁹⁷⁸ for pretrial release.⁹⁷⁹ Therefore, in approximately 47 percent of the cases, the defendant spent some time detained in jail, but at the bail hearing, judges granted a personal bond.⁹⁸⁰

⁹⁷⁷ Jolie McCullough, “Report: Harris County’s bail reforms let more people out of jail before trial without raising risk of reoffending,” *Texas Tribune*, Sept. 3, 2020, https://www.texastribune.org/2020/09/03/harris-county-bail-reform/?utm_source=National+Conference+of+State+Legislatures&utm_campaign=ef6a73ae2e-First+Appearance+Oct+8&utm_medium=email&utm_term=0_1716623089-ef6a73ae2e-377843392.

⁹⁷⁸ A personal bond is a personal recognizance bond that allows a defendant to be released from jail without paying any money to secure release and a defendant promises that they will return for their court date. A general order bond is an order that has been signed by a judge that states that a defendant does not have to pay money to secure pretrial release for particular offenses. See Harris County Sheriff’s Office, “Inmate Bonding Process,” https://www.harriscountysso.org/JailInfo/inmate_info_inmate_bondingprocess.aspx; Harris County District Court, General Bond Order, <https://www.justex.net/JustexDocuments/0/News%20Items/News%202020/General%20Order%20Bond%2020May2020.pdf>.

⁹⁷⁹ Brandon Garrett and Sandra Guerra Thompson, *Monitoring Pretrial Reforms in Harris County: First Sixth Month Report of the Court-Appointed Monitor*, Sept. 3, 2020, at 11, <https://sites.law.duke.edu/odonnellmonitor/wp-content/uploads/sites/26/2020/09/ODonnell-Monitor-Report-Six-Months-Final-2.pdf>. The report notes that the review of cases were limited to cases in which “a person appeared in the jail roster, as someone who was in custody, with an active misdemeanor case, in which there were no pending concurrent felony or other holds at the time of the review.” *Ibid.*

⁹⁸⁰ *Ibid.*, p. 12.

Table 5: Pretrial Conditions Hearings, March to mid-July 2020

	Cases with Personal Bond or General Order Bond	Cases with Secured Bond
Total number granted	270 cases	290 cases
Average cash amount	\$2,212	\$3,515
Median cash amount	\$1,500	\$1,500
Average District Attorney (DA) cash request	\$4,312	\$6,995
Average Public Defender (PD) cash request	\$1,123	\$1,343
Number of District Attorney (DA) request for personal bond	0 (DA opposed in 89 cases)	1 (DA opposed in 201 cases)
Number of Public Defender (PD) request for personal bond	86 (PD opposed in 1 case)	152 (PD opposed in 8 cases)

Source: Brandon Garrett and Sandra Guerra Thompson, *Monitoring Pretrial Reforms in Harris County: First Sixth Month Report of the Court-Appointed Monitor*, Sept. 3, 2020.

As the above table illustrates, the largest personal bond amount was \$30,000 and the smallest was \$20. The average bond was \$2,212 and the median amount was \$1,500.⁹⁸¹ Comparatively, in 50 percent of the cases (290 of the 579 cases), a judge set a secured bond, with an average amount of \$3,515; and charges were dismissed, or no bond was imposed in the remaining cases. The most expensive secured bond was set at \$100,000, and the smallest at \$50. In over a third of the bond cases (102), the amounts set were for \$500 or less.⁹⁸²

Trend data show that the pretrial population has consistently comprised a large percentage of the overall Harris County jail population.⁹⁸³ For example, from 2016 to 2020, pretrial detainees have represented approximately 74 to 82 percent of the total jail population in the county.⁹⁸⁴ While the number of individuals in jail have fluctuated over the past four years (from its lowest in this time frame in 2018 with 7,801 individuals to its highest in this time frame the following year with 9,127), the racial demographics have remained stable (see Chart 12 below).⁹⁸⁵

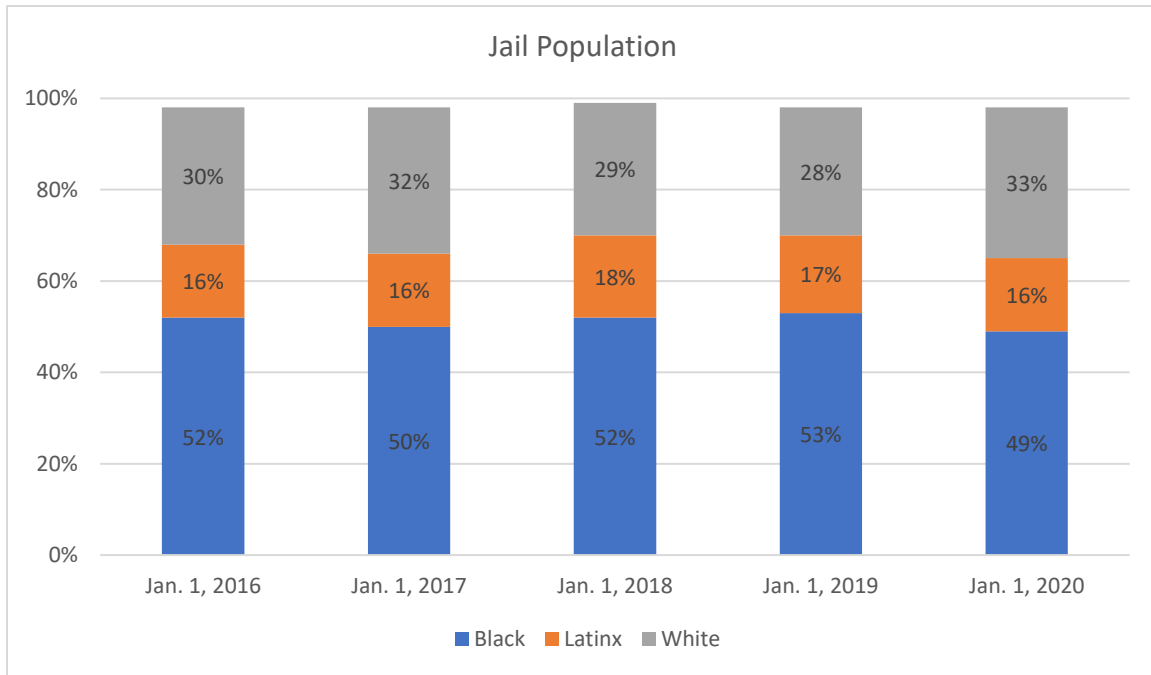
⁹⁸¹ Ibid.

⁹⁸² Ibid.

⁹⁸³ Harris County, Jail Population History, <https://charts.hctx.net/jailpop/App/JailPopHistory>.

⁹⁸⁴ Ibid.

⁹⁸⁵ Brandon Garrett and Sandra Guerra Thompson, *Monitoring Pretrial Reforms in Harris County: First Sixth Month Report of the Court-Appointed Monitor*, Sept. 3, 2020.

Chart 12: Harris County Jail Population by Race/Ethnicity (2016-2020)

Source: Harris County, Jail Population History, <https://charts.hctx.net/jailpop/App/JailPopHistory>; data compiled and chart created by Commission staff

On January 1, 2016, there were 8,234 were incarcerated; and of those, 82 percent (6,745) were pretrial. That year, Black individuals made up 52 percent of the jail population; White individuals: 30 percent; Latinx individuals: 16 percent; and “Other” individuals: approximately two percent.⁹⁸⁶ Comparatively, on January 1, 2020, 8,675 individuals remained incarcerated; of those, 80 percent were individuals who were detained pretrial. Demographic data show that Black individuals made up almost half (4,247 or 49 percent) of the inmate population, White individuals represented about a third (2,857 or 33 percent), followed by Latinx individuals (1,395 or 16 percent), and those individuals categorized as “Other” constituted the remaining 176.⁹⁸⁷

These data are significant because they show that Black residents are overrepresented in the incarcerated population, representing 20 percent of the total county’s population,⁹⁸⁸ while making up approximately 50 percent of those incarcerated.⁹⁸⁹ Conversely, White residents represent 69.6

⁹⁸⁶ Harris County, Jail Population History, <https://charts.hctx.net/jailpop/App/JailPopHistory><https://charts.hctx.net/jailpop/App/JailPopHistory><https://charts.hctx.net/jailpop/App/JailPopHistory>.

⁹⁸⁷ Ibid.

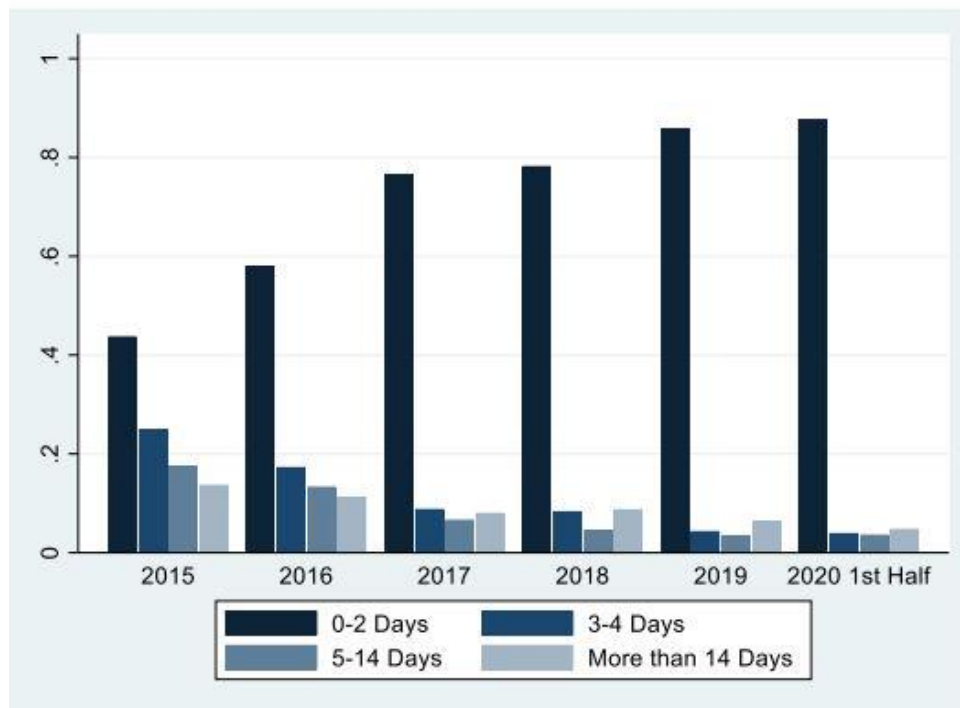
⁹⁸⁸ U.S. Census Bureau, Harris County, Texas, <https://www.census.gov/quickfacts/harriscountytexas>.

⁹⁸⁹ Harris County, Jail Population History, <https://charts.hctx.net/jailpop/App/JailPopHistory>.

percent of the county's population but make up approximately 30 percent of those incarcerated; and Latinx residents represent 43.7 percent and make up approximately 16 percent of those incarcerated.⁹⁹⁰

Regarding the length of time in pretrial detention, court monitors reported that in 2019 most misdemeanor defendants were released from jail within two days of the initial arrest, an approximate 20 percent increase from 2016.⁹⁹¹ Conversely, more than 10 percent of misdemeanor defendants were detained pretrial for more than 14 days in 2016 but decreased to six percent in 2019 (see Chart 13 below).

Chart 13: Share of Misdemeanor Cases by Duration of Pretrial Detention



Source: Brandon Garrett and Sandra Guerra Thompson, *Monitoring Pretrial Reforms in Harris County: First Sixth Month Report of the Court-Appointed Monitor*, Sept. 3, 2020, at 24.

Additionally, the researchers noted that prior to the implementation of reforms in 2019, most misdemeanor cases did not involve a judge setting a personal or general order bond. Comparatively, after implementation, more than 70 percent of the cases in 2019 and 2020 involved pretrial release with the use of a personal or general order bond.⁹⁹² Demographic data show that

⁹⁹⁰ U.S. Census Bureau, Harris County, Texas, <https://www.census.gov/quickfacts/harriscountytexas>; Harris County, Jail Population History, <https://charts.hctx.net/jailpop/App/JailPopHistory>.

⁹⁹¹ Brandon Garrett and Sandra Guerra Thompson, *Monitoring Pretrial Reforms in Harris County: First Sixth Month Report of the Court-Appointed Monitor*, Sept. 3, 2020.

⁹⁹² Brandon Garrett and Sandra Guerra Thompson, *Monitoring Pretrial Reforms in Harris County: First Sixth Month Report of the Court-Appointed Monitor*, Sept. 3, 2020, at 24.

Black and White defendants had similar levels of personal bond approval. However, the share of Black defendants who were bonded out – either cash or personal—was considerably lower than white defendants, especially in 2015 and 2016; but the disparity was nearly eliminated by the implementation of Rule 9 in February 2019.⁹⁹³

Similar to the public health emergency in the Cook County Jail population, the Harris County Jail also faces a public health crisis.⁹⁹⁴ According to COVID-19 tracking data, as of November 19, 2020, the Harris County Jail had the highest number of reported cases (3,212) among the nation’s jail population.⁹⁹⁵ As with other local sheriffs, Harris County Sheriff Ed Gonzalez explained that he has been working on ways to reduce the jail population by releasing more vulnerable and nonviolent inmates through a policy of “compassionate release” and implementing more cleaning and safety protocols within the jail to limit the spread of the virus.⁹⁹⁶ In March 2020, under the “compassionate release” policy, the jail population decreased by over 1,500 individuals⁹⁹⁷ and dropped to its lowest number of incarcerated individuals over the past decade in April, to approximately 7,363 inmates.⁹⁹⁸ However, Texas Governor Greg Abbott signed an executive order on March 30th blocking release for individuals charged with violent crimes or threats of violence;⁹⁹⁹ and as a result, the jail population has increased to back to its pre-pandemic numbers of approximately 8,800.¹⁰⁰⁰ In other counties, such as Travis County, judges have also started to release more individuals from local jails on personal bonds – an increase of almost 50 percent – and are specifically focusing on keeping medically-vulnerable individuals who are charged with non-violent offenses from entering the jail system.¹⁰⁰¹ In Hays County, the sheriff announced a

⁹⁹³ Ibid., 30-31. Demographic data was unavailable for Latinx individuals. Ibid., p. 40.

⁹⁹⁴ See, e.g., Ian MacDougall, “‘I do not want to die in here’: Letters from the Harris County Jail,” *Texas Tribune*, May 1, 2020, <https://www.texastribune.org/2020/05/01/letters-coronavirus-harris-county-jail/>.

⁹⁹⁵ New York Times, “Covid in the U.S.: Latest Map and Case Count,” *New York Times*, Nov. 19, 2020, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

⁹⁹⁶ Akela Lacy, “Coronavirus Cases are Increasing at Texas Jail Where Efforts to Release People Amid Pandemic Fell Apart,” *The Intercept*, Jul. 16, 2020, <https://theintercept.com/2020/07/16/coronavirus-texas-harris-county-jail/>; Ian MacDougall, “‘I do not want to die in here’: Letters from the Harris County Jail,” *Texas Tribune*, May 1, 2020, <https://www.texastribune.org/2020/05/01/letters-coronavirus-harris-county-jail/>.

⁹⁹⁷ Akela Lacy, “Coronavirus Cases are Increasing at Texas Jail Where Efforts to Release People Amid Pandemic Fell Apart,” *The Intercept*, Jul. 16, 2020, <https://theintercept.com/2020/07/16/coronavirus-texas-harris-county-jail/>.

⁹⁹⁸ Harris County, Texas, Jail Population History, <https://charts.hctx.net/jailpop/App/JailPopHistory>.

⁹⁹⁹ Office of the Texas Governor, “Governor Abbott Prohibits Release of Individuals In Custody With History of Offenses Involving Physical Violence,” Mar. 30, 2020, <https://gov.texas.gov/news/post/governor-abbott-prohibits-release-of-individuals-in-custody-with-history-of-offenses-involving-physical-violence>.

¹⁰⁰⁰ Harris County, Texas, Jail Population History, <https://charts.hctx.net/jailpop/App/JailPopHistory>.

¹⁰⁰¹ Ryan Autullo, “Travis County judges releasing inmates to limit coronavirus spread,” *Statesman*, Mar. 16, 2020, <https://www.statesman.com/news/20200316/travis-county-judges-releasing-inmates-to-limit-coronavirus-spread?fbclid=IwAR3VKawwn3bwSLSO9jXBxXNRuaWd1DRLsCBFc-ZkPN1INWW8xnzLPvZYNO4>.

new “cite and divert” program intended to reduce arrests, jail time, and criminal charges in the county that went into effect on September 1, 2020.¹⁰⁰²

As with other pretrial reform measures, one of the main concerns is public safety. In an interview with Commission staff, Wendy Baimbridge, Assistant Chief for the Houston Police Department, explained that “the overarching issues with [bail] reform is that past behavior is not being considered... [and by] not considering the past, you’re ignoring the probable future behavior, and therein lies the recidivist issue.”¹⁰⁰³ She also stated that as law enforcement, “we completely understand the goal is to reduce that jail population, but you must consider past criminal behavior before you let these suspects out without assessing bonds.”¹⁰⁰⁴

Similarly, Harris County District Attorney Kim Ogg explained in an interview with Commission staff that public safety has also been one of her top concerns when it came to the Harris County bail measures, stating her concern over judges allowing defendants who are at high risk for re-offending, especially for felony defendants, to be eligible for bail.¹⁰⁰⁵ She also raised the concern that the imposition of bail across Texas is not being done in a uniform way and judges have wide discretion on amounts and conditions.¹⁰⁰⁶

While Ogg expressed apprehension regarding some of the new pretrial practices, she also acknowledged that the previous pretrial system was unfair to indigent defendants. She stated that “it’s wrong and that it’s discriminatory and that it’s unconstitutional. The remedy however of giving everybody bonds especially repeatedly, to me is frustrating the legitimate effort to reform bail because it is inciting the public’s anger and it is being weaponized publicly.”¹⁰⁰⁷ Ogg explained that the issue is complex, and that a cash bail system will not fix the issue of recidivism

because people [] who have money will still be able to make [bail] regardless of how bad they acted, and poor people will not be able to make [bail] regardless of how good they acted, and so ... I believe cash bail should be eliminated. But I do believe that the public needs to know that they will be protected from people who have shown themselves to be violent and repeat that violence.”¹⁰⁰⁸

According to the Harris County’s monitor report, data show that recidivism in the misdemeanor cases studied – measured at 90, 180, and 365 days—has not risen with the increasing use of

¹⁰⁰² The program focuses on low-level misdemeanor cases which include offenses, such as marijuana possession, misdemeanor theft, driving with an invalid license, and criminal mischief, among other misdemeanors. *See* Erin Cargile, “Hays Co law enforcement agree to more citations instead of jail with COVID-19 rise behind bars,” *KXAN*, Jul. 9, 2020, <https://www.kxan.com/investigations/hays-co-law-enforcement-agree-to-more-citations-instead-of-jail-with-covid-19-rise-behind-bars/>.

¹⁰⁰³ Wendy Baimbridge, Assistant Chief, Houston Police Department, Interview Transcript at 8:37-8:51 [on file].

¹⁰⁰⁴ Baimbridge Transcript at 9:52 [on file].

¹⁰⁰⁵ Kim Ogg, Harris County’s District Attorney, Interview Transcript, at 33:31-36:21 [on file].

¹⁰⁰⁶ *Ibid.*

¹⁰⁰⁷ Ogg Interview Transcript at 36:55 [on file].

¹⁰⁰⁸ Ogg Interview Transcript at 39:26-52 [on file].

unsecured pretrial release, and is actually decreasing.¹⁰⁰⁹ Brandon Garrett, Professor of Law at Duke University and one of the court monitors for the Harris County reforms, stated that the fear of individuals who are released pretrial will commit new crimes is common when bail reform measures are implemented, but the data on new criminal activity does not substantiate many of those concerns.¹⁰¹⁰ He stated that “[t]hose fears haven’t come to pass in other jurisdictions as well. Sometimes people point to particular anecdotes ... Anecdotes can be powerful, but they can also be quite misleading.”¹⁰¹¹ The report did not analyze failure to appear rates but the authors stated it will be considered in future reports.¹⁰¹²

Other counties in Texas have also had similar bail reform efforts stemming from litigation over concerns of unfair pretrial practices. In April of 2018, the ACLU of Texas filed a lawsuit, *Booth v. Galveston County*, on behalf of people locked in the Galveston County Jail who could not afford bail, asserting that the county’s bail policy was unconstitutional because it allowed the routine detention of misdemeanor and felony arrestees before assessing their ability to pay bail.¹⁰¹³ The county’s practice caused Aaron Booth to sit in jail for 54 days before he received a bail reduction hearing. Booth also claimed that he was denied the right to an attorney at the “critical stage” of prosecution: the bail hearing. Senior staff attorney for the ACLU of Texas, Trisha Trigilio maintains:

It’s a matter of basic fairness that you should get a lawyer before a judge decides whether to lock you in jail. Unsurprisingly, without lawyers to advocate for their release, many people wind up in jail who shouldn’t be there. And even a short time in jail can have devastating repercussions on someone’s life.¹⁰¹⁴

Booth also asserted that this policy violated his right to equal protection and due process. While the case is ongoing, in September of 2019 the court issued a preliminary injunction requiring Galveston County to provide defense counsel to defendants at bail hearings.¹⁰¹⁵

¹⁰⁰⁹ Brandon Garrett and Sandra Guerra Thompson, *Monitoring Pretrial Reforms in Harris County: First Sixth Month Report of the Court-Appointed Monitor*, Sept. 3, 2020, at 28-29, 35-36.

¹⁰¹⁰ Jolie McCullough, “Report: Harris County’s bail reforms let more people out of jail before trial without raising risk of reoffending,” *Texas Tribune*, Sept. 3, 2020.

¹⁰¹¹ *Ibid.*

¹⁰¹² Brandon Garrett and Sandra Guerra Thompson, *Monitoring Pretrial Reforms in Harris County: First Sixth Month Report of the Court-Appointed Monitor*, Sept. 3, 2020.

¹⁰¹³ *Booth v. Galveston Cty.*, 352 F. Supp. 3d 718 (S.D. Tex. 2019)

¹⁰¹⁴ Jolie McCullough, “Federal judge orders Galveston County to have defense lawyers at bail-setting hearings,” *Texas Tribune*, Sept. 11, 2019, <https://www.texastribune.org/2019/09/11/galveston-county-bail-practices/>.

¹⁰¹⁵ Preliminary Injunction, *Booth v. Galveston County*, 352 F. Supp. 3d 718 (S.D. Tex. 2019) (No. 3:18-CV-00104.), https://www.aclutx.org/sites/default/files/2019-09-11_order_adopting_memorandum_dckt_279_0.pdf; Adopting the Recommendations of the Magistrate, *Booth v. Galveston County*, 352 F. Supp. 3d 718 (S.D. Tex. 2019)(No. 3:18-CV-00104), https://www.aclutx.org/sites/default/files/pi_mem_and_recs.pdf. Complaint, *Booth v. Galveston County*, 352 F. Supp. 3d 718 (S.D. Tex. 2019)(No. 18-cv-Civil Action (2018)), <https://www.clearinghouse.net/chDocs/public/CJ-TX-0014-0002.pdf>

Data from Galveston County also suggest that the county is struggling with an increasing pretrial population. In a 2017 report, researchers found that the overall jail population grew 11 percent from 2015 to 2016, largely due to the growth of the pretrial population.¹⁰¹⁶ Defendants detained during pretrial constitute 71 percent of the jail population, which was higher than surrounding counties and grew by 25 percent between 2012 and 2016.¹⁰¹⁷ According to the Council of State Governments' Justice Center the county also does not have a fully operational pretrial services office to conduct assessments, make bail recommendations, or provide supervision for defendants on pretrial release.¹⁰¹⁸ The lack of these services is connected to the limited use of personal recognizance bonds, more defendants pleading guilty to secure their release, and an increase of recidivism.¹⁰¹⁹

Bail reform litigation is also ongoing in Dallas County. In 2018, Civil Rights Corps in partnership with the ACLU of Texas and the Texas Fair Defense Project, filed a lawsuit in *Daves v. Dallas County*,¹⁰²⁰ similar to the Harris County lawsuit, but also challenged the incarceration of misdemeanor defendants along with those charged with felonies.¹⁰²¹ The lawyers alleged that the county utilized a “system of wealth-based detention by imposing and enforcing secured money bail without an inquiry into and findings concerning the arrestee’s present ability to pay, and without individualized consideration of less-restrictive, alternative conditions of release.”¹⁰²² One of the plaintiffs in the case, Shannon Daves, was homeless and unemployed at the time she was arrested on a misdemeanor theft charge for allegedly attempting to steal clothes from a department store. Daves stated that the magistrate judge who set her \$500 bail did not ask her if she could afford the bail before imposing it. Due to her inability to pay the bond and because she is a transgender woman, Daves was kept in solitary confinement until an activist group could pay her bail four days later.¹⁰²³

The lawsuit further alleged that the county is violating the defendants’ First Amendment rights by conducting private bail hearings that do not allow the public to view them. Elizabeth Rossi, an attorney with Civil Rights Corps, stated that “these hearings result in the mass pretrial detention

¹⁰¹⁶ Tony Fabelo, Jessy Tyler, Lila Oshatz, Bob Wessels, and BJ Wagner, “Galveston County Justice System Assessment: Preliminary Findings for Review by Local Officials,” June 22, 2017,

https://d3n8a8pro7vhm.cloudfront.net/tomdickensforda/pages/54/attachments/original/1514847683/JUSTICE_CENTER_REVIEW-GALVESTON_COUNTY.pdf?1514847683.

¹⁰¹⁷ *Ibid.*

¹⁰¹⁸ *Ibid.*

¹⁰¹⁹ *Ibid.*

¹⁰²⁰ Civil Rights Corps, “Dallas County, TX: Bail,” <https://www.civilrightscorps.org/work/wealth-based-detention/dallas-county-tx-bail>.

¹⁰²¹ *Daves v. Dallas Cty.*, 341 F. Supp. 3d 688 (N.D. Tex. 2018)(Case No. 3:18-cv-154), <https://www.clearinghouse.net/chDocs/public/CJ-TX-0013-0002.pdf>.

¹⁰²² Complaint, *Daves v. Dallas Cty.*, 341 F. Supp. 3d 688 (N.D. Tex. 2018)(Case No. 3:18-dv-154) at 5, https://www.aclutx.org/sites/default/files/field_documents/amended_complaint_0.pdf.

¹⁰²³ *Id.* at 1-2.

of poor people and people of color.”¹⁰²⁴ The Dallas County jail books about 67,000 individuals a year; in terms of its pretrial population, about 70 percent of the approximately 5,000 inmates are detained pretrial because they cannot afford to post bail.¹⁰²⁵ Although the case is still in progress, the District Court issued a preliminary injunction prohibiting the use of prescheduled bail amounts for arrestees who attest that they cannot afford such amounts.¹⁰²⁶ The injunction also requires a process for ensuring individual consideration of each arrestee over whether another amount or condition provides sureties of court appearance and public safety.¹⁰²⁷

In a study analyzing pretrial release mechanisms utilized by Dallas County, Stephen Clipper and colleagues found that when comparing failure to appear (FTA) rates between attorney, cash, commercial, and pretrial service bonds that commercial bonds had lower FTA rates compared to the other forms of release.¹⁰²⁸ While the researchers could not fully explain the results, they suggest that it may be due to the available resources and funds for these release conditions. For instance, the researchers found that commercial bail agents, who presumably are invested in defendants appearing to court, had lower FTA rates because they were able to provide reminders to defendants and possibly provide transportation for defendants.¹⁰²⁹ The researchers maintain that, at the time of the study, the ability to provide the same resources did not exist for the government-funded alternatives (e.g., Dallas County’s Pretrial Services Department) due to lack of adequate funding and large caseloads. As such, this underfunding prevented Dallas’ Pretrial Agency to provide the same services to defendants as commercial bond agents.¹⁰³⁰

Rural vs Urban jail growth

Bail reform efforts have also been difficult in Texas due to the state being geographically vast, with differences in court practices in urban versus rural areas.¹⁰³¹ While many stakeholders have raised concerns about the increasing pretrial detainee population across the state, recently there

¹⁰²⁴ Michael Barajas, “Bail Lawsuit Accuses Dallas County of Violating Poor People’s Rights in Secret Hearings,” *Texas Observer*, April 4, 2018, <https://www.texasobserver.org/bail-lawsuit-accues-dallas-county-violating-poor-peoples-rights/>.

¹⁰²⁵ *Ibid.*

¹⁰²⁶ *Daves v. Dallas Cty.*, 341 F. Supp. 3d 688 (N.D. Tex. 2018).

¹⁰²⁷ *Id.*

¹⁰²⁸ Stephen Clipper, Assistant Professor in the Department of Criminology & Criminal Justice at the University of Alabama, Written Testimony for the Civil Rights Implications of Cash Bail Briefing before the U.S. Commission on Civil Rights, Feb. 26, 2021, p. 1 (hereinafter Clipper Statement); *see also*, Stephen Clipper, Robert Morris, and Amanda Russell-Kaplan, “The link between bond forfeiture and pretrial release mechanism: The case of Dallas County, Texas, *Plos One*, vol. 12, no. 8, 2017.

¹⁰²⁹ Stephen Clipper, Robert Morris, and Amanda Russell-Kaplan, “The link between bond forfeiture and pretrial release mechanism: The case of Dallas County, Texas, *Plos One*, vol. 12, no. 8, 2017.

¹⁰³⁰ *Ibid.*

¹⁰³¹ Marc Levin and Michael Haugen, “Open Roads and Overflowing Jails: Addressing High Rates of Rural Pretrial Incarceration,” Right on Crime and Texas Public Policy Foundation, May 2018.

has also been a specific concern about smaller and rural jurisdictions that have been found to be responsible for an outsized share of the overall growth.¹⁰³²

In a 2018 report, Right on Crime found that over the past four decades, jail populations in smaller counties grew almost sevenfold, compared to about threefold in larger counties.¹⁰³³ Outside of the larger urban counties, rural county pretrial incarceration rates have also been growing at an alarming rate.¹⁰³⁴ According to the Vera Institute, since 2000, the pretrial incarceration rate has increased 65 percent across the state's 172 rural counties (394 per 100,000), four percent in the state's 47 small or medium counties (308 per 100,000), 16 percent in the six urban counties (198 per 100,000), and 12 percent in the state's 29 suburban counties (244 per 100,000).¹⁰³⁵ As with other states, the growth in jail populations have not corresponded with an increase of crime.¹⁰³⁶ Crime rates have been declining over the past several years across the nation, and rural areas have traditionally had fewer victimizations than their more populous counterparts.¹⁰³⁷

Marc Levin asserted that some of this growth is due to individuals being “subject to bail amounts that preclude them from being released or to conditions of release unrelated to protecting public safety and preventing flight.”¹⁰³⁸ For example, studies have shown that the use of bail schedules that do not take into account a defendant's ability to pay have significant effects on those in rural areas.¹⁰³⁹ For example, in a 2018 study, researchers found that bail schedules were the most important factor that judges utilized when imposing bail and often these bail amounts were set without regard to the defendant's ability to pay which significantly increased the likelihood of pretrial detention.¹⁰⁴⁰ As this report has detailed, the imposition of unaffordable bail amounts is far from isolated; however, high bail amounts may be a significant factor in rural locations since

¹⁰³² Mary Mergler, Written Testimony submitted to the Texas House of Representatives Committee on Criminal Jurisprudence,” Texas Appleseed, April 8, 2019; Marc Levin and Michael Haugen, “Open Roads and Overflowing Jails: Addressing High Rates of Rural Pretrial Incarceration,” Right on Crime and Texas Public Policy Foundation, May 2018.

¹⁰³³ Marc Levin and Michael Haugen, “Open Roads and Overflowing Jails: Addressing High Rates of Rural Pretrial Incarceration,” Right on Crime and Texas Public Policy Foundation, May 2018.

¹⁰³⁴ See, e.g., Ram Subramanian, Christian Henrichson, and Jacob Kang-Brown, “In Our Backyard: Confronting Growth and Disparities in American Jails,” Vera Institute for Justice, 2015.

¹⁰³⁵ Vera Institute for Justice, “Incarceration Trends in Texas,” <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-texas.pdf>.

¹⁰³⁶ Rachel Morgan and Jennifer Truman, “Criminal Victimization, 2019,” Bureau of Justice Statistics, Sept. 2020, <https://www.bjs.gov/content/pub/pdf/cv19.pdf>.

¹⁰³⁷ Ibid; see also, Jennifer Truman and Lynn Langton, “Criminal Victimization, 2014,” Bureau of Justice Statistics, 2015; Matthew Friedman, Ames Grawert, and James Cullen, “Crime Trends: 1990-2016,” Brennan Center for Justice, <https://www.brennancenter.org/sites/default/files/publications/Crime%20Trends%201990-2016.pdf>.

¹⁰³⁸ Marc Levin and Michael Haugen, “Open Roads and Overflowing Jails: Addressing High Rates of Rural Pretrial Incarceration,” Right on Crime and Texas Public Policy Foundation, May 2018, at 9.

¹⁰³⁹ Ibid., p. 13.

¹⁰⁴⁰ Sarah Ottone and Christine Scott-Hayward, “Pretrial Detention and the Decision to Impose Bail in Southern California,” *Criminology, Criminal Justice, Law and Society*, vol. 19, no. 2, 2018, pp. 24-43, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3135998.

these areas often have lower average incomes, particularly in southern states that also have the highest levels of incarceration.¹⁰⁴¹

Additionally, some rural jail populations have increased in response to the ongoing opioid epidemic, and many small counties have witnessed an increase in drug-related arrest rates. Nationally, rural counties between 2013 and 2016 had a 48 percent increase in drug arrests, compared to a 19 percent increase in urban counties.¹⁰⁴² With these increases in arrests, the issues in rural counties can become further exacerbated, due to a lack of infrastructure.¹⁰⁴³ Many of these counties may not have enough court officials (e.g., judges, prosecutors, public defenders) to properly handle cases, which can delay or cause a backlog in pretrial hearings and individuals being detained.¹⁰⁴⁴ Further, these counties may not have enough pretrial services to supervise individuals in the community or access to treatment services, leaving detained individuals in jails as the only alternative.¹⁰⁴⁵

Criminal justice experts suggest that to decrease the number of pretrial detainees, and subsequently the jail population, there are several reforms that can be safely implemented. These reforms include reducing the number of offenses that lead to arrests and jail time. In Texas, there are over 1,700 offenses that can result in arrest.¹⁰⁴⁶ Further, states can increase the use of recognizance bonds and the imposition of the least restrictive release conditions that create an undue burden on individuals and can lead to negative consequences and possible jail time.¹⁰⁴⁷ Lastly, jurisdictions can expand their use of nonfinancial release conditions through the options of pretrial diversion and mental health and drug treatment alternatives, especially for low-level, nonviolent individuals.

Some preliminary data suggest that these reform efforts may have positive results on the reducing the jail population. As part of Harris County's reform efforts, the county expanded its diversion

¹⁰⁴¹ See, e.g., Sentencing Project, "State-by-State Data," <https://www.sentencingproject.org/the-facts/#rankings>; U.S. Census Bureau, "New Census Data Show Differences Between Urban and Rural Populations," Dec. 8, 2016, <https://www.census.gov/newsroom/press-releases/2016/cb16-210.html>; Casey Leins, "10 States With the Highest Incarceration Rates," May 28, 2019, <https://www.usnews.com/news/best-states/slideshows/10-states-with-the-highest-incarceration-rates>

¹⁰⁴² Marc Levin and Michael Haugen, "Open Roads and Overflowing Jails: Addressing High Rates of Rural Pretrial Incarceration," Right on Crime and Texas Public Policy Foundation, May 2018, at 11.

¹⁰⁴³ Jacob Kang-Brown and Ram Subramanian, "Out of Sight: The Growth of Jails in Rural America," Vera Institute of Justice June 2017, <https://www.vera.org/downloads/publications/out-of-sight-growth-of-jails-rural-america.pdf>.

¹⁰⁴⁴ Marc Levin and Michael Haugen, "Open Roads and Overflowing Jails: Addressing High Rates of Rural Pretrial Incarceration," Right on Crime and Texas Public Policy Foundation, May 2018, at 9-10.

¹⁰⁴⁵ Ibid.; Jacob Kang-Brown and Ram Subramanian, "Out of Sight: The Growth of Jails in Rural America," Vera Institute of Justice June 2017.

¹⁰⁴⁶ Marc Levin and Michael Haugen, "Open Roads and Overflowing Jails: Addressing High Rates of Rural Pretrial Incarceration," Right on Crime and Texas Public Policy Foundation, May 2018.

¹⁰⁴⁷ See, e.g., Bernadette Rabuy, "Detaining the Poor," Prison Policy Initiative, May 2016, <https://www.prisonpolicy.org/reports/DetainingThePoor.pdf>; Pretrial Justice Institute, "Smarter Pretrial Solutions: Responding to Technical Violations," 2019, <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=514d95d4-413d-7a4f-f2e2-7fa588a297c2&forceDialog=0>.

programs and found that those individuals involved in the program were 50 percent less likely to be rearrested than those who did not choose the program.¹⁰⁴⁸ The county has also reported considerable success with reducing the jail population and recidivism rates through the implementation of its mental health diversion program.¹⁰⁴⁹ This speaks to the need to provide alternatives to detention, such as pretrial services that are coordinated with treatment options and a need for reinvestment into mental and substance abuse treatment facilities.¹⁰⁵⁰

In an interview with Commission staff, Harris County Sheriff Ed Gonzalez explained that for bail reform to be successful, all stakeholders need to come together and identify where there are “antiquated systems” and examine what policies and practices have worked and where adjustments can still be made.¹⁰⁵¹ He maintained that all parties

collectively have a vested interest. I don’t know of anybody that says: ‘hey I want more crime in my county [or] community that I live. I want more crime’ [] nobody wants more crime. What we have just doesn’t quite work... [W]e could do much better I think, and we rethink how we operate, how we re-engineer things and, so I think that it’s a matter of really building a stronger process of looking at data [and] what programs are available, supervision where it’s merited for those who are not [violent] ...

If we can move [] away from just a cash flow system to one that really looks at who’s in jail. What does the population look like and then let us see if there’re individuals who maybe don’t need to be in there [and] we could look for other alternatives... So I think that again, getting to [a] more intentional-based system where we’re looking at pretrial services, looking at data, working with the state on statutes where they can be firmer and who stays in jail for legitimate reasons. Not because of money, but if they’re really at risk ... even if it’s the richest person in Houston, they will stay in there too ... But don’t do it for people that can’t afford it. I thought we were concerned about risk, you know, and so we should be fair about it.¹⁰⁵²

¹⁰⁴⁸ Marc Levin and Michael Haugen, “Open Roads and Overflowing Jails: Addressing High Rates of Rural Pretrial Incarceration,” Right on Crime and Texas Public Policy Foundation, May 2018.

¹⁰⁴⁹ Health and Human Services Commission, *Report on the Harris County Mental Health Jail Diversion Pilot Program for Fiscal Year 2016*, Feb. 2017, <https://hhs.texas.gov/sites/default/files/documents/laws-regulations/reports-presentations/2017/sb1135-harris-county-mh-jail-diversion-feb2017.pdf>.

¹⁰⁵⁰ See, e.g., Nancy La Vigne, S. Rebecca Neusteter, Pamela Lachman, Allison Dwyer, and Carey Anne Nadeau, “Justice Reinvestment at the Local Level,” Urban Institute and Justice Policy Center, <https://www.urban.org/sites/default/files/publication/71341/412233-Justice-Reinvestment.pdf>; Marie VanNostrand, “Alternatives to Pretrial Detention: Southern District of Iowa, A Case Study,” https://www.uscourts.gov/sites/default/files/74_3_3_0.pdf.

¹⁰⁵¹ Gonzalez Interview Transcript (11/5/2020) at 37:48 [on file].

¹⁰⁵² Gonzalez Interview Transcript (11/5/2020) at 37:48-40:03 [on file].

District of Columbia

One jurisdiction that has a long record of success when it comes to its rates of pretrial detention and low rates of cash bail is the District of Columbia.¹⁰⁵³ Stakeholders have often considered the D.C. system and the federal system to be “model” systems when it comes to bail laws and practices.¹⁰⁵⁴ In several interviews with stakeholders from other jurisdictions, they mentioned that when considering bail reforms for their respective jurisdictions, they looked to the D.C. and federal system as examples of good models.¹⁰⁵⁵ In an interview with Commission staff, then-Chief of Police Peter Newsham also mentioned that he believed the District’s pretrial and bail system was a good system. Specifically, he stated that:

I think that people should not be able to buy their way out of pretrial confinement, just by the fact that they have money. I think that’s unfair ... I do think that people who are a danger to the community need to be held. I understand that everybody has a constitutional right [] that they’re innocent before [] they’re proven guilty. But I also understand that has to be balanced against the need for our society to be safe. So, I think the system here in the District of Columbia is a very good system.¹⁰⁵⁶

The District’s pretrial and bail decisions are based on the notion that defendants are either bailable and thus released, or defendants are not eligible for bail and thus detained.¹⁰⁵⁷ The foundation of the system is based on a strong presumption of release for all non-capital defendants with an emphasis on the imposition of least restrictive release conditions for eligible defendants, allowing

¹⁰⁵³ Marc Levin and Michael Haugen, “Open Roads and Overflowing Jails: Addressing High Rates of Rural Pretrial Incarceration,” Right on Crime, Texas Public Policy Foundation, May 2018, <https://files.texaspolicy.com/uploads/2018/08/16104511/2018-04-RR-Rural-Pretrial-Incarceration-CEJ-Levin-Haugen-1.pdf>; Colin Doyle, Chiraag Bains, and Brook Hopkins, “Bail Reform: A Guide for State and Local Policymakers,” Criminal Justice Policy Program at Harvard Law School, Feb. 2019; Timothy Schnacke, “Money as a Criminal Justice Stakeholder: The Judge’s Decision to Release or Detain a Defendant Pretrial,” National Institute of Corrections, U.S. Dep’t of Justice, Sept. 2014, p. 50.

¹⁰⁵⁴ Colin Doyle, Chiraag Bains, and Brook Hopkins, “Bail Reform: A Guide for State and Local Policymakers,” Criminal Justice Policy Program at Harvard Law School, Feb. 2019; Timothy Schnacke, “Money as a Criminal Justice Stakeholder: The Judge’s Decision to Release or Detain a Defendant Pretrial,” National Institute of Corrections, U.S. Dep’t of Justice, Sept. 2014.

¹⁰⁵⁵ Newsham Interview Transcript (9/9/20) at 7:24; Kenneally Interview Transcript at 30:49; Ogg Interview Transcript at 37:29; Scotti Interview Transcript at 22:52 [on file].

¹⁰⁵⁶ Peter Newsham, Chief of District of Columbia Police, Interview Transcript (9/9/20) at 7:24-8:10 [on file].

¹⁰⁵⁷ Colin Doyle, Chiraag Bains, and Brook Hopkins, “Bail Reform: A Guide for State and Local Policymakers,” Criminal Justice Policy Program at Harvard Law School, Feb. 2019; Timothy Schnacke, “Money as a Criminal Justice Stakeholder: The Judge’s Decision to Release or Detain a Defendant Pretrial,” National Institute of Corrections, U.S. Dep’t of Justice, Sept. 2014.

judges the discretion for preventive detention for defendants who may pose danger to the community, and heavily limiting the use of cash bail.¹⁰⁵⁸

While Chief Newsam stated that he supports the District’s non-cash bail system, he raised concerns about the standard judges utilize to determine the dangerousness of an individual who is released. He mentioned that there have been several cases where defendants were released pretrial, despite being arrested for a gun-related homicide.¹⁰⁵⁹ He stated that the definition of what constitutes a defendant as “dangerous” needs to be defined more clearly, and additional oversight of the judges making these decisions is needed.¹⁰⁶⁰ Thus, Newsam recommends “maybe a tweak to our system where there’s maybe some oversight over those decisions to ensure that our community is safe.”¹⁰⁶¹

The 1992 D.C. Bail Reform Act specifically targeted what the city’s council at the time recognized as “an over-dependence on cash bond, coupled with delays in bringing defendants to trial [that] resulted in lengthy pretrial detention of too many defendants, a disproportionate number who were poor.”¹⁰⁶² As a result, the 1992 Act virtually eliminated the use of money bail in the District.¹⁰⁶³ Judge Truman Morrison, who has been a judge in the District since 1979 explained the shift this way:

If you think about our goals in the pretrial realm of our criminal-legal system, which are to ensure community safety and to ensure a court appearance and to get as many people to remain at liberty without their lives being destroyed as possible. If you think about those goals, money bail is a joke. We have so much research now that shows the collateral consequences of needlessly incarcerating people pretrial. It increases the likelihood they’ll be recidivists. It destroys their families, the economies of their community, costs us billions of dollars a year to needlessly warehouse people. And we are not some sleepy village here on North Capitol Street where you and I are talking. This is a big criminal justice system. And if we have managed for more than twenty years to be successful without using money, how can we contend that we need money?¹⁰⁶⁴

¹⁰⁵⁸ Pretrial Services Agency for the District of Columbia, *Congressional Budget Justification and Performance Budget Request Fiscal Year 2021*, Feb. 10, 2020, https://www.psa.gov/sites/default/files/FY2021%20PSA%20Congressional%20Budget%20Justification_0.pdf; Colin Doyle, Chiraag Bains, and Brook Hopkins, “Bail Reform: A Guide for State and Local Policymakers,” Criminal Justice Policy Program at Harvard Law School, Feb. 2019, pp. 36-37, <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=9a804d1d-f9be-e0f0-b7cd-cf487ec70339&forceDialog=0>.

¹⁰⁵⁹ Newsam Interview Transcript (9/9/20) at 8:14-26 [on file].

¹⁰⁶⁰ *Ibid.*, 11:23-36 [on file].

¹⁰⁶¹ *Ibid.*, 10:07 [on file].

¹⁰⁶² Colin Doyle, Chiraag Bains, and Brook Hopkins, “Bail Reform: A Guide for State and Local Policymakers,” Criminal Justice Policy Program at Harvard Law School, Feb. 2019, pp. 35-36.

¹⁰⁶³ *Ibid.*, p. 36.

¹⁰⁶⁴ Melissa Block, “What Changed After D.C. Ended Cash Bail,” *NPR*, Sept. 2, 2018, <https://www.npr.org/2018/09/02/644085158/what-changed-after-d-c-ended-cash-bail>.

Due to the uniqueness of the District’s criminal justice system, it is hard to make direct comparisons between incarcerated populations with other jurisdictions.¹⁰⁶⁵ But regarding its jail population, Washington, D.C. incarcerates an average of 1,862 individuals in its local jails.¹⁰⁶⁶ This number has remained relatively consistent since 2016, with FY 2020 having the lowest jail population during that time (1,639 as of July 1, 2020). The Department of Corrections states that in response to the COVID-19 pandemic, it has been making efforts to reduce the jail’s daily population.¹⁰⁶⁷ Similar to the other analyzed jurisdictions in this report, the demographic composition of the District’s jail population shows an overrepresentation of incarcerated Black individuals compared to the District’s population (89.2 percent, 46.0 percent, respectively) (see chart 11).¹⁰⁶⁸ By comparison, Latinx, Asian, and White individuals are underrepresented compared to the District’s population.¹⁰⁶⁹ As with most jail populations across the nation, men constitute the vast majority of incarcerated individuals compared to women (96.5 percent, 3.5 percent, respectively). However, all women – other than Black women— constitute a higher percentage of the jail population compared to their male counterparts (see Chart 14). For instance, White women make up 6.8 percent, whereas White men make up 3.8 percent; and strikingly, women categorized under the label of “Other”¹⁰⁷⁰ made up 11.4 percent, compared to “Other” men who made up 1.0 percent of the jail population.¹⁰⁷¹

¹⁰⁶⁵ See, e.g., Martin Austerhuhle, “District of Corrections: Does D.C. Really Have the Highest Incarceration Rate in the Country?” *NPR*, Sept. 10, 2019.

¹⁰⁶⁶ Number of incarcerated individuals was calculated by Commission staff by averaging the 5 available fiscal year inmate populations reported by Department of Corrections. See Department of Corrections, “Facts and Figures,” July 2020, at 4, <https://doc.dc.gov/sites/default/files/dc/sites/doc/publication/attachments/DC%20Department%20of%20Corrections%20Facts%20and%20Figures%20July%202020.pdf>.

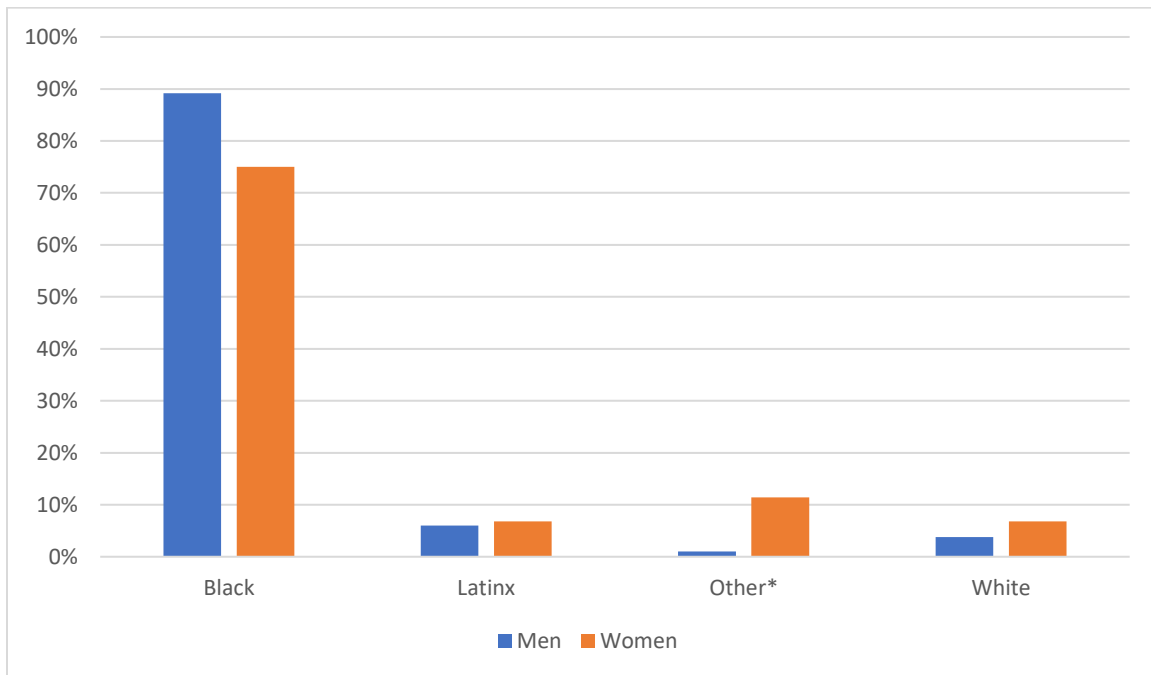
¹⁰⁶⁷ Ibid.; see also U.S. Census Bureau, “District of Columbia,” Population estimates, July 1, 2019, <https://www.census.gov/quickfacts/DC>.

¹⁰⁶⁸ According to Census data, in the District, Latinx individuals represent 11.3%, Asian individuals: 4.5%, Native American/Alaska Native individuals: 0.6%, and white individuals: 46.0%, see <https://www.census.gov/quickfacts/DC>.

¹⁰⁶⁹ Department of Corrections, “Facts and Figures,” July 2020.

¹⁰⁷⁰ The category “Other” includes Native American and Alaska Native individuals as well as those who declared their race as “Other” or did not declare a race. See Department of Corrections, “Facts and Figures,” July 2020.

¹⁰⁷¹ Ibid.

Chart 14: Jail Population, by Race and Gender

*“Other” includes Native Americans and those who have declared their race as “Other” or decline to declare their race. Source: Department of Corrections, July 2020.

Under D.C. law, all defendants are interviewed by a pretrial services agent within 24 hours of arrest;¹⁰⁷² and all defendants who are initially detained pretrial are then entitled to a hearing within three to five days of the initial appearance to assess whether release conditions can be met to reasonably assure court appearance and public safety.¹⁰⁷³ The result of this subsequent hearing can be continued pretrial detention, personal recognizance release, pretrial services supervision, or dismissal of the charge.¹⁰⁷⁴

Trend data from 2015 through 2019 suggest that this system has been successful in releasing defendants pretrial without sacrificing public safety and maintaining high court appearance rates (see Table 6 below). Throughout each of these years, between 88 and 91 percent of individuals released pretrial appeared at their court dates.¹⁰⁷⁵ Further, between 86 and 89 percent of individuals who were released pretrial were not re-arrested during this period, and between 98 percent and 99 percent of defendants released pretrial were not re-arrested during the pretrial period for a violent

¹⁰⁷² D.C. Code Ann. § 23-1303(a); *see also*, Pretrial Services Agency for the District of Columbia, “Court Support,” https://www.psa.gov/?q=programs/court_support.

¹⁰⁷³ Pretrial Services Agency for the District of Columbia, “FY 2019 Release Rates for Pretrial Defendants within Washington, DC,” <https://www.psa.gov/sites/default/files/2019%20Release%20Rates%20for%20DC%20Pretrial%20Defendants.pdf>.

¹⁰⁷⁴ *Ibid.*

¹⁰⁷⁵ Pretrial Services Agency for the District of Columbia, 2015-2019.

crime.¹⁰⁷⁶ In 2019, 94 percent of defendants were released pretrial and without financial conditions;¹⁰⁷⁷ and of those released, 88 percent of defendants appeared at their court dates and 99 percent were not arrested for a new violent crime while awaiting trial.¹⁰⁷⁸

Table 6: Pretrial Rates in D.C. (FY 2015-2019)

	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019
Arrest-Free Rate (overall)	89%	88%	86%	87%	87%
Arrest-Free Rate (violent crimes)	98%	98%	99%	99%	99%
Court Appearance Rate*	88%	91%	88%	89%	88%
Total Released Pretrial (misdemeanor & felony)	91.29%	94.33%	94%	93%	94%
Total Held Pretrial (misdemeanor & felony)	8.71%	5.66%	6%	7%	6%

Source: Pretrial Services Agency for the District of Columbia, 2015-2019; data compiled and collected by Commission staff

While D.C. may have high release rates at initial appearance (85%), the remaining 15 percent of defendants were detained after this first appearance in front of the judge. Prior to the pandemic, these preliminary hearings generally occurred within 3 to 5 days and a judge would decide: 1) if there is probable cause for the case to continue, and 2) if the defendant can be released or needs to be subsequently detained. For all offenses, other than murder and armed assault with the intent to

¹⁰⁷⁶ Ibid.

¹⁰⁷⁷ Pretrial Services Agency for the District of Columbia, “FY 2019 Release Rates for Pretrial Detention within Washington, DC,

<https://www.psa.gov/sites/default/files/2019%20Release%20Rates%20for%20DC%20Pretrial%20Defendants.pdf>.

¹⁰⁷⁸ In FY 2019, 85% of defendants (felony and misdemeanor) were initially released at first appearance. The remaining 15% of defendants were subjected to an initial pretrial detention. Of the 15% who were initially detained, 59% of the cases resulted in a “subsequent release.” Thus, taking the initial and subsequent release together, results in 94% of defendants being released pretrial and 6% of cases resulting in detention until disposition. Pretrial Services Agency for the District of Columbia, “Congressional Budget Justification and Performance Budget Request, Fiscal Year 2021,” Feb. 10, 2020,

https://www.psa.gov/sites/default/files/FY2021%20PSA%20Congressional%20Budget%20Justification_0.pdf.

kill, those individuals are entitled to an indictment within 90 days and a trial within 100 days.¹⁰⁷⁹ Stephany Reaves, staff attorney for the Public Defender’s office in the District, explained that since the pandemic the 90/100-day rule has not been enforced and has caused serious delays in pretrial hearings.¹⁰⁸⁰

In an interview with Commission staff, Reaves stated that: “there’s a lot of people who in the normal [non-pandemic] world get detained at that first hearing but then get out three days later” after the defendant’s attorney can challenge the need for detention.¹⁰⁸¹ But now due to the pandemic, these subsequent hearings are not happening until weeks later and so for detainees, the length of detention is becoming longer because, as Reaves explained, there are not “any trial dates on the calendar whatsoever right now. So, if you were detained earlier this year or last year, we’re not having very many meaningful hearings that move cases along.”¹⁰⁸²

This extended time in pretrial incarceration is also reflected in the data, particularly for those accused of felony offenses (see Table 7 below). Based on July 1, 2020 data, men who were “pretrial misdemeanants”¹⁰⁸³ represented 2.9 percent of the detained population and had an average time in jail of 48.2 days, compared to women pretrial misdemeanants who represented 9.8 percent of the population and had an average pretrial incarceration period of 42.4 days.¹⁰⁸⁴ Men who were “pretrial felons”¹⁰⁸⁵ constituted 31.4 percent of the population and had an average incarceration period of 279.5 days, compared to women pretrial felons who represented 21.6 percent of the jail population, with an average detention of 182.6 days.¹⁰⁸⁶

¹⁰⁷⁹ Parties may choose to push out the first hearing, particularly in more serious cases, for various reasons, but this is the general rule. Code of the District of Columbia, Chapter 13. Bail Agency [Pretrial Services Agency] and Pretrial Detention: Detention prior to trial §23-1322(h)(1), <https://code.dccouncil.us/dc/council/code/titles/23/chapters/13/>.

¹⁰⁸⁰ Stephany Reaves, staff attorney for the Public Defender Services in District of Columbia, Interview Transcript at 15:18-15:29 [on file].

¹⁰⁸¹ Stephany Reaves, staff attorney for the Public Defender Services in the District of Columbia, Interview Transcript at 12:34 [on file].

¹⁰⁸² Stephany Reaves, staff attorney for the Public Defender Services in the District of Columbia, Interview Transcript at 14:21-54 [on file].

¹⁰⁸³ Defined as an individual who has at least one unresolved legal matter and indicates that the individual has no felony offenses. Ibid.

¹⁰⁸⁴ Department of Corrections, “Facts and Figures,” July 2020, <https://doc.dc.gov/sites/default/files/dc/sites/doc/publication/attachments/DC%20Department%20of%20Corrections%20Facts%20and%20Figures%20July%202020.pdf>.

¹⁰⁸⁵ Defined as an individual who has at least one unresolved legal matter and indicates that the most serious offense requiring detention is a felony. Ibid.

¹⁰⁸⁶ Department of Corrections, “Facts and Figures,” July 2020, <https://doc.dc.gov/sites/default/files/dc/sites/doc/publication/attachments/DC%20Department%20of%20Corrections%20Facts%20and%20Figures%20July%202020.pdf>.

Table 7: Average length of detention, pretrial detainees by offense type and gender

	Women		Men	
Pretrial Misdemeanors	9.8%	42.4 Days	2.9%	48.2 Days
Pretrial Felons	21.6%	182.6 Days	31.4%	279.5 Days

Source: Department of Corrections, Facts and Figures, July 2020

As the above table indicates, for both women and men the average pretrial detention period is much shorter for those accused of misdemeanors than felonies. However, while women make up a smaller percentage of the overall jail population, they constitute a larger percentage of the pretrial misdemeanor detainees compared to men; but spend, on average, about six-days less in pretrial detention. For those accused of felonies, on average women spend almost 100 days less than men accused of felonies.¹⁰⁸⁷

These long detention periods in the District are because there are not statutory time limits regarding the detaining of defendants accused of some violent offenses, such as murder. Stephany Reaves explained that:

We pretty routinely have clients charged murder who sit in jail for one, two, three, or more years in the normal non-pandemic world and your cases that we end up winning or that the government ends up dismissing or [] a lot of things happen between that initial detention decision and when it actually gets resolved. And obviously there's no compensation for our clients who are acquitted three years from now or four years from now.¹⁰⁸⁸

In comparison, if these individuals were in another jurisdiction that had a cash bail system, they would possibly be able to post bail and be released. However, Reaves stated that the District not having a cash bond system is better because many of her clients are indigent and would not be able to post bail even if the option were available to them.¹⁰⁸⁹

A release rate of 94 percent of defendants in fiscal year 2019 suggests that the District may be releasing some individuals who do not fall into the low-risk category on a risk assessment tool yet demonstrate that they can be safely released. These data have several implications for pretrial systems. On its face, this could indicate that there are structural ways to remediate risk – both in terms of failing to appear in court and re-offending. For example, an individual who is homeless would be more likely to be considered “risky” of not appearing in court, however, if the individual

¹⁰⁸⁷ Department of Corrections, “Facts and Figures,” July 2020, <https://doc.dc.gov/sites/default/files/dc/sites/doc/publication/attachments/DC%20Department%20of%20Corrections%20Facts%20and%20Figures%20July%202020.pdf>.

¹⁰⁸⁸ Reaves, Interview Transcript at 20:16 [on file].

¹⁰⁸⁹ Reaves Transcript at 19:24 [on file].

was connected to temporary housing that may help to mitigate some of that risk.¹⁰⁹⁰ In another instance, a defendant who is unemployed may be considered at higher risk of re-offending, but being connected to employment services could also aid in reducing the possibility of pretrial misconduct.¹⁰⁹¹ Research has shown that even moderate- and high-risk defendants who are connected to services during the pretrial period are more likely to appear at their scheduled court dates and are less likely to be re-arrested.¹⁰⁹² Judge Truman Morrison explains that “there is no evidence you need money to get people back to court. It’s irrational, ineffective, unsafe and profoundly unfair.”¹⁰⁹³

Data has shown that defendants who are released on pretrial supervision tend to have the lowest recidivism rates, and those detained pretrial have the highest rates.¹⁰⁹⁴ Therefore, one possible reason that the District has been successful in having release rates that are over 90 percent with high court appearance rates and low re-arrest rates is due in part to a longstanding Pretrial Services Agency for the District of Columbia (PSA). The PSA was created as an independent federal agency in 1967 and works to assist judicial officers in D.C. Superior Court and U.S. District Court for the District by conducting risk assessments and recommending either release conditions or detention. For released defendants, the PSA also provides supervision and treatment services to individuals in order to reasonably assure court appearance and curtail pretrial misconduct.¹⁰⁹⁵

In an interview with Commission staff, Leslie Cooper, Director for the Pretrial Services Agency for the District explained that:

Here in D.C., we have been around for just over 50 years and in that time period, we have existed to serve both the Federal and the local court. And the way that we do that is by interviewing arrestees completing a risk assessment and utilizing that risk assessment to formulate potential release condition recommendations. Those conditions are then considered by the court during each defendant’s first appearance. And for those individuals that are released to the community with

¹⁰⁹⁰ Marc Levin and Michael Haugen, “Open Roads and Overflowing Jails: Addressing High Rates of Rural Pretrial Incarceration,” Right on Crime and Texas Public Policy Foundation, May 2018.

¹⁰⁹¹ Stephany Reaves, staff attorney, Public Defender Services for the District of Columbia, Interview Transcript at 50:01 [on file].

¹⁰⁹² See, e.g., Cynthia Mamalian, “State of the Science of Pretrial Risk Assessment,” Pretrial Justice Institute, Mar. 2011, https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/PJI_PretrialRiskAssessment.pdf; Christopher Lowenkamp and Marie VanNostrand, “Exploring the Impact of Supervision on Pretrial Outcomes,” Nov. 2013, Arnold Foundation, https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_Supervision_FNL.pdf.

¹⁰⁹³ Ann Marimow, “When it comes to pretrial release, few other jurisdictions do it D.C.’s way,” *Washington Post*, July 4, 2016, https://www.washingtonpost.com/local/public-safety/when-it-comes-to-pretrial-release-few-other-jurisdictions-do-it-dcs-way/2016/07/04/8eb52134-e7d3-11e5-b0fd-073d5930a7b7_story.html.

¹⁰⁹⁴ See, e.g., Tony Fabelo, Jessy Tyler, and Rebecca Cohen, “County Uniform Recidivism Measure Project: Third Year Results for Dallas County,” Council of State Governments Justice Center, June 7, 2016, https://www.dallascounty.org/Assets/uploads/docs/cjab/meetings/2016/DallasRecidivism_Study_062016.pdf.

¹⁰⁹⁵ Pretrial Services Agency for the District of Columbia, *Congressional Budget Justification and Performance Budget Request Fiscal Year 2021*, Feb. 10, 2020, https://www.psa.gov/sites/default/files/FY2021%20PSA%20Congressional%20Budget%20Justification_0.pdf.

court-ordered release conditions, we supervise those individuals, and we provide both supervision and pro-social supportive services that are designed to foster compliance with those court-ordered release conditions.¹⁰⁹⁶

During fiscal year 2019 (the latest data available), PSA supervised over 12,700 pretrial released defendants and served an additional 21,705 defendants by providing services such as court date notifications.¹⁰⁹⁷ The agency also provided the courts criminal history checks for defendants who were released on personal recognizance bonds or citations, or whose charges were dismissed. In total, in fiscal year 2019, the PSA worked with 34,000 defendants.¹⁰⁹⁸

The Pretrial Services Agency states that the basic principles of its model are:

- providing timely and accurate information to the courts to support informed decision-making;
- honoring the presumption of innocence and each defendant's right to pretrial release under the least restrictive conditions that assure community safety and return to court;
- promoting the use of appropriate graduated sanctions and incentives in response to defendant conduct;
- using evidence-based solutions and implementing continuous process evaluation to improve outcomes;
- partnering with other criminal justice agencies and community organizations to enhance public safety in the District's neighborhoods and build capacity for support services for defendants under pretrial supervision; and
- effectively managing the appropriated funds entrusted to the Agency's stewardship.¹⁰⁹⁹

While some stakeholders may point to the District as having a model pretrial and bail system, it is not without its flaws. Critics argue that due to the dichotomous "release or detain" decisions, judges can decide that there is no condition or combination of conditions that can reasonably assure court appearance or public safety for certain offenses.¹¹⁰⁰ This means that certain offenses

¹⁰⁹⁶ Leslie Cooper, Director, Pretrial Services Agency for the District of Columbia, Interview Transcript at 00:52-01:29 [on file].

¹⁰⁹⁷ Pretrial Services Agency for the District of Columbia, *Congressional Budget Justification and Performance Budget Request Fiscal Year 2021*, Feb. 10, 2020.

¹⁰⁹⁸ *Ibid.*

¹⁰⁹⁹ Pretrial Services Agency for the District of Columbia, *Congressional Budget Justification and Performance Budget Request Fiscal Year 2021*, Feb. 10, 2020, p. 2.

¹¹⁰⁰ *See, e.g.*, Reaves Interview Transcript at 7:51-8:46 [on file]; *see also* Clayton Interview Transcript at 11:47-12:14 (discussing the issue of preventive detention in a bail system that does not allow for monetary bail) [on file].

can automatically “trigger” a preventive detention hearing based on the offense charged, even though the offense charged may not correspond to risk of reoffending, which can then lead to unnecessary detention.¹¹⁰¹

The Criminal Justice Policy Program at Harvard Law School states that:

Offense-based triggers are problematic because they are not tied to individual circumstances of a defendant and reflect the relatively low threshold for issuing a charge. If used, it is crucial that such enumerated offenses remain narrow and that, even when they trigger hearings, they do not dictate outcomes or prevent an individualized determination based on the defendant’s circumstances.¹¹⁰²

Stephany Reaves, staff attorney for the Public Defender Services for D.C. explained that offenses that are defined as “dangerous crimes” or as “crimes of violence” under the D.C. statute¹¹⁰³ can be broadly and, sometimes, unevenly applied. For example, in D.C.,

a theft from a person, like if you take someone’s purse when it’s sitting next to them ... versus a robbery where [] you threatened someone with violence or you punch them to get their materials, all of those things are robbery. And [] so all of those things are considered a crime of violence. So, snatching a phone is the same as pointing a gun at someone. At the very first hearing the government can ask for you to be detained pending your preliminary hearing and the judge basically doesn’t have discretion if they think [] there’s probable cause for that.¹¹⁰⁴

Reaves explained that while this is just one example, offense-based triggers can make it harder to secure a defendant’s release because if prosecutors seek detention, the judge will grant it if they believe there is probable cause for the offense.¹¹⁰⁵ As discussed previously, being detained can then lead to other issues such as accepting a plea deal or pleading guilty just to secure release,¹¹⁰⁶ especially during the pandemic because there are even more delays regarding hearings. Moreover, while judges in D.C. usually consider several factors when making release or detention decisions (e.g., community ties, stable housing, etc.), Reaves argued that because there is no cash bail system, sometimes it can be harder for defendants to secure release; whereas if they were in a different jurisdiction they could possibly have access to a cash or surety bond.¹¹⁰⁷

In her interview with Commission staff, she explained that:

¹¹⁰¹ Reaves Interview Transcript at 7:51-8:46 [on file]; *see also*, Criminal Justice Policy Program, “Moving Beyond Money: A Primer on Bail Reform,” Harvard Law School, Oct. 2016, <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>.

¹¹⁰² Criminal Justice Policy Program, “Moving Beyond Money: A Primer on Bail Reform,” Harvard Law School, Oct. 2016, at 27, <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>.

¹¹⁰³ Code of the District of Columbia, § 23-1331.

¹¹⁰⁴ Stephany Reaves, staff attorney for the Public Defender Services for D.C, Interview Transcript at 7:51 [on file].

¹¹⁰⁵ *Ibid.*, 8:46 [on file].

¹¹⁰⁶ *Ibid.*, 8:29-33 [on file].

¹¹⁰⁷ *Ibid.*, 9:08-10:01 [on file].

[I]t's all up to whichever judge is on their case, and if the judge has decided that they're dangerous or a flight risk then there's nothing that we can do to try to get them out, which [] right now in the pandemic is exacerbated because no trials are happening. So, people who are in that situation have no idea when they will get a trial, let alone have a meaningful chance of release.¹¹⁰⁸

In an interview with the D.C. Bar Association, Monica Lotze, a founding partner at Lotze Mosely LLP, claims that the District's system is more fair than the neighboring jurisdiction in Maryland because it "ensures that people who would not otherwise be able to afford to be released are released."¹¹⁰⁹ But the lack of cash bail in the District does not mean that released defendants are necessarily released without conditions. Similar to other jurisdictions, the District's release conditions often require defendants to regularly report to supervising agents, submit to regular drug testing, or wear an electronic GPS monitoring device.¹¹¹⁰ As discussed previously, these release conditions can prove to be unduly burdensome for some defendants.¹¹¹¹

As discussed in previous chapters, these other conditions such as electronic monitoring, curfews, and drug testing may also hinder a defendant's success during pretrial for a multitude of reasons. For instance, Reaves stated that release conditions can often be more like "monitoring compliance as opposed to making sure that people are actually getting the help that they need."¹¹¹² She explained that:

[T]he standard is supposed to be what [are] the least restrictive conditions that will address the concerns about flight risk or danger of the community because again at this stage, all of our clients are supposed to be presumed innocent. And so we approach it from that perspective, of what are the things that my client needs to be successful to make sure that they don't get into any more trouble and that they come back to court as required, but without going overboard so much that it's more difficult for them to get a job to pay bills. Just do normal things, a lot of the conditions, and being pretty onerous.

Because if you have concerns about the community, you want to make sure that they're not doing anything negative in the community, but maybe that means actually helping people get jobs and enroll in school instead of putting an onerous curfew on them or locking them at home. In which case they can't go to school or get a job... We should be meaningfully addressing the issues that are causing that

¹¹⁰⁸ Stephany Reaves, Staff Attorney, Public Defender Service for the District of Columbia, Interview Transcript at 10:13-28 [on file].

¹¹⁰⁹ David O'Boyle, "Going Against the Grain: D.C.'s No-Bail Pretrial Release System," DC Bar Association, July 13, 2016, <https://old.dcb.org/about-the-bar/news/dc-no-bail-release.cfm>.

¹¹¹⁰ Ann Marimow, "When it comes to pretrial release, few other jurisdictions do it D.C.'s way," *Washington Post*, July 4, 2016; *see also*, David O'Boyle, "Going Against the Grain: D.C.'s No-Bail Pretrial Release System," DC Bar Association, July 13, 2016, <https://old.dcb.org/about-the-bar/news/dc-no-bail-release.cfm>.

¹¹¹¹ *See, e.g.*, David O'Boyle, "Going Against the Grain: D.C.'s No-Bail Pretrial Release System," DC Bar Association, July 13, 2016, <https://old.dcb.org/about-the-bar/news/dc-no-bail-release.cfm>.

¹¹¹² Stephany Reaves, staff attorney at the Public Defender Service for the District of Columbia, Interview Transcript at 48:56 [on file].

non-compliance. Because I think especially for misdemeanor repeat offenses, it's a lot of people who have mental health issues, trauma issues, substance abuse and that sort of thing. That's not going to be resolved by saying well, if you don't listen to these rules, you are going to go to prison...

And, so I think if our goal is to have less crime and to have people return to court as required, [] it needs to be shifting resources to meaningfully making those things better as opposed to just nominally saying you need to do these things and then using jail as a switch so that you're afraid of non-compliance.¹¹¹³

New York

In April 2019, New York legislators passed a new bail reforms law that went into effect January 2020.¹¹¹⁴ The initial bail reform provisions were then amended in April 2020 after highly publicized debate about their scope. As amended, the changes New York implemented require that for most misdemeanors and nonviolent felonies, imposing cash bail is no longer permitted.¹¹¹⁵ Judges were instructed that individuals charged with those crimes are to be released on personal recognizance bonds or with other non-monetary conditions such as pretrial supervision.¹¹¹⁶ For most violent felonies and some nonviolent felonies (e.g., sex offenses and witness tampering), the reforms still allow judges the option to impose cash bail or preventively detain persons charged.¹¹¹⁷

Unlike nearly every other state, New York does not allow for danger to the community to be a consideration when determining detention or release (see Appendix A). This consideration has been prohibited since 1971 to ensure that those charged were afforded the presumption of innocence.¹¹¹⁸ One proposed version of changes to bail in New York would have added a provision allowing judges to consider public safety when making pretrial release determination, but that version was not enacted. Instead, it remains the law in New York that pretrial release decisions are made with the sole purpose of ensuring the accused person returns for their court date. One of the intended purposes of the original bail reform law was focused on reducing the number of

¹¹¹³ Reaves Transcript at 30:25-52:24 [on file].

¹¹¹⁴ SB 2101A, 2019-2020 Reg. Sess. (NY 2019), <https://legislation.nysenate.gov/pdf/bills/2019/S2101A>; *see also*, City of New York, "Projected City Jail Population Falls To 3,300 By 2026," Office of the Mayor, <https://www1.nyc.gov/office-of-the-mayor/news/484-19/projected-city-jail-population-falls-3-300-2026>; Krystal Rodriguez, Michael Rempel, and Matt Watkins. The Facts on Bail Reform and Crime in New York City. Center for Court Innovation. https://www.courtinnovation.org/sites/default/files/media/documents/2021-02/Handout_Bail_Reform_Crime_02032021.pdf.

¹¹¹⁵ SB 1509—C, 2019-2020 Reg. Sess. (NY 2019), <https://legislation.nysenate.gov/pdf/bills/2019/S1509C>.

¹¹¹⁶ *Id.*

¹¹¹⁷ *Id.*

¹¹¹⁸ Center for the Administration of Criminal Law, "Preventive Detention in New York: From Mainstream to Margin and Back," NYU Law, Feb. 2017, https://www.law.nyu.edu/sites/default/files/upload_documents/2017-CACL-New-York-State-Bail-Reform-Paper.pdf.

individuals detained pretrial due to their inability to post bail.¹¹¹⁹ For the remaining cases, judges maintained the discretion to set cash bail.¹¹²⁰

Changes to New York’s bail laws, as amended by legislation in April 2020, provide:

- Most misdemeanors and non-violent felonies are now ineligible for cash bail or preventive detention. Judges may release individuals charged with these crimes on their own recognizance or may impose non-monetary release conditions. Certain charges originally ineligible for cash bail were made eligible by the April amendments.
- Electronic monitoring may be required in some cases, but for some charges this option is not available to judges;
- Risk assessments may only be used to determine if a person is to be released on recognizance or non-monetary conditions imposed;
- Judges are required to consider an individual’s ability to pay when setting bail where bail remains an option; and,
- As of April 2020, judges have the discretion to set cash bail based upon the individual’s prior criminal history and/or if an individual is on probation or parole.¹¹²¹

One of the intended purposes of the bail reform law was focused on reducing the number of individuals detained pretrial due to their inability to post bail.¹¹²² In 2019, the Center for Court Innovation found the city’s defendants were unable to post bail at arraignment 85 percent of the time. As a result, the imposition of a cash bail can serve as a de facto detention, contrary to the legal purpose of bail, which is to facilitate release while incentivizing a return to court.¹¹²³ Supporters of New York’s bail reforms argue that there is no inherent justification for detaining a defendant due to their inability to post a cash bail, which equates to the criminalizing of poverty and perpetuates race inequities in the justice system.¹¹²⁴ Moreover, reform advocates maintain that

¹¹¹⁹ Taryn Merkl, “New York’s Upcoming Bail Reform Changes Explained,” Brennan Center for Justice, Dec. 10, 2019, <https://www.brennancenter.org/our-work/analysis-opinion/new-yorks-upcoming-bail-reform-changes-explained>; SB 2101A, 2019-2020 Reg. Sess. (NY 2019).

¹¹²⁰ Michael Rempel and Krystal Rodriguez, “Bail Reform in New York: Legislative Provisions and Implications for New York City,” Center for Court Innovation, Apr. 2019, https://www.courtinnovation.org/sites/default/files/media/document/2019/Bail_Reform_NY_full_0.pdf.

¹¹²¹ SB 7506—B, 2019-2020 Reg. Sess. (NY 2019), <https://legislation.nysenate.gov/pdf/bills/2019/a9506b>.

¹¹²² Taryn Merkl, “New York’s Upcoming Bail Reform Changes Explained,” Brennan Center for Justice, Dec. 10, 2019, <https://www.brennancenter.org/our-work/analysis-opinion/new-yorks-upcoming-bail-reform-changes-explained>;

¹¹²³ Krystal Rodriguez, Michael Rempel, and Matt Watkins. The Facts on Bail Reform and Crime in New York City. Center for Court Innovation. https://www.courtinnovation.org/sites/default/files/media/documents/2021-02/Handout_Bail_Reform_Crime_02032021.pdf.

¹¹²⁴ Lea Hunter, “What You Need To Know About Ending Cash Bail: What’s Wrong With Cash Bail and How To Fix It,” Center for American Progress, <https://www.americanprogress.org/issues/criminal-justice/reports/2020/03/16/481543/ending-cash-bail/>

there is no evidence that poor defendants are significantly more likely to commit crimes while free on bail, thus releasing indigent defendants does not decrease public safety.¹¹²⁵

Additionally, proponents claimed reforms were necessary because bail deepens racial disparities. For instance, in 2019, Black defendants in New York City were 6 percent more likely to face bail compared to white defendants, and 7 percent less likely to be able to afford the set bail at arraignment.¹¹²⁶ These disparities persisted even when comparing individuals of different races with similar criminal histories.¹¹²⁷ Proponents also argued jail and pretrial detention drain government resources, noting also that a weakness of the reforms is that dedicated funding is not provided to implement services of programs for the increased number of individuals who are now released pretrial under supervision.¹¹²⁸

Opponents to the changes to the bail system argue that those facing charges lacked incentive to appear before the court after bail is removed from the release conditions.¹¹²⁹ They also claim reforms undermine public safety, warning of potential increases in crime as an increased number of people are released before trial.¹¹³⁰ They point to increases in certain crimes following the implementation of the bail reforms as evidence the reforms have been detrimental to public safety. They object to the removal of judicial discretion for misdemeanor and non-violent felony crimes which now require mandatory release, either with or without non-monetary release conditions. Many believe public safety should be a consideration in bail decisions in New York, as it is in nearly every other state. As former New York City Police Commissioner William Bratton testified:

Like many former and current police officials, I think bail reform is both warranted and overdue. There's an inherent inequity in the proposition that wealthier persons should be able to buy their freedom pending trial, while poor persons should not. I would favor a system in which the decisions about pretrial detention are never based on cash amounts, so long as judges maintain the discretion and authority to remand dangerous offenders and chronic criminals, as well as genuine flight risks, the so-called public safety risks. In New York State, judges are not given that opportunity.

¹¹²⁵ Gary Craig, State Attorney General Letitia James says new bail laws should be revisited, Rochester Democrat and Chronicle. January 6, 2020 <https://www.democratandchronicle.com/story/news/2020/01/06/state-ag-letitia-james-says-new-bail-laws-should-revisited/2813406001/>

¹¹²⁶ Krystal Rodriguez, Michael Rempel, and Matt Watkins. The Facts on Bail Reform and Crime in New York City. Center for Court Innovation, https://www.courtinnovation.org/sites/default/files/media/documents/2021-02/Handout_Bail_Reform_Crime_02032021.pdf.

¹¹²⁷ Ibid.

¹¹²⁸ Taryn Merkl, "New York's Latest Bail Law Changes Explained," Brennan Center for Justice, Apr. 16, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/new-yorks-latest-bail-law-changes-explained>; SB 7506—B, 2019-2020 Reg. Sess. (NY 2019), <https://legislation.nysenate.gov/pdf/bills/2019/a9506b>.

¹¹²⁹ Taryn Merkl, "New York's Latest Bail Law Changes Explained," Brennan Center, Apr. 16, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/new-yorks-latest-bail-law-changes-explained>

¹¹³⁰ Vera Institute of Justice, "New York's New Bail Reform Model. The next wave of bail reform goes beyond ending money bail," <https://www.vera.org/state-of-justice-reform/2019/bail-reform>

It's only one of two states in which the public safety risk aspect is not given to judges.¹¹³¹

Additionally, representatives of the bail bonds industry have argued the reforms will not result in a decrease in the racial disparities in pretrial detention.¹¹³² They also posit they will not result in cost savings for cities and counties.¹¹³³ They echo concerns of those in favor of reform that the new laws inappropriately rely too heavily on risk assessment tools.¹¹³⁴ Moreover, they argue a weakness of the reforms is that they do not standardize which risk assessment tools should be used. This ambiguity could allow counties to utilize any assessment method they chose, which could result in variations across counties.¹¹³⁵

Those generally in favor of bail reform objected to changes made in April 2020 that allowed judges the discretion to set cash bail based upon the individual's prior criminal history and/or if an individual is on probation or parole. For these individuals, they can no longer be released on recognizance.¹¹³⁶ Scott Levy, Chief Policy Counsel for the Bronx Defenders argues that this new provision is overly punitive, stating that: "what this really does is penalize and punish people for things that may be many, many, many, years in their past and allow incarceration of people who have not yet been proven guilty of anything."¹¹³⁷

The concern over using "static factors" such as prior criminal history to determine pretrial conditions was discussed at the Commission's briefing. DeAnna Hoskins, President and CEO at JustLeadership, testified to how these factors affected her personally. She explained that:

I can never change my history, although my life has progressively changed and I've actually become a different type of person, that if I encounter law enforcement at this point in my life, they're going to go back to my 22-year history, because there's no needle that actually moves to say how many times have you missed court in the last five years? ... So, it doesn't even give me the latitude to move away from those static factors that I'm being judged on if I encounter law enforcement.¹¹³⁸

Some supporters of the revisions state the original bail law went too far, and the revisions were necessary.¹¹³⁹ According to the president of the District Attorneys Association of New York,

¹¹³¹ Bratton, *Bail Reform Briefing*, Transcript, p. 74-75.

¹¹³² New York State Bail Bondsman Association Facts About Bail Reform, New York State Senate https://www.nysenate.gov/sites/default/files/testimony_given_by_the_new_york_state_bail_bondsman_association.pdf

¹¹³³ *Ibid.*

¹¹³⁴ *Ibid.*

¹¹³⁵ *Ibid.*

¹¹³⁶ *See, e.g.*, Beth Fertig, "What The New Rollbacks To Bail Reform Mean In New York," *Gothamist*, July 2, 2020, <https://gothamist.com/news/what-new-rollbacks-bail-reform-mean-new-york>.

¹¹³⁷ *Ibid.*

¹¹³⁸ DeAnna Hoskins, President & CEO, JustLeadership, testimony, *Bail Reform Briefing* transcript, p. 111.

¹¹³⁹ Beth Fertig, "What The New Rollbacks To Bail Reform Mean In New York," *Gothamist*, July 2, 2020, <https://gothamist.com/news/what-new-rollbacks-bail-reform-mean-new-york>.

Sandra Doorley explains that many of the new provisions in the revised law was to give judges back much of the discretion that the original law took away. She stated that

the original bail reform did strip judges of a lot of discretion [and] [n]ow, some of that has been given back and it's going to be up to us, each individual D.A. and assistant D.A. that appears in court, to make the arguments for each particular case.¹¹⁴⁰

Prosecutors and law enforcement officials, who were often some of the most outspoken critics of the initial law, state that the new law has not gone far enough, however. For example, some argue that the law should have expanded judges' ability to impose bail if they believe a defendant poses a danger to public safety, similar to other state statutes.¹¹⁴¹ NYPD Chief of Crime Control Strategies Michael LiPetri maintains that

while there are slight improvements [in the new law], the changes to the criminal justice system have driven recidivism and caused more New Yorkers to be victimized. Further reform is necessary, particularly for robbery offenders, burglaries of commercial establishments and grand larceny auto — where perpetrators continue to walk out of a station house hours after stealing a vehicle. These offenders are helping to drive crime increases in New York City.¹¹⁴²

The revised law also requires court administrators to collect and publicly report data regarding people charged with crimes and what courses of action are taken during the pretrial phase of each case.¹¹⁴³ These data include demographic and criminal history data, as well as details regarding the alleged crime(s) of the accused.¹¹⁴⁴ Additionally, the new legislation requires court administrators to track how many people are released and under what conditions, how many are committed to pretrial custody and for how long, the rate at which people fail to appear or are rearrested, the length of any period of pretrial incarceration, and case outcomes.¹¹⁴⁵

Now that the changes have been enacted, New York City's data has shown that people return to court at high rates even without imposing any financial release conditions. Advocates for the reforms argue crime rates have also remained generally consistent, while opponents have

¹¹⁴⁰ Ibid.

¹¹⁴¹ Ibid.

¹¹⁴² Ibid.

¹¹⁴³ Taryn Merkl, "New York's Latest Bail Law Changes Explained," Brennan Center, Apr. 16, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/new-yorks-latest-bail-law-changes-explained#:~:text=New%20York's%20new%20bail%20reform,amended%20it%20in%20early%20April.&text=Court%20watchers%20estimated%20that%20it,as%2090%20percent%20of%20arrests.>

¹¹⁴⁴ Ibid.

¹¹⁴⁵ Taryn Merkl, "New York's Latest Bail Law Changes Explained," Brennan Center, Apr. 16, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/new-yorks-latest-bail-law-changes-explained#:~:text=New%20York's%20new%20bail%20reform,amended%20it%20in%20early%20April.&text=Court%20watchers%20estimated%20that%20it,as%2090%20percent%20of%20arrests.>

highlighted a rise in certain crimes.¹¹⁴⁶ Following implementation of the bail reforms, opponents noted certain increases in crime which they attributed to the new laws, while others disputed that the increases were particularly dramatic, or that the new laws were the cause. For instance, in the first 58 days of 2020, 482 individuals who had previously been arrested for committing a serious felony offense (e.g., robbery) were rearrested for committing an additional 846 crimes.¹¹⁴⁷ Moreover, 35 percent (299 incidents) were for arrests in the seven major crime categories.¹¹⁴⁸ This number is almost triple the amount of those types of crimes committed during the same period in 2019.¹¹⁴⁹ Opponents of bail reform argue that these rearrests involved individuals who were released due to the new law.¹¹⁵⁰ Conversely, researchers posit that this claim may not be accurate because the statistics cited are based upon limited court data regarding defendants. A New York Post analysis of 2020 arrests for shootings found only one case in which the person arrested was released as a result of the changes to the bail system.¹¹⁵¹ There is consensus among supporters and opponents that crime statistics should continue to be monitored going forward.

Opponents of the changes also point to increases in robbery, burglary, and gun crimes as evidence that bail reforms have compromised public safety.¹¹⁵² Supporters of the changes do not find evidence that bail reforms have driven the increase in certain crimes and note that many other factors drive crime rates.¹¹⁵³ For example, effects of the COVID-19 pandemic are likely to have affected crime statistics in 2020. New York City was far from the only city to experience an increase of some crimes in 2020 compared to 2019.¹¹⁵⁴ According to crime data analyzing 10 offense types in 34 cities across the nation, researchers found that homicide rates rose 30 percent higher than 2019 – representing an historic increase; however, the absolute rate of homicides remain well below the highest rates in 1995 (19.4 versus 11.4 per 100,000 residents, respectively).¹¹⁵⁵ Alternatively, property crimes (e.g., burglaries and larcenies) dropped

¹¹⁴⁶ City of New York, Supervised Release Quarterly Scorecard, Criminal Justice, Citywide | January—March 2019, <https://criminaljustice.cityofnewyork.us/wp-content/uploads/2019/06/Scorecard-Jan-to-Mar-2019-TJ06072019-2-pgs.pdf>

¹¹⁴⁷ New York Police Department, “NYPD Announces Citywide Crime Statistics for February 2020,” Mar. 5, 2020, <https://www1.nyc.gov/site/nypd/news/pr0305/nypd-citywide-crime-statistics-february-2020>.

¹¹⁴⁸ These categories include: murder, rape, robbery, felony assault, burglary, grand larceny and grand larceny auto. Ibid.

¹¹⁴⁹ New York Police Department, “NYPD Announces Citywide Crime Statistics for February 2020,” Mar. 5, 2020, <https://www1.nyc.gov/site/nypd/news/pr0305/nypd-citywide-crime-statistics-february-2020>.

¹¹⁵⁰ Rocco Parascandola and Leonard Greene, “Many suspects freed under bail reform go on to commit major crimes: NYPD,” *Daily News*, Mar. 5, 2020, <https://www.nydailynews.com/new-york/ny-crime-bail-reform-20200305-orj4edxnh5awfojesnohu276mq-story.html?outputType=amp>.

¹¹⁵¹ Craig McCarthy, Carl Campanile, and Aaron Feis, “NYPD’s own stats debunk claims of bail reform leading to spike in gun violence,” July 8, 2020, <https://nypost.com/2020/07/08/nypds-own-stats-debunk-claims-about-bail-reform-link-to-shootings/>

¹¹⁵² Bratton written testimony at page 2.

¹¹⁵³ <https://www.vera.org/downloads/publications/dont-let-fear-mongering-drive-bail-policy.pdf>

¹¹⁵⁴ See, e.g., Richard Rosenfeld, Thomas Abt, and Ernesto Lopez, *Pandemic, Social Unrest, and Crime in U.S. Cities*, Council on Criminal Justice, Jan. 2021,

https://cdn.ymaws.com/counciloncj.org/resource/resmgr/covid_commission/Year_End_Crime_Update_Design.pdf.

¹¹⁵⁵ Ibid., p. 6.

significantly during 2020, despite that motor vehicle thefts increased.¹¹⁵⁶ While these data are still preliminary and causality cannot be determined yet, researchers posit that cities with higher poverty and unemployment rates witnessed larger increases in homicides in 2020. Moreover, these increases in some crimes, including homicides are correlated to the coronavirus pandemic that

disproportionately affected vulnerable populations, placing at-risk individuals under additional physical, mental, emotional, and financial stress... [and] strained the institutions charged with responding to violent offenses, including police agencies, courts, hospitals, emergency medical services, and community-based groups that productively engage at-risk individuals.¹¹⁵⁷

Researchers attribute a substantial decrease in the jail population to the bail reforms. Analysis conducted by the Center of Courtroom Innovation found in the year following the April 2019 passage of the law, the reforms contributed to a 40 percent decline in New York City's pretrial jail population (see chart 16 below).¹¹⁵⁸ The new bail reform law has not only resulted in a decrease in the jail population in New York City, some rural counties such as in Herkimer and Onondaga counties, it also facilitated a dramatic decrease in jail populations with no correlative increase in crime rates.¹¹⁵⁹ However, while the law led to a decrease in the number of those detained pretrial, data show that in January 2020, more than 70 percent of those incarcerated in New York City jails and almost 50 percent of those incarcerated in non-New York City jails were still being detained pretrial.¹¹⁶⁰ Researchers acknowledge, however, that data regarding the use of pretrial detention both prior and post-bail reform outside of New York City are difficult to fully evaluate due to the interacting effects of the COVID-19 pandemic and further research will be crucial to ongoing policy discussions.¹¹⁶¹

Researchers with the Vera Institute conducted a study that sampled trends in jail populations and jail admissions for New York City and 43 non-NYC counties from January 1, 2018 to June 1, 2020. Their analysis discovered that although the original bail reform led to decreases in the overall jail populations, bail reform measures did not reduce the existing racial disparities among the jail population.¹¹⁶²

¹¹⁵⁶ Ibid., p. 17.

¹¹⁵⁷ Ibid., p. 20.

¹¹⁵⁸ Mike Rempel and Krystal Rodriguez, "NY's Amended Bail Law—Here's What the Changes Mean," July 2, 2020, <https://www.courtinnovation.org/about/announcements/nys-amended-bail-law-heres-what-changes-mean>.

¹¹⁵⁹ Vera Institute of Justice, "New York's New Bail Reform Model," 2019, <https://www.vera.org/state-of-justice-reform/2019/bail-reform>.

¹¹⁶⁰ Jaeok Kim, Quinn Hood, and Elliot Connors, "The Impact of New York Bail Reform on Statewide Jail Populations: A First Look," Vera Institute of Justice, Feb. 2021, <https://www.vera.org/downloads/publications/the-impact-of-new-york-bail-reform-on-statewide-jail-populations.pdf>.

¹¹⁶¹ Jaeok Kim, Quinn Hood, and Elliot Connors. The Impact of New York Bail Reform on Statewide Jail Populations: A First Look. New York State Jail Population Brief, January 2018–June 2020. *Vera Institute of Justice*. February 2021. <https://www.vera.org/downloads/publications/the-impact-of-new-york-bail-reform-on-statewide-jail-populations.pdf>

¹¹⁶² Ibid.

In January 2020, Black individuals in New York City were 6.3 times more likely to be incarcerated than White individuals, which was an increase from 5.4 times in January 2019.¹¹⁶³ Counties outside of New York City also experienced an increase, with Black individuals being 5.7 times more likely to be incarcerated compared to White individuals in January 2020, compared to 5.2 times more likely in January 2019. These disparities increased further, by June 2020 in the counties outside of New York City, Black individuals were 6.4 times more likely to be incarcerated in jails than White individuals which was an increase from 5.5 times in March.¹¹⁶⁴

Bail reform appeared to have a greater impact on pretrial admissions where bail was set in the counties that do not include New York City. From October 2019 to January 2020, the number of people admitted to jail with a set bail fell 70.8 percent in those counties, from nearly 2,400 admissions in October 2019 to less than 700 in January 2020.¹¹⁶⁵ Continuing the trend, from January 2020 to June 2020, the number of pretrial admissions declined 27.9 percent. In contrast, other admissions for non-eligible bail charges barely declined, from 2,040 in January 2019 to 1,906 in January 2020.¹¹⁶⁶

The data also suggest that the new reform policies may have exacerbated current racial disparities in New York City jails and in counties outside of New York City due to the fact that White jail populations decreased faster than that of the Black jail population.¹¹⁶⁷ Researchers found that racial disparities in pretrial admissions continued from January 2019 to January 2020, even though pretrial admissions decreased significantly among all racial groups due to bail reform.¹¹⁶⁸ The pretrial admission rate to New York City jails from January 2019 to January 2020 dropped 50 percent for Black people from 80 per 100,000 to 40 per 100,000, respectively; while the rate for White people dropped 52.6 percent from 19 per 100,000 to 9, respectively. In January 2020, the month when bail reform took effect, Black people were 4.7 times more likely to be admitted pretrial than White people.¹¹⁶⁹ However, due to the newness of these data and the ongoing pandemic, this disparity has fluctuated without a consistent trend.¹¹⁷⁰ During the onset of the

¹¹⁶³ Ibid.

¹¹⁶⁴ Ibid.

¹¹⁶⁵ Jaeok Kim, Quinn Hood, and Elliot Connors. The Impact of New York Bail Reform on Statewide Jail Populations: A First Look. New York State Jail Population Brief, January 2018–June 2020. *Vera Institute of Justice*, February 2021. <https://www.vera.org/downloads/publications/the-impact-of-new-york-bail-reform-on-statewide-jail-populations.pdf>.

¹¹⁶⁶ Ibid.

¹¹⁶⁷ Jaeok Kim, Quinn Hood, and Elliot Connors, “The Impact of New York Bail Reform on Statewide Jail Populations: A First Look. New York State Jail Population Brief, January 2018–June 2020,” *Vera Institute of Justice*, Feb. 2021, <https://www.vera.org/downloads/publications/the-impact-of-new-york-bail-reform-on-statewide-jail-populations.pdf>.

¹¹⁶⁸ Ibid.

¹¹⁶⁹ Ibid.

¹¹⁷⁰ Jaeok Kim, Quinn Hood, and Elliot Connors, “The Impact of New York Bail Reform on Statewide Jail Populations: A First Look. New York State Jail Population Brief, January 2018–June 2020,” *Vera Institute of Justice*, Feb. 2021, <https://www.vera.org/downloads/publications/the-impact-of-new-york-bail-reform-on-statewide-jail-populations.pdf>.

COVID-19 pandemic in March 2020, New York suspended grand juries and jury trials in response to public health concerns. During this time period the median length of time people were held in detention rose significantly, increasing from 78 days in March 2020 to 129 days in June 2020, an increase of 65.4 percent.¹¹⁷¹

Nevada

Nevada's bail system resembles many of the pretrial and bail systems across the country. For instance, the state's constitution provides a presumption of pretrial release; however, release can be denied for capital offenses, murder punishable by life without parole, and first-degree murder.¹¹⁷² Nevada pretrial release conditions are also similar to other states where laws allow for release on personal recognizance. Common conditions of release include commercial surety, cash deposit, other secured bond, and additional requirements.¹¹⁷³ According to the Prison Policy Initiative, data show that like other states, the growth of the pretrial population has been accounting for higher percentages of the local jail population over the past several decades (see Chart 15).¹¹⁷⁴

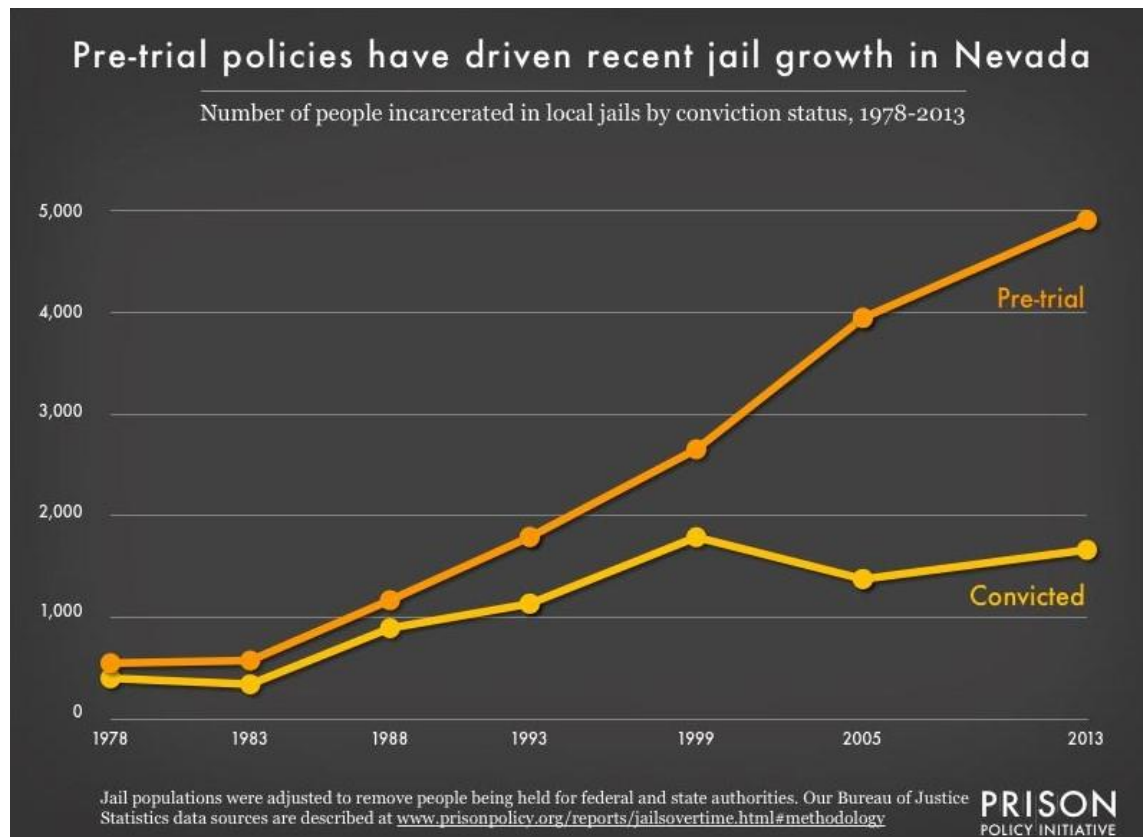
¹¹⁷¹ Jaeok Kim, Quinn Hood, and Elliot Connors, "The Impact of New York Bail Reform on Statewide Jail Populations: A First Look. New York State Jail Population Brief, January 2018–June 2020," Vera Institute of Justice, Feb. 2021, <https://www.vera.org/downloads/publications/the-impact-of-new-york-bail-reform-on-statewide-jail-populations.pdf>

¹¹⁷² Nevada Const. art. 1, § 7; § 178.484.

¹¹⁷³ See Nevada Pretrial Release Conditions § 178.484; § 178.504; § 178.502; § 178.4851; A \$3,000 to \$15,000 secured bond as enumerated in § 178.484(7) and § 178.484(9) is required for domestic violence offenses and for a violation of a protection order. See § 178.484; § 178.504; § 178.502; § 178.4851.

¹¹⁷⁴ Joshua Aiken, "Era of Mass Expansion: Why State Officials Should Fight Jail Growth," Prison Policy Initiative, May 2017, <https://www.prisonpolicy.org/profiles/NV.html>.

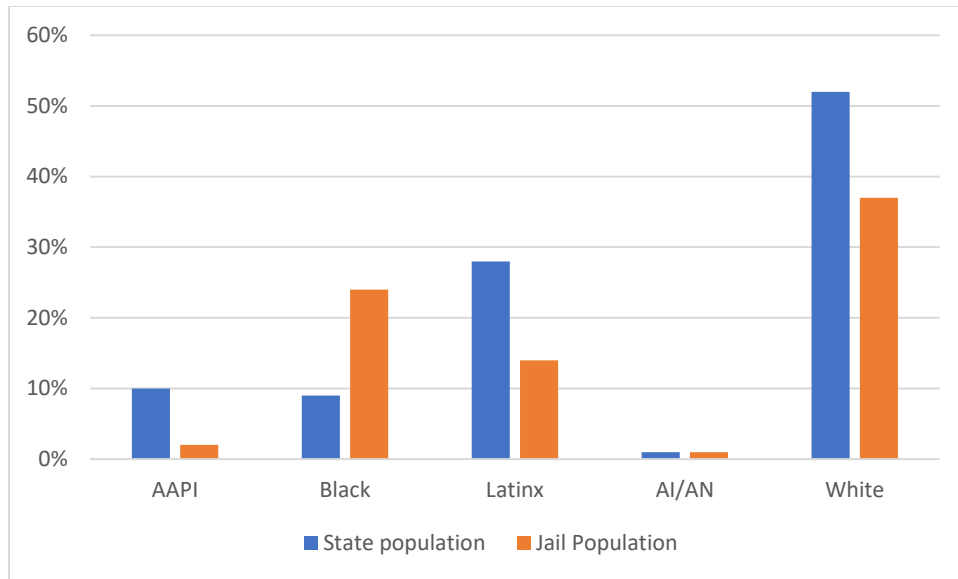
Chart 15: Pretrial rates in Nevada (1978-2013)



Source: Joshua Aiken, Prison Policy Initiative, May 2017, <https://www.prisonpolicy.org/reports/jailsovertime.html>

In 2015, the Nevada jail population was 7,052; of those, the pretrial population represented 54 percent of the total population (3,780).¹¹⁷⁵ This represented an increase of 39 percent since 2000 and an 896 percent increase since 1970. Demographic characteristics of the jail population was also similar to other jurisdictions that show racial disparities. In 2015, Black individuals represented 9 percent of the state's residents, yet constituted 24 percent of the individuals in jail and 31 percent of those in prison (see Chart 16). Similarly, the number of women in jail have also increased. Since 1980, the number of women in jail has increased 1,088 percent.

¹¹⁷⁵ Vera Institute of Justice, "Incarceration Trends in Nevada," 2019, <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-nevada.pdf>

Chart 16: Jail Population, by Race/Ethnicity (2015)

Source: Vera Institute, “Incarceration Trends in Nevada,” 2019, <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-nevada.pdf>

As with other states around the nation, Nevada has witnessed a stark increase in its jail population among the rural population. For instance, in Esmeralda County, the jail population increased 900 percent from 2005 to 2015, compared to more urban Douglas County that witnessed a 47 percent decrease. Similar trends were found among the pretrial population, where the pretrial population in rural counties continued to increase despite the decline in larger counties. Since 2000, the pretrial incarceration rate increased nine percent among the state’s three small to medium counties (242 per 100,000), 41 percent among the state’s 13 rural counties (293 per 100,000) but decreased 28 percent in the state’s one urban county (180 per 100,000).¹¹⁷⁶ Compared to other states in the region in 2015, Nevada had the third highest pretrial population rate (202), following Idaho (236) and Arizona (234).¹¹⁷⁷

Similar to other states that were concerned with the growing pretrial population, in January 2016, the Supreme Court formed a committee to study evidence-based pretrial release. Chief Justice James Hardesty formed the committee for the purpose of developing a validated risk assessment tool that would then be utilized by judges across the state to aid them in pretrial and bail determinations.¹¹⁷⁸ Chief Hardesty stated that “For too long Nevada judges have had to make pretrial release judgments based on anecdotal information about the accused or payment of bail

¹¹⁷⁶ Vera Institute, “Incarceration Trends in Nevada,” 2019, <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-nevada.pdf>.

¹¹⁷⁷ Ibid.

¹¹⁷⁸ Supreme Court of Nevada, Administrative Office of the Courts, <https://nvcourts.gov/AOC/Templates/documents.aspx?folderID=19312>.

from schedules that vary from county to county and crime to crime.”¹¹⁷⁹ The risk assessment tool was ordered to be implemented statewide by September 2020.¹¹⁸⁰

Nevada’s pretrial and bail system recently came to national attention due to a lawsuit filed by the Clark County public defender’s office and the Civil Rights Corps in the case against Jose Valdez-Jimenez who was accused of stealing thousands of dollars of merchandise.¹¹⁸¹ He was detained pretrial with bail set at \$40,000 which he was unable to afford that resulted in his incarceration since May 2018. An attorney in the case with the Clark County public defender’s office, Nancy Lemke asserted that “what we’re saying over and over again is cash bail is a condition of release. It has to be attainable. So if somebody earns Paul Manafort money, bail is higher. If somebody earned \$1,000 a year, bail should be lower.”¹¹⁸² In a court filing for the case, Valdez-Jimenez’s attorneys wrote that:

To date, no court has determined, following the filing of the indictment, that preventative detention is the least restrictive means of ensuring community safety and assuring Petitioner’s return to court. In the absence of such a finding by clear and convincing evidence, Petitioner’s continued incarceration violates his constitutional and statutory rights.¹¹⁸³

Prosecutors for the case stated that the assessed bail amount was fair due to the defendant’s prior criminal history and incidents in failing to appear in court.¹¹⁸⁴

On July 24, 2019, the state Supreme Court dismissed the issue of excessive bail but agreed to hear oral arguments as to “whether the initial bail settings were unconstitutional because they were made in the absence of the petitioners without any adversarial hearing, and whether the individualized bail hearings violated the petitioners’ rights to due process and equal protection.” The case is still proceeding through state court but is not moving forward in federal court where the case was dismissed due to Valdez-Jimenez accepting of a plea deal and waiving his right to a

¹¹⁷⁹ National Conference of State Legislatures, “NCSL Pretrial Quarterly Newsletter,” Jan. 2016, <https://www.ncsl.org/research/civil-and-criminal-justice/ncsl-pretrial-release-quarterly-newsletter.aspx>; Supreme Court of Nevada, Administrative Office of the Courts, <https://nvcourts.gov/AOC/Templates/documents.aspx?folderID=19312>.

¹¹⁸⁰ Raeshann Canady and Brittany Bruner, “Enhancing the Justice System Through the Nevada Pretrial Risk Assessment Tool: A Case Study in Las Vegas Municipal Court,” National Training and Technical Assistance Center, June 29, 2020, <https://bjatta.bja.ojp.gov/media/blog/enhancing-justice-system-through-nevada-pretrial-risk-assessment-tool-case-study-las>.

¹¹⁸¹ Riley Snyder, “Lawsuit before state Supreme Court seeks to curtail use of cash bail statewide,” *Nevada Independent*, Aug. 14, 2019, <https://thenevadaindependent.com/article/lawsuit-before-state-supreme-court-seeks-to-curtail-use-of-cash-bail-statewide>.

¹¹⁸² Riley Snyder, “Lawsuit before state Supreme Court seeks to curtail use of cash bail statewide,” *Nevada Independent*, Aug. 14, 2019, <https://thenevadaindependent.com/article/lawsuit-before-state-supreme-court-seeks-to-curtail-use-of-cash-bail-statewide>.

¹¹⁸³ *Ibid.*

¹¹⁸⁴ *Ibid.*

trial.¹¹⁸⁵ Lemke maintained that attorneys for the defendants were not necessarily requesting the state Supreme Court overturn bail laws, but rather to set a precedent that requires “clear and convincing” evidence in pretrial hearings instead of assessing bail at the outset, which she argues results in a de facto judgement of pretrial detention when an individual cannot afford to post bail.¹¹⁸⁶

Following this case, in April 2020, the state Supreme Court ruled to modify the state’s pretrial system and use of cash bail. The judges created a three-tiered process that requires judges to take an individual’s finances into account prior to imposing any cash bail, but it did not abolish the use of cash bail.¹¹⁸⁷ The three-step process involves:

- a prompt individualized hearing on custody status, at which the defendant has the right to be represented by an attorney and is also afforded the right to testify or present evidence;
- a requirement that at the hearing, prosecutors must meet a burden of clear and convincing evidence that no less restrictive alternative will satisfy its interests in ensuring the defendant’s presence and the community’s safety;
- The district court judge must make findings of fact and state its reasons for the bail decision on the record.¹¹⁸⁸

The Court ruled that “bail may be imposed only where necessary to only be set when it is necessary to reasonably ensure the defendant’s appearance at court proceedings or to protect the community, including the victim and the victim’s family.”¹¹⁸⁹ Judges are ordered to assess cases based on the individual circumstances of the defendant that includes the character or ties to the community, past criminal history, the nature of the potential crime and sentence, and whether a recognizance bond or supervision was sufficient to ensure appearance at future court dates.¹¹⁹⁰

The public defenders in the Valdez-Jimenez case stated that while the Court has issued the new order regarding, several jurisdictions have not been adhering to the new hearing rules.¹¹⁹¹ In a meeting with lawmakers, they offered several legislative recommendations that include providing

¹¹⁸⁵ Riley Snyder, “Lawsuit before state Supreme Court seeks to curtail use of cash bail statewide,” *Nevada Independent*, Aug. 14, 2019, <https://thenevadaindependent.com/article/lawsuit-before-state-supreme-court-seeks-to-curtail-use-of-cash-bail-statewide>.

¹¹⁸⁶ *Ibid.*

¹¹⁸⁷ *Valdez-Jimenez v. Eighth Judicial Dist. Court*, 460 P.3d 976 (2020), <https://casetext.com/case/valdez-jimenez-v-eighth-judicial-dist-court>.

¹¹⁸⁸ Riley Snyder, “Nevada Supreme Court orders significant limits on cash bail,” *Nevada Independent*, Apr. 9, 2020, <https://thenevadaindependent.com/article/nevada-supreme-court-orders-significant-limits-on-cash-bail>.

¹¹⁸⁹ *Valdez-Jimenez v. Eighth Judicial Dist. Court*, 460 P.3d 976 (2020), at 998, <https://casetext.com/case/valdez-jimenez-v-eighth-judicial-dist-court>.

¹¹⁹⁰ *Id.* at 986.

¹¹⁹¹ Riley Snyder, “Advocates say many courts not adhering to Supreme Court decision that restricted cash bail,” *Nevada Independent*, June 5, 2020, <https://thenevadaindependent.com/article/advocates-say-many-courts-not-adhering-to-supreme-court-decision-that-restricted-cash-bail>.

a standard definition of “prompt” for initial hearings and defendants should be released on recognizance unless proved to be a flight risk or dangerous to public safety, and lawmakers should allow prosecutors to ask for detention if deemed necessary. Other recommendations included more clearly defining how courts assess an individual’s financial means and the ability to post bail, transition away from utilizing flat bail schedules, and utilizing a “tiered system starting with a promissory note or more severe restrictions based on past behavior or basing bail amounts on a percentage of a person’s annual income.”¹¹⁹² These recommendations are not without some concerns, however. For example, prompt bail hearings could be costly, especially for some rural counties with limited resources and already struggle to provide adequate representation for indigent defendants.¹¹⁹³

Proponents of bail reform point to extended detention times and racial disparities in detention centers and jails in large counties such as Clark County. Data from 2019 show that approximately 600 individuals were detained longer than 7 days due to the inability to post bail that was less than \$2,500.¹¹⁹⁴ Of the approximately 75,000 individuals booked into the Clark County Detention Center (CCDC) in 2019, nearly 31,000 were awaiting trial. The majority of this pretrial population was estimated to consist of those facing felony charges (85 percent), 13 percent for misdemeanors, and 2 percent for gross misdemeanors.¹¹⁹⁵ Data further showed that the Black community represents 11 percent of Clark County residents yet constitutes 40 percent of those in detained in pretrial at the CCDC.¹¹⁹⁶

These racial disparities are not a new concern and was one of the reasons that Judge Hardesty called for the development and implementation a statewide risk assessment tool in 2016.¹¹⁹⁷ The Nevada legislature further called for a study on racial disparities in the implementation of the pretrial risk assessment tool in 2019.¹¹⁹⁸ James Austin, who assisted in the development of this tool, stated that judges consider the following factors when making bail determinations:

- Age of first arrest
- Anytime a defendant failed to appear in court in the last two years

¹¹⁹² Riley Snyder, “Advocates say many courts not adhering to Supreme Court decision that restricted cash bail,” *Nevada Independent*, June 5, 2020, <https://thenevadaindependent.com/article/advocates-say-many-courts-not-adhering-to-supreme-court-decision-that-restricted-cash-bail>.

¹¹⁹³ *Ibid.*

¹¹⁹⁴ Michael Lyle, “Yes, people sit in jail because they can’t afford bail,” *Nevada Current*, Mar. 4, 2020, <https://www.nevadacurrent.com/2020/03/04/yes-people-sit-in-jail-because-they-cant-afford-bail/>.

¹¹⁹⁵ *Ibid.*

¹¹⁹⁶ *Ibid.*

¹¹⁹⁷ Supreme Court of Nevada, “Nevada Pretrial Risk Assessment Training Created for Nevada Justice System,” Sept. 17, 2019,

https://nvcourts.gov/Supreme/News/Nevada_Pretial_Risk_Assessment_Training_Created_for_Nevada_Justice_System/; Supreme Court of Nevada, Administrative Office of the Courts, <https://nvcourts.gov/AOC/Templates/documents.aspx?folderID=19312>.

¹¹⁹⁸ Michael Lyle, “Yes, people sit in jail because they can’t afford bail,” *Nevada Current*, Mar. 4, 2020, <https://www.nevadacurrent.com/2020/03/04/yes-people-sit-in-jail-because-they-cant-afford-bail/>.

- If there was a prior violent crime conviction
- Prior felony, gross misdemeanor or misdemeanor convictions
- Pending pretrial cases at the time of arrest
- Repeat prior arrests for drug crimes
- Stability factors such as if they are employed or their living situation.¹¹⁹⁹

Austin explained that a point is assigned based upon each factor, and the higher the score, the higher assumption that the defendant will not appear at court. Results from the pilot test of the risk assessment tool are shown in the table below.¹²⁰⁰

Table 7: Results from Nevada Risk Assessment Tool

Attribute	Clark County Detention Center	Las Vegas City Jail (Clark County)	Washoe	White Pines	Total
Releases	406	179	410	62	1,057
Gender					
Male	77%	73%	85%	77%	80%
Female	23%	27%	15%	23%	20%
Race					
White	46%	40%	66%	N/A	50%
Black	30%	30%	11%	N/A	21%
Latinx	16%	26%	18%	N/A	18%
Asian	6%	3%	1%	N/A	3%
Other	14%	36%	0%	1%	12%
Method of Release					
Cash Bail	3%	10%	9%	10%	7%

¹¹⁹⁹ James Austin and Robin Allen, “Development of the Nevada Pretrial Risk Assessment System: Final Report,” June 2016 [on file].

¹²⁰⁰ The developers of the tool chose four representative Nevada counties based on 2014 data. In Clark county, two random samples were created for defendants released from the Clark County Detention Center and the Las Vegas City Jail. *Ibid.*

Surety Bond	37%	23%	36%	63%	35%
Recognizance	46%	31%	55%	26%	46%
Other	14%	36%	0%	1%	12%
Nevada Resident	78%	74%	86%	81%	81%
LOS Prior Release	15	8	12	5	12
Avg. Bail	\$19,122	\$3,251	\$8,043	\$12,563	\$11,674
Median Bail	\$10,000	\$2,115	\$2,500	\$9,000	\$5,000
Avg. Prior Misd Arrests	6	3	2	3	4
Avg. Prior Felony/GM Arrests	4	1	2	2	3

Source: James Austin and Robin Allen, “Development of the Nevada Pretrial Risk Assessment System: Final Report,” June 2016.

As the above table demonstrates, males made up the majority of the defendants across all four samples. Regarding race and ethnicity, Washoe County had predominantly White defendants, whereas Clark County had higher proportions of Black and Latinx defendants.¹²⁰¹ Comparing these two counties’ bail outcomes reveal some similarities and important differences.

The most common form of release for both the Clark County Detention Center (CCDC) and Washoe County were recognizance bonds (46% and 55%, respectively). The least common form of release in both counties was cash bail (9% and 3%, respectively). The average and median bail amounts, however, vary substantially. In Washoe County, the average bail amount was \$8,043 and the median amount was \$2,500. Comparatively, the average bail amount in CCDC was \$19,122 and the median amount was \$10,000. This means that while both counties utilized cash bail as the least common form of release, when used, judges imposed bail amounts that were over twice as high in the county with more Black and Latinx defendants.¹²⁰² Furthermore, these higher bail amounts were imposed against defendants in CCDC compared to those in Washoe County, despite

¹²⁰¹ While both Clark County Detention Center (CCDC) and the Las Vegas City Jail both reside in Clark County, the developers of the risk assessment tool split the county into two distinct samples. *See* James Austin and Robin Allen, “Development of the Nevada Pretrial Risk Assessment System: Final Report,” June 2016 [on file]. For this report’s analysis, Commission staff chose to compare CCDC and Washoe County due to the similar number of releases (406 and 410, respectively). *Ibid.*

¹²⁰² James Austin and Robin Allen, “Development of the Nevada Pretrial Risk Assessment System: Final Report,” June 2016 [on file].

that median incomes are relatively similar (\$64,791 and \$59,340, respectively).¹²⁰³ Some of these differences may be able to be explained by the defendants in CCDC have higher prior arrest averages than those in Washoe County. These results are consistent with other studies that show that while judges may impose cash bail for Black and White defendants at similar rates, when these forms of release are utilized, they are more likely to impose higher bail amounts for Black and Latinx defendants.¹²⁰⁴

He also stated that results from this tool showed that on average Black defendants score one point higher than White defendants. Austin claimed that this possible bias was not due to the risk assessment tool, but due to other factors such as arrest and conviction rates.¹²⁰⁵

Austin explained that

[w]here the big racial and ethnic decision kicks in is at the police decision to arrest. I can look nationally at the Black population at 12 percent but the percentage that are arrested jumps up to about 30 percent. That's the big jump. Then you look for other jumps for those charged, convicted, length of stay and you can see other jumps.¹²⁰⁶

As discussed in Chapter 2, many concerns persist regarding the usage of these tools, including a joint letter signed by 110 national civil rights groups calling for an end to these tools due to the concern of racial bias and lack of transparency.¹²⁰⁷ Other national groups, such as the American Bail Coalition, also spoke out against Nevada implementing a risk assessment tool for bail and pretrial decisions stating that among other things, it has not been independently determined that it will not contribute to racial disparities and it may overweigh certain demographic factors such as employment, residential stability, and age. In a public comment, the organization wrote that:

The risk assessment tool relies more heavily on un-convicted conduct than any [] other assessment I have seen. This is hugely problematic from the perspective of defendants' rights. For example, three of the nine categories can be scored based

¹²⁰³ Census, QuickFacts: Clark County, Nevada, <https://www.census.gov/quickfacts/clarkcountynevada>; Census, QuickFacts: Washoe County, Nevada, <https://www.census.gov/quickfacts/washoecountynevada>.

¹²⁰⁴ See, e.g., David Arnold, Will Dobbie, and Crystal Yang, "Racial Bias in Bail Decisions," *Quarterly Journal of Economics*, vol. 133, no. 4, May 2018, https://scholar.harvard.edu/files/cyang/files/ady_racialbias.pdf; Leon Digard and Elizabeth Swavola, "Justice Denied: The Harmful and Lasting Effects of Pretrial Detention," Vera Institute Brief, April 2019, at 7, <http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/04/Justice-Denied-Evidence-Brief.pdf>; Wendy Sawyer, "How race impacts who is detained pretrial," Prison Policy Initiative, Oct. 9, 2019, https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/.

¹²⁰⁵ Michael Lyle, "Yes, people sit in jail because they can't afford bail," *Nevada Current*, Mar. 4, 2020, <https://www.nevadacurrent.com/2020/03/04/yes-people-sit-in-jail-because-they-cant-afford-bail/>.

¹²⁰⁶ Michael Lyle, "Yes, people sit in jail because they can't afford bail," *Nevada Current*, Mar. 4, 2020, <https://www.nevadacurrent.com/2020/03/04/yes-people-sit-in-jail-because-they-cant-afford-bail/>.

¹²⁰⁷ See, e.g., Leadership Conference on Civil and Human Rights, "More than 100 Civil Rights, Digital Justice, and Community-Based Organizations Raise Concerns About Pretrial Risk Assessment," July 30, 2018, <https://civilrights.org/2018/07/30/more-than-100-civil-rights-digital-justice-and-community-based-organizations-raise-concerns-about-pretrial-risk-assessment/>.

on having been arrested but not convicted of misdemeanors, gross misdemeanors, or felonies. In addition, if someone is homeless, they will get two points for that, labeling them as high risk solely due to their poverty. Moreover, a non-resident but legal alien would get a higher risk score due to the fact that they are not a “resident” of the State of Nevada.

At the end of the day, a jury could exonerate someone of all charges, and a defendant could sue civilly to seek redress for a false allegation and be awarded judgement, and yet this risk assessment will place them into the higher risk category, unnecessarily trammeling their civil liberties by labeling them as dangerous, a label that no subsequent exoneration would remove until this risk assessment. In approving a risk assessment that has not been tested for racial or other protected-class bias and relies so heavily on demographic factors and unconvicted conduct, the Supreme Court of Nevada is disregarding a known risk that the tool may disparately treat similar situated defendants.¹²⁰⁸

These concerns may be substantiated since data show that pretrial and bail practices may have a disparate impact on poor individuals, individuals suffering from mental health and/or substance abuse issues, and communities of color.¹²⁰⁹ For example, in Clark County (largest county in the state) the greatest trend affecting the county’s jail population is the increase of arrests of transient and/or indigent populations, with many of these individuals suffering from mental health and/or substance abuse issues. There is an estimated 35 percent of the jail population on psychotropic medications, which due to the size and percentage of these medications, the county jail is often referred to as the largest mental health facility in Nevada.¹²¹⁰ Over-reliance on incarceration of repeat offenders who suffer from mental illness is a determined concern in Clark County, where some individuals have been booked more than 15 times in one year. Additionally, individuals with behavioral and/or substance abuse issues who enter the county’s jail spend an average of 45.7 days longer in detention than other defendants.¹²¹¹

Moreover, like other counties nationwide, Clark County data show that pretrial detention is the main driver of the jail population. In 2017, the pretrial population alone accounted for 67 percent, with the 7.9 percent remaining in custody for over a year.¹²¹² In 2017, 16 percent of all low and low-moderate-risk defendants remained in detained over three days and spent an average of 58

¹²⁰⁸ American Bail Coalition, “Nevada Supreme Court Proposes Statewide Use of Pretrial Risk Assessment Tools Despite Ban Recommendation by Leadership Conference of Civil Rights Organizations,” Feb. 1, 2019, <https://ambailcoalition.org/nevada-supreme-court-recommends-statewide-use-of-pretrial-risk-tools-abc-opposes-recommendation/>.

¹²⁰⁹ Safety and Justice Challenge, “Clark County: 2018 Safety and Justice Challenge Fact Sheet,” John D. and Catherine T. MacArthur Foundation, <https://www.safetyandjusticechallenge.org/wp-content/uploads/2018/10/Clark-County-Safety-Justice-Challenge-Fact-Sheet.pdf>.

¹²¹⁰ Ibid.

¹²¹¹ Ibid.

¹²¹² Safety and Justice Challenge, “Clark County: 2018 Safety and Justice Challenge Fact Sheet,” John D. and Catherine T. MacArthur Foundation, <https://www.safetyandjusticechallenge.org/wp-content/uploads/2018/10/Clark-County-Safety-Justice-Challenge-Fact-Sheet.pdf>.

days in jail.¹²¹³ Lastly, data also show that while the Black and Latinx communities make up 42.3 percent of the local population, these groups represent 54.1 percent of the jail population on average.¹²¹⁴

To address these issues, the county was awarded a \$700,000 two-year grant in 2018 from the Safety and Justice Challenge¹²¹⁵ that is intended to “implement strategies that address the main drivers of the local jail population in the area, including unfair and ineffective bail practices that take a particularly heavy toll on people of color, low-income communities, and people with mental health and substance abuse issues.”¹²¹⁶

¹²¹³ Safety and Justice Challenge, Clark County, Nevada, <https://www.safetyandjusticechallenge.org/challenge-site/clark-county-nv/>.

¹²¹⁴ Ibid.

¹²¹⁵ The Safety and Justice Challenge is a five-year, \$217 million investment by the John D. and Catherine T. MacArthur Foundation that awards jurisdictions financial and technical support in their efforts to “rethink justice systems and implement data-driven strategies to safely reduce jail populations... Jurisdictions participating in the Challenge will develop and model effective ways to keep people out of jail who don’t belong there, more effectively reintegrate those who must be confined into the community upon release, and help them stay out of jail thereafter. In doing so, they will demonstrate alternatives to incarceration as usual, creating models for reducing unnecessary jail use to make communities healthier, fairer, and safer.” See <https://www.safetyandjusticechallenge.org/about-the-challenge/>.

¹²¹⁶ Ibid.

Statement of Commissioner J. Christian Adams

I voted for this report because, unlike most previous Commission reports, the staff included at least some countervailing viewpoints from opposing voices, and I want to encourage them to provide more balanced, less one-sided reports in the future. I support parts of the report, particularly with regard to excessive bail or pre-trial release requirements for those charged with misdemeanors, but the vast bulk of the report still favors one side of the public debate regarding alternatives to cash bail.

First off, the report relies too heavily on just a few pro-reform voices. Almost 80 quotes or citations are to Vera Institute documents and reports and over 40 are from UVA professor Megan Stevenson. They were also both verbal witnesses at the Commission's hearing on this issue. Similarly, the same reports, studies, and findings from a handful of other authors and sources were also cited over and over again, such as: Timothy Schnacke – 31 times; Marc Levin – 30 times; Katherine Hood – 28 times; Will Dobbie – 26 times; Wendy Sawyer – 22 times; Bernadette Rabuy – 18 times.

Some of these voices stand to benefit financially through consulting, education, operation, or other government contracts –if their ultimate recommendation is adopted, i.e., that the taxpayers via federal, state, and local government take over the cash bail process and expand pre-trial services throughout the nation. As Commissioner Kirsanow pointed out, the Vera Institute was hired by Houston's court monitor to educate court, legal, and law enforcement staff about Houston's new bail reform requirements. The Vera Institute's New York public charitable filings state that it received almost \$110 million in government grants from July 2018 to June 2019 – so \$110 million a year.

The result is that the report focuses almost exclusively on the plight of those that have been arrested and spends very little time on the interests of the law abiding in public safety. It spends scant time examining, exploring, or reporting on the info and testimony that was given on the public safety concerns of Americans. Whenever that issue was broached by witness testimony in the report, it was countered with opposing arguments from pro-reform advocates and no additional information or rebuttal from those concerned about public safety and increases in crime in the jurisdictions that have actually implemented bail reform.

For instance, in June of this year, NYC Police Commissioner Dermot Shea blamed New York City's 14-year high in shootings on the state's bail reform law for not keeping criminals behind bars:

“New York City Police Commissioner Dermot Shea sounded off on the state's criminal justice system and reiterated his frequent calls for legal changes that would help the NYPD get guns off the street. ‘We're arresting someone for pushing a woman down the stairs and we're releasing them back into the streets,’ said Shea Tuesday. ‘This is craziness.’ . . . ‘We cannot be chasing our tail, catch and release, catch and release.’”

<https://www.fox5ny.com/news/nypd-top-cop-blames-bail-reform-for-surge-in-crime>

In an earlier December 20, 2020 New York Daily News article, Police Commissioner Shea also blamed bail reform for out-of-control bloodshed and was quoted saying:

“NYPD officers have made a “staggering number of gun arrests” over the past three months, Shea said, praising his rank-and-file. But those caught with guns don’t stay in jail for any length of time, he said. Three days later, four days later, those people are back on the street committing gun violence,” Shea told NY1, blasting New York’s new laws that prevent incarceration for misdemeanors and some nonviolent felonies. ... If New York City could just keep criminals behind bars instead of giving them a free pass to wreak havoc on communities, residents wouldn’t be so afraid to walk the streets.”

<https://www.nydailynews.com/new-york/nyc-crime/ny-nyc-shootings-dermot-shea-bail-reform-20201208-eszymgyix5fu7owmcq5lvkgyui-story.html>

A July 16th Wall Street Journal Article titled “*Some Police Push Back on Bail Reform, Citing Wave of Killings*,” quoted Chicago Police Superintendent David Brown:

“It’s madness,” said Chicago Police Superintendent David Brown. ‘It’s making us all less safe,’ said Mr. Brown of suspects in violent crimes being released on electronic monitoring, which has greatly increased since a 2017 change of policy in Cook County Circuit Court that also lowered some bails. ... At a city council meeting ahead of the holiday weekend, Mr. Brown argued that judges needed to get tougher. ‘If one person is killed on electronic monitoring, we need to rethink electronic monitoring,’ he said, of the system that provides those accused of crimes with an electronic ankle bracelet that tracks their movements. ... ‘We continue to do our best to monitor these individuals around the clock, but a monitoring bracelet cannot predict human behavior and will never be able to stop a bullet,’ the [Cook County] sheriff’s office said.”

<https://www.wsj.com/articles/some-police-push-back-on-bail-reform-citing-wave-of-killings-11626441851>.

One of the few voices permitted to testify at the Commission’s hearing on the issue of public safety concerns was former New York City Police Commissioner William Bratton. However, the report cherry-picked his comments that generally supported fair and just bail reform and left out completely any of his testimony decrying the impacts from New York state’s current bail reform system on increases in crime in NYC. On page 159 of the report, Bratton is quoted saying:

“Like many former and current police officials, I think bail reform is both warranted and overdue. There’s an inherent inequity in the proposition that wealthier persons should be able to buy their freedom pending trial, while poor persons should not. I would favor a system in which the decisions about pretrial detention are never based on cash amounts, so long as judges maintain the discretion and authority to remand

dangerous offenders and chronic criminals, as well as genuine flight risks, the so-called public safety risks. In New York State, judges are not given that opportunity. It's only one of two states in which the public safety risk aspect is not given to judges."

All of his other testimony is left out, though his transcript (but not his words) is referenced in footnotes 27 and 1153. However, Bratton's testimony included statements regarding the consequences of New York's Bail Reform on crime, even after it was amended, in New York City, such as:

"Changes in the law since July 2nd have allowed nominal consideration of a narrowly defined class of persistent offenders, but in too many cases, persistent offenders have still not been subject to incarceration. The laws also require that bails be set commensurate with the subjects' capacities to pay and that bail amounts do not impose a hardship on defendants, with the result that many offenders go free on nominal bails. (Emphasis added.) (pgs. 1-2 of written testimony)

"Shootings nearly doubled in the city in 2020, pushing homicide up by about 46 percent. Bail was set in only 45.9% of gun possession cases in 2020 vs. 64.6% in 2013. It was often set so low that the even the gun arrestees held on bail were soon released because they were able to make bail within a few days." (pg. 2 of written testimony)

"During the first week in September, the NYPD arrested 164 people for gun charges, the largest number of weekly gun arrests since 1995. Forty of these arrestees were previously convicted felons, and 20 of them were on the street with open felony cases. Within hours, 113 of them were back on the street. During the next week, cops arrested another 173 people for illegal guns, again setting a record. Thirty-nine of these arrestees had previous felony convictions, and 21 were subjects of open felony cases. One hundred and thirty-one were promptly released. Despite very strong gun laws in the state, the amended bail laws are perpetuating a revolving door for gun criminals in New York City, undercutting any deterrent to carrying loaded firearms." (pg. 2 of written testimony)

"Commercial burglars are now ineligible for bail assessments and are generally released on their own recognizance within a day or two. In 2020, the NYPD arrested 458 people for burglaries at least three times each. Burglaries were up 41.7 percent in 2020. Except for small increases in three years, burglaries had declined every year in New York City since 1981. (pg. 2 of written testimony)

"And then we have the case of auto theft. The New York State bail reforms stipulate that auto thieves cannot be held even for arraignment and must be released on desk appearance tickets within hours of their arrests. Auto thefts were up 66.7 percent by year's end. As with burglary, auto thefts have declined for decades in the city, with only one annual increase in any year since 1990." (pg. 2 of written testimony)

"A total of 376 subjects have been arrested for robbery in 2020 three or more times each." (pg. 3 of written testimony)

“The current New York City police commissioner, Dermot Shea, has been accused of “fear mongering” for pointing out this connection. ... He is not fear mongering. He is identifying the clear practical implications of the bail laws as they are currently written.” (pg. 3 of written testimony)

“The surge in these particular crime and arrest categories is not a coincidence. They are precisely the crime categories that the New York State bail reform laws have affected, reducing the immediate deterrent to the crimes in question.” [Emphasis added.] (pg. 3 of written testimony)

Bratton also addressed the arguments of pro-bail reform advocates alleging mass incarceration is due to onerous bail requirements, saying such arguments did not apply in New York City:

“I am not current with how things stand in the rest of the country, but in New York City, there is no mass incarceration. The city has the lowest jail entry rate of any big city in the nation. The NYPD reduced arrests by 45 percent from 2013 to 2019, including 148,000 fewer arrests of people of color per year. Eighty-seven percent of arrested persons are released at arraignment. Most never go back to jail.” (pg. 3 of written testimony)

“The city jail population has been falling since 1993 (down 77.6 percent) and the state prison population has been falling since 2000 (down 31 percent). A person arrested for a felony in New York City has about a one in five chance of serving any type of jail or prison sentence. Between the scaling back of arrests since I became police commissioner in New York City in 1994 and the pronounced leniency of the New York State criminal justice system, it seems to me that we can safely detain dangerous and chronic criminals pretrial without risking the emergence of a gulag.” (pg. 3 of written testimony)

Similarly, hearing witness Rafael Mangual with the Manhattan Institute, had his Constitutional concerns about the cash bail system in his testimony cherry-picked for inclusion in the text of the report, but none of his arguments regarding the adverse impact of pre-trial release on increased crime were included in either the text or the footnotes in the report. His Constitutional concerns were included on page 16 of the report:

“Getting pretrial justice wrong can mean more defendants unjustifiably spending unreasonable amounts of time in American jails, but it can also mean more American citizens being criminally victimized by pretrial releasees who should have been but were not remanded to pretrial detention. Balancing these concerns for the rights of defendants on the one hand and the safety of communities on the other requires parsing complicated questions...”

“The first of these points is that pretrial justice systems that rely heavily on monetary release conditions, i.e., cash bail, can and often do place undue burdens on both individual liberty and public safety. In a cash bail system, you can end up with a situation in which a relatively dangerous, but well-off defendant can essentially purchase his release, despite his risk of reoffending during the pretrial

period, while a relatively harmless, but indigent defendant gets stuck in pretrial detention, despite posing very little risk of reoffending. This, in my view, illustrates one of the strongest arguments in favor of reforming cash bail systems.”

Mangual was also quoted on page 99 in favor of the federal government providing “better funding [to the] criminal justice system, so that [jurisdictions] can afford more prosecutors, more judges, and more public defenders” and asserting that this “is the most direct route to shortening pretrial detention periods, as well as to ensur[e] that truly speedy trials become the norm.”

However, predictably his observations and references to studies in his testimony that pre-trial release often leads to more crime was never noted anywhere in the report, such as:

“One thing the research on bail reform seems to pretty convincingly show is that an increase in the percentage of pretrial defendants released pending trial will translate to more crimes committed by that population. One study by researchers at Princeton, Harvard, and Stanford Universities, found that pretrial release increases the likelihood of rearrest prior to case disposition by more than 37%—it also increased the likelihood of a defendant failing to appear in court by 124%, which adds to the burden of police officers tasked with returning absconders to court. Two other studies analyzing the recent bail reform effort in Chicago, IL also found increases in the number of crimes committed by pretrial defendants in that jurisdiction. In a study of violent felons convicted in large urban counties between 1990—2002, the Bureau of Justice Statistics (BJS) found that 12% of those felons were out on pretrial release at the time of their arrests.” [Emphasis added.] (*pg. 4 of written testimony*)

“**[V]ictims also have liberty interests that should be given due consideration in debates about bail reform.** Minimizing the risks faced by those with the highest likelihood of being victimized by pretrial defendants who reoffend is as worthy a cause as protecting the liberty interests of the accused.” [Emphasis added.] (*pg. 5 of written testimony*)

“A fairer and more accurate way for judges to assess a given defendant’s risk is through a validated algorithmic risk assessment tool (RAT), which calculates risk based on attaching weights to a variety of factors like criminal history and age. A recent study by the Center for Court Innovation illustrated the predictive accuracy of such a tool—even across racial groups, a crucial criterion, given the opposition of some reformers who claim that racial bias is built into the algorithms.” (*pg. 6 of written testimony*)

The two studies of Chicago’s Bail Reform effort mentioned by Mangual that “also found increases in the number of crimes committed by pretrial defendants in that jurisdiction” are not listed, cited, or mentioned anywhere in the Commission’s report other than in Mangual’s testimony.

Finally, Matt DeLisi, professor of sociology at Iowa State University and a criminologist who worked as a pretrial services officer before his academic career, was allowed to submit written

testimony but was not invited to verbally testify at the Commission's hearing. Excerpts of his written statement are quoted on pages 37 and 66 of the report:

“Unfortunately, allegations of discrimination are overwhelmingly *inferred* from data disparities and most criminological studies lack measures of discriminatory actions that could be used to substantiate allegations of bias and/or do not contain adequate control variables that could mediate demographic effects.” (pg. 37)

This statement was immediately followed by a rebuttal from Vera Institute “scholars” in the report:

“On the other hand, criminal justice scholars with the Vera Institute argue that “many studies use an overly simplistic consideration of racial discrimination and the ways in which it manifests, failing to consider the ways in which race intersects with other diverse factors such as income, crime type, and the race of the harmed party.” (pg. 37)

On page 67, DeLisi was cited once again, despite not appearing as a witness at the Commission's hearing:

“[R]isk assessment tools were implemented *explicitly* because they are based on objective empirical criteria as opposed to subjective professional or clinical judgments of offender risk that were shown to be less reliable and valid. To move away from risk assessment tools would be to return to a non-scientific, subjective pretrial evaluation process. For example, a recent study compared a group of 2,631 pretrial defendants who received a risk assessment to matched control groups of defendants who did not receive an assessment. Defendants with risk assessment, where the courts could clearly see objective behavioral criteria, were more likely to receive non-financial release from jail, had higher rates of pretrial release, and spent less time in pretrial detention. Those with risk assessment were no more or less likely to fail to appear, but had slightly higher rearrest rates.” (pg. 67)

However, the report did not include any of the following excerpts from DeLisi's testimony relating to the issue of racial disparities in pretrial detention:

“It is critical to consider the source regarding claims that pretrial outcomes are necessarily detrimental to lower socioeconomic groups and communities of color. To activist organizations and certain entities in the criminal justice system whose function is to advocate for defendants, there is solicitude for criminal defendants. To illustrate, a study of judicial officers in 30 jurisdictions found that ... 17% of judges, 21% of pretrial staff, and 47% of prosecutors, but 82% of defense counsel perceived that pretrial practices engendered disparities.” (Pg. 8 of written testimony.)

“Disparities in criminal justice system outcomes by race assume parity in criminal offending by race. There is not. African Americans represent 12.5% of the total population of the United States, but account for 51.2% of arrests for murder and non-negligent manslaughter, 52.7% of arrests for robbery, 33.2% of arrests for aggravated assault, and 26.7% of arrests for rape. Thus, according to official data

from the FBI Uniform Crime Reports, blacks engage in the most serious forms of criminal violence at a level that is two to four times their proportion of the population. This is substantively important because offense seriousness and violence are key considerations in criminal justice system outcomes including those at the pretrial phase.” [Emphasis added.] (Pg. 8 of written testimony.)

“Of course, allegations of systemic or institutional racism in the criminal justice system would impugn official arrest data due to concerns that police activity itself is biased. However, large racial differences in criminal victimization undermine that narrative. **This is especially important since most criminal victimization is intraracial.** According to the most recent data from the National Crime Victimization Survey, which is a nationally representative survey of households to measure criminal victimization, African Americans accounted for 29% of nonfatal violent crimes including more than half of robberies, a third of aggravated assaults, and nearly one fourth of rape or sexual assaults and simple assaults. Importantly, there are no statistically significant differences by race between offenders identified in the NCVS and offenders arrested in the UCR.” [Emphasis added.] (Pg. 8 of written testimony.)

“Given these large offending differentials by race, research is equivocal about the specific importance of race and pretrial and sentencing outcomes in part because more serious, violent, and extensive criminal and incarceration history is not equivalent across racial groups. For example, a study using statewide data from Kentucky found that compared to white defendants, black defendants had greater history of failing to appear in court, more felony convictions, more prior incarcerations, and more prior convictions for crimes of violence (consistent with both the UCR and NCVS data sources). **Other research found that main effects of race on pretrial detention, release, bail amounts, and prison sentences are rendered non-significant when legal criteria are specified.**” [Emphasis added.] (Pg. 9 of written testimony.)

“This is one of the most important substantive issues surrounding pretrial detention and policy discussions of bail reform. It is specious to assert that race differences in pretrial outcomes are de facto evidence of bias or discrimination. Indeed, when one considers the best data on criminal offending and criminal victimization, both of which show significant race differences in antisocial behavior, the reason for disparities becomes clear.” [Emphasis added.] (Pg. 9 of written testimony.)

The point is that the report leans almost totally to the pro-bail reform side of the issue since it relies dominantly on sources advocating that viewpoint. In the instances where the few witnesses and sources that have a dissenting view are cited, it is their most pro-reform statements that are cherry-picked to be included in the report. The report fails to explore issues and concerns raised by the dissenting viewpoints.

For instance, it is not just the bail industry that has an economic interest in how and by whom pretrial detention is administered. As the report notes on pages 26 and 124, Sharlyn Grace, a member of the Illinois Network for Pretrial Justice, testified at the Commission’s briefing that some

stakeholders opposed reform measures due to state and local government's reliance upon monetary bail. She explained:

“We have no private bail bonds industry in Illinois because it was eliminated in 1963 in the first wave of bail reform. But, instead, people pay money to the courts. And in 2017, when we first began introducing legislation to end money bail, it was in fact the court clerks who were our biggest opposition, because, not based on ethics or legality, but on their need for revenue, they could not give up the money being generated by money bail.”

Economic interests are not just at issue in the current cash bail pre-trial detention systems, but also in the systems bail reform advocates are pushing to replace cash bail. The preferred remedy appears to be pre-trial detention administered by local governments that to some degree or other offers defendants legal counsel, court supervision, court date reminders, electronic monitoring, transportation, childcare, and other social services. While the report notes that \$14 billion in bail bonds are issued each year by the bail bond industry – which provides accountability for released arrestees reappearing in court at no cost to the taxpayers – nowhere in this report is there an effort to quantify the cost to local governments of providing the pre-trial detention and services that are offered as alternatives to cash bail systems.

As Commissioner Kirsanow noted, “‘Advocacy groups’ like the ones who testified at this hearing will receive grants to develop these new systems, serve in advisory roles, and staff these systems at taxpayer expense. It will simply be that people who are aligned with the views of advocacy groups will profit from these new systems, rather than bail bondsmen.”

In numerous places in the report it is argued that states and cities will achieve substantial savings from reduced incarceration costs to pay for the new system, but again nowhere in the report are the costs of the new bail reform proposals and their pre-trial detention services enumerated – to evaluate whether the supposed savings promised will make up for the new costs.

Some indications of the burden and costs to be shifted onto taxpayers from such proposals is on page 33 where the report notes potential problems that rural jurisdictions might face in implementing bail reform proposals:

“One potential cause of the growth in pretrial rates in rural areas has been traced to the local criminal justice system having fewer resources, such as court practitioners and administrators (e.g., judges, prosecutors, public defenders, staff), as well as a lack of pretrial services programs, diversion programs and community-based services. Some rural counties may only be able to hold court hearings during normal business hours, while others may rely on circuit court judges and can only convene bail hearings a few times a month or per year in a given location.”

If rural counties are having a difficult time meeting criminal justice system costs and needs under the current cash bail system, how are they going to meet the more expansive services and requirements pushed by most bail reform advocates – and again are savings in the cost of

incarceration going to be able to offset the additional costs of reform services and requirements? The increase in such costs for urban counties will be on an even larger scale, though they do have a larger base of taxpayers on which to spread the costs of the reforms and the expanded pre-trial services to defendants.

In short, the report never explores the cost of any of the bail reform alternatives -- except for electronic monitoring on page 77. I would note that most pro-reform advocates argue that forcing pre-trial detainees to bear the often high cost of such monitoring (\$5-\$35 a day) could place even more of a pre-trial financial burden on those arrested than cash bail does – as well as an intrusion on such arrestees’ Constitutional rights.

The report ignores or glosses over other issues that should be considered in evaluating bail reform proposals.

Pro-reform advocates and the report decry the percentage of jail populations that are pre-trial detainees. Since jails no longer serve to incarcerate inmates with longer sentences, it would be helpful to know what percentage of the jail inmates are actually serving their sentences, merely awaiting transfer to prison post-sentencing, or are in jail for other reasons in addition to the percentage that are pre-trial detainees.

It would also be helpful to know what costs in time and money are incurred by courts, law enforcement, bail bond companies, and others when arrestees fail to appear in court. One witness whose testimony was cited in the report commented that FTAs are administrative “technical violations” and not “criminal violations” and another Commission witness recommended eliminating “mere FTA” [failure to appear] in the past as a basis to detain arrestees. FTA means lost time to court staff, judges, prosecutors, police officers, attorneys, witnesses, and others who do appear at the court even when a defendant does not. The court and police will also incur time and effort reissuing warrants and apprehending defendants that fail to appear, so there is no such thing as a “mere FTA.”

In addition, the report should have more fully explored the issue of not being able to obtain release from jail (if cash bail is totally eliminated) due to arbitrary or capricious actions of a judge under the various alternatives proposed for replacing the cash bail systems. Under cash bail systems, defendants can appeal the amount of bail set or other issues if they feel the judge or judicial officials have been arbitrary or capricious in making their decision. In the face of malfeasance on the part of a court or judge, what are a defendant’s rights to overturn a judicial decision regarding their release under the alternative reforms proposed to replace cash bail systems?

Like almost everyone in America, I oppose detaining people in jail who pose no danger to society. The question is determining who among those arrested present a danger to public safety if they are released. To some extent it is a crystal ball, but one element in making such determinations must be defendants’ past and current actions and behavior. While the presumption should be release for

most that are arrested, it is unfair to the public and our communities to release individuals that present a danger of future criminal acts, or a demonstrated disregard for the law and the courts.

I applaud the Commission staff who organized the hearing and wrote the report for including some dissenting witnesses this time and for that reason I voted for the report. I hope in the future the staff will not just include dissenting witnesses at a hearing, but incorporate their dissenting statements and opposing viewpoints in the substance of the reports themselves as well. Future reports will also hopefully explore substantive matters on both sides of the issues to fully explore them rather than advocate for particular viewpoints – something this report still suffers from – in light of the fact that it is now a 4-4 Commission.

Statement of Commissioner Stephen Gilchrist

Freedom! Freedom! Those words mean something in this country and when forces for good (law enforcement professionals) challenges individual freedoms then we should be ready to course correct. When the constitution was crafted, bail was crucial and included for a reason. The architects of the Constitution knew that there must be protections against an overly punitive government that can erode individual liberties, especially when one is accused of a crime. Our Forefathers did not want to emulate Britain's, common law practices that mostly benefited the upper class of society. Instead, the United States formulated a system slightly different. Through The Eight Amendment to the Constitution, "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."¹²¹⁷ The Eight Amendment begs the question; what is an excessive fine? What's modest for one defendant maybe "excessive" for another one. Some courts have determined that the indigent defense to be unpersuasive as an Eighth Amendment violation. In fact, in *Katona v. City of Cheyenne* Mr. Katona inability to pay \$35.00 was rejected as a violation of his constitutional rights.¹²¹⁸ The court applied a "rationally and reasonably" standard and found that the state's position was within constitutional bounds. In another lower court case in *Walker v. City of Calhoun* Mr. Walker was arrested on the influence of alcohol while a pedestrian. He was unable to pay the cash bond set by a money bail schedule. His bail was only a \$160.00. Mr. Walker spend six nights in jail and filed a class action lawsuit against the City of Calhoun for violation of his Fourteenth Amendment rights.¹²¹⁹ The lower court found in favor of Mr. Walker, but upon appeal by the city to the Eleventh Circuit they determined that the lower court "erred in applying heightened scrutiny to wealth-based classifications."¹²²⁰

However, other courts have positioned that not including an indigent individual ability to post bail a violation of their constitutional rights. In *Pierce v. City of Velda City* the court surmised in a declaratory judgment that "no person may, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond."¹²²¹

The report illuminated some very important constitutional questions. I believe the most important of these are the Eight Amendment and the Fourteenth Amendment. The report stated, "The U.S. Supreme Court has interpreted this provision multiple times over the years, most recently holding that the Eight Amendment did not create a right to bail in criminal cases. In fact, the 1987 case of

¹²¹⁷ Constitution of the United States, Eight Amendment. Constitution.congress.gov.

¹²¹⁸ U.S. Constitutional Limits on State Money-Bail Practices for Criminal Defendants, February 26, 2019, Congressional Research Service pg. 9. <https://fas.org/sgp/crs/misc/R45533.pdf>

¹²¹⁹ Id.

¹²²⁰ Id.

¹²²¹ Id.

United States v. Salerno, the Court upheld the constitutionality of the Bail Reform Act of 1984, which required courts to detain prior to trial arrestees charged with serious felonies if the Government demonstrates by clear and convincing evidence, after and adversary hearing, that no release conditions “will reasonable assure...the safety of any other person and the community.” The Court also ruled in Salerno that pretrial detention should be the “carefully limited exception” and liberty “the norm.”¹²²²

While many jurisdictions are undergoing reform efforts, it’s clear that the Courts over the years have increased judges’ ability to remand defendants based on “flight risk” and “danger to the community.” This is an appropriate consideration in determining bail for a criminal defendant. However, over the years bail- as an instrument of justice has been overly utilized. According to this report, approximately 631,000 individuals are held in jails and almost half a million or 74% of these individuals are not convicted and awaiting trial. This number is particularly striking considering that our criminal justice system is founded on a presumption of innocence...¹²²³ An article in the Savannah Morning News referenced that the “U.S. crime rate is roughly the same as it was in 1970, but its incarceration rate is five times what it was then. The use of pretrial detention has grown by 433% over the same period.”¹²²⁴ Also in this report, it highlighted that “the pretrial population grew substantially between 1970 and 2015 and accounted for an increasing proportion of the total jail population.”¹²²⁵ Our criminal legal system has become too bloated over the years. The “administrative state” has become too influential and powerful. Many of the decisions regarding bail are often handled by “judicial officers” and not judges. This practice in-of-itself is a cause for alarm when one’s liberty rights are at stake. The report also referenced statistics from the Bureau of Justice Statistics data, by midyear 2018, across the United States, approximately 66 percent (490,000) of the more than 738,000 people in city and county jails remain in jail despite having not been convicted of a crime and await their day in court.¹²²⁶ This report also highlighted that “increasing pretrial populations occurred despite declining violence and property crime rates: there was a 50 percent decrease for violent crime and a 47 percent decrease for property crimes between 1991 and 2013.”¹²²⁷

¹²²² The Civil Rights Implications of Cash Bail, Briefing Report. November 2021 pg. 18

¹²²³ The Civil Rights Implications of Cash Bail, Briefing Report. November 2021 pg. 18

¹²²⁴ Sara E. Murphy, February 10, 2021. “Reforming the cash bail system benefits both the accused and taxpayers.” *Savannah Morning News*. <https://www.savannahnow.com/in-depth/special/2021/02/09/reforming-cash-bail-system-benefits-both-accused-and-taxpayers/3948807001/>

¹²²⁵ Vera Institute, Incarceration Trends, <http://trends.vera.org/incarceration-rates?data=pretrial>; Leon Digard and Elizabeth Swavola, “Justice Denied: The Harmful and Lasting Effects of Pretrial Detention,” Vera Institute, Apr. 2019. See pg. 8 in this report.

¹²²⁶ Zhen Zeng, “Jail Inmates in 2018,” Bureau of Justice Statistics, U.S. Dep’t of Justice, Mar. 2020. See pg. 27 in this report.

¹²²⁷ See pg. 27 of this report

Getting pre-trial determinations “right” is crucial in ensuring our justice system maintains a level of integrity and fairness in how justice is dispensed, particularly to for our most vulnerable citizens. The testimony given by Rafael Mangual was informative:

“Getting pretrial justice wrong can mean more defendants unjustifiably spending unreasonable amounts of time in American jails, but it can also mean more American citizens being criminally victimized by pretrial releases who should have been but were not remanded to pretrial detention. **Balancing these concerns for the rights of defendants on the one hand and the safety of communities on the other requires parsing complicated questions...**”¹²²⁸

The first of these points is that pretrial justice systems that rely heavily on monetary release conditions, i.e., cash bail, can and often do place **undue burdens on both individual liberty and public safety**. In a cash bail system, you can end up with a situation in which a relatively dangerous, but well-off defendant can essentially purchase his release, despite his risk of reoffending during the pretrial period, while a relatively harmless, but indigent defendant gets stuck in pretrial detention, despite posing very little risk of reoffending. This, in my view, illustrates one of the strongest arguments in favor of reforming cash bail systems.¹²²⁹

Parameters must be placed on governmental powers to protect the “accused” from potential abuse. It’s very important that the judicial system don’t treat the “accused” as though they are the “convicted.” While advocacy groups and “talking heads” may engage in “canceling” people out because of their views and actions, our justice system do not have the luxury to mimic that posture! Individual liberties suffer when we make the false choice of exchanging freedoms in the “hope” of more “security.”

As this report indicated, “bipartisan efforts have been underway in many states to reform pretrial practices and to offer alternatives to pretrial detention, while maintaining public safety and assuring court appearance.”¹²³⁰ Also, it stated that at least 10 states and 40 counties have

¹²²⁸ The Civil Rights Implication of Cash Bail, Briefing Report. November 2021 pg. 16

¹²²⁹ Ibid.

¹²³⁰ See, e.g., John Wagner, “Trump signs bipartisan criminal justice bill amid partisan rancor over stopgap spending measure,” *New York Times*, Dec. 21, 2018, https://www.washingtonpost.com/politics/trump-to-sign-bipartisan-criminal-justice-bill-amid-partisan-rancor-over-stopgap-spending-measure/2018/12/21/234f9ffc-0510-11e9-b5df-5d3874f1ac36_story.html; Marc Levin and Michael Haugen, “Open Roads and Overflowing Jails: Addressing High Rates of Rural Pretrial Incarceration,” Right on Crime and Texas Public Policy Foundation, May 2018.

accordingly revised, or are in the process of revising, their pretrial law and policy—and in some cases their state constitutions.¹²³¹

There seem to be some agreement now that our “tough on crime” positions must be balanced with being “smart on crime.” And being smart on crime doesn’t mean “soft” on crime. But it does mean accessing risks-rewards analysis in determining how best to provide safety while ensuring constitutional protections for both the “accused” and the public. It’s also important to note that reform does NOT mean elimination of cash bail! This report did not push the elimination of cash bail, but it simply investigates potential constitutional implications of a cash bail system. This report also mentioned the desire from some criminal justice stakeholders that “believe that getting rid of a wealth-based pretrial system will ultimately make the pretrial processes fairer and more equitable for all defendants regardless of financial means.¹²³² Yet other stakeholders, raise concerns over how to accomplish this goal without leading to an increase in crime or failure to appear in court.”¹²³³

Many jurisdictions have also begun to implement risk assessment tools. This report did a good analysis of highlighting why assessment tools were implemented as well as some limitations and potential constitutional issues with risk assessment tools. For example, in Nevada the risk assessment tool was ordered to be implemented statewide by September 2020.¹²³⁴ Risk assessment tools are attempts by the judicial system to take “biases” out of the decision-making process and utilize an “objective” tool in which to assess a defendant’s bail status. In April 2020, “the state Supreme Court ruled to modify the state’s pretrial system and use of cash bail. The judges created a three-tiered process that requires judges to take an individual’s finances into account prior to imposing any cash bail, but it did not abolish the use of cash bail.¹²³⁵ The three-step process involves:

1. A prompt individualized hearing on custody status, at which the defendant has the right to be represented by an attorney and is also afforded the right to testify or present evidence.

¹²³¹ Pretrial Justice Institute, “Rational and Transparent Bail Decision Making: Moving From A Cash-Based to a Risk-Based Process,” Mar. 2012, <http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/05/Rational-and-Transparent-Bail-Decision-Making.pdf>. See pg. 11 of this report.

¹²³² See generally U.S. Comm’n on Civil Rights, *Bail Reform Briefing*. See pg. 10

¹²³³ See, e.g., William Bratton testimony, p. 76; Rafael Mangual testimony, *Bail Reform Briefing*, transcript pp. 16-18. (Also see pg. 10 of this report)

¹²³⁴ Raeshann Canady and Brittany Bruner, “Enhancing the Justice System Through the Nevada Pretrial Risk Assessment Tool: A Case Study in Las Vegas Municipal Court,” National Training and Technical Assistance Center, June 29, 2020, <https://bjatta.bja.ojp.gov/media/blog/enhancing-justice-system-through-nevada-pretrial-risk-assessment-tool-case-study-las>.

¹²³⁵ *Valdez-Jimenez v. Eighth Judicial Dist. Court*, 460 P.3d 976 (2020), <https://casetext.com/case/valdez-jimenez-v-eighth-judicial-dist-court>. Also see pg. 168 of this report

2. A requirement that at the hearing, prosecutors must meet a burden of clear and convincing evidence that no less restrictive alternative will satisfy its interests in ensuring the defendant's presence and the community's safety.
3. The district court judge must make findings of fact and state its reasons for the bail decision on the record.¹²³⁶

The above recommendations are not perfect, yet they are a step in the right direction to ensure the “accused” is not summarily subjected to “over-reach” from the state. Additionally, in the report it was stated that judges consider the following factors when making bail determinations:

- Age of first arrest
- Anytime a defendant failed to appear in court in the last two years
- If there was a prior violent crime conviction
- Prior felony, gross misdemeanor or misdemeanor convictions
- Pending pretrial cases at the time of arrest
- Repeat prior arrests for drug crimes
- Stability factors such as if they are employed or their living situation.¹²³⁷

None of the above characteristics mentions race, sex, color, or national origin. Dispensing justice that's more attributable to the “crime” and the defendant's likelihood of pre-trial success should be the goal. ‘Color-blind’ assessments are laudable and must not be dismissed as “utopian.” It's in the best interest of justice, individual liberty, and constitutional protections if “we the people” can faithfully entrust a system that's just. However, risk assessment tools are not perfect, as indicated by the American Bail Association. Their opposition to risk assessment tools in a public comment session read as follows:

The risk assessment tool relies more heavily on un-convicted conduct than any [] other assessment I have seen. This is hugely problematic from the perspective of defendants' rights. For example, three of the nine categories can be scored based on having been arrested but not convicted of misdemeanors, gross misdemeanors, or felonies. In addition, if someone is homeless, they will get two points for that, labeling them as high risk solely due to their poverty. Moreover, a non-resident but legal alien would get a higher risk score due to the fact that they are not a “resident” of the State of Nevada.

At the end of the day, a jury could exonerate someone of all charges, and a defendant could sue civilly to seek redress for a false allegation and be awarded

¹²³⁶ Riley Snyder, “Nevada Supreme Court orders significant limits on cash bail,” *Nevada Independent*, Apr. 9, 2020, <https://thenevadaindependent.com/article/nevada-supreme-court-orders-significant-limits-on-cash-bail>. Also see pg. 168 of this report.

¹²³⁷ James Austin and Robin Allen, “Development of the Nevada Pretrial Risk Assessment System: Final Report,” June 2016 [on file]. Also see pg. 167 in this report

judgement, and yet this risk assessment will place them into the higher risk category, unnecessarily trammeling their civil liberties by labeling them as dangerous, a label that no subsequent exoneration would remove until this risk assessment. In approving a risk assessment that has not been tested for racial or other protected-class bias and relies so heavily on demographic factors and unconvicted conduct, the Supreme Court of Nevada is disregarding a known risk that the tool may disparately treat similar situated defendants.¹²³⁸

Risk assessment tools should not serve as a complete replacement for judges. The assessment should serve as a tool by which judges can utilize to try and eliminate as much “biases” out of the decision-making process. However, if the creation and implementation of risk assessment tools are proven to be mired with similarly discrepancies as the current cash bail system then it must be corrected. Our criminal justice system must be adaptable enough to make changes when inconsistencies emerge and be willing to self-evaluate to stop an erosion of individual liberties.

The many jurisdictions that have attempted to balance “individual liberty” and “public safety” must be commended. States are meant to be laboratories of experimentation to institute “ideas” and reforms to better serve their respective citizens. Bail Reform is a worthwhile endeavor particularly due to its constitutional considerations. A lot goes into these reports! This document consisted of the “nineteen (19) qualitative interviews with a variety of experts and community stakeholders, which included legislators, judges, prosecutors and public defenders, law enforcement officers and community advocates. The Commission also assessed six jurisdictions as case studies to evaluate how bail reform measures can reduce disparities, limit unnecessary pretrial detention, and ensure the equal administration of justice.”¹²³⁹

I want to thank my colleagues, their special assistants, the Commission’s staff, our panelists of experts, those that submitted written testimony and those that appeared before the Commission. I affirm the publication of this document because it presented a balance perspective on an issue that often get “butchered” in partisan rancor, but instead this document was able to rise above the fray.

¹²³⁸ American Bail Coalition, “Nevada Supreme Court Proposes Statewide Use of Pretrial Risk Assessment Tools Despite Ban Recommendation by Leadership Conference of Civil Rights Organizations,” Feb. 1, 2019, <https://ambailcoalition.org/nevada-supreme-court-recommends-statewide-use-of-pretrial-risk-tools-abc-opposes-recommendation/>. Also see pg. 172

¹²³⁹ See pg. 13-14 of this report

Statement of Commissioner David Kladney in which Commissioners Debo P. Adegbile and Michael Yaki Concur

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”¹²⁴⁰

Adopted as part of the Bill of Rights in 1791, the eighth amendment to the constitution requires a defendant's bail not be set higher than an amount reasonably calculated to ensure appearance at trial.¹²⁴¹ It also allows that an accused can be detained prior to trial if the government can prove the individual is potentially dangerous to other people in the community.¹²⁴²

Yet almost half a million or 74 percent of the people currently in local jails are not convicted. They are awaiting trial, clothed with the presumption of innocence.

Our report highlights the many issues surrounding how bail is set by the courts, the problems caused by setting bail in an amount higher than necessary to ensure the accused returns to court for trial and determining which individuals may cause a threat to the community if allowed an own recognizance release.

Witnesses at our briefing proffered that many states maintain a wealth-based detention system. Those with funds available can walk out of the jailhouse as soon as bail is set by providing credit card, check or cash. Those living paycheck to paycheck, even with roots in the community, may languish in jail causing cascading negative effects in their lives and their family's lives before innocence, guilt or resolution can be determined.

Those who cannot afford to post bail may lose their jobs, their assets, relationships and/or the place they live. Even worse, a tactic used by prosecutors, is to use a high bail amount to encourage a guilty plea to the charged offense or a lesser offense just to earn their freedom to resume their lives. Even though, they are just as likely to return to court as the person who wrote the check as soon as bail was set. This disruption causes devastating life changing results in their lives.

The constitution sets the minimum standard for setting bail — it shall not be excessive. The magistrate courts and trial courts are in the business of setting bail with legislatures and appellate courts deciding the legal standards and procedures to guarantee bail is not excessive or delayed and abides by the constitution.

¹²⁴⁰ U.S. Const. Amend. VIII.

¹²⁴¹ See *Stack v. Boyle*, 342 U.S. 1 (1951).

¹²⁴² See *United States v Salerno*, 481 U.S. 739 (1987).

Bail serves the important function of allowing a defendant to be released pending trial while at the same time ensuring that he or she will appear at future proceedings and will not pose a danger to the community. When bail is set in an amount the defendant cannot afford, however, it deprives the defendant of his or her liberty and all its attendant benefits, despite the fact that he or she has not been convicted and is presumed innocent.¹²⁴³

Justice Hardesty, writing for the majority, continued:

Where the defendant presents little to no flight risk or danger to the community, release on personal recognizance or nonmonetary conditions will likely be appropriate, in which case bail in any amount would be excessive. On the other hand, where the defendant has an extensive history of failing to appear for court proceedings and few ties to the community, bail will likely be necessary.¹²⁴⁴

The Commission's briefing showed that with 50 states, the federal government, and thousands of judicial districts, there isn't any one way for bail or own recognizance release to be determined fairly or consistently.

The Commission looked at six jurisdictions in this report. Each jurisdiction is taking different approaches to bail issue.

New York has a matrix that is absolute. It sets out a menu for the different offenses and whether the offense prohibits cash bail or allows it. However, it is the only state in the nation without a provision to deny own recognizance or cash bail release to someone who may pose a threat to the community (I disagree with denying consideration of a defendant's dangerousness to the courts.).

Washington, D.C.'s system is set with a strong presumption of pretrial no cash bail release with or without conditions for all non-capital offenses. However, judges retain the discretion for preventative detention where the defendant may pose a danger to the community. This system has operated for more than 20 years.

New Jersey uses a risk assessment tool. The court must make a decision regarding bail within 48 hours of arrest. The defendant must be released from jail unless the prosecutor files a motion to detain. The court may impose non-monetary conditions of release.

Nevada has a conventional bail system; however, pursuant to a Nevada Supreme Court decision, the prosecutor must bring a defendant before a magistrate within 48 hours for a bail hearing. The prosecutor must show, with clear and convincing evidence, why the defendant is a risk not to return

¹²⁴³ *Valdez-Jimenez v. Eighth Judicial District Court*, 136 Nev. 155, 460 P.3d 976 (2020).

¹²⁴⁴ *Id.* at 986.

to court for a trial and/or may be a threat to the community. The defendant has a right to counsel at the bail hearing.

Like the country, cash bail in Texas is handled differently in the several counties. There have been several lawsuits challenging the Texas cash bail system. Some court challenges have dealt solely with misdemeanors while others dealt with misdemeanors and felonies. The system and lawsuits are complex and too broad to summarize here.

Illinois 2021 legislation eliminates cash bail and significantly limits judges from imposing pretrial detention. Uniquely, the law defines which defendants are dangerous and/or a public safety risk. This is not a generalized standard, but, rather, the statute defines dangerous and applies only to those certain listed charges where a judge finds a “specific, real, and present threat” to another person.

Many of these reforms have brought positive changes throughout the communities in which they operate. Significant numbers of people do not languish in the jailhouse while they lose their jobs, housing or other vital parts of their lives. The taxpayer’s cost of detaining high numbers of people that will show up for trial and not endanger the community is greatly diminished. More importantly, it allows more police personnel from jail duty to provide other police services to the community.

These new approaches need to be proven. The differences in each approach and element they relate to cash bail/no cash bail should be analyzed through the collection of demographic data in each jurisdiction. The successes and failures of each element of these cash or no cash bail systems must be studied for the protection of the defendants, the judicial system, and the public. Evidence showing which approaches are successful is vital for all sides of the issue presented in this report. Data will go a long way in leading to a successful way forward.

The laboratories of democracy are at work reforming the cash bail process. Every jurisdiction should be working on a successful system that favors the presumption of no cash bail. Cash bail should only be required where absolutely necessary to prevent the accused from fleeing the jurisdiction prior to trial and physical detention allowed only where the prosecutor can show the accused may pose a danger to the community.

Statement of Commissioner Michael Yaki

The Civil Rights Implications of Cash Bail

In my sixteen years on the Commission, it has been my honor and privilege to be part of and bear witness to the work of our Commission on important issues affecting the civil rights of our nation. On a few occasions, however, our Commission has fallen short. This report on the civil rights implications of cash bail is one of those times.

One American scholar has written:

“[T]he race of the arrestee plays a role in a way that disproportionately and adversely subjects African Americans to pretrial detention and harsher bail conditions. Race-neutral explanations of the persistent patterns of racial disparities are belied by the fact that the relevant information that bail officials could legitimately use to differentiate bail outcomes for white and African American defendants is rarely known by the bail official at the time of the bail determination. Moreover, even when the relevant background information of white and African American arrestees is taken into account by researchers, studies confirm that white defendants still receive more favorable bail decisions than do African American defendants with comparable backgrounds.”¹²⁴⁵

This Report only plays at the edges, if at all, on this important issue. Cash bail and its direct and collateral consequences to the constitutional and civil rights of people of color is too important an issue to be subject to the vicissitudes of partisan posturing. There can be no dispute that our criminal justice system, for far too long, has stacked the deck against people of color. This Commission has over its six-plus decades of service, consistently and continually engaged in fact-finding and reporting that underscores this conclusion.

On this particular, but important, subset of the criminal justice ecosystem – cash bail – we find ourselves in a position where we lack a majority to continue our mission, and where those opposed to making the critical findings and recommendations on this subject of study that are the sine qua non of the Commission lack the fortitude to publicly articulate their objections in hearings or in the vote before the Commission.

In some ways, we have been hamstrung from the very beginning by the limitations of our report. One of the collateral consequences of a cash bail system that is punitive to those who can least afford it is that it essentially grants the right of incarceration to the state without having to prove its burden in court. This type of pre-incarceration also has profound consequences on the right to

¹²⁴⁵ Cynthia Jones, “‘Give Us Free’: Addressing Racial Disparities in Bail Determinations,” *Legislation and Policy*, 2013, vol. 16, pp. 920-961, <https://www.nyuilpp.org/wp-content/uploads/2014/01/Jones-Give-Us-Free-16nyuilpp919.pdf>

counsel, on the right to a speedy trial, not to mention the psychological and economic toll on the putative defendant and their family. It is the flip side of the coin to the report we issued on **Targeted Fines and Fees against Low-Income People of Color: Civil Rights and Constitutional Implications**;¹²⁴⁶ where the state utilizes economic sanctions, without reference to background or ability to pay, that constituted severe burdens on the constitutional and civil rights of persons of color.

For people who cannot afford to pay for a citation, the consequences of being in debt can impact credit scores, result in the loss of a driver's license, and lead to incarceration. Jail time can result from a court ordering an individual to appear, and then holding that individual in contempt, and issuing an arrest warrant. Other states allow individuals to "pay" their debt through time in jail. These practices may be unconstitutional in some circumstances and implicate the Equal Protection and Due Process Clauses of the United States Constitution.¹²⁴⁷

This report had the potential to examine, in particular, the impact of pre-incarceration on the disparate impact of these practices on the constitutional right to a speedy trial protected by the Sixth Amendment, a right that is hollow if someone spends almost the same, if not more, time locked up because they could not afford bail than if they were able to access counsel and present their case to a jury of their peers.

The people at risk through the continued practice of indiscriminate cash bail practices deserve better than this.

¹²⁴⁶ U.S. Comm'n on Civil Rights, *Targeted Fines and Fees against Low-Income People of Color: Civil Rights and Constitutional Implications* (Nov. 2017) available at <http://www.usccr.gov/pubs/admin.php>

¹²⁴⁷ *Id.* at p.3.

Statement of Commissioner Gail Heriot

I abstained from the Commission vote on this Report. While it seemed to me that the staff members who drafted it were making a real effort, it contains too many errors for me to endorse it.¹²⁴⁸

I will give only a few examples of the kinds of errors I mean here, but one shouldn't get the impression that the errors were so few that they easily could have been corrected. What follows are only examples. I suspect the real solution is for the Commission to undertake the study of more modest research topics. Our staff is not large enough for the sprawling topics we tend to take on.

Some of the errors are technical in nature. For example, the Report claims that 69.6% of the residents of Harris County, Texas are white, but only 30% of jail inmates are white. Rep. at 160.¹²⁴⁹ If so, for what it's worth, that would be a very large disproportionality. But the 69.6% is the figure for *all* whites, while the 30% is for *non-Hispanic* whites. According to the Report's own source, Harris County's non-Hispanic white population is 28.7%, not 69.6%.¹²⁵⁰ The disproportionality thus evaporates.

There were enough errors of this kind in the Report to make me nervous about accepting at face value any of its factual assertions. A wise reader would do well to double-check.

A second kind of error found in the Report is what I would call broad errors of omission. For example, much of the Report's historical focus suggests that only in fairly recent years has preventive detention without bail been legally permissible for non-capital but nonetheless violent

¹²⁴⁸ Commissioner Yaki complains in his Statement that, with this report, "we find ourselves in a position where we lack a majority to continue our mission." Rep. at 223. Commissioner Yaki's point seems to be that because the report has no findings or recommendations, the report is useless. I don't agree with that. A report that contains accurate information can be very useful. Even a report that contains information that needs to be double-checked can be useful. Moreover, there is something disturbing about a federal official thinking that knowledge is only useful if it leads to an agreed-upon bottom line as to what is to be done. Congress created a Commission composed of an even number of commissioners (8) for a reason. When knowledgeable people are evenly split on a given issue of public policy, that's worth knowing in itself. On this issue, no majority view emerged. To me, that counsels caution. This is a tricky area, particularly in an era of rising crime.

¹²⁴⁹ Citing *Jail Population History*, Harris County, Texas, <https://charts.hctx.net/jailpop/App/JailPopHistory> (last visited Oct. 7, 2021) (showing the population of Harris County jails by ethnicity for white non-Hispanic, black non-Hispanic, white Hispanic, and other ethnicities).

¹²⁵⁰ *Quick Facts: Harris County, Texas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/harriscountytexas> (last visited Oct. 7, 2021).

crimes, such as armed robbery. It quotes from the Judiciary Act of 1789:

Based on the Constitution and the Bill of Rights, the Judiciary Act of 1789 first established the principle of a defendant’s right to bail. The Act provided that “upon all arrests in criminal cases, bail *shall* be admitted, except where the punishment may be death,” in which cases bail was subject to judicial discretion.

Rep. at 13.

But context is important here. In the 18th century, for all practical purposes, *all* felonies were punishable by death.¹²⁵¹ The great jurist and legal scholar William Blackstone was able to recite a few oddball exceptions (e.g., suicide), but concluded:

The idea of felony is indeed so generally connected with that of capital punishment that we find it hard to separate them; and to this usage the interpretations of the law do now conform. And therefore if a statute makes any new offense felony, the law implies it shall be punished with death¹²⁵²

This puts the history lesson offered in the Report in a somewhat different light. At the time of the 1789 Act, most serious crimes—not just murder—would have been non-bailable since most would have been punishable by death. When this is acknowledged, the various late 20th century statutory reforms that place a greater emphasis on public safety—which are discussed in the section of the Report entitled “Relevant Federal Legislation & Reform”—seem less of a departure from the 1789 Act. Rep. at 21–25. Public safety has always been important.

A third kind of error is what I would call statements that are literally true but which betray a certain naiveté. For example, the Report’s section on Texas points out that the jail population has been growing. It then states: “As with other states, the growth in jail populations have [sic] not corresponded with an increase in crime.” Report at 167. The implication is that there is something surprising or incongruous about the fact that during a period in which crime was not increasing, the size of the incarcerated population was nevertheless going up.

This Report is not the first to express that kind of surprise. Indeed, in the popular media, that kind of statement has a name—the Butterfield Fallacy. The term was popularized by *Wall Street Journal* Features Editor James Taranto, who meant it as a gentle jab at veteran *New York Times* reporter Fox Butterfield. Butterfield had repeatedly expressed surprise that incarceration

¹²⁵¹ As Blackstone himself acknowledges, that doesn’t mean that they were actually punished by death in every case. Various doctrines, such as benefit of clergy and the powers of reprieve and pardon, prevented the death penalty from always being carried out. Blackstone did, however, count 160 crimes that were both “without benefit of clergy” and “worthy of instant death.” 4 WILLIAM BLACKSTONE, COMMENTARIES *18.

¹²⁵² *Id.* at *98.

rates were rising during a period that crime rates were falling.

Of course, what Butterfield called a “paradox,” was very likely a simple cause-and-effect relationship. Crime rates were decreasing *precisely because* incarceration rates were increasing; criminals were being prevented from committing more crimes. As Taranto writes: “The Butterfield Fallacy is rooted in ideological prejudice. The typical *New York Times* reporter does not like the idea of sending people to prison”¹²⁵³

Taranto agrees that there “may be reasonable arguments for treating criminal offenders more leniently” But, he states, “a nonideological approach to the question would balance these costs against the benefit of reducing crime by removing criminals from society and deterring those who would commit crimes. Butterfield became a subject of mockery because he was incapable even of comprehending the benefit.”¹²⁵⁴

When this Report slips into the Butterfield Fallacy, it worries me. Why didn’t the Report’s authors see the linkage between increasing incarceration rates and decreasing crime rates as a natural one? For most Americans, I suspect it is obvious that putting more criminals in jail will likely mean having fewer criminals on the streets. Is the cause-effect relationship that counterintuitive to the Report’s authors? Can I trust the Report’s analysis of bail-reform issues generally if the authors missed that basic point?

But let me put all that aside and focus on the bigger picture of “bail reform.” Despite all the problems with this Report, I have sympathy for the position that pre-trial detention is very different from post-conviction incarceration. One need not take any particular position on the desirability of present post-conviction incarceration rates to want to take a close look at the bail system and its effect on pre-trial detention rates.

The reason to treat the pre-trial rates separately from post-conviction incarceration rates is easy to explain: One of the most basic principles of our criminal justice system is that we are presumed innocent until proven guilty. In keeping with that principle, individuals should not have their lives shattered simply because they have been arrested.

This is not to deny that the state has a legitimate interest in ensuring that criminal defendants show up for trial. Nor is it to deny that pretrial detention is sometimes necessary in order to ensure public safety. Those considerations are obviously important. But the presumption of innocence should mean something. At a minimum it should mean that sometimes efforts must

¹²⁵³ James Taranto, *Dr. Butterfield, I Presume*, WALL ST. J., Jan. 7, 2013, <https://www.wsj.com/articles/SB10001424127887323482504578227664228137272>.

¹²⁵⁴ *Id.*

be made to ensure that arrestees can keep their jobs, continue to pay their rent or mortgage, and receive emotional support from their family, pending the resolution of their speedy and fair trial.¹²⁵⁵

Reconciling the presumption of innocence with the criminal justice system's competing needs has never been easy. It never will be. It is entirely possible, however, that we could do a somewhat better job at this than we currently are doing.

Could, for example, greater use of modern surveillance techniques—ankle bracelets and such—be part of the answer? Or is that a road best avoided? The Report mentions these methods and how they are already being employed in some jurisdictions. But it discusses them only briefly and does not seem to view them as the answer to the problems it has with the bail system. I would have liked to see a fuller discussion.¹²⁵⁶

In any event, right now I don't hold out a lot of hope for significant reforms in this area (assuming that significant reforms are what's needed). I could be wrong, but I doubt the kind of reforms my colleagues envisioned when they voted to undertake this study in July 2019 will be getting much support from the public.¹²⁵⁷ Voters are worn out. In the last year or so, many of the country's leaders at the federal, state, and local levels have gone off the deep end on matters of

¹²⁵⁵ Note that a speedy and fair trial is key here. The more quickly a trial can be had, the easier it is to strike the right balance among the various interests at stake.

¹²⁵⁶ Beginning a number of years ago, I began to wonder if modern technologies might be available that could help law enforcement keep track of an accused's whereabouts and ensure an adequate level of public safety without relying quite as much on pre-trial incarceration. Of course, surveillance technologies pose their own problems. But maybe, just maybe, those problems can be overcome or partially overcome. They are at least worth giving serious thought.

For reasons that George Orwell could describe all too well for you, *see* GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949), some Americans oppose relying on surveillance technology for the purpose of ensuring appearance at trial. They fear, perhaps rightly, that this will normalize surveillance of Americans in a way that will be harmful to the nation. On the other hand, unnecessary pre-trial detention is arguably worse. This may argue for preserving cash bail as a preferred option. Cash bail, as I understand it, works in practice either of two ways. First is the familiar notion that one can post a sum of money that the court deems large enough to assure that the accused will appear for trial. If he does, he (or his friend or relative who posted bail for him) gets the money back regardless of the outcome of the trial. Second is the option to pay a private bail bondsman to post bail. In this case, the accused (or his friend or relative) pays a much smaller amount (typically 10% of the bail amount) to the bondsman who in turn posts the full amount on behalf of the accused. This creates an incentive on the part of the bondsman to ensure that the accused appears for trial, which is what makes this option workable. In essence, the accused is paying the bondsman to make sure he appears at trial. If the accused does not appear at trial, the bondsman will likely come looking for him. If the accused does appear, the bondsman gets the posted bail back, but the accused does not. The bondsman's services do not come free.

¹²⁵⁷ Transcript of U.S. Commission on Civil Rights Business Meeting at 51 (July 19, 2019) (available at <https://www.usccr.gov/calendar/2019/07-19-Transcript-Commission-Business-Meeting.pdf>).

criminal justice. Some of the “reforms” undertaken by state and local governments have turned out to be spectacularly ill-advised. To me at least, it looks like the trust that leaders must have from their constituents in order to effectuate real reform has been squandered.

I need mention here only one example of what I mean by “going off the deep end”—the movement to “defund the police.” In cities like Oakland, Austin, Seattle, Los Angeles, Baltimore, Washington, Philadelphia, and New York, city councils have voted to reduce police budgets dramatically.¹²⁵⁸ Shockingly few elected officials have had the presence of mind to condemn that

¹²⁵⁸ Natasha Brown, *Philadelphia City Council Approves Fiscal Year 2021 Budget That Slashes Police Funding, Features Coronavirus Cuts*, CBS PHILLY (June 25, 2020), <https://philadelphia.cbslocal.com/2020/06/25/philadelphia-city-council-approves-fiscal-year-2021-budget-that-slashes-police-funding-features-coronavirus-cuts/> (“Philadelphia City Council gave final approval to the fiscal year 2021 operating budget on Thursday. They were tasked with filling a massive \$749 million deficit brought on by the coronavirus pandemic. While the budget reduces \$33 million in police department funding, it pours \$45 million into affordable housing, arts funding and social services that address poverty.”); Barnini Chakraborty, *Seattle City Council Approves Plan to Defund Police Department, Slashes Jobs and Salaries*, FOXNEWS (Aug. 10, 2020), <https://www.foxnews.com/us/seattle-city-council-approves-defund-the-police> (“The Seattle City Council voted Monday to move forward with a controversial proposal that would begin the process of defunding the police department. . . . Seattle currently has around 1,400 police officers, and the current plan would see about 100 cut. It was also cut the police department’s \$400 million budget by about \$3 million.”); Jonathan Franklin & Kolbie Satterfield, *DC Council Passes Budget Including a \$15 Million Cut to Policing*, WUSA9.COM (July 23, 2020), <https://www.wusa9.com/article/news/local/dc/dc-council-passes-budget-reducing-mpd-budget/65-81a11840-b887-46f3-832b-db5b31c4db16> (“The D.C. Council held a virtual session Thursday in which members unanimously voted to approve a budget cutting \$15 million from the police department. Previously, on June 25, D.C.’s [sic] Committee on the Judiciary and Public Safety unanimously approved a \$15 million cut from the Metropolitan Police Department’s budget.”); Jemima McEvoy, *Austin Cuts Police Budget By A Third As Defunding Efforts Gain Momentum*, FORBES (Aug. 13, 2020), <https://www.forbes.com/sites/jemimamcevoy/2020/08/13/austin-cuts-police-budget-by-a-third-as-defunding-efforts-gain-momentum/?sh=17a123fe56b6> (“The Austin City Council on Thursday voted unanimously to cut its police budget by \$150 million and reinvest the money in social services days after a similarly sweeping defunding effort in Seattle led to the resignation of Police Chief Carmen Best.”); Anabel Munoz, *Los Angeles City Council Votes to Cut LAPD Budget by \$150 Million*, ABC7.COM (July 2, 2020), <https://abc7.com/defund-the-police-lapd-los-angeles-mayor-eric-garcetti/6289037/> (“The Los Angeles City Council on Wednesday approved a \$150 million cut to the LAPD’s budget for the next fiscal year, a move that followed activists’ mounting calls to ‘defund the police.’”); *Oakland City Council Votes to Defund Police, Stripping More Than \$17M from Department Budget*, CBS SF BAYAREA (June 24, 2021), <https://sanfrancisco.cbslocal.com/2021/06/24/oakland-city-council-votes-defund-police-stripping-17-million-department-budget/> (“The Oakland City Council approved a budget early Thursday evening that will strip \$17.4 million in funding from the Oakland Police Department and direct the money toward other programs. The \$18 million is over the course of the next two years.”); Talia Richman & Yvonne Wenger, *The Baltimore City Council Eliminated \$22 million from the Police Budget. What Does that Look Like?*, BALTIMORE SUN (June 17, 2020), <https://www.baltimoresun.com/politics/bs-md-pol-police-budget-explainer-20200617->

course of action¹²⁵⁹; many have even endorsed it.¹²⁶⁰ It is hard to imagine when defunding the police would be a good idea. But immediately following a rash of riots in which 14,000 have been arrested,¹²⁶¹ and considerably more than one billion dollars' worth of property damage has

[4yjweepbkreknjlef4f45jiblm-story.html](https://www.baltimorecity.gov/newsroom/4yjweepbkreknjlef4f45jiblm-story.html) (“Rather, it voted to eliminate roughly \$22 million in police spending for the upcoming fiscal year — a move that City Council President Brandon Scott says is a signal of what’s to come. ‘I am proud to lead a City Council that took the first step to responsibly reduce Baltimore’s budget dependence on policing,’ said Scott, who is the Democratic nominee for mayor. ‘This is just the beginning, and I intend to continue leading this process to redirect our public dollars and reimagine public safety in Baltimore.’”); *Speaker Corey Johnson, Finance Committee Chair Daniel Dromm, and Capital Budget Subcommittee Chair Vanessa Gibson Announce Agreement on FY 2021 Budget*, N.Y.C. COUNCIL (June 30, 2020), <https://council.nyc.gov/press/2020/06/30/1999/> (“The Fiscal Year 2021 Adopted Budget includes \$837 million in cuts and transfers to the New York Police Department (NYPD) expense budget. When combined with associated costs, these cuts remove \$1 billion from the NYPD’s spending. This was a hard-fought battle, which marks the beginning of the Council’s efforts to not only limit the size and scope of the NYPD, but also reimagine how we structure criminal justice and public safety in this city.”).

¹²⁵⁹ One of the few is Eric Adams, a former police captain, who was recently nominated by Democratic voters in New York City to be the next mayor there. *See infra* at note 1268.

¹²⁶⁰ Rashida Tlaib (@RashidaTlaib), TWITTER (Apr. 12, 2021), <https://twitter.com/RashidaTlaib/status/1381745303997534216?s=20> (“No more policing, incarceration, and militarization. It can’t be reformed.”); Ayanna Pressley (@AyannaPressley), TWITTER (Apr. 12, 2021), <https://twitter.com/AyannaPressley/status/1381702744310943750?s=20> (“From slave patrols to traffic stops. We can’t reform this.”); Mary Markos, *Mayor Walsh Wants to Reallocate Police OT Funds. Here’s Where the Money Would Go*, NBCBOSTON (June 15, 2020), <https://www.nbcboston.com/news/local/in-proposed-budget-boston-mayor-walsh-reallocates-police-overtime-funds/2143019/> (“Boston Mayor Marty Walsh has submitted a revised budget for the 2021 fiscal year in which he calls for diverting some police overtime funds to support police reforms and bolster social services. . . . The new budget involves reallocating 20%, or \$12 million, of the Boston Police Department’s overtime budget to invest in equity and inclusion after Walsh on Friday declared racism a public health crisis.”); J. Edward Moreno, *Ocasio-Cortez Dismisses Proposed \$1B Cut: ‘Defunding Police Means Defunding Police’*, THE HILL (June 30, 2020), <https://thehill.com/homenews/house/505307-ocasio-cortez-dismisses-proposed-1b-cut-defunding-police-means-defunding> (“‘Defunding police means defunding police,’” the congresswoman said in a statement. ‘It does not mean budget tricks or funny math. It does not mean moving school police officers from the NYPD budget to the Department of Education’s budget so the exact same police remain in schools.’”); Ilhan Omar (@IlhanMN), TWITTER (June 8, 2020), <https://twitter.com/IlhanMN/status/1270148561536274439?s=20> (“The ‘defund the police’ movement, is one of reimagining the current police system to build an entity that does not violate us, while relocating funds to invest in community services. Let’s be clear, the people who now oppose this, have always opposed calls for systematic change.”).

¹²⁶¹ Scott Pham, *Police Arrested More than 11,00 People at Protests Across the US*, BUZZFEED NEWS (June 2, 2020), <https://www.buzzfeednews.com/article/scottpham/floyd-protests-number-of-police-arrests>; Emily Olson, *Antifa, Boogaloo Boys, White Nationalists: Which Extremists Showed Up to the US Black Lives Matter Protests?*, AUSTRALIAN BROADCASTING CORP. NEWS (June 27, 2020), <https://www.abc.net.au/news/2020-06-28/antifa-boogaloo-extremists-at-us-floyd-protests/12388260> (putting number at 14,000 through the end of June).

occurred,¹²⁶² is almost certainly not that time. According to the *Guardian*, at least 25 Americans were killed in incidents linked to the protests and political unrest of 2020—all but one by “fellow citizens.”¹²⁶³

Not surprisingly, a recent poll conducted by Harvard University’s Center for American Political Studies and the Harris Poll found that voters overwhelmingly (72%) oppose defunding the police.¹²⁶⁴ A different poll, this one conducted by Ipsos/*USA Today*, found that only 18% of respondents (and only 28% of Black Americans) supported the movement known as “defund the police.” Fully 57% of respondents opposed redirecting any police funds toward social services. The reason should be obvious: This “defund the police” movement has predictably contributed to higher crime rates.¹²⁶⁵

¹²⁶² Jennifer A. Kingson, *Exclusive: \$1 Billion-Plus Riot Damage Is Most Expensive in Insurance History*, AXIOS (Sept. 16, 2020), <https://www.axios.com/riots-cost-property-damage-276c9bcc-a455-4067-b06a-66f9db4cea9c.html>. The figure is only for damage for which an insurance company paid.

¹²⁶³ Lois Beckett, *At Least 25 Americans Were Killed During Protests and Political Unrest in 2020*, GUARDIAN, Oct. 31, 2020, <https://www.theguardian.com/world/2020/oct/31/americans-killed-protests-political-unrest-acled>.

¹²⁶⁴ Tal Axelrod, *Poll: Majority of Voters Say More Police Are Needed Amid Rise in Crime*, THE HILL (Aug. 2, 2021), <https://thehill.com/homenews/campaign/565979-poll-majority-of-voters-say-more-police-are-needed-amid-rise-in-crime>. Seventy-five percent of the respondents to that poll said more police are needed on the street; only 25% said they are not needed.

¹²⁶⁵ Sixty-three of the 66 largest police jurisdictions saw increases in at least one category of violent crime in 2020, which include homicide, rape, robbery, and aggravated assault. Laura Cooper, *Violent Crime Survey – National Totals*, MAJOR CITIES CHIEFS ASS’N, <https://majorcitieschiefs.com/wp-content/uploads/2021/02/MCCA-Violent-Crime-Report-2020-and-2019-Year-End-Final.pdf>; see also Robert Cherry, *2020’s Spike in Urban Homicides Should Not Be a Mystery*, NAT’L REV. (Jan. 13, 2021), <https://www.nationalreview.com/2021/01/2020s-spike-in-urban-homicides-should-not-be-a-mystery/> (“[C]onservatives claim that many violent felons quickly return to the streets because of recent decriminalization and bail-reform initiatives. In Philadelphia, first-time offenders caught with an illegal gun are charged with a misdemeanor, and even a second offense can be pleaded down to another misdemeanor. This past year’s homicide data seem consistent with these claims. The three cities with particularly high increases were Milwaukee (96 percent), Louisville (78 percent), and Minneapolis (72 percent). These were the sites of the three most publicized cases of police misconduct. Another group — Seattle (68 percent), Memphis (58 percent), and Atlanta (55 percent) — also had viral incidents. Aggressive criminal-justice-reform initiatives in Chicago (55 percent), New York (41 percent), and Philadelphia (41 percent) may explain their above-average increases.”); see also Jason L. Riley, *Will Crime Keep Rising? Not Necessarily*, WALL ST. J., June 15, 2021, <https://www.wsj.com/articles/will-crime-keep-rising-not-necessarily-11623795873> (“‘We’re turning loose people who commit repeat offenses,’ he said, in reference to the popularity of so-called bail-reform measures that make it harder to keep defendants locked up until trial. We’re ‘demoralizing’ law-enforcement by treating criminals like victims and police officers like criminals. ‘We’re creating a perfect storm,’ he said. The suspect in a triple homicide

in Austin, Texas, earlier this year had been out on bail. A man arrested last week in Flint, Mich., in connection with the fatal stabbing of a 13-year-old girl and the sexual assault of her mother, is a career criminal who had been released on bond a few days earlier. A crime wave isn't inevitable, but that doesn't mean one can't be manufactured."); see also Jeff Asher, *Murder Rose by Almost 30% in 2020. It's Rising at a Slower Rate in 2021*, N.Y. TIMES, Sept. 22, 2021, <https://www.nytimes.com/2021/09/22/upshot/murder-rise-2020.html>? ("The United States in 2020 experienced the biggest rise in murder since the start of national record-keeping in 1960, according to data gathered by the F.B.I. for its annual report on crime."). The FBI's latest data on 2020 crime statistics is available for anyone's perusal. FEDERAL BUREAU OF INVESTIGATION—CRIME DATA EXPLORER, <https://crime-data-explorer.app.cloud.gov/pages/explorer/crime/crime-trend> (last visited Oct. 7, 2021).

That downsizing police forces results in higher crime rates is neither a new discovery nor isolated to the latest "defund the police" movement. In a study of the effects of police layoffs from the 2008 recession on crime, researchers determined "that sudden and drastic reductions in police force size via police officer layoffs can generate significant crime increases." Eric L. Piza & Vijay F. Chillar, *The Effect of Police Layoffs on Crime: A Natural Experiment Involving New Jersey's Two Largest Cities*, JUST. EVALUATION J. (2020).

Notably, our progressive colleagues on the Commission continue to refuse to study this drastic increase in crime. Indeed, some staff members engaged in the negotiations over topic selection for next year have suggested that studying this issue is somehow anti-black. I note that a recent poll of Minnesotans (with a special emphasis on Minneapolis African Americans) indicates African Americans are likely *more* concerned about rising crime than whites, not less. When asked "Do you think Minneapolis should or should not reduce the size of its police force?", 75% of African Americans answered, "should not" and 14% answered, "should." By contrast, 51% of whites answered, "should not" and 33% answered, "should." African Americans were also more decisive than whites with only 11% "not sure" compared to 16% of whites who were "not sure." *Minnesota Polls Results: Minneapolis Policing and Public Safety Charter Amendments*, MINNEAPOLIS STAR TRIBUNE, Sept. 18, 2021, <https://www.startribune.com/minnesota-poll-public-safety-minneapolis-police-crime-charter-amendment-ballot-question/600097989/>.

This shouldn't surprise anyone. African Americans are disproportionately victimized by crime. Studies dating back decades show African Americans concerned over the lack of appropriate attention from law enforcement in predominantly African American neighborhoods. See e.g., GUNNAR MYRDAL, 2 AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 551 (1944) (calling lack of enforcement of the criminal law in instances of black-on-black crime "actually a form of discrimination" and indicating that African Americans are acutely aware of this).

In *Black Silent Majority: The Rockefeller Drug Laws and the Politics of Punishment*, Professor Michael Javen Fortner counters suggestions that the dominant response from African Americans to crime in the 1960s–1980s was "a sense of sympathy for and empathy with the perpetrators." He states bluntly:

[T]hat's not what I heard. . . . I remember black folks constantly worrying about keeping their children, homes, and property safe. These working- and middle-class families did not express much "sympathy for and empathy with the perpetrators" of crime in the neighborhood. I recall hearing "That's what he gets" every time one of "our youngsters" was arrested. I recall hearing about fathers calling the cops on sons and mothers throwing daughters out onto the street. I

I suspect that many citizens will have a difficult time believing that the leaders who advocated defunding the police (or even those who failed to vocally oppose defunding the police) have the judgment necessary to come up with a decent plan for bail reform. I certainly have a difficult time believing it.

The Overton Window is the range of public policies that are politically plausible at any given moment in time.¹²⁶⁶ Elected officials and other policymakers must work within that window. They might personally desire policies that have no chance of gaining the public's assent. But since politics is the art of the possible, they must put away their personal preferences and concentrate on what can actually be accomplished.

The Overton Window can, of course, shift over time. Previously “unthinkable” policies may become “thinkable.” In the wake of George Floyd's death and the resulting riots and protests, politicians in major American cities thought it had shifted. They viewed defunding the police as politically plausible, and given that it passed in many cities, in some sense of the term it was plausible. But it's not clear it ever had the level of support those politicians thought it had among their constituents. Gauging public sentiment wasn't easy during the COVID lockdown. Perhaps

remember that from the pews of my Pentecostal church sanctified working- and middle-class African Americans distinguished between saints and sinners. They certainly believed that salvation was free for drug users and dealers, but salvation was always a choice—a test of individual morality and fortitude—because these iniquities were rooted in the soul rather than social structure. These saints had no compunction about beseeching police or calling forth prisons for their own salvation when junkies and pushers became a cross too heavy to bear.

MICHAEL JAVEN FORTNER, *BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT* x–xi (2015). He discusses numerous polls and events that support that recollection. *Id.* at 155–213. See also Gail Heriot, *Statement of Commissioner Gail Heriot*, in U.S. COMM'N ON CIVIL RIGHTS, *POLICE USE OF FORCE: AN EXAMINATION OF MODERN POLICING PRACTICES* (2018) (discussing the work of Myrdal and Fortner) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3285429).

Interestingly, the Minnesota poll mentioned above shows that young adults are the most likely to support downsizing the Minneapolis police department. Among those 18–34, 36% favored downsizing, while only 31% of those 35–49, 24% of those 50–64, and 22% of those 65 and over did so. The poll also shows that college graduates are more likely to favor downsizing (31%) than are non-college graduates (25%). Perhaps part of the reason for these differences is that young people have never experienced periods of high crime and that college graduates—because they are more likely to live in prosperous, low-crime neighborhoods—are unlikely to experience crime even today.

¹²⁶⁶ See generally *The Overton Window*, MACKINAC CTR. FOR PUB. POL'Y, <https://www.mackinac.org/OvertonWindow> (last visited Oct. 4, 2021).

they were mistaking Twitter mobs for the vox populi.¹²⁶⁷ In any event, if the Overton Window shifted on police funding during the early summer of 2020, it seems likely it has shifted back.

My question is whether the window has shifted on tinkering with the bail system as well. We might know more about that soon.

¹²⁶⁷ One strong signal that progressives may have misgauged public sentiment in the months following the death of George Floyd and the ensuing protests and riots is the selection by voters of tough-on-crime candidate Eric Adams, a former police captain, to be the Democratic nominee for New York City mayor. Adams is the overwhelming favorite to defeat Republican nominee Curtis Sliwa, founder of the Guardian Angels, a non-profit volunteer organization of unarmed civilian crime patrols, in November. *Eric Adams: Ex-Policeman Wins NYC Democratic Mayoral Primary*, BBC NEWS (July 7, 2021), <https://www.bbc.com/news/world-us-canada-57744522> (“Mr. Adams told supporters on the night of last month’s primary election: “If black lives really matter, it can’t only be against police abuse. It has to be against the violence that’s ripping apart our communities.”).

Another non-crime-related signal came from the defeat of Proposition 16 in California. In the wake of George Floyd’s death, the California legislature voted to delete from the Constitution words that had been put there in 1996 by Proposition 209. Proposition 209’s operative clause read: “The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, color, sex, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” Repealing Proposition 209 would have allowed, for example, the University of California to resume its earlier practice of giving preferential treatment to African-American applicants for admission even when that individual applicant is the son or daughter of financially well-off parents. The repeal effort (Proposition 16) was thumpingly defeated. Christine Mai-Duc, *Measure to Restore Affirmative Action in California Fails*, WALL ST. J., Nov. 4, 2020, <https://www.wsj.com/articles/measure-to-restore-affirmative-action-in-california-fails-11604517345> (“Voters in America’s most populous state rejected a measure that would have allowed affirmative action in public employment, contracting and admissions 24 years after it was initially banned. As of Wednesday morning local time, results showed 56% of Californians voted against Proposition 16 and 44% in favor”) (Full disclosure: I co-chaired both the “Yes on Proposition 209” campaign in 1996 and the “No on Proposition 16” campaign in 2020.).

Dissenting Statement of Commissioner Peter N. Kirsanow

Introduction

This is far from the worst report the Commission has issued during my tenure. Bail reform is an important topic, and there are aspects of this report with which I agree. However, there are too many omissions and faulty premises for me to support it wholeheartedly. This statement should not be taken as an exhaustive list of my disagreements with the report and with many of the issues surrounding bail reform.

As is the case with many of this Commission's reports, this one begins from the wrong place. The report is primarily concerned with the consequences experienced by people who have been arrested. In my view, the balance of considerations should be weighed in favor of the law-abiding.

Let me put it more bluntly: it is the duty of government officials to prioritize the law-abiding over law-breakers. It is true that no one is legally guilty until they are convicted. However, the police had probable cause to arrest them. And the lack of a conviction later on does not necessarily mean they did not commit the crime. It may mean that they were innocent, or it may be that witnesses failed to appear (either due to fear or simple lack of interest), prosecutors dropped the case to prioritize other cases, or any number of other considerations.

Bail Reform: What Are We Examining?

Even if a person commits a crime because he or she is (for example) addicted to drugs, that does not mean he or she did not commit the crime. One panelist testified that she was arrested for a theft charge and said that the charge arose out of a drug problem she had. That doesn't mean that she didn't commit the theft. In fact, she didn't deny that she had committed the theft, but rather said that she took a plea deal in order to go to a treatment program and get back to her children sooner.¹²⁶⁸

There is a societal cost to releasing criminals. Former Washington, D.C. police chief Peter Newsham testified:

¹²⁶⁸ Transcript at 85.

I was arrested in 1998, from a drug addiction that I had at the time, but it was for a theft charge, and was given a bail that I could not afford, a \$10,000 cash bail. The options were I can plea out to go to treatment immediately and be home in six months or take it to trial and actually go to prison for up to 18 months. Having small children at home, I was not afforded the opportunity, because I couldn't pay bail, to actually try to get treatment outside or see what my options were.

I felt I was forced to plead to the six months so that I can return home to my children as soon as possible. But also, was returning home and wanted to address the issue I had.

[T]he violence in Washington, D.C. is restricted to a very small geographic area. So Washington, D.C., although it's considered a big city, the neighborhoods that are plagued with violence are very, very small.

When a dangerous gun-related violent offender is turned back into that community, everybody knows that that happened. That results in a lack of trust in the system by the folks who live there.

The trauma that's being placed on these communities by this gun violence is so palpable. You have young people that are fearful to go to the store, young people that are afraid to go to school.

So I think that when we're considering release, particularly on the violent offenders, we've got to be extremely careful that we don't let the pendulum swing too far.¹²⁶⁹

The question should not be, “How much of the margin of error can we persuade the law-abiding to bear?” Yet too often, that is the premise from which government policy starts.

Any reform of the bail system should be a non-starter if it potentially exposes the public to more crime. This is particularly true in regard to violent crime, but it is not limited to violent crime. The same rule applies to property crime. Property crimes, drug crimes, and “lifestyle crimes” are not “victimless crimes.” A criminal who repeatedly steals cars is victimizing people. His victims then have to file a claim with their insurance company, find alternative transportation to work or school, purchase a new vehicle (which will almost certainly require a financial outlay on their part in addition to their insurance claim), and likely have an increased insurance premium. Their neighbors will also likely experience increases in their insurance premiums. Likewise, selling drugs (as very few people are incarcerated for mere possession, even if possession is what they are charged with) is not a victimless crime. Thousands of people die of drug overdoses every year. The drug cartels that smuggle drugs into this country or grow them here illegally engage in human trafficking, murder, intimidation, and virtually every form of criminal activity – even when drugs are legalized.¹²⁷⁰

Thus, I disagree with panelists who primarily focus on the relative rarity of violent felony offenses committed by people released pretrial. Violent felony offenses are not the only crimes that are worthy of judicial consideration.¹²⁷¹ But even some of those panelists, when they begin discussing specifics, believe that it is the law-abiding public, rather than criminals, that should shoulder the

¹²⁶⁹ Transcript at 91-92.

¹²⁷⁰ Dennis Romero et al., “Foreign cartels embrace home-grown marijuana in pot-legal states,” NBC News, May 29, 2018, [Foreign cartels embrace home-grown marijuana in pot-legal states \(nbcnews.com\)](https://www.nbcnews.com/news/foreign-cartels-embrace-home-grown-marijuana-pot-legal-states-nbcnews.com).

¹²⁷¹ Insha Rahman, Vera Institute, written statement at 2 (“typically less than 2% of all people released – either on their own recognizance, under nonmonetary conditions, or on bail – are rearrested for a violent felony offense during the pretrial period.”).

costs of crime. Insha Rahman of the Vera Institute listed three characteristics of what she described as “good” bail reform”:

- Implementing mandatory release without bail, and without onerous conditions, for the vast majority of people arrested.
- Building a community-based, supportive system of pretrial services.
- When considering detention, eliminate mere FTA [failure to appear] as a basis to detain and tighten the standard for risk to public safety.¹²⁷²

These three recommendations, taken together, shift both the costs of crime and the risks of future crime from criminals to taxpayers. The first recommendation may be feasible, depending upon how it is implemented. The second recommendation – “building a community-based, supportive system of pretrial services” – shifts the cost from the arrestee (who would receive reminders, etc., from a bail bondsman) to taxpayers, who are going to pay to build this “supportive system”. Not coincidentally, people will still profit from these new systems. “Advocacy groups” receive grants to develop these new systems, serve in advisory roles, and staff these systems. Indeed, the court-appointed monitor hired the Vera Institute of Justice to provide trainings about the Harris County consent decree to public defenders, district attorneys, judges, and others.¹²⁷³

It will simply be that people who are aligned with the views of advocacy groups will profit from these new systems, rather than bail bondsmen.

The owner of two bail-related companies stated in her public comment to the Commission that bail professionals work with their clients to help them achieve success, beyond merely showing up for court.

¹²⁷² Insha Rahman, Vera Institute, written statement at 3.

¹²⁷³ *Monitoring Pretrial Reform in Harris County: Second Report of the Court-Appointed Monitor*, March 3, 2021, at 20, <https://sites.law.duke.edu/odonnellmonitor/wp-content/uploads/sites/26/2021/03/ODonnell-Monitor-Second-Report-v.-32.pdf>. During this past six-month time period, Vera Institute of Justice was retained to provide trainings on Rule 9 and the Consent Decree. On December 11, 2020, the first training was provided and it was attended by about 370 people. The initial training covered these topics:

- Origin of Consent Decree (and authority based in Federal Constitution)
- Impact of bail reform in Harris County
- How the basic process has changed and each step in the process from arrest to first setting
- Serve as a problem-solving liaison: Vera Institute of Justice will be available to gather feedback and concerns.

The Vera Institute of Justice will provide additional targeted workshop trainings with specific groups: (1) workshops for all practitioners (district attorneys, defense counsel, magistrates, and judges) about how to make the hearings robust [and] how to think through cases, and (2) a session specific to pretrial services and their role and expectations.

What I see instead are human beings who need accountability so that they go to court. My agents and I provide that accountability at no cost to taxpayers. We remind clients of court dates, and then if they do not go, we help them get there.

We also provide many of our clients with friendship and someone to believe in them and cheer them on. We give them referrals to things like domestic violence shelters, food banks, drug and alcohol programs. We help them get jobs and safe housing. We help them make positive changes in their lives. Our goal for every client is that they never need our services again. That may seem counter-intuitive, but that is not only our choice, but also the choice of every bondsman I know. We all desire to help people to do better.¹²⁷⁴

It is also worth noting that Rahman's preferred bail reform would "eliminate mere FTA as a basis to detain". There is nothing "mere" about failing to appear for a court date. Failing to appear for a court date is thumbing your nose at the legal system. If a person doesn't appear for a court date, he is avoiding the punishment that is likely coming his way. If it is a relatively low-level crime, such as a property crime, the police likely will not have the resources to track him down until they (almost inevitably) encounter him when he commits another infraction. On the other hand, if a person out on bond fails to show up, the bail bondsman will track him down, and the criminal knows it. This is an additional incentive to appear in court, and also the cost of apprehending a criminal who does not appear for a court date falls on the bail bondsman, rather than the taxpayer. Since the bail bondsman has an incentive to apprehend his client quickly, it may also reduce the client's opportunities to commit more crimes.

Furthermore, at least one study has found that people released on commercial bonds have lower rates of FTA than people released on other types of pretrial release. In a public comment to the Commission, Dr. Stephen Clipper explained what his research found:

In this study, we compared the failure to appear (FTA) rates between attorney, cash, commercial, pretrial service bonds, as measured by a bond forfeiture or similar outcome for defendants released via pretrial serviced supervision. (For a detailed explanation of the study methodology see: Clipper et al., 2017.) **Our results indicated that commercial bonds had lower rates of FTA compared to other mechanisms when accounting for the effect of relevant and available covariates.** It bears repeating: we were not and do not advocate for or against any mechanism of pretrial release.

While my coauthors and I cannot know for certain why the commercial bail bonds yielded a lower rate of FTA compared to other mechanisms, we hypothesize that the difference may be the result of available resources which affect the ability for these mechanisms to engage in best practices. Research on FTA suggests that absconding is rare and instead most FTAs are non-nefarious. Studies have found that many FTAs are the result of defendant confusion surrounding the appearance

¹²⁷⁴ Kay Sharpe, Public Comment, Mar. 3, 2021 (on file with Commission).

requirements. One such study utilized a court reminder initiative coupled with modifications to the appearance of summons to make them easier to understand. Results of these interventions were found to increase appearance rates and decrease added charges. **At the time of data collection in Dallas County, commercial bail bonds often collected many means of communication with a defendant (e.g., contact information for an employer, family member, and friends) and provided reminders through many points of contact, if there was difficulty contacting the defendant directly. Anecdotally, commercial bail bonds providers would ensure transportation and provide transportation to court if the defendant did not have adequate means to get to court. Commercial bond providers were at an advantage to perform these roles; they were adequately resourced by a for-profit, defendant-funded model.**

These resources simply did not exist for the government-funded alternatives we compared to commercial bonds. This was especially true for individuals released via Dallas County's Pretrial Services Department. Dallas County's Pretrial Services Department did not have the resources necessary to match the level of service provided by commercial bonds providers, even with the dedication and hard work of the agency staff. The case load for Dallas County's Pretrial Services Department was several times larger compared to commercial bond provider's caseloads. The underfunding largely prevented Dallas County's Pretrial Service Agency from engaging in the same practices that commercial bonding agencies were performing. Regardless of the nature of the program, a well-resourced program engaging in evidence-based best practices will perform better compared to an under-funded program that is unable to provide that same support [emphasis added; citations omitted].¹²⁷⁵

In her oral testimony, Rahman elaborated upon what she means by "tighten[ing] the standard for risk to public safety." She said:

Illinois just signed into law bail reform this week. And one thing they did that is unique is that the risk to public safety element for considering detention, they narrowed it significantly, so that the standard is that it's risk to an individual person or persons and a risk of physical harm, not just this broad standard that can encompass all kinds of behavior, including behavior that is not threatening or not risk at all.¹²⁷⁶

The Illinois statute in question, which goes into effect January 1, 2023 provides, "Detention shall only be imposed when it is determined that the defendant poses a specific, real and present threat to a person, or has a high likelihood of willful flight."¹²⁷⁷

¹²⁷⁵ Stephen Clipper, Public Comment, Mar. 25, 2021, at 1-2 (on file with the Commission).

¹²⁷⁶ Transcript at 35-36.

¹²⁷⁷ 725 ILCS 5/110-2(c).

Subsection (e) seems to contradict this, as it provides:

This Section shall be liberally construed to effectuate the purpose of relying upon contempt of court proceedings or criminal sanctions instead of financial loss to assure the appearance of the defendant, and that the defendant will not pose a danger to any person or the community and that the defendant will not pose a danger to any person or the community and that the defendant will comply with all conditions of pretrial release.¹²⁷⁸

It remains to be seen how the Illinois courts interpret this statute. The “specific, real, and present threat to a person” language in subsection (c) suggests that the pretrial detention should only be used in rare circumstances where there is an identifiable future victim. Subsection (e)’s command to interpret the section “liberally” and that the defendant should not pose a danger to the community suggests that detention should be used to protect the community generally from future crimes.

Rahman’s interpretation of this statute seems to suggest that public safety should not be considered as a basis to detain someone unless there is a specific physical threat to an identifiable person. If someone has committed a violent offense but the police can’t identify an individual who might be at risk if this person is released, the arrestee should be released. If someone committed a violent robbery, but it was a crime of opportunity, there probably isn’t an identifiable future victim. Law-abiding citizens will just have to hope they are not in the perpetrator’s vicinity when he again feels the need for some easy money. Someone arrested for auto theft likely does not pose a physical threat to an identifiable person. The fact that he may steal another car hours after being released, as happened in New York under its bail reform law, apparently does not matter.¹²⁷⁹ The owner of the stolen car is out of luck. Enjoy navigating the insurance process!

Here is just one example of a man whose arrest for a nonviolent offense does not adequately capture his criminal background:

On September 25, 2020, Metropolitan Police Department (MPD) officers arrested the Defendant, and the next day the Court issued an arrest warrant pursuant to a criminal complaint charging him with one count of Unlawful Possession of a Firearm and Ammunition by a Person Convicted of a Crime Punishable by Imprisonment for a Term Exceeding One Year, in violation of 18 U.S.C. §9 922(g)(1). . . .

¹²⁷⁸ *Id.* at (e).

¹²⁷⁹ William Bratton, written statement at 2.

The New York State bail reforms stipulate that auto thieves cannot be held even for arraignment and must be released on desk appearance tickets within hours of their arrests. Auto thefts were up 66.7 percent by year’s end. As with burglary, auto thefts have declined for decades in the city, with only one annual increase in any year since 1990. An auto thief with multiple arrests in 2020, was released, as required, on a desk appearance ticket only to be arrested again on the very same night trying to steal a van within blocks of the precinct house from which he had been released.

On September 25, 2020, MPD officers responded to a location in Southeast, Washington, District of Columbia, based on an anonymous report that an unresponsive individual was lying under a vehicle. D.C. Fire Department members arrived first to the scene, where they found the Defendant unconscious. They administered Narcan to resuscitate him. The Fire Department members found a firearm loaded with one round of ammunition in the chamber and twelve rounds in the magazine in the Defendant's waistband, which they removed while he was still unresponsive. The firearm was a 45 semi-automatic pistol. When the MPD officers arrived, they saw the Defendant lying on the ground and regaining consciousness.

In 2012, the Defendant was convicted of Accessory After the Fact: Assault with Intent to Commit Robbery While Armed. In 2014, the Defendant was convicted of Second-Degree Murder and Use of a Handgun/Crime of Violence.¹²⁸⁰

Using the bail reform characteristics proposed by advocates, Kent likely would have been released rather than detained, given that there was no evidence that the safety of an identifiable individual was threatened. As the court noted in its decision requiring detention, however:

The danger posed by the Defendant's release is that he would use or possess a firearm in a dangerous way. Firearms present a risk of danger from either intentional or unintentional discharge; each risk has the potential to cause injury or death to members of the community. . . . Here, the Defendant had a loaded firearm on his person while apparently under the influence of a controlled substance. . . . This firearm could have discharged, causing injury to the Defendant or anyone else in the area, or it could have easily been taken by someone else, as evidenced by the fact that a member of the Fire Department was able to remove the firearm from his waistband while the Defendant remained unresponsive. . . . Given the Defendant's repeated offenses and his instant re-arrest while on supervision, the Court has little confidence that even strict release conditions, such as home incarceration, would adequately mitigate the danger posed by his release.¹²⁸¹

This case illustrates why it is vital to give judges broad discretion to detain criminals to protect public safety. When a federal judge orders an individual detained pending trial, she is required to issue a detention order containing findings of fact and a written statement providing the reasons for the detention.¹²⁸² This is not required if a judge releases an individual. Therefore, it is more difficult to know the history of those who are being released.

A similar dynamic is in play at the state court level, at least in some states. New York law requires that when a judge must determine whether to release a defendant and under what conditions, "The court shall explain its choice of release, release with conditions, bail or remand on the record or in

¹²⁸⁰ U.S. v. Kent, 496 F.Supp.500, 501 (D.D.C. 2020).

¹²⁸¹ *Id.* at 506.

¹²⁸² 18 U.S.C. § 3142(i).

writing.”¹²⁸³ However, as a New York court explained in a decision regarding a defendant’s appeal of his bail, “bail decisions are made all the time, and they are also usually made orally and immediately. For example, a judge sitting in a busy New York City Criminal Court arraignment part (when no pandemic is underway) can sometimes be called upon to make as many as seventy-five oral bail decisions in one day.”¹²⁸⁴ In this particular case, although the defendant had not yet been convicted of any crimes as an adult, he had embarked on a criminal career at a young age.

Petitioner Brian Cespedes is a twenty-year-old man. His criminal history record (or “rap sheet”) indicates that, apart from the two instant open gun indictments, petitioner has a 2016 Juvenile Delinquent adjudication for Assault in the Second Degree with a Weapon or Dangerous Instrument for which he received a sentence of fifteen months’ probation, and an Adjournment in Contemplation of Dismissal for a July 2019 misdemeanor arrest (for inciting to Riot, and related charges).

Petitioner was arrested on May 26, 2018, and charged with Criminal Possession of a Weapon in the Second Degree. It is alleged in substance on that case that petitioner and his companions, upon seeing the police approach, discarded two loaded guns under a parked car.

Petitioner was initially released on his own recognizance on the 2018 case. In August of 2018, a Grand Jury voted Indictment Number 1657/2018 charging Petitioner Cespedes with two counts of Criminal Possession of a Weapon in the Second Degree and related crimes. The 2018 case was calendared in Part 77 pending trial, and petitioner Cespedes voluntarily appeared on that case a number of times without incident until his re-arrest in August of 2020.

On August 12, 2020, petitioner Cespedes was once again arrested and charged with Criminal Possession of a Weapon in the Second Degree and related charges.

In the 2020 case the prosecution in substance alleges that petitioner Cespedes became embroiled in some kind of a dispute inside a bodega. As shown on surveillance video, petitioner was wearing a “fanny pack” while inside the bodega. The police were summoned. As the police approached, petitioner discarded the fanny pack just outside the bodega. The police recovered it almost immediately, and found a loaded gun inside.¹²⁸⁵

Reported cases will tend to be the most serious cases, and also the cases where a judge denied bail. In this case, the petitioner had been charged with numerous serious crimes by age 20, despite not yet having been convicted of a crime. This is worth bearing in mind when advocacy organizations and ex-convicts claim that individuals facing pretrial detention are still innocent. They remain not guilty until convicted, but that does not mean they are not dangerous and have not committed other crimes. The judicial system gave Cespedes every opportunity to change his ways. Even as an adult,

¹²⁸³ CPL § 510.10(1).

¹²⁸⁴ *People ex rel. Griffin v. Brann*, 147 N.Y.S.3d 313, 323 (N.Y. App. Div. 2020).

¹²⁸⁵ *Id.* at 316-317.

he was first released on his own recognizance for his first adult weapons charge, and then received an adjournment in contemplation of dismissal on the misdemeanor charge of inciting a riot. Nevertheless, the very next year he was back to illegally possessing firearms and engaging in altercations.

Sharlyn Grace of the Coalition to End Money Bond and the Illinois Network for Pretrial Justice said that she was representing “people who have been incarcerated pretrial, their loved ones, and all of us who are made less safe by the destabilization of our communities that pretrial jailing causes”.¹²⁸⁶ Grace testified that the stakeholders she represents want several things out of bail reform:

[P]eople want to be released, and they want to be free from other forms of pretrial surveillance and punishment. . . .

This means that any referrals to services must be voluntary. We know that for people who use drugs, in particular, who are at a dramatically increased risk of death both in jails and after they're released from jail, that voluntary engagement with treatment is much more effective than mandatory treatment.

I also want to caution against the imposition of pretrial release conditions that lead to greater failure rates and have no proven benefits to the community, such as drug testing, electronic monitoring, and other conditions that the courts refer to as services, but which are experienced nearly universally as forms of pretrial punishment.¹²⁸⁷

The interests of society and law-abiding citizens are subordinated to the preferences of criminals and their families. Grace says that drug users should not be required to seek drug treatment or be subject to drug testing as a condition of release. Drug use is still a crime in most states, particularly drugs other than marijuana. Treatment may be more effective when a person seeks it voluntarily, but drug users are notoriously averse to seeking treatment. Drug use is also a motivation for many types of property and vice crimes, and also a contributing factor to public order offenses and some violent crimes. If someone is going to be released pending trial, it is not too much for taxpayers and law enforcement to demand that the person avoid further lawbreaking while awaiting trial. Drug use is by its nature lawbreaking (even marijuana use is a violation of federal law), and it contributes to many other crimes as well. Requiring people to seek treatment and be tested for compliance is not too much to ask.

Likewise, the staff-written portion of the report approvingly cites Professor Megan Stevenson forty-six times. This is Professor Stevenson’s view on pretrial detention:

A coauthor and I developed a form of contingent valuation that allows us to estimate the relative cost of crime victimization and incarceration. We asked

¹²⁸⁶ Transcript at 79.

¹²⁸⁷ Transcript at 80.

respondents questions such as, if you had to choose between spending a month in jail or being the victim of a robbery, which would you choose?

In short, we find that people are incredibly averse to incarceration. Most of our respondents reported that a single day in jail imposes harms greater than burglary. Three days in jail impose harms greater than robbery. A month in jail imposes harms greater than a serious assault.

And these responses are not just uninformed speculation, even those who have personal experience with incarceration and/or crime victimization report that jail is incredibly harmful and even short stays can impose harms as grave as serious crime.

Now, back to our cost-benefit analysis, once again, a legal precondition for pretrial preventive detention. If jail is so harmful, then a person must pose an extraordinarily high risk of committing a serious crime in order to justify pretrial detention.

In order for pretrial detention to avert more harm than it creates, you would have to avert crimes as grave as burglary in order to justify caging someone for a single day, avert crimes as grave as robbery in order to justify caging them for three days, avert crimes as grave as serious assault in order to justify caging them for a month.¹²⁸⁸

If we follow this reasoning to its logical conclusion, there is almost no reason to ever incarcerate someone, even after they are convicted of a crime. After all, if people would rather be the victim of a robbery than go to jail for three days, that applies just as much to post-sentence incarceration as to pretrial detention. Policymakers cannot look at crime and punishment in a “would this individual rather suffer x or y” approach. They must consider, “What will society be like if all robbery suspects are released pending trial?” Professor Stevenson says very few people reoffend pending trial, and we can’t accurately predict which ones will reoffend.

In one commonly used risk assessment tool, only 2.5 percent of those in the highest risk category are expected to commit a violent crime within 30 days. At that risk level, the harms of incarceration are probably 40 times greater than the benefits of averted crime.¹²⁸⁹

Professor Stevenson did not, however, address how criminals’ behavior is likely to change if they are aware that they will be released as soon as they are arrested. Why would you avoid robbing people if you know you are almost certain to be released again, if you are even caught?

Bail Reform and Witness Intimidation

¹²⁸⁸ Transcript at 115-116.

¹²⁸⁹ Transcript at 116-117.

Policymakers and the public should also bear witness intimidation in mind when considering bail reform. Peter Newsham, who was formerly chief of police in Washington, D.C. and currently serves as chief of police in Prince William County, raised this concern in his testimony to the Commission.

[O]ften, what's not considered is whether or not the releasee will intimidate or dissuade participation by witnesses while they are on pretrial release. Sometimes, the offense itself can be an intimidating factor to victims of violent crime.¹²⁹⁰

A Chicago Tribune investigation of Chicago's bail reform (General Order 18.8A, discussed later in this statement) suggests that witness intimidation increased in domestic violence cases following the reform.¹²⁹¹ Tribune reporters examined a total of 702 "aggravated domestic violence cases" in 2016 and 2018. The average bond amount in 2018 was dramatically lower than in 2016, and 19% of defendants were released on their own recognizance. This was accompanied by a sharp increase in aggravated domestic violence cases dropped by prosecutors. In 2016, 56% of aggravated domestic violence cases were dropped by prosecutors, and that rose to 70% in 2018.

This is a consideration that is often omitted from discussions of bail reform. The mere knowledge that a person involved in a robbery or assault has been released may be enough to discourage neighborhood witnesses from cooperating with police. After all, the released person knows where you live. This is particularly true because many of those arrested for low-level offenses have been known to the police for some time, or may have committed violent crimes in the past. As William Bratton, two-time NYPD Commissioner, testified:

For the advocates, arrested persons have merely been accused of crimes, not convicted, and therefore should be spared incarceration except in the cases of serious violent offenses.

Police take a longer view. Many offenders, including many robbers, burglars, and auto thieves have long histories of criminal activity. The same is true of many gun criminals, who often exhibit a pattern of firearm arrests and involvement in prior shootings, without having been convicted yet as the actual violent perpetrator of a particular shooting or murder. They are deeply enmeshed in violence, but not yet charged with an act of violence.¹²⁹²

No one wants to draw the attention of the neighborhood tough guy. Advocacy organizations argue that people released from detention are more likely not to be convicted of a crime, and point to their ability to maintain ties to the community, work, and so on. This may be true. However, it is

¹²⁹⁰ Transcript at 72.

¹²⁹¹ David Jackson and Madeline Buckley, "Domestic violence victims face risk of being attacked again following Cook County reforms, a Tribune investigation found," CHI. TRIB., May 2, 2019, <https://www.chicagotribune.com/investigations/ct-met-domestic-violence-bonds-20190219-story.html>.

¹²⁹² Transcript at 77-78.

also entirely possible that an additional factor is that prosecutors more often drop charges because witnesses refuse to testify due to fear.

The Cost of Bail

A repeated complaint among those who want to reform bail is that many people cannot afford even small amounts of bail.

Professor Megan Stevenson found that when equal bail amounts were set, residents from low-income neighborhoods were less likely to be able to afford bail and thus, more likely to be detained pretrial and often times these defendants were detained for the entire duration of their pending case. These results often apply even for defendants who have relatively low monetary bail amounts set. For instance, in a report of pretrial detainees in New York, 40 percent of defendants remained in jail until case disposition, despite having bail amounts that were \$500 or less.¹²⁹³

Two quick notes on this paragraph. First, *of course* poorer people will have more difficulty paying the same amount of bail as a wealthier person.

Second, the report is remarkably incurious as to how someone winds up in jail despite having a bail amount of \$500 or less. Does he have no siblings, no friends, who might be willing to chip in to get him out of jail? Again, one of our panelists offered an answer to this question, but our staff missed it. Michelle Esquenazi, herself a bail agent, wrote in her statement to the Commission:

Our profession offers a community based service in conjunction with family members who have the accused's restorative goals as a priority. ***Much of the time those who do not make bail have been involved in previous behavior that has alienated their familiar support group. Many are heavily involved in addiction, or suffer from mental illness issues*** (emphasis added).¹²⁹⁴

A public comment submitted by Kay Sharpe, who owns two bail-related companies in North Carolina, made a similar point:

It's rare that a client is "stuck in jail because they are poor". We help clients find creative and legal ways to raise money. They find ways to accomplish that goal. The ones who stay in jail tend to be people who have no one in their lives who is willing to co-sign for them (guarantee they will go to court). That's often because the defendant has stolen from them, broken many promises over years, or been violent in the past. When you have no friends or family willing to trust that you'll go to court, you're not likely to go to court.¹²⁹⁵

¹²⁹³ Report at n. 317-319.

¹²⁹⁴ Michelle Esquenazi, written statement, at 2.

¹²⁹⁵ Kay Sharpe, Public Comment, Mar. 3, 2021 (on file with the Commission).

Why is “For-Profit” Bad?

I also note that the report and various panelists repeatedly criticized the bail industry for being “for profit”.¹²⁹⁶ Bail companies are taking a risk when they post bond for someone who has been arrested. If the person fails to appear, the bail company forfeits the money they have posted. The bail company has to buy insurance to cover these losses – because it is virtually guaranteed that some people will not appear for their hearings. In order to minimize those losses, the bail company sends reminders to clients about appearing for hearings. All of this requires staff and money.

Many advocacy organizations and individuals seem to believe that it is the bail industry that is driving increases in bail amounts. Although that is possible, it ignores the fact, as panelist Michelle Esquenazi pointed out, that it is judges, not bail companies, that set bail amounts.¹²⁹⁷ Why, then, do some advocacy organizations, government officials, and others denigrate bail professionals and not judges?

There may be at least two reasons. First, judges are lawyers, like many of the individuals who work for advocacy organizations, as well as the members of this Commission and many members of the Commission staff. They belong to the same professional class and also occupy positions of authority, and thus they are respected by fellow lawyers and other professionals. People who work in the bail industry are, as Ms. Esquenazi said, “the bluest of blue shirt America.”¹²⁹⁸ They are small business owners, and not a glamorous small business like producing ethically sourced bean-to-bar artisanal chocolate. The nature of their business means that they are dealing with some rough people.

Second, there is a strange assumption that if two people are doing the same work, but one works for a for-profit company and the other for a non-profit company, the latter is morally superior. This may be true if the second person is working for free, but that is rarely the case.

No one here at the Commission is doing this work purely out of the goodness of their hearts. All of our staff and Commissioners expect to be paid. Likewise, all the witnesses from advocacy organizations who testified at our briefing are paid by their organizations. There is nothing inherently less noble about working for a for-profit company than an advocacy organization.

Racial Disparities in Pretrial Detention

The report and some of the witnesses and advocacy organizations that testified at our hearing also make much of the fact that there are racial disparities in pretrial detention, and these disparities persist even after bail reform is implemented. These racial disparities are wholly predictable.

¹²⁹⁶See, e.g., Insha Rahman, Vera Institute, written statement at 1 (“The ills of a for-profit bail bond industry – whose primary purpose is to turn a profit, almost \$2 billion per year – are by now well documented.”).

¹²⁹⁷Michelle Esquenazi, written statement, at 2.

¹²⁹⁸Transcript at 130.

African-Americans commit crimes at dramatically higher rates than their percentage of the population would lead one to expect, and at higher rates than other ethnic groups. Therefore, they will be more likely to be arrested and more likely to be detained pretrial.

According to the FBI's Uniform Crime Report for 2019 (the most recent year that is available), in 2019 the law enforcement agencies that contribute to the UCR made 6,816,975 total arrests for the covered crimes. 4,729,290 of those arrests were of white individuals (which includes most Hispanic individuals), and 1,815,144 of those arrests were of black individuals.¹²⁹⁹ This means that 69.4 percent of arrests were of non-Hispanic white and Hispanic individuals, and 26.6 percent of arrests were of black individuals. Yet African-Americans account for only 13 percent of the U.S. population.

The difference is even more stark when one examines arrest statistics for individuals under 18. The contributing jurisdictions made 475,371 arrests of individuals under 18 for the covered crimes in 2019. Of those, 296,881 were white (which again includes most Hispanics) and 161,149 were black. In percentages, 62.5 percent were white and 33.9 percent were black.¹³⁰⁰ This suggests that black offenders begin their criminal careers at a younger age than whites. Therefore, at any given time when they are arrested, blacks are likely to have a lengthier criminal background than a white person of the same age and be considered (by algorithms, judges, and the average citizen) at greater risk of failing to appear or recidivate if released.

Nor are black arrests concentrated among less serious offenses, which might lead to more equal rates of pretrial detention. African-Americans are overrepresented relative to their population share in every crime category except for "drunkenness" and "driving under the influence," where they account for only 14.8 percent and 14 percent of arrests, respectively. Interestingly, whites constitute a huge majority of those arrested on "suspicion," which would likely be an easy catch-all charge if the police were truly seeking to discriminate on the basis of race. But here is a sample of black percentages of other crimes:

- Murder and non-negligent manslaughter: 51.2 percent (this is actually larger in both number and percentage than white arrests for murder and non-negligent manslaughter, not just in terms of population share)
- Rape: 26.7 percent
- Robbery: 52.7 percent
- Aggravated assault: 33.2 percent
- Burglary: 28.8 percent
- Larceny-theft: 30.2 percent

¹²⁹⁹ Table 43A, Arrests by Race and Ethnicity, Uniform Crime Report, FBI, 2019, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-43>.

¹³⁰⁰ Table 43B, Arrests by Race and Ethnicity, Uniform Crime Report, FBI, 2019, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-43>.

- Motor vehicle theft: 28.6 percent
- Fraud: 30.5 percent
- Embezzlement: 36.3 percent
- Weapons; carrying, possessing, etc.: 41.8 percent
- Prostitution and commercialized vice: 42.2 percent
- Drug abuse violations: 26.1 percent
- Offenses against the family and children: 28.3 percent
- Drunkenness: 14.8 percent
- Driving under the influence: 14.1 percent

This is not an exhaustive list even of crimes tracked by the FBI. Again, blacks constitute approximately 13 percent of the U.S. population. Except for crimes pertaining to the personal consumption of alcohol, African-Americans are represented among arrests for almost every type of crime at least double their percentage of the population. This includes “white-collar” crimes such as fraud and embezzlement. It is therefore completely predictable that blacks would be overrepresented among pretrial detainees, and that bail reform would reduce the racial disparity in pretrial detention.

Some of the witnesses at the briefing claimed that racial disparities in incarceration are the result of “over-policing” black communities, which results in “more interaction around probation and parole technical violations.”¹³⁰¹ This is unlikely.

African-Americans are overrepresented among perpetrators of crime. They are also overrepresented among victims of crime. Thus, bail reform that results in an increased number of crimes being committed – even if the overall re-offending rate remains constant – will fall most heavily on African-Americans. As Dr. Matt DeLisi wrote in his statement to the Commission:

Of course, allegations of systemic or institutional racism in the criminal justice system would impugn official arrest data due to concerns that police activity itself is biased. **However, large racial differences in criminal victimization undermine that narrative. This is especially important since most criminal victimization is intraracial.** According to the most recent data from the National Crime Victimization Survey, which is a nationally representative survey of households to measure criminal victimization, African Americans accounted for 29% of nonfatal violent crimes including more than half of robberies, a third of aggravated assaults, and nearly one fourth of rape or sexual assaults and simple assaults. Importantly, there are no statistically significant differences by race

¹³⁰¹ Transcript at 103.

between offenders identified in the NCVS and offenders arrested in the UCR (emphasis added).¹³⁰²

The police have to go where the crime and complaints are. This means they are going to receive more calls to black neighborhoods, and if they are engaged in proactive policing, will spend more time in black neighborhoods. Even if people released on probation or parole encounter the police and incur a technical violation, they still committed the crime that initially caused them to be on probation or parole.

Bail reform may in some cases actually *exacerbate* the racial disparity in pretrial detention, because African-Americans constitute a *majority*, not just a disproportionate percentage, of those arrested for homicide offenses and robbery (the latter of which is also a crime of violence). They are therefore less likely to be released from detention under any system that takes public safety into consideration.

Bail Reform in Chicago

The portion of the report that concerns Chicago is remarkably gullible. In support of its proposition that the bail reform implemented by Chief Judge Timothy Evans did not lead to an increase in crime, the report cites only a review of the reform by the Chief Judge's own office.¹³⁰³ (The order mandating bail reform is General Order 18.8A, henceforth referred to as GO18.8A.) Unsurprisingly, the review issued by the Office of the Chief Judge evaluating the effects of the Chief Judge's order concluded that it was a glowing success.

Commission staff should not have been unaware of other evaluations of GO18.8A. At the Commission's briefing, panelist Rafael Mangual specifically noted that two independent studies concluded that Chicago's bail reform led to a greater number of crimes being committed.

Another paper, by researchers at the University of Utah, found that the more generous release procedures put into place recently in the city of Chicago led to a 45 percent increase in the number of pretrial defendants charged with new crimes and a 33 percent increase in the number of pretrial defendants charged with new violent crimes.

A more recent study of Chicago's bail reform by researchers at Loyola University Chicago found that the rate at which pretrial defendants in that city reoffended essentially remained constant after the reforms went into effect, meaning that the

¹³⁰² Matt DeLisi, written statement, at 8, *citing* Allen J. Beck, *Race and Ethnicity of Violent Crime Offenders and Arrestees, 2018*, Bureau of Justice Statistics, January 2021, <https://bjs.ojp.gov/content/pub/pdf/revcoa18.pdf>.

¹³⁰³ Report at n. 902-906.

increase in the number of pretrial defendants translated to an increase in the number of crimes committed by that population.¹³⁰⁴

Commission staff did not address either of these studies in the report. Nor did they address a multi-part Chicago Tribune investigation of the effects of GO18.8A, which found serious deficiencies in the Chief Judge's review.

The Loyola University Chicago study, which is generally supportive of Chicago's bail reform, found that there was a slight increase in failures to appear following GO18.8A.

After controlling for defendant and case factors, 16.7% released defendants were expected to have an FTA before GO18.8A compared to roughly 19.8% after GO18.8A[.]. In other words, of the 9,200 defendants who were released in the six months after GO18.8A, we would have expected 1,536 to have an FTA if the pre-GO18.8A rates had continued. However, the statistical model revealed that 1,822 defendants had an FTA after GO18.8A.¹³⁰⁵

When looking closely at the data, it is clear that even the sympathetic Loyola study found slight increases in new crimes and new violent crimes after the issuance of GO18.8A. 17.3% of releasees were arrested for new criminal activity post-GO18.8A, versus 16.7% of releasees prior to GO18.8A. There was also an increase in releasees arrested for new violent criminal activity. Prior to GO18.8A, 2.9% of releasees were arrested for new violent criminal activity, which rose to 3.2% after GO18.8A.¹³⁰⁶

As Rafael Mangual noted in his testimony, however, and as Paul Cassel and Richard Fowles point out in their study of GO18.8A, if the *rate* of new crimes remains constant, the *number* of new crimes will increase.¹³⁰⁷ Think of it this way: In Chicago, 17% of released individuals commit crimes after their release. If you release 100 people, that means 17 of them will commit new crimes. Even if each one only commits one crime, that is 17 new crimes. Now imagine you release 150 people. If the rearrest rate remains constant at 17%, 26 new crimes will be committed. And as Cassel and Fowles also note, this does not account for the low percentage of crimes solved by police. They estimate that the national clearance rate for violent crimes is about 45%, and only

¹³⁰⁴ Transcript at 17-18.

¹³⁰⁵ Don Stemen and 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*, Safety + Justice Challenge, at 10, <https://www.safetyandjusticechallenge.org/wp-content/uploads/2020/11/Report-Dollars-and-Sense-in-Cook-County.pdf>.

¹³⁰⁶ *Id.* at 19.

¹³⁰⁷ Paul Cassel and Richard Fowles, *Does Bail Reform Increase Crime? An Empirical Assessment of the Public Safety Implications of Bail Reform in Cook County, Illinois*, S.J. Quinney College of Law research paper No. 349, February 19, 2020, at 35, <https://dc.law.utah.edu/scholarship/194/>.

20% for property crimes.¹³⁰⁸ It is extremely unlikely that the number of arrests represents the total number of crimes committed by these individuals.¹³⁰⁹

Therefore, Cassel and Fowles argue:

We have previously estimated that the expanded pretrial releases from G.O. 18.8A led to at least 280 additional charged new crimes against persons in the fifteen months after the Order compared to the fifteen months before. Using crime clearance rates to estimate what fraction these charged crimes were compared to the crimes actually committed by the pretrial releasees, we can estimate that G.O. 18.8A led to 930 additional crimes against persons in the “after” period compared to the “before” [period].¹³¹⁰

The report never addresses the most serious consideration in evaluating the success of bail reform – homicides. Nor does the Loyola University study discuss homicides, preferring to look only at “new violent criminal activity”.¹³¹¹ The report issued by the Office of the Chief Judge claims that “only” three homicides were committed by pretrial releasees after the issuance of G.O.18.8A.¹³¹² A subsequent investigation by the Chicago Tribune found that in reality, twenty-one homicides were committed by pretrial releasees after the issuance of G.O.18.8A.¹³¹³ Cassel and Fowles summarize the reasons for the discrepancy:

The reasons for the dramatic undercount varied from case to case, but included:

- The Study included only those defendants whose initial charge was a felony; it excluded those charged with a misdemeanor, which is far more common. Five of the murder defendants found by the Tribune had bonded out of jail on

¹³⁰⁸ *Id.* at 35; see also Paul Cassel and Richard Fowles, *Still Handcuffing the Cops? A Review of Fifty Years of Empirical Evidence of Miranda’s Harmful Effects on Law Enforcement*, 97 BOST. U. L. REV. 685, 709-710 (2017).

¹³⁰⁹ Paul Cassel and Richard Fowles, *Does Bail Reform Increase Crime? An Empirical Assessment of the Public Safety Implications of Bail Reform in Cook County, Illinois*, S.J. Quinney College of Law research paper No. 349, February 19, 2020, at 35, <https://dc.law.utah.edu/scholarship/194/>.

¹³¹⁰ *Id.* at 35.

¹³¹¹ Don Stemen and 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*, Safety + Justice Challenge, at 11, <https://www.safetyandjusticechallenge.org/wp-content/uploads/2020/11/Report-Dollars-and-Sense-in-Cook-County.pdf>.

¹³¹² Office of the Chief Judge, *Bail Reform in Cook County: An Examination of General Order 18.8A and Bail in Felony Cases*, Circuit Court of Cook County, State of Illinois, May 2019, at 36, <https://www.cookcountycourt.org/Portals/0/Statistics/Bail%20Reform/Bail%20Reform%20Report%20FINAL%20-%20Published%2005.9.19.pdf>.

¹³¹³ David Jackson, Todd Lighty, and Gary Mark, “Bail reform analysis by Cook County chief judge based on flawed data, undercounts new murder charges,” Chi. Trib., Feb. 13, 2020, <https://www.chicagotribune.com/investigations/ct-cook-county-bail-bond-reform-tim-evans-20200213-tkodxevlyvcp7k66q2v2ahboi4-story.html>.

misdemeanor charges. Four of them had past felony convictions from attempted murder to armed robbery, and three had served prison time.

- The Study counted only the first new charge against defendants after they were released from custody. The Tribune identified two people who were released, charged with another crime, released again and then charged with murder, all within the time period being examined. Those later murder charges were not entered into the database used for the report.
- The Study excluded three murder defendants whose first charge occurred before bail reform even though they were released on bond after the reforms took effect in September 2017.
- Data entry mistakes and incomplete court records marred the data set used in the analysis.¹³¹⁴

This brings me once again to the question I asked at the beginning of this essay: Who should bear the costs of crime? Is it (accused) criminals? Or is it the law-abiding public? There is undoubtedly a cost to individuals and their families when held on pretrial detention. But there is also a cost for people like Terrell Jones, a sanitation worker married to his high school sweetheart and father of three, killed by a gang member released on his own recognizance from a felony weapons charge.¹³¹⁵ Who should have borne the risk of re-offending – Terrell Jones and his family, or his killer who was released pending trial?

Risk Assessments

Whatever form possible bail reforms take, they should incorporate risk assessments. Matt DeLisi, a professor at Iowa State University, explained in his testimony to the Commission:

Risk assessment instruments that use race as a proxy for risk are discriminatory, fortunately, there is no evidence to my knowledge that any risk assessment tools use race or ethnicity to inform pretrial decision-making. In contrast, risk assessment tools employ behavioral criteria that are empirically associated with offending, recidivism, and noncompliance. To illustrate, the development of the federal pretrial actuarial risk assessment tool included the following criteria: number of felony convictions, prior failures to appear, pending cases, current offense type, offense classification, age at interview, highest education, employment status, residence, and current drug problems. These criteria are correlates of antisocial behavior and do not invoke race or ethnicity. As mentioned earlier, the only demographic feature that is included—age—is incorporated into risk assessment

¹³¹⁴ Paul Cassel and Richard Fowles, *Does Bail Reform Increase Crime? An Empirical Assessment of the Public Safety Implications of Bail Reform in Cook County, Illinois*, S.J. Quinney College of Law research paper No. 349, February 19, 2020, at 27, <https://dc.law.utah.edu/scholarship/194/>.

¹³¹⁵ David Jackson, Todd Lighty, and Gary Mark, “Bail reform analysis by Cook County chief judge based on flawed data, undercounts new murder charges,” *Chi. Trib.*, Feb. 13, 2020, <https://www.chicagotribune.com/investigations/ct-cook-county-bail-bond-reform-tim-evans-20200213-tkodxevlyvcp7k66q2v2ahboi4-story.html>.

tools because of its strong inverse association with criminal offending. The other socioeconomic factors (education, employment, and residence) are similarly empirical correlates of offending and substantiate a defendant's community ties.¹³¹⁶

In other words, risk assessments use behavioral characteristics to predict whether someone is likely to reoffend while on pretrial release. Risk assessments take some of the guesswork out of the decision whether to release an individual. Because judges have more information, they have more confidence in releasing people who are classified as low-risk.¹³¹⁷

Oddly, the report repeats panelist DeAnna Hoskins's criticism of risk assessments, which is that the assessments only look at how many times an individual failed to appear for court, not how much time has elapsed since those failures to appear.¹³¹⁸ Immediately after Ms. Hoskins expressed her concern, however, Judge Glenn Grant of New Jersey stated that New Jersey's risk assessment tool does take into account how much time has elapsed since someone failed to appear.

New Jersey's tool is not static. And the efforts that Ms. Grace described is what we're currently working on, to recalibrate our tool to take into consideration what was the type of notice you missed.

It also currently says did you miss in the last two years or was it more than two years? And it creates a different assumption for you with respect to that.

But we're going more granular, to saying can we track what was the reason for the person missed, as opposed to absconding, which is relevant to a court's consideration. So I don't want to lump all risk assessment in the same tool.¹³¹⁹

By including Ms. Hoskins's criticism of the lack of a time element in risk assessments, but not Judge Grant's clarification that New Jersey's risk assessment does include such a time element, the report misleads readers into believing Ms. Hoskins's criticisms are generally applicable.

However, risk assessments are not perfect. As the Chicago Tribune found in its investigation, the Arnold Ventures risk assessment did not flag individuals charged with domestic violence. Risk

¹³¹⁶ Matt DeLisi, written statement at 6.

¹³¹⁷ Matt DeLisi, written statement at 7.

For example, a recent study compared a group of 2,631 pretrial defendants who received a risk assessment to matched control groups of defendants who did not receive an assessment. Defendants with risk assessment, where the courts could clearly see objective behavioral criteria, were more likely to receive non-financial release from jail, had higher rates of pretrial release, and spent less time in pretrial detention. Those with risk assessment were no more or less likely to fail to appear, but had slightly higher rearrest rates.

¹³¹⁸ Report at n. 1142, quoting transcript at 111.

¹³¹⁹ Transcript at 111-112.

assessments should be regularly evaluated to ensure that they are fulfilling the purpose of protecting the community as well as releasing people deemed to be at low risk of reoffending.

Possible Bail Reforms

There are some simple reforms that might improve the bond process without endangering public safety. The monitor of the consent decree for Harris County, Texas made the following suggestions that the sheriff's office might be able to implement:

- Expanding the avenues for people to “self-bond” without the need for assistance from family or bondsman, which is currently only available for people who happen to have in their possession at the time of arrest the full amount needed in cash to post bond.
- Implementing quality assurance measures to ensure that every person admitted to the jail has had an opportunity to transcribe phone numbers from their phones so that no one is left incommunicado while in jail.
- Improving the procedures and interdepartmental communication to reduce the time it takes to release people after making bond.¹³²⁰

¹³²⁰ *Monitoring Pretrial Reform in Harris County: Second Report of the Court-Appointed Monitor*, March 3, 2021, at 18, <https://sites.law.duke.edu/odonnellmonitor/wp-content/uploads/sites/26/2021/03/ODonnell-Monitor-Second-Report-v.-32.pdf>.

Rebuttal of Commissioner David Kladney

Rebuttal: Freedom for Sale

By Commissioner David Kladney, in which Commissioner Michael Yaki Concurs.

Although the “U.S. crime rate is roughly the same as it was in 1970, but its incarceration rate is five times what it was then. The use of pretrial detention has grown by 433% over the same period.”¹³²¹

Whether one supports bail reform is, and should be, a simple matter. Bail has two purposes: (1) to protect the public from those who, if released pending trial, would present a danger to the public and (2) to act as insurance that an individual will show up to trial if there is reason to doubt that he/she would do so willingly.¹³²² When bail does not serve one of these two purposes, support for its imposition is revealed as nothing but a desire to profit off of leveraging the power of the state to coerce money from those who have yet to be found guilty or, at its worst, it represents support for keeping those the law still considers innocent but one determines to be undesirable in jail unless they can quite literally pay for the privilege of their freedom. The same freedom that they are entitled to under the Constitution.

Support for this report, or bail reform more generally, is not about whether one thinks a serial robber should walk free pending trial – the law generally allows a person posing a danger to the public to be required to post bail, or even to be held without bail. Likewise, support for bail reform is not about if an individual who has failed to appear multiple times for court within a couple of years should be allowed an own recognizance release – those who have indicated, through past or present behavior, that they will not comply with a summons from the court can be assigned an appropriate bail amount as to reasonably ensure their appearance. Instead, support for bail reform is a matter of if one thinks it is wrong that two people who are accused of the same crime get different outcomes because of the amount of money they have. One walks out of the courthouse, free to continue working, taking care of family, and otherwise living in and contributing to society by merely writing a check, while the other stays in jail at taxpayer’s expense, his life put on hold, his job in jeopardy and his family and community without his support. This not because the second person is too dangerous to be let out, or because he has provided a reason to think he would not appear to court when summoned; no, he is in jail because he could not afford to pay the ransom demanded of him.

Pretrial Detention is the Incarceration of those who have yet to be Convicted of the Crime of which they are Accused.

¹³²¹ Sara E. Murphy, *Reforming the cash bail system benefits both the accused and taxpayers*, Savannah Morning News, <https://www.savannahnow.com/in-depth/special/2021/02/09/reforming-cash-bail-system-benefits-both-accused-and-taxpayers/3948807001/>.

¹³²² See *Stack v. Boyle*, 342 U.S. 1 (1951); see also *United States v. Salerno*, 481 U.S. 739 (1987).

As an initial matter, some of my colleagues fail to appreciate the difference between a person who has been arrested for a crime and a person who has been convicted – namely that, in America, the former is presumed innocent. For example, Commissioner Kirsanow takes the view that “the report is primarily concerned with the consequences experienced by people who have been arrested. In my view, the balance of considerations should be weigh[ed] in favor of the law-abiding.”¹³²³ This perspective is incredible for two reasons: (1) Because the subject of this report is those that cash bail affects – those that are arrested and thus under threat of being detained pretrial – not those that cash bail does not affect; and (2) the fact that one was arrested does not mean that one is guilty of a crime – or even broke the law. Indeed, we must remember that even evidence of a prior **conviction** cannot be admitted during a criminal trial to demonstrate that one is guilty of the unrelated crime for which they are being presently accused because criminality is part of their character.¹³²⁴ If one cannot use a prior **conviction** to improperly impugn someone’s character with regard to a current charge, it follows that one cannot treat an arrest, where the accused has not been convicted and is entitled to the presumption of innocence, as evidence of guilt or unlawfulness.

Commissioner Kirsanow appears to advocate for a version of the United States where, if one is arrested, one is presumed to be guilty unless he can prove himself innocent. For a host of philosophical, legal, and logical reasons, we have rejected this approach when pursuing justice in America. The presumption of innocence is a bedrock of American jurisprudence.¹³²⁵

By way of another example, Commissioner Heriot, for her part, argues that crime rates have decreased **because** incarceration rates, including pretrial detention rates, have increased.¹³²⁶ Again, with cash bail in mind, we are dealing with pretrial defendants who have yet to be convicted of the crime for which they are accused.

In order to be able to “know” someone is a criminal without providing due process would require omniscience, and humans have a poor track record when it comes to playing God.

Response to Public Safety Concerns:

¹³²³ Statement of Commissioner Peter Kirsanow at 1.

¹³²⁴ See Fed. R. Crim. P. 404(b)(1) (While evidence of a prior bad acts may be used for certain purposes – such as proving motive, opportunity, or a pattern, “[e]vidence of any other crime, wrong, or act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.”).

¹³²⁵ See *Coffin v. United States*, 156 U.S. 432 (1895) (Explaining that it is not enough to instruct a jury that a defendant must be found guilty beyond a reasonable doubt; a court must also instruct a jury that a defendant is presumed to be innocent.).

¹³²⁶ Commissioner Gail Heriot’s Statement at 3.

Some of my colleagues frame their opposition to the reforms discussed in this report as being out of respect for public safety. When one looks at the facts this concern is revealed for what it is: simple fearmongering.

First, where someone is determined to be a danger to the public, bail may generally be, and often is, denied completely. To the extent some of my colleagues simply disagree with New York's decision to deny its judges discretion to consider whether a person poses a threat to public safety when deciding whether to hold him/her,¹³²⁷ I am in agreement. But focusing on the exception rather than the rule in 49 states and the District of Columbia is mere pandering for the purpose of political gain and not the betterment of the United States. The wrong-headed action by one state does not change how bail normally operates, nor does it justify opposing the pursuit of reforms to better the bail systems in the other parts of the country. In 49 of 50 states in this country, as well as the District of Columbia, a criminal defendant's threat to public safety is considered when making the determination of the bail amount or if bail should be denied completely. I agree with my colleagues that this should be the case in every jurisdiction.¹³²⁸

Commissioner Kirsanow's comments regarding an Illinois law that would, according to him, lead to the mass release of violent criminals on the streets, can be dismissed as speculative, poorly reasoned, and contrary to law and logic. He speculates as to how an Illinois law which takes effect in 2023 would be interpreted to allow a defendant with prior convictions of assault with intent to commit robbery and second-degree murder to be released out on the streets if law enforcement could not identify the specific individual(s) that would be threatened by the accused's release.¹³²⁹ Not only is this claim facially ridiculous, it is not a reasonable interpretation of what the law says or how it would operate.

The part of the law that concerns Commissioner Kirsanow reads: "Detention only shall be imposed when it is determined that the defendant poses a specific, real and present threat to a person, or has a high likelihood of willful flight."¹³³⁰ Commissioner Kirsanow has construed this language to mean that, to hold a defendant pending trial, law enforcement need point to an "identifiable future victim." This, of course, does not make any rational sense; it is also not what the law says. The law makes clear that what needs to be "specific," "real," and "present" is the threat, and that the threat can be to "a person," meaning "any person."¹³³¹ Thus, if a defendant had a prior criminal

¹³²⁷ Tiana Herring, *Releasing People Pretrial does not harm Public Safety*, Prison Policy Initiative, <https://www.prisonpolicy.org/blog/2020/11/17/pretrial-releases/> (Nov. 17, 2020).

¹³²⁸ Former Police Commissioner William Bratton testified before the Commission and submitted a statement in which he said, "I would favor a system in which the decisions about pretrial detention are never based on cash amounts, so long as judges maintain the discretion and authority to remand dangerous offenders and chronic criminals, as well as genuine flight risks." Written Statement of Panelist William Bratton at 1. I agree with the sentiment that judges should take into account the dangerousness of the accused and his or her likelihood of flight when making bail determinations.

¹³²⁹ See *supra* Kirsanow Statement, at 5-7.

¹³³⁰ 725 ILCS 5/110-2(c).

¹³³¹ See *id.*

conviction of second degree murder related to let's say, a gang-related shooting, law enforcement would be able to point to a specific, real, and present threat of harm that might befall others (be it rival gang members, cooperating witnesses, or others in the community) if he was to be released. The identity of the individual(s) would not be required. We know this is the interpretation of the law not only from common sense and ordinary simple grammar, but from subsection E of the same statute, which reads: "This Section shall be liberally construed to effectuate . . . that the defendant will not pose a danger to **any person or the community** and that the defendant will comply with all conditions of pretrial release."¹³³²

Commissioner Kirsanow admits that his reading of the Illinois law, requiring a specific identifiable future victim is inconsistent with subsection E of the same statute.¹³³³ Courts, when interpreting laws, are required to read all parts of the law together to make sense of a provision under the presumption that the law is coherent and internally consistent.¹³³⁴ This is called the "whole act" rule.¹³³⁵ Thus, Commissioner Kirsanow's speculative interpretation of the Illinois law that results in two related provisions being inconsistent is a legal impossibility.

Second, statistics indicate that the overwhelming majority, nearly 75%,¹³³⁶ of pretrial defendants, detained but not yet convicted of a crime, are accused "of low-level drug or property crimes or other non-violent crimes."¹³³⁷ Further and importantly, studies from various jurisdictions indicate that rearrest rates for released pretrial defendants are low and that requiring financial bail has little to no impact on these rates.

As a means for developing a risk assessment system for pretrial defendants, Nevada conducted a study of more than 1000 defendants among various counties and risk populations (low, moderate, and higher risk).¹³³⁸ Results indicated that 87% of released pretrial defendants were not rearrested

¹³³² 725 ILCS 5/110-2(e).

¹³³³ See *supra* Kirsanow Statement, at 5 ("Subsection (e) seems to contradict [subsection (c)]").

¹³³⁴ See *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 220 (2001).

¹³³⁵ See Carolyn Shapiro, *Legislative Process Summary of (Some) Textual Canons*, IIT Chicago-Kent College of Law,

<http://www.kentlaw.edu/faculty/cshapiro/classes/LegProcSp07/CourseReadings/Leg%20Pro%20Handout%20-%20Textual%20Canons.pdf> (2017) ("The statute should not be interpreted in ways that would create conflict between the provisions of the statute or in ways that would undermine aspects of the statute.").

¹³³⁶ Tara O'Neill Hayes, Margaret Barnhorst, *Incarceration and Poverty in the United States*, American Action Forum, https://www.americanactionforum.org/research/incarceration-and-poverty-in-the-united-states/#_edn15 (June, 30, 2020).

¹³³⁷ *Id.*

¹³³⁸ James Austin & Robin Allen, *Development of Nevada Pretrial Risk Assessment System Final Report*, https://nvcourts.gov/AOC/Committees_and_Commissions/Evidence/Documents/Committee_Materials/NPRA_Vali_dation_Report_and_Final_NPRA_Tool/ (June 2016).

pending case disposal.¹³³⁹ Approximately 42% of the pretrial defendants in the Nevada study were released after financial bail.¹³⁴⁰ This is significant because, in jurisdictions that have practically eliminated financial bail, such as Washington, D.C. and New Jersey in which approximately 94% of pretrial defendants are released without bail, 87-92% of released pretrial defendants were not rearrested pending case disposal.¹³⁴¹ Thus, despite Nevada requiring financial bail for six times the percentage of released pretrial defendants as New Jersey and Washington, D.C., rearrest rates remained approximately the same. The data from other jurisdictions indicate the same result: eliminating or drastically reducing cash bail amount had no significant effect on rearrest rates.¹³⁴² Particularly important to a concern over public safety, while 13% of pretrial defendants released in Washington, D.C. in 2019 were rearrested, only 1% were rearrested for violent crime.¹³⁴³ This statistic is far from an anomaly.¹³⁴⁴ In a criminal justice report to the Governor and Legislature analyzing the differences pre and post-bail reform in the state, the New Jersey Judiciary concluded: “No criminal justice system can ensure that all defendants will strictly adhere to the conditions of their pretrial release while they await trial. **But statistics show that predictions of an increase in crime under CJR did not materialize.**”¹³⁴⁵

Commissioner Kirsanow appears to take issue with the statistics that indicate the risk of pre-trial defendants “reoffending” prior to trial is small, as he argues that these studies ignore the risk of “another” offense if a defendant knows he would be released shortly after arrest. There are three issues with this view: (1) it is simply inaccurate to say that a criminal defendant released pretrial can “reoffend” when that individual has not been convicted of the offense for which he or she is currently being charged; (2) as covered above, factual data has made clear that eliminating or reducing cash bail had no statistical impact on rearrest rates; and (3) his view stands for the proposition that, because we do not know who could be accused of committing another offense

¹³³⁹ *Id.*

¹³⁴⁰ *Id.*

¹³⁴¹ See Email Statement of Kennedy Spurgeon, President of the National Association of Pretrial Services Agencies (Oct. 12, 2021); see also *supra* Herring, *Releasing People Pretrial does not harm Public Safety*; Glenn A. Grant, Acting Administrative Director of the Courts, 2018 Criminal Justice Report to the Governor and the Legislature, <https://www.njcourts.gov/courts/assets/criminal/2018cjrannual.pdf> (2019).

¹³⁴² See generally, *supra* Herring, *Releasing People Pretrial does not harm Public Safety* (indicating that defendants released without financial bail were no more likely to be arrested than those who paid bail in New Orleans, LA, Harris County, TX, and Kentucky, and were less likely to have new arrests than those required to pay financial bail in Jefferson County, CO.); see also James Austin & Wendy Naro-Ware, *Why Bail Reform is Safe and Effective: The Case of Cook County*, The JFA Institute at 5, http://www.jfa-associates.com/publications/reduce/Cook_County_Bail_Report.pdf (April 2020) (In Cook County, pre-reform rearrest rate was 18% and for violent crime it was .7%; post-reform rearrest rate was 17% and for violent crime it was .6%).

¹³⁴³ See *supra* Herring, *Releasing People Pretrial does not harm Public Safety*.

¹³⁴⁴ See *id.* (indicating that 99.4% of those released pretrial from October 2017 to December 2018 in Cook County were not charged with any new violent offense).

¹³⁴⁵ See Grant, 2018 Criminal Justice Report to the Governor and the Legislature at 13.

when they are released pretrial, it is better to be safe and just lock them all up. Again, this may work in an authoritarian state, but not in our Constitutional Republic.

Commissioner Kirsanow finally appears to recognize that the pretrial defendants we are talking about “remain not guilty until convicted,”¹³⁴⁶ but then continues to say, “that does not mean they are not dangerous and have not committed other crimes.”¹³⁴⁷ Many people, those who have criminal convictions and those who have never received a parking ticket, may indeed be dangerous. In this country, however, detaining people for their dangerousness rather than their guilt is meant to be the exception, not the rule.¹³⁴⁸ Further, as was discussed above, not only does the data indicate that the vast majority of these defendants will not be rearrested, much less for violent crime,¹³⁴⁹ it is inappropriate and indeed legally impermissible to point to the fact that one has past convictions as proof of that person’s character so as to state or imply that, because of who that person is, he must be guilty of the crime for which he is presently being accused.¹³⁵⁰ **Past convictions may be reasonably taken into account when determining whether that person should be denied bail because they represent a danger to the public**, but that in no way serves as determination of that person’s guilt for the new offense he or she is charged with. Law enforcement has the burden of proof to persuade a judge or similar official that an individual is **dangerous**; this is a lesser and separate burden from proving an individual is **guilty**.

When bail reform advocates indicated that individuals released from detention were more likely not to be convicted of a crime and pointed to their ability to maintain ties to the community, work, and their families, Commissioner Kirsanow stated, “[t]his may be true. However, it is entirely possible that an additional factor is that prosecutors more often drop charges because witnesses refuse to testify due to fear.” In other words, Commissioner Kirsanow does not contest that criminal defendants released pretrial are less likely to be convicted, or that there were positive benefits to their continued ties to the community, ability to maintain work, and to stay in contact with their families. Rather, because it is **possible** that prosecutors **may** drop charges because witnesses refuse to testify because of fear, we should still keep these defendants locked up. Commissioner Kirsanow offers no facts that support that this intimidation indeed occurs, which could be why he relies on it being among the nearly infinite range of things that are possible rather than things that are likely.

¹³⁴⁶ See *supra* Kirsanow Statement at 8.

¹³⁴⁷ *Id.*

¹³⁴⁸ See U.S. Const. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”); see also *Kingsley v. Hendrickson*, 576 U.S. 389, 400-01 (2015) (“And, most importantly, pretrial detainees (unlike convicted prisoners) **cannot be punished at all**, much less ‘maliciously and sadistically.’ . . . ([I]f the offence be notailable, or the party cannot find bail, he is to be committed to the county [jail] ... [b]ut ... only for safe custody, and not for punishment.”) (internal citations omitted) (emphasis added).

¹³⁴⁹ See *supra* Herring, *Releasing People Pretrial does not harm Public Safety* (finding a rearrest rate of under 1% for violent crime in multiple jurisdictions).

¹³⁵⁰ See *supra* note 4 and accompanying text.

Commissioner Kirsanow continues his advocacy for detaining people unless he has a guarantee that they will not be rearrested (much less found guilty) for a crime while ignoring the fact that, in all but one jurisdiction, law enforcement has the opportunity to argue against the defendant's release because of his or her potential to threaten witnesses. That a judge or similar official rejected the argument that the defendant posed a threat to others (including witnesses) when deciding to release the defendant is no matter to Commissioner Kirsanow because what he wants is the impossible – a guarantee.

Commissioner Kirsanow then decides to try his hand at teaching us a lesson in basic mathematics. Commissioner Kirsanow indicates that, even if the percentage of defendants that are rearrested for new crimes remain the same after bail reform, meaning bail reform did not increase the rate of rearrests, it results in more crime. We should probably indicate at this point that there should be a standing objection to Commissioner Kirsanow's references of arrests as crimes. As an example, he states, referencing rearrest rates for Cook County, that if 17% of pretrial defendants are rearrested for a new crime and you release 100 more defendants post-reform, that is 17 more crimes. First, one must remind Commissioner Kirsanow that you do not have 17 more crimes, you have 17 more arrests. Second, yes, that is how percentages work. If you multiply a bigger number, say 1000, by a set percentage, 17%, you will get a bigger number, 170, than multiplying a smaller number by the same percentage. This goes back to the fundamental problem with Commissioner Kirsanow's view: if there is any possibility reform could lead to the potential for more crime (that potential always exists), we should keep the defective system in place. I do not contest that 17% of 100 is 17, or that 17 more arrests are less ideal than 0 arrests; I suppose I simply care more about creating a system that fits the rule, here the 83% of defendants who were released and had no rearrests, than crafting a system, than keeping a draconian system to fit the exception, or the 17% of still innocent defendants who were rearrested, less than 1% of whom were rearrested for violent crimes.¹³⁵¹

Not satisfied with treating arrests as criminal convictions, Commissioner Kirsanow escalates to treating arrests as evidence of multiple crimes, stating that “it is extremely unlikely that the number of arrests [of pretrial defendants] represents the total number of crimes committed by these individuals.”¹³⁵² For support, he cites to a University of Utah article that advocates taking the number of new crimes released pretrial defendants are **charged** with and the “clearance” or “solve” rate of the kind of crimes the defendants are charged with to calculate the total number of crimes they likely committed.¹³⁵³ In other words, if 100 released pretrial defendants are charged with new property crimes, and property crimes are solved at a 20% rate, these 100 pretrial defendants likely committed 500 crimes. The problems with this methodology should be apparent.

First, the number of crimes one is charged with does not tell you the number of crimes that person has committed. The “clearance” rate of a type of crime, by contrast, tells you what percentage of

¹³⁵¹ See *supra* Herring, *Releasing People Pretrial does not harm Public Safety*.

¹³⁵² See *supra* Statement Kirsanow at 16.

¹³⁵³ See Paul Cassell & Richard Fowles, *Does Bail Reform Increase Crime? An Empirical Assessment of the Public Safety Implications of Bail Reform in Cook County*, S.J. Quinney College of Law research paper No. 349 <https://dc.law.utah.edu/scholarship/194/> (February 19, 2020).

a kind of crime has been solved. In short, you are measuring two totally different things. So, if 100 released pretrial defendants are **charged** with new property crimes, then none of those pretrial defendants have yet to be found to have committed a new property crime meaning the number of new property crimes they committed equals 0. Zero multiplied by anything is still zero, and thus the number of individuals charged with a property crime will not tell you anything meaningful about how many crimes they committed. This methodology is like using the number of projects an employee starts as a measure of productivity rather than the number they complete. This gets us to the second problem: this methodology assumes that pretrial defendants that are released and then rearrested for a new crime constitute 100% of the “unsolved” crimes of that category.

Commissioner Kirsanow’s reliance on this methodology does not even meet the universal common-sense standard.

Again, let us go back to our example of property crimes. Let us assume, for sake of the argument, that due process does not exist and being charged with a crime is the same thing as actually having been convicted of it. Even assuming that is the case, there is no way to tie the 100 pretrial defendants that are now considered convicted of a new property crime as responsible for the 80% of property crimes that go unsolved – which is what you would have to do to justify claiming that they actually committed 500 property crimes despite their 100 “convictions.” If it is possible that a person convicted of a property crime has only committed that one crime (it is), a person who has yet to be convicted of any crime committed a property crime and was not caught (it is), or a person who has been convicted of a different type of crime then committed a property crime (it is), then claiming that people who are guilty of a property crime really are responsible for the 80% of property crimes that are unsolved is untenable. The most one can say is that a person convicted of a property crime is more likely to commit another property crime than one who has not previously committed such a crime. Even this would not tell you whether one who has been convicted of a property crime is more likely to have had **previously** committed a property crime. Again, such inferences (a person is guilty of one act of theft because they were found guilty of theft previously) are legally prohibited by the criminal rules of evidence not only out of Constitutional due process concerns, but for their faulty logic. Commissioner Kirsanow may indeed have valid gripes with a few of the studies contained in the Commission’s Report, particularly if certain data was omitted or miscounted; but citing to a compromised study of his own does not recognize the difference between a charge and a conviction and then, implies released pretrial defendants charged with a certain crime, a small population, are responsible for all such unsolved crimes, is not a winning strategy. Indeed, James Austin and Wendy Naro-Ware explain the multiple flaws in the Cassell and Fowles’ methodology in their own article, pointing out that the Cassell and Fowles article was not published in a peer-reviewed journal and that “[n]o credible researcher would assume that re-arrest rates for state prisoners are the same as for pretrial releases (which are uniformly lower) or could be used as a substitute for actually measuring re-arrests.”¹³⁵⁴

¹³⁵⁴ James Austin & Wendy Naro-Ware, *Why Bail Reform is Safe and Effective: The Case of Cook County*, at 5.

In sum, approximately 83-87% of released pretrial defendants will not be rearrested for any crime pending trial, with only approximately 1% being rearrested for a violent crime.¹³⁵⁵ As numerous studies have indicated, the claim that financial bail is needed to ensure safety is “a tired trope”¹³⁵⁶ that is not supported, and indeed rebutted, by clear and convincing evidence. One who is dangerous does not suddenly become not dangerous after paying a bail of \$10,000. If one is determined to be dangerous to the public, all jurisdictions, save one, allow for that person to be detained pretrial as they should.

Response to Fiscal Concerns:

Another favored tactic of my colleagues in their opposition to the reforms discussed in this report is to recoil in horror at how much money bail bonds people and localities would lose if we were to shift away from requiring bail as a matter of course, or to decry the cost of reform as unjustly putting a burden on the public. They claim that the bail bonds issued each year by the bail bond industry “provide[] accountability for released arrestees reappearing in court at no cost to the taxpayers,”¹³⁵⁷ while at the same time criticizing the Commission’s Report for failing to have a dollar figure available for exactly how much reforms would cost. Even if using cash bail not out of necessity – for a person determined to be potentially dangerous to the public or for a person who risks not showing up to court when summoned – but as a fundraising mechanism is not a draconian tool representing dangerous government overreach every American should fear (which it is), housing 466,940 people in jail¹³⁵⁸ at an average cost of \$128.92¹³⁵⁹ is more than \$60 million (\$60,197,904.80) in taxpayer money **per day** to detain people who have yet to be convicted of the crime for which they are accused. One cannot pretend to be fiscally responsible by speculating as to the cost of reform while ignoring the roughly **\$22 billion** in public money that is spent a year on housing pretrial detainees in jail. One cannot solve a math problem with only half of the formula.

Bail reform results in extraordinary savings. Commissioner Adams is correct that the report briefly discusses some pretrial monitoring costs that can range from \$5-\$35/day.¹³⁶⁰ While even \$35 vs. \$128.92 is a considerable savings (73%), I agreed with Commissioner Adams that the discussion of these costs was insufficient and thus found more data.

¹³⁵⁵ See *supra* James Austin & Robin Allen, *Development of Nevada Pretrial Risk Assessment System Final Report*; see also *supra* Herring, *Releasing People Pretrial does not harm Public Safety*.

¹³⁵⁶ See *supra* Statement of Kennedy Spurgeon, President of the National Association of Pretrial Services Agencies.

¹³⁵⁷ Statement of Commissioner Christian Adams at 8.

¹³⁵⁸ See Bail Report at 5; see also Wendy Sawyer and Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, Prison Policy Initiative, March 24, 2020, <https://www.prisonpolicy.org/reports/pie2020.html>.

¹³⁵⁹ Christian Henrichson, Joshua Rinaldi, and Ruth Delaney, *The Price of Jails, Measuring the Taxpayer Cost of Local Incarceration*, Vera Institute of Justice, <https://www.vera.org/publications/the-price-of-jails-measuring-the-taxpayer-cost-of-local-incarceration> (May 2015).

¹³⁶⁰ See *supra* Bail Report at 74.

In Washoe County, Nevada, the average detention costs per inmate per day hovers right at the national average of \$128.92.¹³⁶¹ Average supervision costs, which can include anything from an initial check-in and phone call reminder to show up for trial to multiple drug tests and in-person check-ins a week, costs \$5.50 per defendant per day.¹³⁶² This fits right in line with other jurisdictions, like Kentucky, in which it was discovered pretrial supervision ranges from 2-10% of detention costs.¹³⁶³ Indeed, “[i]n Kentucky, 88% of all arrested people are released and only 3% are given extra supervision conditions. Kentucky saved counties approximately \$25 million in jail costs in one year by increasing the pretrial release rate by 5%, resulting in nearly 11,000 additional people released pretrial.”¹³⁶⁴ Other examples are even more surprising: Santa Clary County saved \$33 million in six months by using a pretrial risk assessment tool that kept 1400 defendants out of jail.¹³⁶⁵ “Pretrial release costs the county just **\$15-\$25 per day compared to \$204 per day for jail**. The county maintains a **95% court appearance rate and a 99% public safety rate** of defendants released without supervision.”¹³⁶⁶ An analysis performed by the sheriff’s office in Broward County “found the average cost of pretrial detention to be more than 15 times the cost of day reporting and nearly 75 times the cost of pretrial supervision.”¹³⁶⁷ In short, I could not find any version of implemented bail reform that did not result in significant savings to the public purse.

We must realize of course that, even with bail reform, not every pretrial defendant will, or even should, be released. Thus, taking our pretrial detention population of 466,940 defendants and multiplying that by the percentage of released pretrial defendants who are not likely to be **rearrested or fail to appear at trial**, 74%,¹³⁶⁸ we see that there are approximately 345,536 pretrial defendants who will likely show up for trial and not be rearrested that we are spending an

¹³⁶¹ See Email Statement of Jeffery Clark, Chief Deputy of Detention/Courts at Washoe County Jail (Sept. 30, 2021).

¹³⁶² See Email Statement of Angelina Wencke, Court Services Manager, Second Judicial District Court of Nevada, and Alicia Lerud, Court Administrator/Clerk of the Court, Second Judicial District Court of Nevada (Oct. 14, 2021).

¹³⁶³ See *Pretrial Justice: How Much Does It Cost?*, Pretrial Justice Institute, https://portal.ct.gov/-/media/Malloy-Archive/Reimagining-Justice/Reimagining-Justice---Pretrial-justice-at-what-cost-PJI-2017.pdf?sc_lang=en&hash=2D9ACDE29DDD4EE58364277140A64B8F (2017).

¹³⁶⁴ *Id.* at 5.

¹³⁶⁵ *Id.*

¹³⁶⁶ *Id.*

¹³⁶⁷ *Id.*; see also Office of the Chief Judge, *Bail Reform In Cook County: An Examination of General Order 18.8A and Bail in Felony Cases*, Circuit Court of Cook County, at 2, <https://www.cookcountycourt.org/Portals/0/Statistics/Bail%20Reform/Bail%20Reform%20Report%20FINAL%20-%20Published%2005.9.19.pdf> (May 2019) (“At an estimated cost to the taxpayers of \$142 per day to house an inmate in the Cook County Jail, a 42% reduction in the jail population has saved Cook County taxpayers **millions of dollars.**”).

¹³⁶⁸ See *supra* James Austin & Robin Allen, *Development of Nevada Pretrial Risk Assessment System Final Report*.

estimated \$40.1 million a day (\$14.6 billion a year) on by choosing detention over pretrial supervision. The amazing thing is that these are actually conservative estimates. Studies have indicated that, once one calculates not only the savings but the benefits of an evidence-based risk assessment pretrial release system, that figure rises to as much as \$78 billion a year.¹³⁶⁹

The simple fact is that, when one considers the financials of the public, the accused, and the bail bond industry, the only party who benefits is the bail bond industry.

If requiring bail to ensure someone shows up for trial works as well as my colleagues appear to think it does (it does not), then that individual will get his money back when he appears in court. This means that bail is an ineffective fundraising tool for localities as they must return the funds and they have administrative and processing costs for doing so, meaning they may even lose some money. If requiring bail to ensure someone shows up for trial does not work but we do it anyway, then, while a locality might be able to profit from pocketing the bail money (at least temporarily until they need to expend resources to track down the individual), this is an admission that bail was not set to serve a valid Constitutional purpose (safety or ensuring appearance), but simply as a means to raise funds; an abuse of power.

When one looks at the consequences of cash bail on low-income communities, the harm is apparent. Again, looking at figures from Nevada, the average bail amount was \$11,674, with the median bail amount coming to \$500.¹³⁷⁰ Out of the population of pretrial defendants released by means of a financial bail, over 83% had to go to a bail bonds person because they could not afford to post cash bail themselves.¹³⁷¹ Unlike cash bail, where if a defendant with a \$5000 bail can provide the full \$5000 to the court and then get that money back when he appears at trial, bonds people normally require a non-refundable 10% of the bond amount, in addition to further collateral and potential penalties/fees. This means that if you have a \$5000 bail amount and you cannot afford it, you must give a bonds person around \$500 and collateral. This means that, when you show up for trial, as more than 82% of defendants do,¹³⁷² you are still out that \$500. If you do not show up for court, you are out the \$500, whatever additional collateral you had to put up (be it a car, a wedding ring, an heirloom, or furniture), and you are responsible for any applicable penalties and fees. When one considers that only 37% of all Americans, rich and poor, can afford an unexpected \$500 or \$1,000 expense,¹³⁷³ and that one in three families have no savings,¹³⁷⁴ one can imagine what percentage of Americans can afford a \$5,000 or \$11,000 expense and the hardship

¹³⁶⁹ See *supra* *Pretrial Justice: How Much Does It Cost?*, Pretrial Justice Institute; see also Shima Baughman, *Costs of Pretrial Detention*, B.U. L. Rev. Vol. 97:1, 2 (2017).

¹³⁷⁰ See *supra* Austin & Allen, *Development of Nevada Pretrial Risk Assessment System Final*, at 5.

¹³⁷¹ See *id.*

¹³⁷² See *id.* at 7.

¹³⁷³ Maggie McGrath, *63% of Americans Don't Have Enough Savings to Cover a \$500 Emergency*, Forbes, <https://www.forbes.com/sites/maggiemcgrath/2016/01/06/63-of-americans-dont-have-enough-savings-to-cover-a-500-emergency/?sh=36ca25794e0d> (Jan. 6, 2016).

¹³⁷⁴ See *id.*

it would place on families. It is a pretty safe bet that, out of whatever percentage of Americans are left, there are not too many people in there who would qualify as low-income. Taking \$500-\$1,100 from a low-income individual or family can have devastating effects and makes poverty that much more difficult to escape.¹³⁷⁵ When faced with the evidence that bail, even in low amounts, disproportionately impacts the poor and thus minorities, Commissioner Kirsanow responds, “of course poorer people will have more difficulty paying the same amount of bail as a wealthier person.”¹³⁷⁶ And thus we see one of the primary reasons for his opposition: the primary purpose of this report is to explore bail’s disproportionate impact on low-income people and minorities and he simply does not care if it does.

Commissioner Kirsanow next counsels us that we should not be concerned that criminal defendants cannot afford even small bail amounts because it is their own fault that they cannot afford bail or have no one that will offer to help them afford bail. He references the statements of bail agent Michelle Esquenazi that many criminal defendants have alienated friends and loved ones through previous behaviors like drug addiction, and mental illness to stand for the proposition that these defendants did this to themselves.¹³⁷⁷ While one may agree that, if one alienates family, one cannot expect that family to bail him out of jail, the fact that one alienated family hardly seems a sufficient reason to require him to remain in jail. Further, while Commissioner Kirsanow may find many people willing to agree with him, despite the research on drug addiction, that those addicted to drugs deserve to be in jail, it is almost a certainty he will find fewer people willing to accept his premise that those plagued with mental illness also deserve to be incarcerated.

We finally come to the private bail and bond industry. Commissioner Kirsanow dedicates a significant portion of his statement making clear what his position really is: protecting the for-profit bail industry by opposing bail reform. For his part, Commissioner Kirsanow does not see the issue with an industry that is built on the premise of requiring people not yet convicted of a crime to pay bail for virtually all charged crimes, not being able to afford to do so, and then being threatened with jail if they do not turn to private bonds people. Bail, at its core, is supposed to be security against the accused not showing up for trial. Because the numbers tell us that approximately 82% of defendants appear, bonds people have little risk. They know that, 82% or more of the time they will have no issue with the defendant appearing, meaning they get to pocket all of those non-refundable deposits with little to no work. In theory, the 82% appearance rate by the accused would offset the 18% non-appearance rate, where bonds people would have to expend resources to track down FTA defendants. In reality, bonds people, in addition to the 10% premium they already collected, often require collateral from the defendant that can be liquidated in the event they fail to appear in order to offset the cost of tracking them down. This tool, as well as putting penalty and fee provisions in the contract, are a great way for bonds people to ensure that the 18% of defendants who do not appear do not cut into their profit margin. No matter what, they win.

¹³⁷⁵ See *supra* *Pretrial Justice: How Much Does It Cost?*, Pretrial Justice Institute, at 3-4.

¹³⁷⁶ Kirsanow Statement at 11.

¹³⁷⁷ *Id.* at 11-12.

When fewer people can afford bail, the better for the bond industry. As said before, in the Nevada study, over 83% of individuals released on financial bail had to turn to a bonds person because they could not afford the cash bail amount.¹³⁷⁸ With bail amounts high, the only thing standing between an individual eligible for release with bail and freedom is money. Because avoiding jail is very strong motivator for most people – especially if they are the primary breadwinner for a family that cannot afford for them to be in jail – most of these individuals must turn to the private bail industry for salvation.

Commissioner Kirsanow tells us we should blame judges, not the private bail industry, in increasing bail amounts because “it is judges, not bail companies, that set bail amounts.”¹³⁷⁹ While it is indeed true that the problems with our bail system are not fully the fault of one party or another, this view ignores, or rather omits, the fact that often judges in non-reform jurisdictions are setting bail in congruence with bail schedules. These bail schedules are laws; and, as all laws, lobbyists from the relevant industries influence the substance. Thus, acting like the amount of bail one is assigned has nothing to do with the private bail industry when that industry has lobbied the legislators and/or administrators who created the bail schedule is either naïve or active deception. The more people that cannot afford bail, the more they will have to turn to the bail bond industry. The idea of reasonable and affordable bail is inescapably adverse to the financial interests of the private bail industry. Commissioner Kirsanow goes on a tirade about how no one does something purely out of the goodness of their hearts while at the same time citing to a bail bond witness’ statement to convince us to believe that bonds people, private for-profit actors whose industry is built on ensuring people cannot escape their services, want to ensure that no one ever needs their services again. Because bail bond industry has no economic incentive whatsoever to encourage behavior that would decrease the demand for their services, we are left with only one conclusion: they must be doing this out of the goodness of their hearts. The irony is palpable.

Conclusion:

In sum, the oppositions laid out in my colleagues’ statements are nothing more than distractions. They state misleading premises, create false choices, and ultimately stand for the proposition that if bail reforms *could* produce any issues or have the *potential* to be abused, then the current cash bail system, that is full of issues and abuse, should remain in place. Commissioner Kirsanow, perhaps unintentionally, revealed what is likely the heart of the matter: he thinks, echoing the words of one of the witnesses at our hearing, that by not requiring bail we are allowing criminals back out on the streets and thus endangering the public.¹³⁸⁰ He once again shows his enlightenment by referring to those yet to be convicted of a crime as criminals. He forgets that an arrest is not a conviction and that in this country we afford one due process before they are determined to be criminals. Our bail system should reflect the presumption of innocence that our Constitution purports to stand for. Nothing less is acceptable.

¹³⁷⁸ *Supra* note 44 & 45.

¹³⁷⁹ *See supra* Kirsanow Statement at 12.

¹³⁸⁰ *See, generally, id.*

Ultimately, the disharmony surrounding this report can be encapsulated by Commissioner Kirsanow statement that “[a]ny reform of the bail system should be a non-starter if it potentially exposes the public to more crime.”¹³⁸¹ Because the release of any person – indeed even an innocent person wrongfully arrested or incarcerated could potentially expose the public to more crime even though justice requires it, it follows that he simply does not support reform. If one prejudices pretrial defendants as criminals, many of my colleagues’ views make sense and one would be extraordinarily hesitant to release anyone from jail pretrial not because they would fail to appear at trial or would pose a danger to the public, but because they **could**. I adhere to a different philosophy: one where people are presumed innocent until proven guilty; one where the default is freedom over detention; and one that prioritizes data driven decisions to realize that the vast majority of people will appear at trial and will not be rearrested for additional crimes prior to trial regardless of financial bail. Once it is revealed that the benefits of our cash bail system are minimal, with the harms being great, I support reform to not only decrease the disparate impact upon low-income people and minorities, but to be more responsible with our public resources and make smarter choices about how to approach crime in our justice system.

I agree with Commissioner Yaki that our report does not do enough, but merely “plays at the edges” of the inequities present in bail system.¹³⁸² I also do not blame the public if they are caught off-guard by some of the Commissioner’s statements regarding this report after none voted against it. As Commissioner Yaki has said, not one Commissioner articulated his or her opposition to the report at the public hearing at which it was adopted, preferring to wait to convey their real feelings in a written statement.

I second Commissioner Yaki’s recommendation for those that are interested in learning more about the disproportionate impact of cash bail on minority communities to review the Commission’s report, “Targeted Fines and Fees against Low Income People of Color: Civil Rights and Constitutional Implications.”¹³⁸³

¹³⁸¹ *Id.* at 2.

¹³⁸² Commissioner Michael Yaki’s Statement at 1.

¹³⁸³ *Targeted Fines and Fees against Low Income People of Color: Civil Rights and Constitutional Implications*, U.S. Commission on Civil Rights, https://www.usccr.gov/files/pubs/2017/Statutory_Enforcement_Report2017.pdf (Sept. 21, 2017).

Appendices

Appendix A: Pretrial Release Eligibility & Detention, by State Constitutional and Statutory Provisions

State	When Pretrial Release May Be Denied in Constitution		When Pretrial May Be Denied in Statute	
	Citation	Offense(s) if any are specifically listed	Citation	Offense(s) if any are specifically listed
Alabama	Const. art. 1 § 16	Capital offenses	§§ 15-13-108 & 15-13-3	Same as constitution
Alaska	Const. art. 1 § 11	Capital offenses	§ 12.30.011(d)(2)	Unclassified felonies; class A felonies; sexual felonies; felony operating a vehicle while under influence; felony refusing to submit to a chemical test; felony crimes against a person or any domestic violence offense if have a previous similar conviction in last five years; felonies committed while on pretrial release; arrested for felonies committed in another state.
Arizona	Const. art. 2 § 22	Capital offenses; sexual assault; sexual conduct or molestation of a minor; serious felony offenses if the defendant is in the country illegally,* as defined by the Legislature; felony committed while on pretrial	§ 13-3961	Same as constitution plus aggravated driving under the influence by a person in the country illegally; felonies involving dangerous crimes against children; terrorism; if defendant is a street gang member.

		release for a felony offense; felony offenses.		
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Arkansas	Const. art. 2 § 8	Capital offenses	Capital offenses	None specified
California	Const. art. 2 § 8	Capital offenses; felonies involving acts of violence; felony sexual assault; felonies involving threats of greatbodily harm.	Penal Code §§ 1271 & 1270.5	Capital offenses
Colorado	Const. art. II § 19	Capital offenses; violent crimes committed while on pretrial release for a violent crime; violent crimes if there is a previous violent crime conviction or two previous convictions for any felony.	§ 16-4-101	Same as constitution plus illegal possession of a weapon due to criminal record; sexual assault; sexual assault on a child by one in a position of trust.
Connecticut	Const art 1 § 8	Capital offenses		
Delaware	Const. art. 1 § 12	Capital offenses	11 Del. C. §§ 2103 & 2116	Same as constitution plus violent felonies committed while on pretrial release for a violent felony.
District of Columbia			§§§§ 23-1321, 23-1322, 23-1325, & 23-1329	1st and 2nd degree murder; assault with intent to kill while armed; any offense while on pretrial release for a felony or misdemeanor; crime of violence or dangerous crime (defined in §23-1331) while armed; crime of violence or dangerous crime and has previously been convicted of a crime of violence or

				<p>dangerous crime while on pretrial release; two or more crimes of violence or dangerous crimes were committed in separate incidents— joined in the case before the judicial officer; robbery where victim sustained physical injury; carrying a pistol without a license; carrying a rifle or shotgun; possession of a firearm during commission of a crime of violence or dangerous crime; unlawful possession of a firearm; committing a gun crime (as defined in § 7- 2508.01) while on probation, parole, or supervised release for a crime of violence or dangerous crime while armed (as defined in § 22-4502(a).</p>
Florida	Const. art. 1 § 14	Capital offenses or offenses punishable by life.	§ 907.041(4)	<p>Trafficking controlled substances; driving under the influence manslaughter and has a previous conviction for driving under the influence manslaughter, was driving with a suspended license, or was previously convicted for driving with a suspended license; dangerous offenses;</p>

				any offense while on pretrial release for a dangerous offense; defendant has previously been sentenced under §§ 775.082(9) or 775.084 as a releasee reoffender, habitual violent felony offender, three time violent felonyoffender, violent career criminal, or state attorney files notice seeking sentencing as such; manufacturing controlled substances.
Georgia			§§ 17-6-1 & 17-6-13	Stalking if the violation occurred on pretrial release or probation or parole for a stalking violation; serious violent felony if there is a previous conviction for a serious violent felony; family violence crime involvingserious injury to victim.
Hawaii	Const. art. 1 § 12	Offenses punishable by life.	§§ 804-4(a) & 804-3	1st or 2nd degree murder; 1st or 2nd degree attempted murder; a class A or B felony (except 1st degree forgery and failing to render aid).
Idaho	Const. art. 1 § 6	Capital offenses	§§ 19-2902 & 19-2903	Same as constitution

Illinois	Const. art. 1 § 9	Capital offenses; offenses punishable by life; offenses without possibility of parole.	725 ILCS 5/110-4	Same as constitution plus stalking; aggravated stalking; unlawful use of weapons when the offense occurred in a school zone; terrorist threats (attempts included).
Indiana	Const. art. 1 § 17	Murder; treason	§ 35-33-8-2	Murder
Iowa	Const. art. 1 § 12	Capital offenses	§ 811.1	None specified
Kansas	Const. Bill of Rights § 9	Capital offenses	§§ 22-2802 & 59-29a20	Sexually violent predator
Kentucky	Const. Bill of Rights § 16	Capital offenses		
Louisiana	Const. art. 1 § 18	Capital offenses; crimes of violence; production, manufacture, distribution, or dispensing, or possession with intent to manufacture, distribute or dispense a controlled dangerous substance.	C. Cr. P. Art. 312 & Art. 313	Capital offenses; offenses that are classified as both a sex offense and a crime of violence that are punishable by imprisonment of 25 years or more; crimes of violence if defendant failed to appear after posting bail; production manufacture, distribution, or dispensing, or possession with intent to manufacture, distribute or dispense a controlled dangerous substance if defendant failed to appear after posting bail; domestic abuse battery; violation of protective orders; stalking; any felony offense involving use or threatened use of force or a deadly weapon upon

				a family member, household member, or dating partner.
Maine	Const. art. 1 § 10	Crimes that are currently or were formerly (since the adoption of the constitution) a capital offense, regardless of current penalty.	15 § 1003(3) & (4)	Same as constitution
Maryland			Cr. Pr. § 5-202	Escape; defendant being charged as a drug kingpin; crimes of violence if previous conviction for a crime of violence or any of the following crimes under (f)(1): wearing, carrying, or transporting a handgun, use of a handgun or an antique firearm in commission of a crime, violating prohibitions related to assault weapons, use of amachine gun in a crime of violence, use of a machine gunfor an aggressive purpose, use of a weapon as a separate crime, possession of a regulated firearm, transporting a regulated firearm for unlawful sale or trafficking, possession of a rifle or shotgun by a person with a mentaldisorder; any of the above crimes under (f)(1) if previous conviction for a crime of violence or crime

				<p>under (f)(1); one of the following crimes, when committed on pretrial release of the one of the following crimes: first or second degree aiding, counseling, or procuring arson, first, second, or third degree burglary, causing abuse to a child, a crime that relates to a destructive device, a crime that related to a controlled dangerous substance, manslaughter by vehicle or vessel, a crime of violence; violating a protective order involving threats or abuse; a registered sex offender.</p>
Massachusetts			276 §§ 58 & 58A	<p>A felony that has as an element of the offense the use, attempted use, or threatened use of physical force against another; any felony that by its nature involves a substantial risk that physical force against another will result-including burglary and arson; violation of protection orders or offenses involving marital/child disputes (see 58A for specific sections); offenses involving domestic abuse; drug offenses with a mandatory minimum sentence of three years; intimidation of a witness; 3rd or subsequent driving under the</p>

				influence; illegal possession of a firearm as enumerated in 269 §10(a), (c) & (m) & 269 §10G.; new crime while on pretrial release.
Michigan	Const. art. 1 § 15	Murder; treason; violent felonies if there are two previous violent felony convictions within 15 years; 1st degree criminal sexual conduct; armed robbery; kidnapping with intent to extort money; violent felony while on probation, parole, or pretrial release for a violent felony.	§§ 765.5, 765.6(1), & 765.6(d)	Murder and treason.
Minnesota	Const. art. 1 § 7	Capital offenses		
Mississippi	Const. art. 3 § 29	Capital offenses; crimes punishable by life in prison; offenses punishable by 20 or more years; defendant has a previous conviction for a capital offense or offense punishable by 20 or more years; felony committed while on pretrial release as enumerated in Const. Art. 3 § 29(2).	§§ 99-5-33 & 99-5-35	Any offense where there is potential for a murder charge until it is known if the wounded victim will recover.

Missouri	Const. art 1 § 20	Capital offenses	§§§ 544.455, 544.457 & 544.470	Illegal alien charged with any offense.
Montana	Const. art. 2 § 21	Capital offenses	§ 46-9-102	Same as constitution
Nebraska	Const. art. 1, § 9	NA	NA	
Nevada	Const. art, 1, § 7	Capital offenses or murder punishable by life without parole.	§ 178.484	1st degree murder
New Hampshire			§§§ 597:1, 597:1c, & 597:2	Offenses punishable by life; abuse of a family or household member or intimate partner (see §173 B:1(I)); violation of a protection order protecting an intimate partner.
New Jersey	Const. art. 1 § 11	None specified	§ 2A:162-19	Murder; offenses punishable by life.
New Mexico	Const. art. 2 § 13	Capital offenses; felonies		
New York			CLS CPL §510.10	A violent felony offense (see CLS Penal § 70.02) except 2nd degree burglary under § 140.25(2) and 2nd degree robbery under § 160.10(1); 3rd degree witness intimidation; witness tampering; Class A felonies except section 220 (§ 220.77 not excepted);
North Carolina	Const. art. 1 § 27	None specified		Capital offenses; drug trafficking while on pretrial release for another offense

				and there is a prior Class A through E felony or drug trafficking conviction (or release from custody for that conviction) within the previous five years; offense associated with a criminal street gang while on pretrial release for another offense and there is a prior similar conviction (or release from custody for that conviction) within the previous five years; felonies or Class A1 misdemeanors involving a firearm while on pretrial release for the same and there is a prior similar conviction (or release from custody for that conviction) within the previous five years; manufacture of methamphetamine committed to maintain dependence on or illegal use of the drug.
North Dakota	Const. art. 1 §11	Capital offenses		
Ohio	Const. art. 1 § 9	Capital offenses; felonies that pose a substantial risk of serious physical harm, as determined by the General Assembly.	§ 2937.222	Noncapital aggravated murder; murder; 1st or 2nd degree felony; aggravated vehicular homicide; vehicular homicide; vehicular manslaughter; felony stalking;

				felony driving under the influence of drugs or alcohol.
Oklahoma	Const. art. 2 § 8	Capital offenses; violent offenses; offenses punishable by life; felonies when there are two or more prior felony convictions; dangerous controlled substance offenses when maximum sentence at least 10 years.	22 § 1101	Same as constitution plus kidnapping.
Oregon	Const. art. 1 §§ 14 & 43	Murder; treason; aggravated murder; violent felonies.	§135.240	Same as constitution plus any offense while on pretrial release.
Pennsylvania	Const. art. 1 §14	Capital offenses or offenses punishable by life.	42 Pa.C.S. 5701	Same as constitution
Rhode Island	Const. art. 1 §9	Offenses punishable by life; offenses involving use or threat of use of a dangerous weapon when there is a previous similar conviction or previous life sentence; drug crimes punishable by more than 10 years.	§ 12-13-1	None specified
South Carolina	Const. art. 1 §15	Capital offenses; offenses punishable by life; violent offenses, as defined by the General Assembly.	§ 22-5-510	Same as constitution. Defines violent offenses as those enumerated in § 16-1-60.
South Dakota	Const. art. 6 §8	Capital offenses		

Tennessee	Const. art. 1, §15	Capital offenses	§ 40-11-102	Same as constitution
Texas	Const. art. 1 §§§11, 11a, & 11c	Capital offenses; felonies when there are two previous felony convictions; felonies while on pretrial release for a felony; offenses involving a deadly weapon when there is a previous felony conviction; violent or sexual felonies while on supervision for a prior felony. Authorizes legislature to enact a law to deny release for a violation of a protection order that is a condition of pretrial release for a family violence offense.	C. Cr. P. Art. 17.152 & Art.17.153	Violation of a protection order that is a condition of pretrial release related to family violence or a childvictim.
Utah	Const. art. 1 §8	Capital offenses; felonies committed while on pretrial release, probation, or parole for another felony; crimes designated by statute as non-bailable.	§ 77-20-1 (effective Oct. 1, 2020)	Same as constitution plus felonies, if in a former instance defendant violated a material condition of bail; domestic violence offenses.
Vermont	Const. §40	Offenses punishable by death or life imprisonment; felonies involving violence.	13 §§§§§ 7553, 7553a, 1043, 1044, & 1063	Same as constitution plus 1st and 2nd degree aggravated domestic assault; aggravated stalking.
Virginia			§§ 19.2-120 & 19.2-120.1	Violent offenses enumerated in §19.2-297.1; offenses punishable by life imprisonment or death; drug offenses punishable by 10 or

				<p>more years if there is a prior similar conviction or conviction as drug kingpin; firearm offenses carrying a mandatory minimum penalty; any felony if there are two or more prior convictions for violent offenses or offenses punishable by life imprisonment or death; felonies committed while on pretrial release for another felony; sexual crimes listed under § 18.2-67.5:2(B) with a previous conviction for a similar offense; child pornography/certain offenses against children; gang participation or recruitment; terrorism; bioterrorism; driving under the influence resulting in death or injury and there are three prior convictions for a similar offense in the past five years; a second or subsequent violation of a protection order; third or subsequent assault and battery against family or household member within 20 years; offenses of obstructing justice or resisting arrest with threats of force; strangulation of a family or household member;</p>
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				sex trafficking; illegal aliens charged with certain crimes see § 19.2-120.1.
Washington	Const. art. 1 §20	Capital offenses; offenses punishable by life.	NA	
West Virginia			§ 62-1C-1	Life imprisonment
Wisconsin	Const. art. 1 §8	Authorizes the Legislature to enact a law allowing denial of release for murder punishable by life, sexual assault punishable by a maximum of 20 years, and for felonies involving serious bodily injury or threat of serious bodily injury if there is a previous similar conviction.	§§ 969.01 & 969.035	1st degree intentional homicide; 1st or 2nd degree sexual assault of a child; repeated acts of sexual assault on the same child; sexual assault of a child placed in substitute care; violent crime or attempted violent crime and has a previous similar conviction.
Wyoming	Const. art. 1 §14	Capital offenses	§ 7-10-101	Same as constitution

Note: Pretrial detention for defendants charged with a listed offense is not absolute. Often a court official will make a determination before ordering detention against the defendant or that no condition or combination of conditions could reasonably assure the appearance of the defendant or the safety of the defendant and the community. Some state laws also authorize detention without specifying charges or circumstances.

Source: National Conference of State Legislatures, 2020,

[https://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-eligibility.aspx?utm_source=National+Conference+of+State+Legislatures&utm_campaign=ef6a73ae2e-First Appearance Oct 8&utm_medium=email&utm_term=0_1716623089-ef6a73ae2e-377843392](https://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-eligibility.aspx?utm_source=National+Conference+of+State+Legislatures&utm_campaign=ef6a73ae2e-First+Appearance+Oct+8&utm_medium=email&utm_term=0_1716623089-ef6a73ae2e-377843392)

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Appendix B: Pretrial Reforms, by State and Type

	Changing Practice	Judiciary-Led	Pretrial Litigation	Pretrial Legislation	Executive-Led	Community & Grassroots-Led	State & Local Level Reports
Alabama							
Alaska		x		x			
Arizona	x	x	x				
Arkansas		x					
California	x	x	x	x	x	x	
Colorado	x			x	x		
Connecticut							
Delaware					x		
Florida		x		x			
Georgia					x		
Hawaii				x			x
Idaho							

Illinois	x		x		x		x
Indiana	x						
Iowa							
Kansas							
Kentucky	x	x				x	x
Louisiana		x	x	x		x	x
Maine							
Maryland	x						
Massachusetts	x		x				x
Michigan		x	x	x	x		
Minnesota	x						
Mississippi						x	
Missouri	x	x	x	x	x	x	
Montana	x		x				
Nebraska				x			
Nevada			x	x		x	
New Hampshire			x	x			

New Jersey							X
New Mexico		X					X
New York			X	X		X	X
North Carolina	X		X		X	X	X
North Dakota	X	X					
Ohio	X	X		X	X	X	
Oklahoma	X		X	X			X
Oregon	X		X				X
Pennsylvania	X	X	X				X
Rhode Island							X
South Carolina							
South Dakota							
Tennessee			X			X	X
Texas	X	X	X				
Utah							
Vermont						X	

Virginia	x			x	x		x
Washington					x	x	x
West Virginia							
Wisconsin			x			x	x
Wyoming	x						

Source: Pretrial Justice Institute, "What's Happening in Pretrial Justice?" Feb. 2020.