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Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next

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TOWARD A JUST MODEL OF PRETRIAL RELEASE: A HISTORY OF BAIL REFORM AND A PRESCRIPTION FOR WHAT'S NEXT

**ALEXA VAN BRUNT
LOCKE E. BOWMAN***

The criminal justice system is in the midst of the “third wave” of bail reform in the United States. The current movement aims to end the ingrained practices of wealth-based discrimination in pretrial administration. The authors—civil rights attorneys who have litigated the issue of cash bond in Cook County, Illinois—have been on the front lines of this policy shift. From this vantage, we conduct a historical analysis of modern-day bail reform efforts in the “first” and “second” waves of bail reform, and examine the impact of these reforms on incarceration rates and racial disparities in the justice system. We explain how these earlier efforts both influenced and created the conditions for the third wave reforms that are now underway, including a “groundswell” of class action litigation that seeks to minimize pretrial detention by breathing new life into longstanding principles of equal protection and due process. We then analyze the impact of these third wave reforms nationwide, while using Cook County as a case study. The results suggest reason for both optimism and caution, particularly in jurisdictions where advocates have been willing to trade a more expansive scheme of preventive detention for the elimination of the cash bail system. We conclude with observations in support of a just system of pretrial release—one that relies neither on

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money bond nor on preventive detention measures. This system is one in which the vast majority of the presumptively innocent people charged with offenses are immediately released back into their communities. It is a system in which courts provide services rather than onerous conditions, to minimize failures to appear in court, mitigate recidivism, and ensure that communities are not decimated by unconstitutional pretrial detention. While this model is not without some societal risk, we contend it is the only tolerable outcome under our constitutional system.

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INTRODUCTION

The criminal justice system is in the midst of what has been termed the “third wave” of bail reform in the United States.¹ The current movement—similar to reform efforts in the mid-twentieth century—seeks to end a system of ingrained, institutionalized wealth-based incarceration.² As we recount, the current bail reform efforts have resulted in a number of remarkable early successes. This Article aims to provide a historical context in which to evaluate these recent achievements and, in particular, to assess their staying power. We are not bystanders to the current reform efforts. We write out of a personal commitment to ending unjust pretrial incarceration of those too poor to purchase freedom.³ Section I provides a historical overview of the institution of money bond and efforts to reform

¹ See Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. REV. 837, 839 (2016) (describing the “tipping point” in the reform movement, away from monetary bail and an overreliance on pretrial detention) (citing Lisa Foster, Dir. Office for Access to Justice, Remarks at ABA’s 11th Annual Summit on Public Defense (Feb. 6, 2016)); see also Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L. J. 490, 492–93 (2018) (describing the movement to replace the system of monetary bail with one based on the defendant’s risk of recidivism).

² Mayson, *supra* note 1, at 508. Caleb Foote, a criminal justice advocate and reformer in mid-twentieth century America and an observer of the so-called second wave of bail reform, described in 1965 a crisis in the pretrial system, particularly as applied to the poor and indigent. In one famous work, he stated that it “has been established that pretrial imprisonment of the poor solely as a result of their poverty, under harsher conditions than those applied to convicted prisoners, so pervades our system that for a majority of defendants accused of anything more serious than petty crimes, the bail system operates effectively to deny rather than to facilitate liberty pending trial.” Caleb Foote, *The Coming Constitutional Crisis in Bail: I (Bail I)*, 113 U. PA. L. REV. 959, 960 (1956). Foote posited presciently that the “next major clash between our norms of actual administration and the constitutional theories expounded in recent years by the Supreme Court” would concern the systemic wealth-based discrimination in the bail system. *Id.* at 962. Unfortunately, the reforms advanced in Foote’s lifetime, and particularly those implemented during the “tough on crime” era of the 1970s and 1980s, led to the expansion of the pretrial detention system rather than its constriction. See *infra* Section I(B)(4).

³ The authors, with co-counsel, brought class action litigation against Cook County, Illinois judges who impose monetary bonds on arrestees without making findings as to their ability to pay or who willfully ignore their inability to pay. This dereliction has left thousands confined in the Cook County Jail because they lack the funds to purchase their freedom. See generally Class Action Complaint, *Robinson et al. v. Martin et. al.*, No. 2016 CH 13587 (filed Oct. 14, 2016). The *Robinson* suit was brought in collaboration with Matt Piers, Chirag Badlani and Kate Schwartz, from the law firm of Hughes Socol Piers Resnick & Dym, Ltd., and Alec Karakatsanis of Civil Rights Corps. Civil Rights Corps has helped lead the charge in bringing the spate of new litigation described in *infra* Section II(A).

that system. Section II describes the legal arguments that present-day reformers are deploying to push for an end to wealth discrimination in pre-trial incarceration. Section III outlines the results of litigation attacking the bond system. And Section IV offers some concluding, cautionary remarks about how to cement and institutionalize meaningful change.

Section I begins with a brief history of the antecedents of the United States' pretrial release system. We then turn to an overview of bail reform efforts⁴ in the decades since Robert F. Kennedy, in 1964, decried a system that enabled those with means to gain their freedom but consigned the poor to jail for inability to post bond.⁵ The mid-twentieth century movement—retrospectively termed the “first wave” of bail reform—coincided with the civil rights movement and the War on Poverty. High-minded reformers, from the federal halls of power to the non-profit sector to the academy, imagined a system in which the presumption of innocence would be honored; the overwhelming majority of criminally accused persons would be entitled to freedom prior to trial; and, certainly, a person's wealth would not be the arbiter of whether he remained in custody following arrest.⁶

But pretrial administration in this country has proceeded along two divergent tracks. The ideals of liberty and presumptive innocence part company with the reality of judicial decision-making in local criminal courts. Judicial officers overseeing bail hearings—driven by concern for community safety and, even in some cases, by a desire to preemptively punish—have consistently paid less heed to state and constitutional law

⁴ The terms “bail” and “bond” are often used interchangeably in American discourse. However, a historical understanding of pretrial detention posits bail as a “system of release,” while bond is the shorthand used to describe the conditions attached to that release—for instance, a secured or unsecured money bond, or release on personal recognizance. *See, e.g.*, Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*, 2014 NAT'L INST. OF CORR., 2–3, 91–96 (2014), <https://s3.amazonaws.com/static.nicic.gov/Library/028360.pdf>. [<https://perma.cc/BY6E-XCNK>].

⁵ Testimony by Attorney General Robert F. Kennedy on Bail Legislation Before the Subcommittees on Constitutional Rights and Improvements in Judicial Machinery of the Senate Judiciary Committee, 88th Cong. (1964) (statement of Robert F. Kennedy, Attorney General, Department of Justice), <https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-04-1964.pdf> [<http://perma.cc/9LZL-3E8E>].

⁶ *See, e.g., id.*; Lyndon B. Johnson, *Remarks at the Signing of the Bail Reform Act of 1966*, THE AMERICAN PRESIDENCY PROJECT (June 22, 1966), <http://www.presidency.ucsb.edu/ws/?pid=27666#axzz2htZwrKnK> [<http://perma.cc/KWP7-D9CL>]; NCJRS, *National Conference on Bail and Criminal Justice, Proceedings of May 27-29, 1964 and Interim Report, May 1964-April 1965*, U.S. DEP'T OF JUST. (1965), <https://www.ncjrs.gov/pdffiles1/Photocopy/355NCJRS.pdf> [<http://perma.cc/QQ2Y-RC5C>] [hereinafter, *NCJRS Report*]; Foote, *supra* note 2.

than to their own intuition about who is deserving of pretrial release.⁷ This permits the insertion of discrimination, particularly against the poor and black defendants, into the pretrial process.⁸

Thus, “first wave” de-incarceration efforts were met by a “second wave” (perhaps, more accurately, a powerful undertow), animated by the growing concern in the 1970s and 1980s for public safety, the tough-on-crime rhetoric that politicians adopted in response to that concern, and the War on Drugs. The District of Columbia and the federal government passed statutes that authorized judges to detain accused persons in the interest of community safety,⁹ and the courts upheld these laws.¹⁰ Many other jurisdictions, Illinois among them, followed the same path.¹¹

This about-face in rhetoric and in policy led to ballooning jail populations around the country.¹² Black individuals were increasingly overrepresented among those held prior to trial.¹³ Money bail was pressed into service as a means to assure public safety.¹⁴ Judges imposed bonds that accused persons could not possibly pay, knowing that the unattainable bonds would keep the defendants incarcerated—even though they were presumptively innocent and had never been found, after a proper hearing, to pose a danger to anyone.¹⁵

⁷ See *infra* notes 101–103, 132, 184, 191.

⁸ See *infra* notes 26, 190–191, 211–212.

⁹ See District of Columbia Court Reform and Criminal Procedures Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (codified at D.C. CODE ANN. §§ 23-1321 to -1323 (West 2017)) [hereinafter, D.C. ACT]; Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1976 (codified at 18 U.S.C. §§ 3141–50, 3062 (2012)).

¹⁰ See *United States v. Salerno*, 481 U.S. 739 (1987) (upholding the federal Bail Reform Act of 1984); see also *United States v. Edwards*, 430 A.2d 1321, 1322 (D.C. 1981) (upholding the District of Columbia Court Reform and Criminal Procedure Act of 1970).

¹¹ See *infra* Section I(B)(4).

¹² The number of admissions to jails in the United States nearly doubled between 1983 and 2013, from 6 million to 11.7 million. See Ram Subramanian et al., *Incarceration's Front Door: The Misuse of Jails in America*, 2015 VERA INST. OF JUST., <https://www.vera.org/publications/incarcerations-front-door-the-misuse-of-jails-in-america> [<https://perma.cc/5YJZ-4D9B>].

¹³ For a more extensive discussion of racial disparities in pretrial administration, see *infra* notes 26, 189–190, 210–211.

¹⁴ See Mayson, *supra* note 1, at 507 (Jurisdictions have “continued to rely on money bail and *sub rosa* detention as a crude mechanism for managing pretrial crime risk.”); see also SHIMA BARADARAN BAUGHMAN, *THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM* 167 (2018) (“[W]hen judges perceive (based on their intuition) that a person presents a high risk, we see those judges setting very high amounts of money bail as a means to try to keep that person in jail.”).

¹⁵ For a discussion of the nation's ongoing use of both explicit preventive detention mechanisms and money bail to detain, see *supra* Section I(B)(5).

The current “third wave” has been driven by an emerging consensus across the political spectrum that the decades-long expansion of the criminal justice apparatus is cruel, counterproductive, and expensive,¹⁶ as well as disproportionately harmful to people of color—particularly black people.¹⁷

Section II of this Article provides a sketch of the well-established due process and equal protection principles that protect the indigent from unjust confinement. It also describes how reformers have recently deployed this precedent to attack the pretrial confinement of those who are unable to purchase their freedom. In particular, recent class action lawsuits have been able to adapt established constitutional law governing the rights of the indigent to new purpose.¹⁸ These suits serve as a beacon to future legal efforts, even as they provide a stark reminder that much of the country continues to use money to manage the purported flight and recidivism risk of pretrial defendants. As Section II recounts, due process and equal protection challenges to money bail have enjoyed limited success in the current environment. Their future success, however, remains uncertain.

¹⁶ In 2015, there were 10.9 million admissions to the nation’s jails—most of them detained without having been convicted of any offense. See TODD D. MINTON & ZHEN ZENG, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, JAIL INMATES IN 2015 (December 2016), <https://www.bjs.gov/content/pub/pdf/ji15.pdf>. [<http://perma.cc/TW6K-UZ6X>]. While some individuals are incarcerated for days or weeks, almost 40% of felony defendants in the United States will spend the entirety of the pretrial phase incarcerated in jail; nine out of ten such detainees will remain locked up solely because of their inability to pay the cash bail bond assigned after their arrest. Subramanian et al., *supra* note 12, at 32 (citing BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009—STATISTICAL TABLES 1, 15 (December 2013)), <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf>.) [<http://perma.cc/BB2U-MTE8>]. There are great human costs to this system. See, e.g., CHRISTOPHER T. LOWENKAMP ET AL., THE ARNOLD FOUNDATION, THE HIDDEN COSTS OF PRETRIAL DETENTION 3–4 (2013) (describing how the length of pretrial detention is associated with a greater likelihood that the defendant will fail to appear for court proceedings and engage in new criminal activity and post-deposition recidivism); Paul Heaton, et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2016) (using empirical evidence from Harris County, Texas to measure the negative effects of pretrial detention on criminal case outcomes and future crime); Cynthia E. Jones, “Give Us Free”: Addressing Racial Disparities in Bail Determinations, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 919, 934–38 (2013) (describing the personal and community hardships incurred as a result of pretrial detention, including loss of employment, child support, and financial resources, and the harm caused by incarceration itself, including as a result of the prevalence of physical and sexual violence in jails).

¹⁷ For a review of scholarship showing the racial disparities in pretrial administration, see *infra* notes 26, 191–92 and 212–13.

¹⁸ See *infra* Section II.

In Section III, we examine the unfolding results of the “third wave” reform efforts nationwide. Reformers can now point to momentous successes. Jurisdictions throughout the country are moving toward pretrial release systems that are not based on wealth.¹⁹ In Maryland, New Mexico, and Arizona, rules have recently been implemented prohibiting the use of cash bonds that the defendant is unable to pay.²⁰ In Cook County, the chief judge of the court system has administratively ordered that bonds in all cases must be within the defendant’s means.²¹

Yet, despite prior and current efforts, the poor and the indigent remain locked up in local jails throughout the nation.²² The successes in limiting the reliance on money bail have been driven in part by reformers’ willingness, in the interest of tactical advantage, to concede that undesirable defendants may be restrained on home confinement or on electronic monitoring, or even incarcerated on “no bond,” without the possibility of release.²³ At the same time, pretrial services entities around the country are

¹⁹ See *Where Pretrial Improvements are Happening*, 2018 PRETRIAL JUST. INST. 4–5, 19, <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=0a93999c-5e28-d285-27f7-db3fdabbdfb8&forceDialog=0> [<https://perma.cc/8QL6-8WX9>] [hereinafter, *Where Pretrial Improvements are Happening*].

²⁰ See MD. R. 4-216.1(d)(1)(B), effective July 1, 2017, <http://mdcourts.gov/rules/rodocs/ro192.pdf> [<http://perma.cc/4KG4-SVWH>] (“A judicial officer may not impose a financial condition in form or amount that the judicial officer knows or has reason to believe the defendant is financially incapable of meeting and that will result in the defendant being detained solely because of that financial incapability.”); N.M. R. 5-401(E)(1)(c), effective July 1, 2017, http://www.nmcompcomm.us/nmrules/NMRules/5-401_6-5-2017.pdf [<http://perma.cc/L8QD-3VX8>] (“The court shall not set a secured bond that a defendant cannot afford for the purpose of detaining a defendant who is otherwise eligible for pretrial release.”); ARIZ. R. 7.3(b)(2), effective April 3, 2017, http://www.azcourts.gov/Portals/20/2016%20December%20Rules%20Agenda/R_16_0041.pdf [<http://perma.cc/SJ8Y-FR6E>] (“The court must not impose a monetary condition that results in unnecessary pretrial incarceration solely because the person is unable to pay the bond.”).

²¹ OFFICE OF THE CHIEF JUDGE, CIRCUIT COURT OF COOK CTY, GENERAL ORDER NO. 18.8A – PROCEDURES FOR BAIL HEARINGS AND PRETRIAL RELEASE (July 17, 2017), <http://www.cookcountycourt.org/Manage/DivisionOrders/ViewDivisionOrder/tabid/298/ArticleId/2562/GENERAL-ORDER-NO-18-8A-Procedures-for-Bail-Hearings-and-Pretrial-Release.aspx> [<http://perma.cc/4FUM-RHN5>] [hereinafter, GENERAL ORDER]. For a discussion of Cook County’s recent reforms, see *infra* Section III(B).

²² See, e.g., Heaton et al., *supra* note 16, at 713 (The “large majority of pretrial detainees [nationwide] are detained because they cannot afford their bail, which is often a few thousand dollars or less.”); BAUGHMAN, *supra* note 14, at 166–67 (In 1990, 53% of felony defendants were assigned financial conditions of release; by 2009, 72% of felony defendants were assigned money bail. Moreover, the average bail amount increased 46% in this time period. Baughman concludes that such statistics “provide a glimpse into how the widespread use of money bail is being applied to a defendant, both for serious and nonserious crimes.”)

²³ See *infra* Section III(A). In many reform jurisdictions, the use of highly intrusive methods of release, including GPS tracking and electronic monitoring, has increased. See

increasingly relying on predictive models to assess the risk posed by the release of individual defendants.²⁴ These models risk normalizing and enhancing the practice of “preventive detention.”

We view some of these trends with alarm. Skepticism is warranted when the discriminatory money bail system is traded for a remade pretrial release program premised on the identification of a cadre of defendants who are purported to present a threat to society and are thus subject to some form of preventive detention.²⁵ Cash-based pretrial incarceration should not be replaced by a more well-honed detention system, whether by electronic monitoring or full-scale detention. We see a risk that the latest set of bail reforms will widen the net of detention by failing to fully eradicate the traditional money bail system while also encouraging more intentional forms of preventive detention.

Accordingly, the final section of the Article suggests a set of baselines on which reformers must insist to create a just system of pretrial release. Under this system, courts default to pretrial *release* of those charged with crimes and provide those individuals with support to help prevent failures to appear in court and mitigate recidivism. While this model is not without some societal risk, we posit that, in the end, it is the only tolerable outcome

Avlana K. Eisenberg, *Mass Monitoring*, 90 S. CAL. L. REV. 123, 153 (2017) (summarizing detractors’ arguments that the “booming” business of electronic monitoring only adds another condition of release upon those who should otherwise be freed on their own recognizance); Kate Weisburd, *Monitoring Youth: The Collision of Rights and Rehabilitation*, 101 IOWA L. REV. 297, 309–11 (2015) (describing the general rise in popularity of electronic monitoring as an alternative to pre- and post-trial incarceration); Samuel Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L. J. 1344, 1367–671 (2014) (describing use of electronic monitoring and GPS tracking pretrial models in various states); Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1478 n.250 (2017) (noting that the number of individuals tracked via electronic monitoring has more than doubled in the past ten years); PEW Charitable Trusts, *Use of Electronic Offender-Tracking Devices Expands Sharply* (Sept. 07, 2016), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/09/use-of-electronic-offender-tracking-devices-expands-sharply> [<http://perma.cc/N747-CYR9>] (noting a 140% increase in the number of accused and convicted people being monitored with electronic devices between 2005 and 2015).

²⁴ See *infra* Section III (A).

²⁵ Indeed, the Pretrial Justice Institute, an advocacy organization dedicated to ensuring more fair adjudication in pretrial decision-making, authored a report acknowledging that in a pretrial system that did not rely on money bail, at least 10% of pretrial detainees would be incarcerated without bond. See *What Pretrial Systems Look Like Without Money Bail*, PRETRIAL JUSTICE INST. 3–5 <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=9f7cfb09-0f95-b3e4-2e03-1fa92fb102a&forceDialog=0> [<https://perma.cc/A8UC-UNZS>].

under our constitutional system and in light of the formal understanding of bail in this country.

I. THE HISTORY OF CASH BAIL REFORM IN THE UNITED STATES AND IN ILLINOIS

Understanding the state of America's bail system today requires a brief analysis of the origins of the jurisprudence and rights undergirding the pretrial release process. This inquiry begins, in Section A, with a review of the early American bail scheme. We then turn, in Sections B(1) and (2), to a description of the transformation of this system over time from one primarily of pretrial release to one of pretrial detention, with wealth as the defining arbiter of a charged person's freedom. In the remaining subparts of Section B, we describe the reform efforts of the mid-twentieth century (the "first wave" of bail reform) and the countervailing movement to toughen detention rules that followed (the "second wave").

In sum, previous campaigns to change the system have been unable to dislodge an entrenched reliance on judicial custom that includes the assignment of monetary bail, as the mostly failed first wave efforts demonstrate. As a result, bond administration in this country continues to be characterized by the over-incarceration of the poor and the disparate treatment of people of color—particularly black people.²⁶ There is a significant risk that prospective efforts at reform will be similarly hobbled. Worse, in jurisdictions where financial conditions have become less central to the pretrial process (a key tenet of recent reforms), the balance has tipped toward a greater acceptance of preventive detention—a widening of the net that does not necessarily represent a liberalization of the bail process.²⁷

²⁶ See Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 201–02 (2018) (Across the country, "less than 25 percent of felony defendants are released without financial conditions and the typical felony defendant is assigned a bail amount of more than \$55,000." Additionally, the authors' data showed that the "typical defendant" earned less than \$7,000 annually in the year prior to arrest, "likely explaining why less than 50 percent of defendants are able to post bail even when it is set at \$5,000 or less."); Subramanian et al., *supra* note 12, at 15 (noting that black men are held disproportionately pretrial as a result of their inability to post monetary bond, a cyclical problem: "Although 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 posting bail."). For a more extensive discussion of racial disparities in pretrial administration, see *infra* notes 189–190 and 210–211.

²⁷ See *supra* Section III(A).

As Malcolm X famously stated, “[o]f all our studies, history is best qualified to reward our research.”²⁸ Criminal justice advocates and stakeholders should pay heed to the lessons of history, so that future changes do not, unintentionally or otherwise, widen the carceral net.

A. THE BAIL EXPERIENCE IN COLONIAL AMERICA

In the colonial era, bail was generally synonymous with release.²⁹ The early American system of bail administration derived heavily from key principles of English bail law—most notably, the Bill of Rights, the Habeas Corpus Act, and the Petition of Right³⁰—but applied them more liberally.³¹ Over time, however, the pretrial release process in the United States diverged from its English roots in ways (both positive and negative) that had a lasting impact both on the country’s bail system and future reform efforts.³²

Drafted in 1641, prior even to the English Bill of Rights, the Massachusetts Body of Liberties created an unequivocal right to bail for non-capital offenses, regardless of the evidence or the accused’s character.³³

²⁸ Malcolm X, Message to the Grassroots (Nov. 10, 1963), <http://teachingamericanhistory.org/library/document/message-to-grassroots/> [<http://perma.cc/66R2-37NE>].

²⁹ June Carbone, *Seeing Through the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 530–31 (1983); see also Matthew J. Hegreness, *America’s Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 920 (2013) (stating that the right to bail articulated at the end of the seventeenth century was “absolute and unequivocal.”).

³⁰ Professor and criminal justice scholar Caleb Foote famously described the Bill of Rights, Habeas Corpus Act, and the Petition of Right as the “three-legged stool” of English bail law. Foote, *supra* note 2, at 696; see also Hegreness, *supra* note 29, at 917–18 (“The Petition of Right, the Habeas Corpus Act, and the English Bill of Rights are three great pillars of bail that emerged from the constitutional struggles of the seventeenth century.”). For a thorough discussion of these three laws, their origins, and their later adoption within the American system, see William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33 (1977); Carbone, *supra* note 29, at 519–533.

³¹ Carbone, *supra* note 29, at 530–31. Carbone noted that the most significant departure of colonial bail practice from English law was the recognition of a right to bail “no matter how great the evidence or how infamous the accused[.]” *Id.* at 531.

³² For instance, while personal character evidence was not imported from England into early colonial bail administration, *id.* at 530–31, neither was a constitutional right of pretrial release (see *infra* note 40), which has subsequently hobbled efforts by legal reformers to achieve a constitutional recognition of a right to bail, regardless of financial ability. See *infra* Section I(B)(2).

³³ Carbone, *supra* note 29, at 530 (citing THE COLONIAL LAWS OF MASSACHUSETTS § 8, at 37 (W. Whitmore ed. 1889)). But see Foote, *supra* note 2, at 981 (stating that the “theoretical liberality” of the Massachusetts bail statute “should not be overdrawn,” for the colony punished by death non-bailable offenses that included “idolatry, witchcraft, blasphemy, bestiality, sodomy, adultery . . . [and] stubbornness or rebelliousness on the part

In 1682, Pennsylvania adopted a colonial charter providing that “all Prisoners shall beailable by Sufficient Sureties unless for capital Offenses, where proof is evident or the presumption great.”³⁴ The Pennsylvania Frame Government further liberalized the bail decision by limiting capital crimes to “willful murder,” which had the effect of expanding the right to bail beyond that ever recognized in Massachusetts or England.³⁵ The rights of those charged with offenses were further codified in the Northwest Ordinance of 1787, passed just two years before the American Bill of Rights was debated in Congress, which stated, similarly, that “all persons shall beailable, unless for capital offences, where the proof shall be evident, or the presumption great.”³⁶ This language, conferring an almost universal right to bail, was later adapted into many state constitutions after the official founding of the country.³⁷ It was also adopted into federal law. The Judiciary Act of 1789, passed while Congress was simultaneously considering the Bill of Rights, borrowed heavily from the Pennsylvania colonial constitution.³⁸ Accordingly, even those charged with capital offenses could, in theory, seek pretrial release. Moreover, in the seventeenth and eighteenth centuries, sureties were paid only upon default, so that wealth did not factor directly into release decisions.³⁹

Despite these auspicious beginnings, the final expression of the country’s federal pretrial policy—the Constitution of the United States—

of a son against his parents.”) (citing George Lee Haskins, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS: A STUDY IN TRADITION AND DESIGN* 145–46 (1960)).

³⁴ Carbone, *supra* note 29, at 531; *see also* Hegreness, *supra* note 29, at 920 (citing *FRAME OF THE GOVERNMENT OF PENNSYLVANIA OF 1682*, art. XI, *reprinted in* 5 Thorpe, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS* 3061 (1906)).

³⁵ Carbone, *supra* note 29, at 531–32.

³⁶ Foote, *supra* note 2, at 970 (citing *An Ordinance for the Government of the Territory of the United States North-West of the River Ohio*, July 13, 1787, art. ii). Foote acknowledged that, in prohibiting the infliction of “cruel and unusual punishment”, the Northwestern Ordinance adopted language not only from Pennsylvania, but also from the English Bill of Rights. *Id.* at 987.

³⁷ Carbone, *supra* note 29, at 532.

³⁸ Samuel Wiseman, *Discrimination, Coercion, and the Bail Reform Act of 1984: The Loss of the Core Constitutional Protections of the Excessive Bail Clause*, 36 *FORDHAM URB. L. J.* 121, 129–30 (2009) (citing Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (codified as amended at 18 U.S.C. § 3141 (2006)) (“[U]pon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law.”)).

³⁹ *See infra* Section I(B)(1).

was drafted with no unequivocal right to bail.⁴⁰ The Constitution lacks reference to the colonial model of bail or even to the language of the English Statute of Westminster, which included at least a limited right to pretrial release for certain classes of defendants.⁴¹ Rather, bail decisions are explicitly circumscribed only by the restriction against the suspension of the writ of Habeas Corpus in Article I, section 9 of the Constitution, and by the Eighth Amendment's safeguards against the imposition of excessive bail, adopted directly from the English Bill of Rights.⁴² While the spare prose of the Eighth Amendment has sparked debate in the academy and the courts as to whether it implies some right to pretrial release, the judicial consensus has been against reading such a right into the text.⁴³

⁴⁰ See *Carlson v. Landon*, 342 U.S. 524, 545 (1952); see also Charles E. Ares et al., *The Manhattan Bail Project: An Interim Report on the Use of Pre-trial Parole*, 38 N.Y.U. L. REV. 67, 70 (1963); Hegreiness, *supra* note 29, at 946.

⁴¹ See Carbone, *supra* note 29, at 529. Carbone noted that whether the Statute of Westminster actually provided a "right to bail" is open to interpretation given that it only required the pretrial release of a specific set of defendants who were charged with minor crimes or whose guilt was uncertain.

⁴² See Wiseman, *supra* note 38, at 127–28.

⁴³ Professor Foote famously argued that, though the language of the excessive bail clause was ambiguous, a reading of the historical circumstances surrounding its passage by the first Congress "argue against giving it a narrow reading." Foote, *supra* note 2, at 989. Foote concluded that the clause was "intended to afford protection against pretrial imprisonment in a broad category of cases" *id.*, and that the omission of such rights-granting language was a result of inadvertence, *id.* at 987. The American judiciary has held otherwise. See *Carlson*, 342 U.S. at 545–56 ("The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable. We think, clearly, here that the Eighth Amendment does not require that bail be allowed under the circumstances of these cases."); see also *United States v. Edwards*, 430 A.2d 1321, 1329 (D.C. Ct. App. 1981) (citing but rejecting Foote's argument that "the narrowly drawn excessive bail clause was the product of oversight."). *But see* *Stack v. Boyle*, 342 U.S. 1, 4 (1952) (suggesting in dictum that there may be a right to bail pursuant to the Eighth Amendment) and *Carlson*, 342 U.S. at 569 (Burton, J. dissenting) ("The Amendment cannot well mean that, on the one hand, it prohibits the requirement of bail so excessive in amount as to be unattainable, yet, on the other hand, under like circumstances, it does not prohibit the denial of bail, which comes to the same thing."). Other scholars have also argued against Foote's conclusion. See Donald B. Verrilli, Jr., *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328, 338 (1982) ("The central flaw in the historical argument for an eighth amendment right to bail is simply that the amendment does not explicitly grant this right. The framers' failure to include a right to bail provision in the Constitution might evidence a specific intent not to raise this right to the level of constitutional protection, but to leave the matter to the discretion of Congress."). For an overview of the competing positions on the meaning of the Eighth Amendment propounded during the mid-twentieth century and leading up to the passage of the Bail Reform Act of 1984, see Wiseman, *supra* note 38, at 135–138 ("The Excessive Bail Clause became a focus

The absence of an explicit constitutional right to pretrial release has had enormous consequences for those charged with crimes in this country, as well as for advocates seeking recognition of the right to pretrial release. The failure of the Founders to provide unambiguous support for this right has also enabled the creation and expansion of the system of “money bond,” which remains the target of modern day bail reform efforts.

B. PRETRIAL RELEASE AND BAIL REFORM EFFORTS IN THE “MODERN” AGE

1. *The Emergence of the “Money Bond” System*

Though the federal constitution did not include a right to bail, most state constitutions from the early days of the republic did include a right to bail.⁴⁴ These state laws mirrored the language in Pennsylvania’s Frame Government in that they adopted a presumption of release for non-capital offenses upon the receipt of “sufficient sureties.”⁴⁵ Thus, reliance on sureties became a quintessential feature of pretrial justice in this country,⁴⁶ and remains so today.⁴⁷

What has changed is the nature of the surety system.⁴⁸ The old system functioned without prepayment; the guarantee was paid only upon the defendant’s default.⁴⁹ Most sureties were provided by an individual who

of scholarly interest in the 1960s as a result of the possibilities created by the Supreme Court’s new authority over state criminal procedure through the doctrine of incorporation.”).

⁴⁴ See Hegreness, *supra* note 29, at 921–22 (conducting comparison of state constitutions and statutory schemes to find that from the post-colonial history until the twentieth century, 42 states had adopted an unequivocal right to bail clause). Hegreness describes the consistency of what he coins the “Consensus Right to Bail Clause” in most state constitutions, the language of which is: “All persons shall beailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great.” *Id.* at 924; *see also id.* app., describing the “right to bail clauses” in state constitutions and amendments, 1776 to 2013.

⁴⁵ Foote, *supra* note 2, at 975.

⁴⁶ Carbone, *supra* note 29, at 540 (“[O]nce the right to bail was extended to all but the occasional defendant indicted for a capital offense, the amount of bail, rather than the fact of bail, became the most important determinant of pretrial release or detention.”).

⁴⁷ See BAUGHMAN, *supra* note 14, at 46 (asserting that cash bail is still “the most common pretrial release method” in the United States).

⁴⁸ A surety is, in general terms, the party that retains liability for paying another’s debt or performing another’s obligations, i.e., a joint obligor. *See* BLACK’S LAW DICTIONARY (10th ed. 2014). In the bail context, a surety may be either commercial (e.g., a bailbondsmen) or noncommercial. Schnacke, *supra* note 4, at 2.

⁴⁹ Timothy R. Schnacke, *Money as a Criminal Justice Stakeholder*, 2014 NAT’L INST. OF CORR. 24, <https://s3.amazonaws.com/static.nicic.gov/Library/029517.pdf> [<https://perma.cc/JN59-U9BB>]; *see also* Carbone, *supra* note 29, at 519–20 (describing the Anglo-Saxon bail

had a personal relationship with the defendant, and who was willing to take responsibility for ensuring the accused's return to court.⁵⁰ This third-party assurance, adopted from English law,⁵¹ became a key tenet of the early American bail experience, as evidenced by eighteenth-century jurisprudence that affirmed the right of a personal surety to arrest his debtor and return him to court.⁵²

As the nineteenth century progressed, the nature of bail administration changed, largely as a result of the nation's changing demographics. The United States became more geographically dispersed; the population expanded across the frontier and into urban areas, fracturing community ties, and precipitating a decline in the availability of unsecured personal sureties.⁵³ Defendants were left to pay bonds themselves—or to languish in jail.⁵⁴ These circumstances gave rise to the creation of the commercial bail bond industry, which remains pervasive in the vast majority of states today

system as one in which the surety represented the total amount sought as relief, a warranty for the accused appearing in any future proceedings, and if the accused fled, the bail amount was paid as a default judgment by the third-party guarantor).

⁵⁰ Schnacke, *supra* note 49, at 24; *see also* Paul Lermack, *The Law of Recognizances in Colonial Pennsylvania*, 50 TEMP. L.Q. 475, 505 (1977) (noting that in colonial Pennsylvania, “few defendants had trouble finding sureties.”); *cf.* Duker, *supra* note 30, at 70 (describing the English concept of the “private jailer,” whereby the person providing the bail would be “interested in looking after and, if necessary, exercising the legal powers he has to prevent the accused from disappearing.”) (citing *Consol. Expl. and Fin. Co. v. Musgrave*, 1 Ch. 37 (1899))

⁵¹ Duker, *supra* note 30, at 70–71; *see also* Carbone, *supra* note 29, at 520.

⁵² *Reese v. United States*, 76 U.S. 13, 21 (1869) (“By a recognizance of bail in a criminal action the principal is, in the theory of the law, committed to the custody of the sureties as to jailers of his own choosing, not that he is subjected or can be subjected by them to constant imprisonment, but that he is so far placed in their power that they may at any time arrest him upon the recognizance and surrender him to the court, and, to the extent necessary to accomplish this, may restrain him of his liberty.”); *see also* *Taylor v. Taintor*, 83 U.S. 366, 371 (1872) (“When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner.”).

⁵³ Duker, *supra* note 30, at 95–96; Schnacke, *supra* note 49, at 24.

⁵⁴ Duker, *supra* note 30, at 96; Schnacke, *supra* note 49, at 24–25; *see also* BEELEY, *infra* note 65, at 162–63 (“With urbanization has come a form of social organization which the bail law as originally administered is unable to deal with. Anonymity has taken the place of intimacy in present-day social relationships, with the result . . . that the failure of an accused person to provide security for bail can no longer be regarded a conclusive proof of his general reliability . . . [I]t may mean that he is merely unknown and poor.”).

(though not in Illinois).⁵⁵ The Supreme Court acknowledged the changing landscape in *Leary v. United States*, stating that the “distinction between bail and suretyship is pretty nearly forgotten . . . [for] [t]he interest to produce the body of the principal in court is impersonal and wholly pecuniary.”⁵⁶

The emergent commercial industry allowed individuals to “bail out” even if lacking a personal surety or the requisite funds, but there were costs involved. A defendant seeking the services of a bail insurance company often had to pay a fee up front and provide collateral on the bond.⁵⁷ This is still the common practice in most jurisdictions, where families frequently bear the brunt of the expense.⁵⁸ The creation of the bail bond industry,

⁵⁵ Ares et al., *supra* note 40, at 69; Carbone, *supra* note 29, at 550 n.169 (noting that the change to a commercial bond system “increased the importance of consideration of the defendant’s financial means”); Duker, *supra* note 30, at 96; Schnacke, *supra* note 49, at 25–27. Currently, only Oregon, Kentucky, Wisconsin and Illinois have a legal ban on the commercial bail bond industry. See *Pretrial Release Conditions*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-conditions.aspx#/> [<http://perma.cc/LD8J-Y5A7>]; Thanithia Billings, *Private Interest, Public Sphere: Eliminating the Use of Commercial Bail Bondsmen*, 57 B.C. L. REV. 1337, 1355 (2016). Illinois outlawed the industry in 1963, and replaced it with a monetary pretrial system administered by the courts. See *Schilb v. Kuebel*, 404 U.S. 357, 359 (1971) (“Prior to 1964 the professional bail bondsman system with all its abuses was in full and odorous bloom in Illinois. . . . One of the stated purposes of the new bail provisions in the 1963 Code was to rectify this offensive situation. The purpose appears to have been accomplished.”) (citation omitted).

⁵⁶ 224 U.S. 567, 575–76 (1912).

⁵⁷ Ares et al., *supra* note 40, at 69; Schnacke, *supra* note 49, at 26.

⁵⁸ Indeed, the monetary system of pretrial release imposes inexorable costs on families and communities. See Norman L. Reimer, *Limited Resources May Present Unlimited Opportunities for Reform*, THE CHAMPION March 2011, at 9, 10 (2011); see also Wiseman, *Right to be Monitored*, *supra* note 23, at 1360–61 (detailing how families expend funds on bail that would otherwise cover basic living necessities); JUSTICE POLICY INST., FOR BETTER OR FOR PROFIT: HOW THE BAIL BONDING INDUSTRY STANDS IN THE WAY OF FAIR AND EFFECTIVE PRETRIAL JUSTICE 15 (2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/_for_better_or_for_profit_.pdf [<http://perma.cc/2NGK-VZZY>]. Courts, however, have not been sympathetic to the plight of family members who lose personal funds through the system’s operation, as evident in a line of Illinois cases. See, e.g., *People v. Chaney*, 628 N.E.2d 944 (Ill. App. Ct. 1993) (State was entitled to bond forfeiture judgment despite financial hardship to defendant’s mother, who had mortgaged her house to pay the bond) (“Donna Chaney’s hardship, in having to repay borrowed funds, does not ameliorate the risk she knowingly assumed, nor is it a legal justification to divest the State of its right to judgment mandated by the bail bond and the Code under the facts and circumstances of this case.”); *People v. Cox*, 363 N.E.2d 389 (Ill. App. Ct. 1977); *People v. Lowder*, 316 N.E.2d 150 (Ill. App. Ct. 1974); *People v. Dabbs*, 321 N.E.2d 185 (Ill. App. Ct. 1974).

nearly the only one of its kind in the world,⁵⁹ in conjunction with a new reliance on “secured” bonds requiring payment *prior* to release, helped to foster the conditions of pretrial detention that have precipitated the need for the current reforms.⁶⁰

The development of the pernicious bail bond industry is just one example of how the country’s pretrial system has morphed into the discriminatory structure it is today. While ostensibly providing a way for poor people to pay their way out of jail, the entrenched customary practice has also worked to the disadvantage of indigent defendants. From the early days of the modern bail age, the rights-creating documents pertaining to pretrial release (e.g., state constitutions and federal law) and the actual experiences of those in the justice system began to diverge. If one were to consider only the written text concerning bail in most state statutes and constitutions in the nineteenth and early twentieth centuries, it would appear that the individual right to pretrial liberty was assured and expansive.⁶¹ The facts on the ground tell a very different story.⁶² Instead, the “modern” American bail system, like the criminal justice system more generally, targeted and incarcerated the poor and minorities to their and

⁵⁹ The Philippines is the only other country in the world to allow a commercial bond industry. *See Schnacke, supra* note 49, at 26 (citing F.E. DEVINE, COMMERCIAL BAIL BONDING: A COMPARISON OF COMMON LAW ALTERNATIVES, 6–7 (1991)).

⁶⁰ *See* TIMOTHY R. SCHNACKE, CENTER FOR LEGAL AND EVIDENCE BASED PRACTICE, “MODEL” BAIL LAWS: RE-DRAWING THE LINE BETWEEN PRETRIAL RELEASE AND DETENTION 29 (Apr. 18, 2017), http://www.clebp.org/images/04-18-2017_Model_Bail_Laws_CLEPB_.pdf [<http://perma.cc/4VD9-Y7AS>] (“The change from personal to commercial sureties was designed to help get bailable defendants out of jail, but the new model also had one important unintended consequence, which was that it forever changed the essential nature of the financial condition of release.”). Professor Foote observed that the bail bond industry provided little benefit to the state, which retained responsibility for ensuring the accused’s presence in court while the bondsman recouped the fee. Accordingly, “the indigent defendant is jailed for inability to put up the fee for the purchase of something which renders no service to the state.” Caleb Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. PA. L. REV. 1125, 1337 (1965).

⁶¹ *See generally* Hegreiness, *supra* note 29.

⁶² For instance, attorney Matthew Hegreiness conducted an analysis of state constitutions spanning from 1776 to 2013, and based upon these texts, concluded that it was not until the last half century, particularly starting in the 1970s, that the right to bail in America began to erode. *See* Hegreiness, *supra* note 29, at 956. But this argument, which relies solely on statutory and constitutional interpretations of bail clauses, fails to take into account the practical administration of bail schemes, which have been dysfunctional and discriminatory from at least the mid-19th century. Professor Foote made this very observation, stating that while historically the United States’ “paper rights” tended to “cast us in a very liberal light,” in reality, the practices of bail administration were “quite repressive.” Foote, *supra* note 2, at 980.

their families' detriment.⁶³ In this way, the history of bond in America illustrates a clear example of legal realism in action.⁶⁴

One of the first empirical analyses of the injustices of the bond system was published using data from Chicago. Arthur L. Beeley conducted a seminal study of the bail and detention practices in Cook County in 1927, rendering conclusions that had wide-reaching influence on future pretrial reform efforts. Beeley found that most defendants remained in the Cook County Jail, not because they were considered any great flight risk, but because they could not afford bail:

The amount of bail in a given case is determined arbitrarily and with little or no regard to the personality, the social history and financial ability of the accused or the integrity and capacity of his sureties. Bail is too often excessive . . . The local policy of standardizing the amount of bail according to the offense charged is diametrically opposed to the spirit and purpose of the bail law.⁶⁵

⁶³ See *infra* notes 26, 190–92 and 212–13. Of course, discrimination against people of color, and especially against black people, in the pretrial system was nothing new. Even at the time the liberal Pennsylvania Frame Government was adopted, which limited capital offenses to willful murder for white men, black men charged with rape, bestiality and burglary could be executed and therefore were not entitled to bail. See Carbone, *supra* note 29, at 531 n.69.

⁶⁴ Prominent jurisprudential scholar Karl Llewellyn described legal realism as an intellectual movement, in which realists “want to check [legal] ideas, and rules, and formulas by facts, to keep them close to the facts . . . [Legal realists] suspect, with law moving slowly and the life around them moving fast, that some law may have gotten out of joint with life.” Note, *Legal Realism and the Race Question: Some Realism About Realism on Race Relations*, 108 HARV. L. REV. 1607, 1609 (1995) (alterations in original). The teachings of legal realism are particularly relevant to the issue of bail reform. The viewpoint emerged, with an emphasis on the field of criminal law, in the 1920s. It represented a backlash against the legal profession’s erstwhile fixation with appellate law and doctrine, which had little to say about most laypersons’ experiences with the nation’s justice system, including the administration of bail and pretrial release. Former Yale Law School Dean, Abraham S. Goldstein, explained it this way: “To most observers, the content of criminal law and the elements of criminal liability seemed less important, in practical terms, than the manner in which the law was administered: how police and prosecutors exercise their discretion to charge; the extent to which the bail decision may be administered in disregard of legal norms; the remarkable degree to which the guilty plea dominates the system and is itself often dominated by ‘plea bargaining’ between the parties; the attitudes, perceptions, and value systems of the decision-makers and of the persons affected by them.” Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1013 (1974).

⁶⁵ ARTHUR L. BEELEY, *THE BAIL SYSTEM IN CHICAGO* 155 (1927). Beeley’s words called forth the proclamation of another famous reformer, also on the topic of Cook County’s system of justice in the early 20th century. Clarence Darrow, addressing prisoners in the Jail in 1902, declared that courts were “not instruments of justice[.]” for “when your case gets into court it will make little differen[ce] whether you are guilty or innocent . . . First and last it’s a question of money.” Clarence Darrow, *Crime and Criminals: An Address*

The adverse effects of what Beeley deemed to be excessive bail served as the impetus for bail studies, projects, and legislative action geared toward reforming the bail system throughout the last century.⁶⁶

Beeley's seminal study focused on a random sample of 170 detainees in the Cook County Jail.⁶⁷ He divided the sample into two groups—whom he termed “dependables” and “undependables”—qualitative assessments based on whether a defendant was likely to appear in court, the current charge, the defendant's “personal characteristics” (such as intelligence and education) and his “social history” (e.g., family stability and employment).⁶⁸ Beeley followed the progression of his sample groups through the court system and determined that the bail scheme was not operating as it should. In particular, many more so-called “dependables” were being detained pretrial than necessary; further, over-detention was largely a result of defendants' poverty.⁶⁹

While many of Beeley's assumptions about the releasability of detainees have since been empirically undermined,⁷⁰ and though he relied upon certain qualitative and thus likely unreliable determinations about who should be “bailable,”⁷¹ Beeley's documented findings about the arbitrary imposition of pretrial detention and its negative effects on the poor were the same that spurred later bond projects and reform efforts.⁷² Beeley endorsed

Delivered to the Prisoners in the Chicago County Jail 20–21 (1910), <https://archive.org/details/2917177.0001.001.umich.edu> [<https://perma.cc/7N2W-3G8L>].

⁶⁶ See *infra* Section I(B)(3) for a discussion of “first wave” reform efforts.

⁶⁷ BEELEY, *supra* note 65, at 63.

⁶⁸ *Id.* at 75–76, 155.

⁶⁹ *Id.* at 159. “That there are persons committed to Jail for failure to provide sureties, who might safely and easily be allowed their freedom pending trial, is a fact which seems fully established by this inquiry [T]he number of such persons is large enough to warrant a drastic revision of the Chicago bail policy, in the interests of justice and economy.” See also *id.* at 160 (“As criminal justice is at present administered in Chicago . . . large numbers of accused, but obviously dependable persons are needlessly committed to Jail[.]” Beeley's study said little about the racial disparities in pretrial detention. That is also possibly a function of the demographics of the Cook County Jail at that time. Beeley noted that the “unsentenced Jail population is made up largely of young men, most of whom are white, native born, and single.” *Id.* at 157. Of course, the Cook County Jail population looks very different today. See *Salerno*, 481 U.S. at 747.

⁷⁰ Including, for instance, his belief that those charged with minor crimes were more likely to appear in court, see BEELEY, *supra* note 65, at 78, an assumption that has since been disproven. See Schnacke, *supra* note 60, at 62, 68–72.

⁷¹ These were based on his staff's personal assessments of a detainee's intelligence or personal character. See BEELEY, *supra* note 65, at 77.

⁷² See John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 3, n.7, n.9, and 13 (1985).

a greater reliance on release on personal recognizance⁷³ (“ROR”) and summonses in lieu of arrests,⁷⁴ both of which were virtually nonexistent in practice at the time of his study but that continue to be part of the broader discourse surrounding pretrial release today.⁷⁵

2. *Judicial Attitudes Toward “Excessiveness” in Bond Setting and the Impact on the Incarceration of the Poor*

The conditions Beeley described were made worse by a line of judicial decisions addressing the inscrutable question of what constituted “excessive bond.” The inscrutable answer: bail that a defendant could not afford was not excessive, as long as the amount itself was “reasonable.”⁷⁶ According to such precedent, it was not deemed to run afoul of either constitutional or state law if an individual remained locked up solely because of his indigence. In 1820, Chief Judge Spencer of New York scoffed at the suggestion that wealth-based incarceration was unfairly discriminatory:

It was urged that the adoption of such a principle would, in its operation, induce to the bailing of such persons as were either affluent themselves, or had such influential friends; whilst it would leave those who were poor and friendless in prison. Such may be the consequence, but it by no means proves the impropriety of the procedure. The rule is adapted to all who can comply with its terms; and it is the misfortune of those who cannot give the necessary [sic] security.⁷⁷

Fifteen years later, in *United States v. Lawrence*, a federal D.C. court weighed in on the proper bail for a defendant accused of attempting to assassinate President Andrew Jackson.⁷⁸ The trial court judge initially set a \$1,000 bond on the grounds that “the constitution forbade [the magistrate] to require excessive bail; and that to require larger bail than the prisoner could give would be to require excessive bail, and to deny bail in a case clearly bailable by law.”⁷⁹ Yet, after the government objected, the court raised the bond amount to \$1,500 on the grounds that “the discretion of the magistrate in taking bail in a criminal case, is to be guided by the

⁷³ Meaning, pretrial release without monetary conditions based on a promise to return to court. See Schnacke, *supra* note 49, at 23–24.

⁷⁴ BEELEY, *supra* note 65, at 166–67.

⁷⁵ See, e.g., CRIM. J. POL’Y PROGRAM, HARV. L., MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM (Oct. 2016), <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf> [<http://perma.cc/ENY7-XJ94>] [hereinafter, HARVARD LAW SCHOOL PRIMER].

⁷⁶ Schnacke, *supra* note 49, at 27. Schnacke refers to these decisions as the line of “unfortunate cases.”

⁷⁷ Carbone, *supra* note 29, at 549 (citing *People v. Goodwin*, 1 Wheeler’s Crim. 443, 448 (N.Y. Sup. Ct. 1820)).

⁷⁸ 26 F. Cas. 887 (C.C. D.C. 1835); see also Carbone, *supra* note 29, at 549–50.

⁷⁹ *Lawrence*, 26 F. Cas. at 887.

compound consideration of the ability of the prisoner to give bail, and the atrocity of the offence.”⁸⁰ In raising the bond amount, the Court held:

That as the prisoner had some reputable friends who might be disposed to bail him, he would require bail in the sum of \$1,500. This sum, if the ability of the prisoner only were to be considered is, probably, too large; but if the atrocity of the offence alone were considered, might seem too small; but taking both into consideration, and that the punishment can only be fine and imprisonment, it seemed to him to be as high as he ought to require.⁸¹

The reasoning in *Lawrence* is typical of bail decisions over the nineteenth and twentieth centuries. The holdings pay some lip-service to the accused’s interest in pretrial liberty and the notion that bail not be “excessive,” yet simultaneously approve the detention of indigent, criminally-accused persons who lack “reputable friends.”⁸² These decisions appear blind to the inherent arbitrariness of the wealth-based system that they endorse.⁸³

Even when courts did take into account the ability of the accused to pay the assigned bond, indigence was not considered a barrier to the ordering of financial conditions of release. Rather, “pecuniary circumstance” was only one designated factor of many to consider in the administration of bail.⁸⁴ (Indeed, certain court decisions proffered the

⁸⁰ *Id.*

⁸¹ *Id.* at 887–89. The defendant in *Lawrence* could not pay the bond amount in the case, however, the issue of bond became irrelevant when the defendant was committed on grounds of insanity. See Foote, *supra* note 2, at 992.

⁸² See, e.g., *United States v. Rumrich*, 180 F.2d 575, 576 (2d Cir. 1950) (per curiam) (“A person arrested upon a criminal charge, who cannot give bail, has no recourse but to move for trial. If upon the return of such a motion the court should deny him the speedy trial to which the Constitution entitles him, it may be that he should be released on habeas corpus—we need not say.”); *People ex. rel. Fraser v. Britt*, 43 N.E.2d 836 (N.Y. Ct. App. 1942) (affirming denial of application for bail in abortion case in which defendant claimed excessive bail). The reference to “reputable friends” is taken from *Lawrence*, 26 F. Cas. 887; *Delaney v. Shobe*, 346 P.2d 126 (Or. 1959) (per curiam) (in case alleging excessive bail of \$15,000 and requesting reduction to no more than \$3,000, court denied petition for “the mere fact of inability to give bail in the amount set is not sufficient reason for holding the amount excessive.”) (citing *Ex Parte Paul*, 252 P. 853, 854 (Crim. Ct. App. Okla. 1927)).

⁸³ Earlier in the 19th century, in contrast, some courts did acknowledge the lack of common sense in ascertaining bailability by reference to the size of a defendant’s pocket book. As the Illinois Supreme Court stated in 1822: “[I]t does seem to us to be a perversion of plain language to say that we must look to the fact of the party’s ability to procure bail, to ascertain whether by law he is bailable.” *Foley v. People*, 1 Ill. 57, 58 (1822).

⁸⁴ See, e.g., *Ex parte Duncan*, 54 Cal. 75, 77 (Cal. 1879) (recognizing the common law “absolute right to be admitted to bail” and the prohibition against excessive bail but finding that while “the extent of the pecuniary ability of a prisoner to furnish bail is a circumstance among other circumstances to be considered in fixing the amount in which it is to be required, but it is not in itself controlling”); *Gregory v. State ex rel. Grudgel*, 94 Ind. 384,

possibility that the poor might be unfairly *advantaged* by the assignment of a reasonable or recognizance bond).⁸⁵ The seminal case of *Sammons v. Snow*, decided by the Illinois Supreme Court in 1930, exemplified this dissembled approach to cash bond.⁸⁶ The Court held that it is “not a valid objection to the amount of bail required that it is greater than the prisoner is able to give, if the bail fixed is not of itself unreasonable in amount, to secure his attendance to answer for the crime with which he is charged.”⁸⁷

The United States Supreme Court, too, was not immune from issuing decisions that decried detention-inducing bond amounts while allowing the practice to continue.⁸⁸ In particular, the Court in *Stack v. Boyle* articulated high ideals of pretrial liberty but provided little in the way of substantive rights.⁸⁹ *Stack* concerned an Eighth Amendment challenge to the uniform setting of \$50,000 bond by petitioners accused of conspiring to violate the Smith Act.⁹⁰ The majority noted that there had been no factual showing to justify the high bail amount set in the case, a sum “much higher than

388 (Ind. 1884) (“That bail is reasonable which, in view of the nature of the offence, the penalty which the law attaches to it, and the probabilities that guilt will be established on the trial, seems no more than sufficient to secure the party’s attendance. In determining this, some regard should be had to the prisoner’s pecuniary circumstances; that which is reasonable bail to a man of wealth being equivalent to a denial of right if exacted of a poor man charged with a like offence.”) (citing COOLEY CONST. LIM. (5th ed.) at 378); *State ex rel. Milliet v. Aucoin*, 18 So. 709 (La. 1895) (“The object of giving bond for one’s appearance to answer an accusation is for the purpose of securing his attendance, and it should be in such an amount as to exact the utmost vigilance on the part of the sureties for the appearance, to prevent a forfeiture of the bonds. The amount of the bond should bear a proportion to the gravity of the offense, and to the ability of the accused to give it.”); *Ex parte Malley*, 256 P. 512, 514 (Nev. 1927) (overturned on other grounds) (“The ability of one charged with a crime to give the bail fixed is an element to be considered in an application of this character, but we have the bare statement of counsel to support the contention; there is no evidence before us to support it, and, even if there was, we would not deem it determinative of the matter, for the real purpose of bail is to assure the presence of one charged at all times when demanded.”). But for a strikingly liberal application of the bail law in the early 20th century, see *Ex parte Bice*, 296 S.W. 541 (Tex. Crim. App. 1927), in which the court lowered the assigned bail amount, holding that the “ability to make bail is to be regarded, and proof may be taken upon this point[,]” for “[t]he power to require bail is not to be so used as to make it an instrument of oppression.”).

⁸⁵ See, e.g., *In re Scott*, 38 Neb. 502, 56 N.W. 1009 (1883) (“We do not question that the pecuniary circumstances of a prisoner should be considered, in determining the amount of bail. Yet that should not, in itself, control. If it did, a prisoner who is without means or friends would be entitled to be discharged on his own recognizance.”).

⁸⁶ *People ex rel. Sammons v. Snow*, 173 N.E. 8 (Ill. 1930).

⁸⁷ *Id.* at 9.

⁸⁸ See *Stack v. Boyle*, 342 U.S. 1 (1951).

⁸⁹ *Id.*

⁹⁰ *Id.* at 3.

usually imposed for offenses with like penalties.”⁹¹ The Court dismissed the Government’s argument concerning the guilt of the petitioners, stating that to “infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act . . . [which] would inject into our own system of government the very principles of totalitarianism which Congress was seeking to guard against”⁹² Consequently, the Court remanded the case to the district court for factual findings in the setting of reasonable bail.⁹³ Yet nowhere does the Court state that inability to pay would or should preclude a determination that the bail amount was reasonable. Indeed, in his concurrence, Justice Jackson, who stated that a high bail amount assigned to ensure that a defendant remained in jail was “contrary to the whole policy and philosophy of bail,” went on to conclude that “[t]his is not to say that every defendant is entitled to such bail as he can provide, but he is entitled to an opportunity to make it in a reasonable amount.”⁹⁴

The pronouncements in *Stack*, delivered in dicta, never created a precedential right to affordable bail.⁹⁵ The subsequent decision in *Carlson v. Landon*, which came down soon after, eradicated any hope of a judicially-cognizable right to bail.⁹⁶ An optimistic examination of *Stack* emphasizes its aspirational language, which extols the notion of a defendant’s presumed innocence and the negative ramifications of pretrial detention.⁹⁷ A cynical view of the case suggests that the Court’s pretense to constitutional principles obscured its de facto sanctioning of the pretrial incarceration of the poor, by affirming the “reasonableness” test in bail-setting. Undeniably, the practice of locking up those too poor to pay continued in jurisdictions throughout the country.

⁹¹ *Id.* at 5.

⁹² *Id.* at 6.

⁹³ *Id.* at 7.

⁹⁴ *Id.* at 10.

⁹⁵ See Shari Seidman Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 874 (2010) (“There has never been an occasion for any court to seriously address the disconnect between the lofty ideal that the presumptively innocent criminally accused person should not be unnecessarily incarcerated before trial, on the one hand, and the highly discriminatory effects upon the poor of the institution of bail in practice, on the other.”).

⁹⁶ *Carlson v. Landon*, 342 U.S. at 545–46 (1952).

⁹⁷ *Stack*, 342 U.S. at 4 (“Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”).

3. *The First Wave: The Proliferation of Bail Projects and the Bail Reform Act of 1966*

The 1960s ushered in the first national bail reform movement and, with it, several projects designed to reduce the number of people being held in pretrial detention. These “bail projects” arose in response to a greater public recognition of the nation’s ingrained system of wealth-based pretrial incarceration.

In 1954, Caleb Foote published a study about the administration of bail in non-capital cases in Philadelphia.⁹⁸ His findings echoed those of Beeley decades before. Fifteen percent of the sample Foote analyzed was unable to raise sufficient bail to obtain release, even when set at low amounts.⁹⁹ Foote concluded, “the amount of bail will determine whether or not an offender will regain his freedom after arrest.”¹⁰⁰ Relatedly, he found that few judges sought to ascertain the defendant’s financial condition in bail proceedings, and that many magistrates used conditions of release in order to punish rather than to assure appearance, which was the only valid purpose of bail-setting at that time.¹⁰¹ Moreover, in setting bond amounts, judges relied heavily on the nature of the offense instead of individualized risk factors.¹⁰² Professor Foote determined that “[b]ecause custom or intuition appears to be the basis of bail determinations, it is difficult to ascertain what standards are being applied.”¹⁰³ This observation would prove prescient.

The seemingly intractable reliance on custom and intuition by the judiciary in the assignment of money bond remains one of the foremost

⁹⁸ Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031 (1954).

⁹⁹ *Id.* at 1033. When the assigned bond amount was higher than \$1,000, pretrial release became the “exception” rather than the norm; at the \$1,500 level, a defendant was 4.5 times more likely to remain in detention pretrial than at the \$400 level.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1036, 1038. Foote provided numerous examples from his observations of Philadelphia bond court of judges setting high bail after expressing disapproval as to the nature of the defendant’s charges, and even cited one case where the presiding magistrate judge explicitly stated that he felt “the man should be punished” in setting a high bail. *Id.* at 1038–39. See also Ares et al., *supra* note 40, at 71 (noting in 1963 that “[h]igh bail is sometimes set to ‘punish’ the defendant or to break crime waves or to keep the defendant off the streets until trial.”).

¹⁰² Foote, *supra* note 98, at 1070. Foote decried the fact that judges were not conducting the sort of individualized analysis he believed was required under *Stack v. Boyle*, reading into that decision a constitutional mandate of individualization in bond administration. *Id.* Whether that is a fair reading of *Stack*, which is heavy on dicta, remedying the lack of individualization became a major goal of mid-20th century bail reform efforts.

¹⁰³ *Id.* at 1038.

roadblocks to reform. In the 1960s, advocates sought to combat such trends and the ensuing over-detention by emphasizing individual bail determinations and pretrial “fact-finding.”¹⁰⁴ The first of these reform efforts was the Manhattan Bail Project, operated by the newly-formed Vera Foundation.¹⁰⁵ Beginning in 1961, the Project attempted to verify poor individuals’ community ties and to provide this information to judicial officers overseeing bail, to promote the use of personal recognizance release.¹⁰⁶ The three-year experiment, during which Vera employees interviewed defendants and collected information about their families, prior record, employment, school, and residence, led to a significant increase in the number of defendants who were granted recognizance release.¹⁰⁷ Further, of the 3,505 defendants who were released without financial conditions following Vera’s recommendations, only 1.6% of the total (56 individuals) failed to appear at their court proceedings.¹⁰⁸ These promising results led to the spread of other bail projects nationwide.¹⁰⁹ They also motivated Vera to perfect a scale designed to measure a defendant’s likelihood to appear—an early attempt at using “scientific methods” to make pretrial predictions.¹¹⁰

Bail reform gained momentum throughout the decade. The National Conference on Bail and Criminal Justice, held in the spring of 1964, focused on alternatives to money bail with the purpose of eliminating the intentional detention of the poor.¹¹¹ That summer, Attorney General Robert F. Kennedy gave remarks before the Senate Judiciary Committee on the discrimination inherent in bail administration, in promotion of new federal legislation to solve “an increasingly disturbing problem[]”:

That problem, simply stated is: the rich man and the poor man do not receive equal justice in our courts. And in no area is this more evident than in the matter of bail.

¹⁰⁴ JOHN S. GOLDKAMP, *TWO CLASSES OF ACCUSED: A STUDY OF BAIL AND DETENTION IN AMERICAN JUSTICE* 88 (1979).

¹⁰⁵ For an overview of Vera’s beginnings, see Lee Friedman, *The Evolution of a Bail Reform*, *POL’Y SCI.* 7, 285–86 (1976).

¹⁰⁶ *Id.* at 285, 287.

¹⁰⁷ *Id.* at 288–89.

¹⁰⁸ *Id.* at 290.

¹⁰⁹ For a description of these projects, see Friedman, *supra* note 105, at 301–08.

¹¹⁰ See Donna Makowiecki, *U.S. Pretrial Services: A Place in History*, 76 *FED. PROBATION* 18, 19 (2015).

¹¹¹ See *NCJRS Report*, *supra* note 6. The interim report noted that bond projects were “proceeding on the philosophy that every defendant, rich or poor, who has sufficient community roots should be entitled to release without bail.” *Id.* at xxvi. It went on to state that this point was endorsed by both the Executive Board and in a report of the Senate Judiciary Subcommittees.

Bail has only one purpose—to insure that a person who is accused of a crime will appear in court for his trial. We presume a person to be innocent until he is proven guilty, and thus the purpose of bail is not punishment. It is not harassment. It is not to keep people in jail. It is simply to guarantee appearance in court.¹¹²

The culmination of this reform movement was the passage of the Bail Reform Act of 1966 (“Reform Act”), the first major modification of the bail system since the Judiciary Act.¹¹³ It provided that “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.”¹¹⁴ Under the Act, defendants were presumptively entitled to release on either personal recognizance or an unsecured appearance bond; however, the Act did maintain alternatives to ROR, including a provision for the deposit of money bond where there was a flight risk.¹¹⁵ The legislation also set forth specific factors for setting bail, all of which were designed only to ensure the appearance of the defendant at trial.¹¹⁶ At the Act’s signing ceremony, President Lyndon B. Johnson remarked upon the revolutionary nature of the legislation, which he promised would “begin to insure that defendants are considered as individuals—and not as dollar signs.”¹¹⁷

There is no question that the Reform Act represented a progressive step forward. The rates of release on personal recognizance increased in cases throughout the 1970s.¹¹⁸ The new regime disfavored wealth-based

¹¹² Testimony by Attorney General Robert F. Kennedy, *supra* note 4.

¹¹³ Floralynn Einesman, *How Long is Too Long? When Pretrial Detention Violates Due Process*, 60 TENN. L. REV. 1, 3 (1992).

¹¹⁴ See Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (1966).

¹¹⁵ Bail Reform Act of 1966, *supra* note 114; see also Einesman, *supra* note 113, at 4–5.

¹¹⁶ Einesman, *supra* note 113, at 5.

¹¹⁷ Lyndon B. Johnson, Remarks at the Signing of the Bail Reform Act of 1966 (June 22, 1966), <http://www.presidency.ucsb.edu/ws/?pid=27666#axzz2htZwrKnK> [<http://perma.cc/KWP7-D9CL>] (“So today we join to recognize a major development in our entire system of criminal justice—the reform of the bail system. This system has endured—archaic, unjust, and virtually unexamined—ever since the Judiciary Act of 1789. Because of the bail system, the scales of justice have been weighted for almost two centuries not with fact, nor law, nor mercy. They have been weighted with money. But now, because of the Bail Reform Act of 1966, which an understanding and just Congress has enacted and which I will shortly sign, we can begin to insure that defendants are considered as individuals—and not as dollar signs.”)

¹¹⁸ See Candace McCoy, *Caleb Was Right: Pretrial Decisions Determine Mostly Everything*, 12 BERKELEY J. CRIM L. 135, 139–40 (2007) (“Like all highly-touted reforms, ROR programs achieved much of what was intended (a significantly higher proportion of people who used to be held in jail pretrial were instead released on ROR or posted ten percent bonds funded by the court and not bondsmen) but fell far short of one of their major

distinctions in pretrial administration, and emphasized the importance of individualized decision-making in bail setting.¹¹⁹ These changes gave rise to the first pretrial services agencies, beginning in Washington, D.C., which collected personal information from defendants to make pretrial release recommendations to the court.¹²⁰ Such developments were linked to the experimentation and success of the bail reform projects at the local level.¹²¹

Nonetheless, as demonstrated earlier in the nineteenth century, when pretrial detention trends bore little relation to the guarantees of liberty in progressive state constitutions,¹²² aspirational language alone could not change practices on the ground. The risk that judicial officers and other court actors would fall back on their habitual way of doing things was particularly acute given that the Reform Act neither prohibited the use of detention where a defendant lacked adequate funds (both full cash and 10% deposition bonds were allowed where necessary to ensure a defendant's appearance in court), nor prevented judges from considering traditional factors, like seriousness of the offense, in the release decision.¹²³ Also

goals, which was to ameliorate the worst effects of poverty as criminal defendants prepared to contest the accusations against them.”).

¹¹⁹ See, e.g., *Wood v. United States*, 391 F.2d 984, 984 (D.C. Cir. 1968) (“We do not think that under the Bail Reform Act a determination that money bail is required is appropriate unless the court at least ascertains the conduct of defendant when previously released on conditions, and whether the defendant previously abided by conditions imposed on him in prior proceedings.”); see also GOLDKAMP, *supra* note 104, at 68 (describing the prevalence of “community tie” indicators in state bail schemes after the Bail Reform Act of 1966).

¹²⁰ Timothy R. Schnacke et al., *The History of Bail and Pretrial Release*, 2010 PRETRIAL JUST. INSTIT. 13 (describing the beginning of the D.C. Bail Agency, the first pretrial services agency). https://b.3cdn.net/crjustice/2b990da76de40361b6_rzm6ii4zp.pdf [<https://perma.cc/8GEN-Z5PB>].

¹²¹ See Friedman, *supra* note 105, at 309; see also NCJRS Report, *supra* note 6, at xiv (“The Conference presented for analysis and discussion specific and workable alternatives to monetary bail based on the experience of the Manhattan Bail Project and some others which followed in its wake.”).

¹²² For instance, Illinois’ constitution, as it existed at the time of Beeley’s study and like many state constitutions in that era, guaranteed, “All persons shall be bailable by sufficient sureties, except for capital offenses, where the proof is evident or the presumption great. . . .” See Ill. Const. of 1870, art. II, § 7; Leonard Cavise, *The New Bail Statute in Illinois: Preventive Detention by Any Other Name*. . . 10 S. ILL. U. L. J. 631, 644 (1985) (noting that Article I, section 9 of the Illinois Constitutions, as it existed in 1985, was “fundamentally unchanged from the analogous provisions” in the Illinois Constitutions of 1818, 1848, and 1870); Hegreness, *supra* note 29, at 978. Clearly, such constitutional assurances did little to ensure the release of many of Cook County’s pretrial detainees.

¹²³ Carbone, *supra* note 29, at 553, 558; see also GOLDKAMP, *supra* note 104, at 24 (“While a presumption of release is implicit in the text of the Act, neither a right to pretrial release nor a right bail is clearly spelled out. Thus, detention may result even in noncapital

significant, the Reform Act applied only to the federal jurisdiction and to the District of Columbia—a small sliver of the nation’s pretrial detainees.¹²⁴ States remained generally free to design and implement their own system of bail administration.

Consequently, despite the fact that the Reform Act was a release-oriented statute, financial conditions remained in widespread use to ensure detention.¹²⁵ In the 1969 case *United States v. Leathers*, the D.C. Court of Appeals noted a dramatic increase in bail appeals by persons held on unattainable financial convictions, and suggested that the “phenomenon may or may not reflect a conscious recoil from the letter and spirit of the Bail Reform Act of 1966 on the part of those judges entrusted with its day-to-day administration.”¹²⁶ That same year, a federal court in New York highlighted the continued use of monetary bonds to obtain preventive detention.¹²⁷ Reviewing bail commissioners’ assignment of financial conditions ranging between \$100,000 and \$300,000 for defendants accused of setting off explosives, the court held: “[I]t is apparent that in this instance, as in many others familiar to all of us, the statement of the

cases, especially where the traditional money-bail option is selected.”) (emphasis omitted). Goldkamp also noted that the Bail Reform Act, with its inclusion of multiple criteria for consideration in bail decisions, provided no guidance as to which criteria were more important than others, especially in ensuring the appearance of the defendant. *Id.* at 25, 69. This issue continues to create problems in bail decision-making in many states today, where criteria for bond decisions are provided no particular weight or order. *See, e.g.*, 725 Ill. Comp. Stat. 5/110-5 (West 2018) (listing 37 factors to be considered in determining the amount of bail and conditions of release under Illinois law); *see also* ABA Standards for Criminal Justice: Pretrial Release 104 (2007), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf [<http://perma.cc/LHT6-LZYN>] (noting that Standard 10-5.1(b) which governs release on defendant’s own recognizance, “does not specify the weight to be accorded [release criteria], either individually or together, and contemplates that they be considered in the overall context of other available information, thereby leaving considerable discretion to the judicial officer).

¹²⁴ *See* Danielle Kaeble et al., *Correctional Populations in the United States, 2014*, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST. (Dec. 2015), <https://www.bjs.gov/content/pub/pdf/cpus14.pdf> [<http://perma.cc/RDB8-GKWD>] (comparing state and federal correctional populations).

¹²⁵ *See* Friedman, *supra* note 105, at 282 (noting that while “restricting freedom to protect the community has generally not been recognized as legitimate” in bond decisions, in practice “through the use of monetary bail requirements set beyond the defendant’s means, pretrial detention is imposed far more frequently than necessary to assure appearance”). *See also* SCHNACKE, *supra* note 60, at 56.

¹²⁶ 412 F.2d 169, 170 (D.C. Cir. 1969) (citation omitted).

¹²⁷ *United States v. Melville*, 306 F. Supp. 124, 125–26 (S.D.N.Y. 1969).

astronomical numbers is not meant to be literally significant. It is mildly cynical but wholly undeceptive fiction, meaning to everyone ‘no bail.’”¹²⁸

Monetary conditions were used not only to ensure appearance at trial, but for less permissible purposes under then-existing bail law. The protection of public safety, which was neither a historical function of bail nor a predominant feature of the 1966 Act,¹²⁹ was implicitly considered in state bail decisions throughout the 1960s and 1970s.¹³⁰ In a political pronouncement, the *Leathers* court acknowledged the ongoing use of such implicit detention practices:

We can appreciate the disquiet a trial judge may feel on occasion in releasing a person charged with a dangerous crime because the Bail Act requires it, a feeling we have at time[s] shared. We can also understand the pressures placed on a judge who sincerely believes that pretrial release in a particular case is incompatible with the public safety¹³¹

Existing bail guidelines remained vague and voluntary, so that judges were allowed to continue exercising significant discretion to achieve subjective outcomes.¹³² In describing local pretrial justice in 1985, criminologist John Goldkamp synthesized the problem as one in which “judges have conducted bail in a low-visibility, highly improvisational fashion with little meaningful guidance concerning how to transact bail to realize optimal results.”¹³³

Goldkamp himself conducted an empirical study of Philadelphia’s bail system in 1975, twenty-one years after Professor Foote’s study, and found that “in spite of the elaborate efforts of a model bail reform program, bail judges continue to ignore community-ties information out of preference for the traditional decision-making criteria: criminal charge, prior criminal record, and indications that defendants have warrants or detainees

¹²⁸ *Id.* at 127.

¹²⁹ Under the Act, public safety was not a proper consideration in non-capital cases. *See Leathers*, 412 F.2d at 171 (“The structure of the Act and its legislative history make it clear that in noncapital cases pretrial detention cannot be premised upon an assessment of danger to the public should the accused be released.”).

¹³⁰ *See* Goldkamp, *supra* note 72, at 10, 16–17, 17 n.61.

¹³¹ 412 F.2d at 170. Until the passage of the Bail Reform Act of 1984, discussed *infra*, public safety was not a cognizable basis on which to issue a release decision.

¹³² *See* Goldkamp, *supra* note 72, at 8 (Even following the passage of the 1966 Act, many states provided little guidance in the bail decision-making process “beyond the gross criteria defining a right to bail.” Consequently, in various jurisdictions, bail was left to the “sound discretion” of the judiciary or was determined by reference to a schedule listing the bail amounts based on criminal charge.).

¹³³ Goldkamp, *supra* note 72, at 55.

outstanding.”¹³⁴ Goldkamp concluded: “Apparently, judicial decision-making practices are not readily reformed by the mere addition of alternative kinds of data to the process.”¹³⁵ His conclusion mirrored Foote’s own about the intractability of judicial decision-making in bond court. The resulting mid-to-late century system was, consequently, one that proceeded along disparate paths. Once again, principles of bail administration provided by state and federal law in this period suggest an expansive right to pretrial freedom; in reality, judges were employing unspoken rationales to ensure the detention of the poor.¹³⁶

The first wave of bail reform presaged other challenges in modern day bail advocacy, including in those jurisdictions that *did* adhere to the reforms. Individualization in the release decision was designed to take into account such personal factors as a defendant’s neighborhood of residence, housing, education, and employment.¹³⁷ But current research shows that consideration of such factors tends to replicate existing societal inequities, allowing for the continued over-detention of both the indigent and racial minorities.¹³⁸ Relatedly, 1960s bail reformers limited the scope of their projects to defendants considered more “attractive” to judges—those accused of nonviolent and minor crimes. The Manhattan Bail Project, for instance, in a nod to political pressure, did not initially include in its sample group anyone accused of a narcotics offense, of a sex offense, or of assaulting a police officer.¹³⁹ Thus, societal groups who were disparately represented in certain arrest categories, particularly Hispanic and black individuals,¹⁴⁰ presumably did not receive the benefit of the ROR programs.

¹³⁴ GOLDKAMP, *supra* note 104, at 224.

¹³⁵ *Id.*

¹³⁶ *See* Goldkamp, *supra* note 72, at 10.

¹³⁷ *See* Foote, *supra* note 2, at 961 (describing the Manhattan Bail Project’s focus on residence patterns, employment and family ties as evidence of reliability in pretrial release decisions).

¹³⁸ *See* Lisa M. Goff, *Pricing Justice: The Wasteful Enterprise of America’s Bail System*, 82 BROOK. L. REV. 881, 887 (2017); Mayson, *supra* note 1, at 496 n.19. Caleb Foote also noted this problem in less empirical detail and without explicating the racial implications: “Even in a jurisdiction with an extensive project a substantial proportion of urban indigent defendants would not meet the standards of reliability which have so far been applied and would not obtain a recommendation of release.” Foote, *supra* note 2, at 962.

¹³⁹ Foote, *supra* note 2, at 962.

¹⁴⁰ The historical targeting by law enforcement of black communities and other communities of color has been well documented. *See, e.g.*, MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); PAUL BUTLER, *LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE* 43–45 (2009) (providing a brief history of the link between race and drug criminalization); DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 41–55 (1999) (describing the

Moreover, even with the introduction of fact-finding in various bond schemes, the early predictive release tools were (like Beeley's) still based on misplaced assumptions, including that the seriousness of a person's offense was correlated with a defendant's likelihood of fleeing.¹⁴¹ In fact, the opposite is true. Those charged with the least serious offenses are the most likely to abscond, an empirical fact recognized in the 1970s.¹⁴² Due to such misbeliefs, the detention net remained wider than necessary.

In any event, the progress that was attained because of the passage of the 1966 Bail Reform Act and related efforts was scaled back as the country entered an era defined by tough-on-crime rhetoric and related legislative action. The second wave of bail reform, encapsulated by the Bail Reform Act of 1984, implemented a new system of preventive pretrial detention in the country.

discriminatory use of stops against black and Hispanic people under “quality-of-life” policing models); Law enforcement targeted black neighborhoods, particularly by the use of drug raids, beginning in the 1960s. *See* Mary Beth Lipp, *A New Perspective on the War on Drugs: Comparing the Consequences of Sentencing Policies in the United States and England*, 37 *LOY. L.A. L. REV.* 979, 1007 n. 116 (2004). This trend continued into the 1970s, 80s and 90s, as racially discriminatory policing, combined with strict drug prosecutions and the proliferation of “draconian” drug sentencing laws, catapulted the number of Black individuals imprisoned for drug crime; William J. Stuntz, *Unequal Justice*, 121 *HARV. L. REV.* 1969 2022–23 (2008). *See also id.* at 2024 (noting that the “use of drug crime as a (partial) proxy for violence amounted to a sentencing enhancement for black drug crime.”); *see also* Michael Tonry, *Race and the War on Drugs*, 1994 *U. CHI. LEGAL F.* 25, 52 (1994) (describing the disparate impact of the war on drugs on black people).

¹⁴¹ *See* Friedman, *supra* note 105, at 291. Even after the Vera Foundation became less cautious in the administration of the Manhattan Bail Project, it still excluded from consideration anyone charged with homicide or certain narcotics offenses. There were also other concerns with the bond project's reliance on “residential/family stability measures” that may discriminate against certain defendants, without evidence that these measures actually increased appearance rates. *See also* GOLDKAMP, *supra* note 104, at 91.

¹⁴² *See* GOLDKAMP, *supra* note 104, at 92 (citing, e.g., William M. Landes, *Legality and Reality: Some Evidence on Criminal Procedure*, 3 *J. LEGAL STUD.* 287, 324 (1974) (“[T]he main determinants of the defendant's bond—the severity of the charge (ASC), prior felonies (FEL), and parole or probation status (PAR)—are not significant predictors of the probability of disappearing. In fact, the more severe the charge, the greater the number of prior felonies and the more likely that the defendant is on parole, the lower the estimated probability of disappearance, other things constant.”)). *See also* Arthur R. Angel et al., *Preventive Detention: An Empirical Analysis*, 6 *HARV. C.R.-C.L. L. REV.* 289, 323–24 (1971); J. LOCKE ET AL., *COMPILATION AND USE OF CRIMINAL COURT DATA IN RELATION TO PRETRIAL RELEASE OF DEFENDANTS* 8–10, 167–70 (National Bureau of Standards Technical Note 535, 1970);

4. *The Second Wave of Bail Reform and the Matter of Public Safety*

Changes to the bail bond system in the second part of the twentieth century stemmed largely from prevailing beliefs about the commission of violent crime by pretrial defendants.¹⁴³ Reforms in this era were a reversal in letter and spirit from those of the 1960s; they were aimed at the protection of society rather than the release of pretrial detainees.¹⁴⁴ By 1984, 34 states and the District of Columbia had laws on their books allowing consideration of a defendant's "dangerousness" in the bond decision.¹⁴⁵

Historically, the pretrial release decision had been linked solely to the likelihood of appearance at court.¹⁴⁶ The passage of the District of Columbia Court Reform and Criminal Procedure Act of 1970 was the first sharp departure from this limitation. Under the D.C. Court Reform Act, judges were allowed to institute widespread preventive detention for "the safety of any person or the community."¹⁴⁷ Although financial provisions were not to be used to ensure public safety, both risk of flight and public safety concerns could justify pretrial incarceration without the imposition of money bond.¹⁴⁸ In particular, defendants charged with certain "dangerous" crimes, crimes of violence, or threatening or intimidating witnesses or jurors could be detained without bond,¹⁴⁹ as long as judges employed specific due process protections in the decision-making process.¹⁵⁰

¹⁴³ Goldkamp, *supra* note 72, at 1–2; *see also Salerno*, 481 U.S. at 742 (citing S. REP. NO. 98-225, at 3 (1983)). Current research undermines the argument that pretrial detention increases public safety. Empirical studies show that pretrial detention, and not release, is actually associated with higher rates of recidivism. *See supra* note 16.

¹⁴⁴ Goldkamp, *Danger and Detention*, *supra* note 72, at 1–2. The Bail Reform Act of 1966 had allowed only the pretrial detention of capital defendants for supposed dangerousness. *See* John Logan Koepke & David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, WASH. L. REV. (forthcoming) (manuscript at 14 n. 51), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3041622 [<https://perma.cc/3BKL-7YW8>] (describing emerging assessment of danger in the bail decision-making process by the federal judiciary). As a result, the 1970s and 1980s saw a much greater widening of the detention net.

¹⁴⁵ Koepke & Robinson, *supra* note 144, at 13.

¹⁴⁶ BAUGHMAN, *supra* note 14, at 19 ("Bail historically served the sole purpose of returning the defendant to court for trial, not preventing her from committing additional crimes.").

¹⁴⁷ D.C. ACT, *supra* note 9; *see also* SCHNACKE, *supra* note 60, at 62, 68–72.

¹⁴⁸ D.C. ACT, *supra* note 9.

¹⁴⁹ SCHNACKE, *supra* note 60, at 72.

¹⁵⁰ *Id.* at 73–74 (citing D.C. CODE ANN. §§ 23-1322(b)). Due process protections included hearings, time limits on detention orders, and a guarantee of a speedy trial. *Id.* at 72.

However, judges could still use money bond to “unintentionally detain” individuals they did not want to release, without signing an explicit detention order or affording the required due process protections.¹⁵¹

In *United States v. Edwards*, the D.C. Court of Appeals upheld the constitutionality of the D.C. Court Reform Act, acknowledging that the purpose of pretrial detention under the legislation was “to protect the safety of the community until it can be determined whether society may properly punish the defendant.”¹⁵² After conducting a historical analysis of bond, the Court rejected the notion that there existed some fundamental right to bail (and in doing so rejected Professor Foote’s arguments concerning that purported right).¹⁵³ Instead, it found pretrial detention to be “regulatory rather than penal in nature[,]” so that those subject to incarceration were not entitled to the full panoply of constitutional rights afforded in the criminal process.¹⁵⁴

In 1984, Congress codified the right to detain for both risk of flight and public safety reasons. The Bail Reform Act of 1984, passed as part of the Comprehensive Crime Control Act, allowed judges four options at the bond-setting stage: (1) release the defendant on a personal recognizance or unsecured bond; (2) release the defendant on conditions; (3) temporarily detain a defendant in certain circumstances; or (4) detain the defendant fully prior to trial.¹⁵⁵ Congress’s intention was to create an “in-or-out system” of pretrial release.¹⁵⁶ But it also expanded the categories of individuals who could be subject to preventive detention prior to trial.¹⁵⁷ In

¹⁵¹ See Carbone, *supra* note 29, at 558, 558 n.209; see also SCHNACKE, *supra* note 60, at 69 (“By leaving money in the process, however, the 1970 Act did nothing new to avoid unintentional detention.”).

¹⁵² 430 A.2d 1321, 1332 (D.C. 1981). The Court found the government had a compelling state interest in the pretrial detention of certain defendants, citing among other things an “increase in street crime” in D.C. and studies concerning recidivism of people on pretrial release. *Id.* at 1341.

¹⁵³ *Id.* at 1326 n.9, 1331 (“While the history of the development of bail reveals that it is an important right, and bail in noncapital cases has traditionally been a federal statutory right, neither the historical evidence nor contemporary fundamental values implicit in the criminal justice system requires recognition of the right to bail as a ‘basic human right,’ which must then be construed to be of constitutional dimensions.”) (citing Foote, *supra* note 2, at 969). See also Duker, *supra* note 30, at 70–71; Carbone, *supra* note 29, at 520.

¹⁵⁴ *Edwards*, 430 A.2d at 1332 (“Although detention pending trial invokes an affirmative restraint, historically it has not been regarded as punishment where the purpose has been to prevent flight or to prevent the coercion or intimidation of witnesses.”).

¹⁵⁵ See Bail Reform Act of 1984, *supra* note 9.

¹⁵⁶ SCHNACKE, *supra* note 60, at 75.

¹⁵⁷ *Id.* at 77–78; see also Wiseman, *supra* note 38, at 140 (describing the categories of defendants eligible for pretrial detention, including those charged with crimes of violence, serious drug crimes, or crimes involving a minor or use of a dangerous weapon).

making a pretrial detention decision, courts were to take into consideration a broad range of factors, including the weight of the evidence and the offense charged (historical bail considerations), as well as the person's character, employment, and family ties (factors stemming from the first wave of reform), but also, historically, "the nature and seriousness of the danger to any person or the community that would be posed by the person's release."¹⁵⁸ Courts, in the aftermath, have adopted a broad view of what constitutes such "danger."¹⁵⁹ The 1984 Act did include a provision that a judicial officer could not "impose a financial condition that results in the pretrial detention of the person."¹⁶⁰ Thus, any pretrial detention order had to be explicit in its intent and signed only after a hearing that provided clear procedural guarantees.¹⁶¹ At the federal level, there was theoretically to be no more reliance on monetary bond to ensure detention.

The United States Supreme Court upheld the federal law in *United States v. Salerno*, approving a system of preventive detention for those accused of certain crimes.¹⁶² In denying a substantive due process challenge to the legislation, the Court cited the procedural protections afforded to anyone the government sought to incarcerate.¹⁶³ It found that, in light of the government's "legitimate and compelling" regulatory purpose in enacting the Bail Reform Act, which was to "prevent[] crime by arrestees," the law was not facially invalid under the Due Process Clause.¹⁶⁴ In short, *Salerno* affirmed that there was no categorical prohibition on preventive detention under the Constitution.¹⁶⁵ The Court likewise found no merit to the respondents' Eighth Amendment claim, dismissing the argument that the dicta in *Stack v. Boyle* provided an absolute right to bail

¹⁵⁸ 18 U.S.C. § 3142(g)(4) (2012).

¹⁵⁹ Wiseman, *supra* note 38, at 143 (describing legislative history and federal court decisions that have given wide scope to interpretations of dangerousness to include the likelihood of causing "economic danger").

¹⁶⁰ 18 U.S.C. § 3142(c)(2).

¹⁶¹ Under the Act, the person facing detention is entitled to testify, present and cross-examine witnesses and to present information by proffer or otherwise. Judicial findings approving detention—specifically, "that no condition or combination of conditions will reasonably assure the safety of any other person and the community"—were to be supported by clear and convincing evidence. 18 U.S.C. § 3142(f)(2).

¹⁶² 481 U.S. 739 (1987).

¹⁶³ *Id.* at 742.

¹⁶⁴ *Id.* at 749, 752.

¹⁶⁵ *Id.* at 746–51. As the *Salerno* Court stated, the "government's interest in preventing crime by arrestees is both legitimate and compelling." *Id.* at 749.

and calling the case “far too slender a reed on which to rest this argument.”¹⁶⁶

The magnitude of the Court’s retrenchment and the severity of the blow to the progressive movement for bail reform can be measured by Justice Marshall’s full-throated dissent, which began with this:

This case brings before the Court for the first time a statute in which Congress declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue, if the Government shows to the satisfaction of a judge that the accused is likely to commit crimes, unrelated to the pending charges, at any time in the future. Such statutes . . . have long been thought incompatible with the fundamental human rights protected by our Constitution.¹⁶⁷

After the D.C. Court Reform Act and *Salerno*, states added provisions allowing for public safety determinations in bail setting, but often without the due process protections included in the Bail Reform Act and relied upon by the Supreme Court in affirming the legislation’s constitutionality.¹⁶⁸ Illinois was part of the national trend. In *People ex rel Hemingway v. Elrod*, the Illinois Supreme Court issued a decision that lay the groundwork for judicial sanctioning of preventive detention based on dangerousness. Ruling on a petition for a writ of habeas corpus brought by a defendant seeking pretrial release, the *Hemingway* court held that it was not “adopting the principle of preventive detention of one charged with a criminal offense for the protection of the public[.]”¹⁶⁹ It instead recommended the use of pretrial restrictions to protect both the public and the accused’s right to bail, and remanded the case to the trial court for consideration of such restrictions.¹⁷⁰ Yet, the court also stated that it “recognize[d] that many crimes are committed by those who are free on bail awaiting trial . . . and acknowledge[d] the need to balance the right of an accused to be free on

¹⁶⁶ *Id.* at 753. In what amounted to a strong undercutting of any subsequent Eighth Amendment bail arguments, the Court suggested that for pretrial detention to be “excessive” the government would have to fail to provide a sufficiently compelling interest. *Id.* at 754–55. The Court, by this point, had already found the prevention of future crime and future flight to constitute such interests. *See* Wiseman, *supra* note 38, at 152.

¹⁶⁷ *Salerno*, 481 U.S. at 755 (Marshall, J., dissenting).

¹⁶⁸ SCHNACKE, *supra* note 60, at 85–87; *see also* Jones, *supra* note 16, at 934. The American Bar Association, too, fell in with the national zeitgeist governing pretrial detention, amending its 1979 standards to recognize the “legitimacy of initial preventive detention for a certain limited class of defendants when their dangerousness has been proved under specific criteria and with appropriate procedural safeguards.” SCHNACKE, *supra* note 60, at 132 (citing A.B.A. Standards, Pretrial Release (Explanatory Note), at 7S (Supp. 1986)).

¹⁶⁹ *People ex rel Hemingway v. Elrod*, 322 N.E.2d 837, 841 (Ill. 1975).

¹⁷⁰ *Id.* at 81–83.

bail against the right of the general public to receive reasonable, protective consideration by the courts.”¹⁷¹

Hemingway was a precursor for things to come in Illinois.¹⁷² In 1986, voters approved an amendment to the state constitution that allowed a judge to deny bail to any person accused of a felony carrying a mandatory prison sentence, where the court determined that the release of the accused would pose a threat to the physical safety of *any* person.¹⁷³ Illinois legislation further expanded who could be denied bail for “dangerousness,” beyond those categories enumerated under the state constitution.¹⁷⁴

State provisions like those in Illinois uniformly failed to specify what constituted a “threat” or “dangerousness” in the bail setting process, rendering them unduly vague and providing little notice to defendants about possible pretrial consequences.¹⁷⁵ Furthermore, the public safety factor was used not only in determining the conditions of release, as described in *Hemingway*, but to augment the class of defendants subject to full-scale detention prior to trial.¹⁷⁶ In contrast to the 1960s reforms that focused on individualization, the second wave of bail reform relied heavily on the defendant’s charge in determining pretrial eligibility.¹⁷⁷

¹⁷¹ *Id.* at 81 (citation omitted).

¹⁷² In *People v. Bailey*, 657 N.E.2d 953, 967–68 (Ill. 1995), the Illinois Supreme Court cited to *Hemingway* in approving the legislature’s expansion of the categories of defendants subject to the denial of bail.

¹⁷³ ILL. CONST. art. 1, § 9 (1986); see also Sally Zeit, *Bail Amendment Would Invite Abuses*, CHI. TRIB., Nov. 3, 1986, http://articles.chicagotribune.com/1986-11-03/news/8603220802_1_amendment-bail-pre-trial [<http://perma.cc/6G3Q-RV34>].

¹⁷⁴ See 725 ILCS 5/110-6.3(a) (West 2014), which allowed the denial of bail for those charged with a stalking offense, which was not one of the enumerated categories within the amended state Constitution. An Illinois court later upheld such legislation in the face of constitutional challenge by affirming there was no “constitutional right to bail,” even for someone who was otherwise bailable, and that the denial of bail was within the inherent authority of the court to prevent the fulfillment of “threats.”; *Bailey*, 657 N.E.2d at 967 (citing *Hemingway*, 322 N.E.2d at 837).

¹⁷⁵ See Mayson, *supra* note 1, at 504–06 (finding that *Salerno*’s limits on detention had “little traction” even in the federal system because the mandated judicial inquiry was “amorphous,” in that there was little Supreme Court guidance on to how to determine whether a pretrial detention regime was excessive and the standards for showing dangerousness were “extremely vague.”); Goldkamp, *supra* note 72, at 17, 27 (noting that one-third of the public safety-oriented laws passed in this time period had no definition for danger).

¹⁷⁶ Goldkamp, *supra* note 72, at 19.

¹⁷⁷ *Id.* at 24–26; see also, McCoy, *supra* note 118, at 141–42 (“Most observers of justice policies would state that the law-and-order movement of the 1970s and 1980s and its attendant high fear of victimization prompted judges to hold defendants in custody without bail more often, which inevitably eroded the ROR movement.”).

There were undeniable racial underpinnings to the new national public safety model.¹⁷⁸ The beginnings of the policy change were seen in the late 1960s, when the response to urban protests against racial discrimination, particularly in the areas of policing, housing, employment and education,¹⁷⁹ provided a blueprint for using pretrial incarceration to incapacitate vocal minorities. Local authorities reacted to the unrest with full-scale crackdowns. In Detroit, for example, the Wayne County judiciary set exorbitant bail for those suspected of participating in the unrest.¹⁸⁰ These bonds were explicitly intended to ensure the detention of protesters, supposedly for the protection of the public. Wayne County Prosecutor William Cahalan announced that his office would request bond amounts of at least \$10,000 for all persons arrested during the disorder, “so that even though they had not been adjudged guilty, we would eliminate the danger of returning some of those who had caused the riot to the street during the time of stress.”¹⁸¹ Similar acts of protest, occurring in Los Angeles, Chicago, and Newark, helped pave the way for the creation of a systemic approach to detention based on “dangerousness”—a singular paradigm for bail-setting at that time.¹⁸² In all the cities in which civil unrest occurred,

¹⁷⁸ See Koepke & Robinson, *supra* note 144, at 12 (President’s Nixon’s focus on pretrial release was attendant to his administration’s wider focus on addressing a purported national crime wave, but “[o]f course, the focus of Nixon’s campaign and administration was never really on crime *per se* – race, more than anything, loomed large behind Nixon’s ‘War on Crime.’”).

¹⁷⁹ See, e.g., REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (“KERNER COMMISSION REPORT”) (1968), <https://www.ncjrs.gov/pdffiles1/Digitization/8073NCJRS.pdf> [<http://perma.cc/J246-XTZ6>].

¹⁸⁰ Comment, *The Administration of Justice in the Wake of Detroit Civil Disorder of July 1967*, 66 U. MICH. L. REV. 1544, 1548–49 (1968) [hereinafter, *Civil Disorder*] (Interviews with 1,014 prisoners who were arrested during the disorder and incarcerated at Jackson State Prison disclosed that at least 50 percent of them were being held subject to bonds in excess of \$10,000 and at least 70 percent on bonds over \$5,000).

¹⁸¹ *Id.* at 1549 (citing CYRUS VANCE, SPECIAL ASSISTANT TO THE SECRETARY OF DEFENSE, FINAL REPORT OF CYRUS R. VANCE, SPECIAL ASSISTANT TO THE SECRETARY OF DEFENSE CONCERNING THE DETROIT RIOTS 43 (1967), <https://www.ncjrs.gov/pdffiles1/Digitization/82468NCJRS.pdf> [<http://perma.cc/9QXR-2RFJ>]; see also *id.* at 1563 (noting that such bail assignments, which had little to do with assuring the appearance of the accused, are “a prima facie case of an abuse of discretion”).

¹⁸² *Civil Disorder*, *supra* note 180, at 1568; cf. William A. Dobrovir, *Preventive Detention: The Lesson of Civil Disorders*, 15 VILL. L. REV. 313, 315 (1970) (“Because preventive detention is not yet part of our law, there are few documented instances of its application that can furnish facts that would prove or disprove the need for, utility and effectiveness of such a device. It is generally accepted, on the other hand, that judges, in setting bail, daily assess the defendant’s ‘dangerousness’ and set bail in amounts designed not to be met.”).

the normal bail rules were suspended.¹⁸³ The intention and the result was to punish the mostly black residents who were engaging in civil disobedience.¹⁸⁴

The change in bail policy was also influenced by the proliferation of race-based law enforcement models, including policing principles founded on the “Broken Windows” theory.¹⁸⁵ That theory provided a metaphorical explanation for crime that led to the development of (now-debunked) crime-fighting strategies based on aggressive enforcement of minor law violations as a way to reduce crime.¹⁸⁶ The result was the widespread arrest and pretrial detention of low-level offenders, generally in poor neighborhoods where residents were overwhelmingly people of color.¹⁸⁷ These policies inevitably undercut the promotion of pretrial release.¹⁸⁸ Instead, pretrial detention was yet another tool to exert social control on minorities.¹⁸⁹

¹⁸³ For a discussion of this phenomenon, see Dobrovir, *supra* note 182, at 316–20.

¹⁸⁴ *Cf. id.* at 320 (“In short, it seems that in the various instances of civil disorder where the prosecuting authorities and the courts have adopted a policy of preventive detention to ‘safeguard’ the community, the policy has been applied wholesale and indiscriminately. It has been used to ‘punish’ accused persons before trial.”)

¹⁸⁵ See George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, THE ATLANTIC MONTHLY, March 1982, <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> [<http://perma.cc/K3S7-PTW4>].

¹⁸⁶ GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* (1996). Subsequent research has shown very little support of the concept. See, e.g., Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271 (2006).

¹⁸⁷ See *supra* note 140; see also Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249, 2271–72 and n.165 (1998) (arguing that “because of the very subtlety of the racialized arguments embedded within the ‘broken windows’ literature, it is much more difficult to challenge the racially disparate impacts of the argument’s derivative programs”); Subramanian et al., *supra* note 12, at 9–10 (linking the growth in jail admissions and the length of stay to the rise of drug crime enforcement between 1981 to 2006); *id.* at 15 (noting that the current racial disparities in pretrial detention are “caused by myriad and interconnected factors, including policing practices that concentrate law enforcement activities in low-income, minority communities, combined with the socio-economic disadvantages experienced by residents in those neighborhoods”).

¹⁸⁸ McCoy, *supra* note 118, at 141–42, 142 n.18.

¹⁸⁹ See ALEXANDER, *supra* note 140, at 237 (2010) (“But if mass incarceration is understood as a system of social control—specifically, racial control—then the system is a fantastic success.”); Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2184 (2013) (describing social and legal systems that incarcerate black people and the poor in disproportionate numbers, including immediately after arrest, thereby creating a “crime control system of criminal justice”); Christopher D. Hampson, *The New American Debtors’ Prisons*, 44 AM. J. CRIM. L. 1, 25–26 (2017) (connecting trends toward

5. *The Consequences of Considering “Dangerousness” in Bail Setting*

The consequence of the changes in bail law, represented by the passage of the 1984 Bail Reform Act and similar state enactments, was both a rise in the number of pretrial detainees and an increase in racial disparities among those who were locked up.¹⁹⁰ The new statutes and constitutional provisions gave judges broad range to decide who was and was not dangerous, and to impose detention based on those judgments. As a result, explicit racial prejudices and other less overt forms of discrimination could infect the pretrial bail-setting process.¹⁹¹

The growing population of pretrial detainees was also a result of the continuing use of money bond. The nationwide adoption of preventive detention mechanisms did not sound the death knell of cash bond; it in fact

detention based on inability to pay debts with historical modes of racial control used over black people in pre-Civil War and antebellum America). Cf. Ernst A. Wenk, James O. Robison & Gerald W. Smith, *Can Violence Be Predicted?*, 18 CRIME AND DELINQ. 393, 402 (1972) (“Confidence in the ability to predict violence serves to legitimate intrusive types of social control. Our demonstration of the *futility* of such prediction should have consequences as great for the protection of individual liberty as a demonstration of the *utility* of violence prediction would have for the protection of society.”).

¹⁹⁰ Wiseman, *supra* note 38, at 156; see also BAUGHMAN, *supra* note 14, at 166 (one of the “lasting effects” of the Bail Reform Act of 1984 was the increased use of pretrial detention); Subramanian et al., *supra* note 12, at 11 (“Despite making up only 13 percent of the U.S. population, African Americans account for 36 percent of the jail population.”); Minton and Zeng, *supra* note 16, at 4 (Black detainees represented 35% of the total jail population and Hispanic detainees represented 15% of the jail population in midyear 2014); Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 JUST. Q. 170, 183 (2005) (analyzing data from urban courts compiled by the DOJ and finding that racial disparities are “most notable” during the decision to deny bail,” and specifically, black defendants are 33% more likely to be denied bail and 21% less likely to be granted non-financial release than white defendants with similar legal characteristics); Shawn D. Bushway and Jonah B. Gelbach, *Testing for Racial Discrimination in Bail Setting Using Nonparametric Estimation of a Parametric Model* (2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990324 [<http://perma.cc/M9BK-GJXH>] (analyzing State Courts Processing Statistics from the BJS to find that black defendants receive statistically significant higher bail amounts than whites in multiple offense categories).

¹⁹¹ Wiseman, *Coercion*, *supra* note 38, at 155–56 (“In addition, of course, the vagueness of the personal characteristics factors generally and the dangerousness factor in particular allows a tremendous amount of latitude for racial and other types of clearly prohibited discrimination; with a laundry list of vague factors to choose from, any reasonably competent judge or prosecutor would be able to justify the detention of almost any defendant while disguising his real motives—and there is reason to believe the government has taken advantage.”); see also Jones, *supra* note 16, at 930 (noting that this process of bail administration, reliant on discretionary determinations, “is at best flawed, and at worst produces racial disparities in pretrial detention”).

exacerbated its use in ensuing decades.¹⁹² There was no explicit judicial limit on the use of monetary bond;¹⁹³ *Salerno* itself said nothing about the use of excessive bonds to effect preventive detention.¹⁹⁴ And by the 1980s, many states, including Illinois, were using both public safety risk assessments and the traditional route of money bail to detain, which further widened the detention net.¹⁹⁵

In Illinois, such detention mechanisms were condoned by the judiciary.¹⁹⁶ Empirical evidence confirmed that money bond was being used to preemptively incarcerate. In 1987, the Illinois Criminal Justice Information Authority (“ICJIA”) published a study on the pretrial process in Cook County, based on an analysis of 519 court cases terminated in the County in 1982 and 1983.¹⁹⁷ The ICJIA found that recognizance bonds remained rare (issued in only 6% of cases), while 82% of defendants received cash deposit or “D-bonds.”¹⁹⁸ Approximately 40% of the sample population was detained pretrial, and most were in custody for inability to pay the D-bond.¹⁹⁹ In their subsequent analysis, the study authors explicitly *encouraged* judges to set pretrial bonds in amounts high enough “to achieve pretrial detention especially for serious offenders.”²⁰⁰ Such a recommendation was consistent with the persistent attitude of many criminal justice stakeholders toward the indigent in this period: the poor

¹⁹² BAUGHMAN, *supra* note 14, at 166; Mayson, *supra* note 1, at 18 (“Even after the 1980s reforms, most jurisdictions have “continued to rely on money bail and *sub rosa* detention as a crude mechanism for managing pretrial crime risk.”).

¹⁹³ *But see infra* Section III (discussing inferred constitutional limits on its use).

¹⁹⁴ Lauren Kelleher, *Out on Bail: What New York Can Learn From D.C. About Solving a Money Bail Problem*, 53 AM. CRIM. L. REV. 799, 805 (2016).

¹⁹⁵ SCHNACKE *supra* note 60, at 85; Mayson, *supra* note 1, at 18; *cf.* Kelleher, *supra* note 194, at 805 (noting that “bail laws should not authorize judges to consider the public safety risk a defendant poses in setting bail, and then fail to bar them from using this public safety justification to set bail at an amount a defendant cannot afford (resulting in his pretrial incarceration)”).

¹⁹⁶ *See, e.g.*, *People v. Saunders*, 461 N.E.2d 1006 (Ill. App. Ct. 1984) (finding that, regardless of the fact that the detainee was likely unable to afford the set bond amount, “the financial ability of the defendant is only one of the considerations the court must balance when setting bail”).

¹⁹⁷ CHRISTINE A. DEVITT ET AL., THE PRETRIAL PROCESS IN COOK COUNTY: AN ANALYSIS OF BOND DECISIONS MADE IN FELONY CASES DURING 1982–83 (August 1987), <https://www.bjs.gov/content/pub/pdf/ppcc-abdmfcd8283.pdf> [<http://perma.cc/ME8B-FCFM>].

¹⁹⁸ *Id.* at 47.

¹⁹⁹ *Id.* at 56. Twenty percent of the sample was held for inability to pay between \$100 and \$500 (10% of the total bond amount), 18% were unable to post between \$600 and \$1,000, and 26% were unable to pay between \$3,000 and \$30,000.

²⁰⁰ *Id.* at 73.

deserve to be detained. This is illustrated quite clearly by the ICJIA's callous conclusion that

it is up to the defendants to determine the 'costs' they are willing to pay to secure release (for example, some defendants find incarceration so onerous that they even are willing to plead guilty in order to be released sooner, while jail conditions may be better than the home environment for other defendants, who might actually avoid pretrial release).²⁰¹

Nationwide, more and more judges detained people for inability to pay. From 1990 to 1994, 41% of all releases were ROR, while 24% of releases were based on surety bonds; a decade later, those percentages were reversed.²⁰² From 2002 to 2004, surety bonds were imposed in 42% of all release cases, while ROR comprised only 23% of all releases.²⁰³ Between 1992 and 2006, the use of cash bail increased 32%, and by 2015, 61% of all pretrial releases included financial conditions of release.²⁰⁴ This change could also be seen at a local level. By November 2016, for instance, the average monetary bond in Cook County, Illinois was over \$70,000, well beyond the County's median household income of \$54,648.²⁰⁵

The results of these second wave policies have been dramatic. Currently, 38% of felony defendants nationwide spend the entirety of the pretrial period incarcerated, and 90% of that population is jailed solely

²⁰¹ *Id.* at 55 (emphasis omitted). That attitude persists among stakeholders today. Defendant Harris County, in moving to dismiss a recent lawsuit challenging the cash bail schedule for misdemeanor defendants in the county, *see* note 216, *infra*, submitted a brief arguing that certain defendants were locked up pretrial because they "wish[e]d to remain in custody[.]" *See* Brief of Respondent-Appellee at 28, ODonnell v. Harris Cty., 251 F. Supp. 1052 (S.D. Tex. 2017) (No. 4:16-cv-001414).

²⁰² THOMAS H. COHEN AND BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 2 (2007), <https://www.bjs.gov/content/pub/pdf/prfdsc.pdf> [<http://perma.cc/FQ5Z-GK2F>].

²⁰³ *Id.* *See also* Mayson, *supra* note 1, at 18 n.82 (citing Bureau of Justice Statistics showing growth in the pretrial jail population from 298,100 in 1996 to 467,500 in midyear 2014).

²⁰⁴ JESSICA EAGLIN AND DANYELLE SOLOMON, BRENNAN CTR. FOR JUST., REDUCING RACIAL AND ETHNIC DISPARITIES IN JAILS: RECOMMENDATIONS FOR LOCAL PRACTICE 19 (2015), <https://www.brennancenter.org/sites/default/files/publications/Racial%20Disparities%20Report%20062515.pdf> [<http://perma.cc/P4MJ-QS2F>]; *see also* REAVES, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, *supra* note 16, at 15.

²⁰⁵ *See* Res. 16-6051, Crim. J. Comm., Bd. of Comm'rs of Cook Cty. (Nov. 17, 2016), http://cook-county.granicus.com/MediaPlayer.php?view_id=2&clip_id=1676 [<http://perma.cc/K6Z9-FW3P>]. *See also* SHERIFF'S JUSTICE INSTITUTE, CENTRAL BOND COURT REPORT (Apr. 2016), https://www.chicagoreader.com/pdf/20161026/Sheriff_s-Justice-Institute-Central-Bond-Court-Study-070616.pdf [<http://perma.cc/66RN-Q8BF>] (noting an average D-bond of \$71,878 and a median D-Bond of \$40,000 in a sample of bond court observations conducted between February and March 2016).

because of an inability to afford money bail.²⁰⁶ These trends were also on display in Cook County.²⁰⁷ In 2005, a study conducted by the United States Bureau of Justice Assistance confirmed that numerous defendants were locked up in the Cook County Jail, not because of flight risk or dangerousness, but because they could not afford the monetary bail.²⁰⁸ A 2011 analysis of the population of the Jail revealed that on any given day, there were 2,000 detainees with assigned bail amounts of \$6,000 or less that they could not pay.²⁰⁹ That same year, a three-judge district court panel found that overcrowding was largely the cause of unconstitutional conditions in the Cook County Jail—and that pretrial release practices were to blame.²¹⁰

Moreover, just as the adoption of “dangerousness” as a factor in bail administration worked to the detriment of people of color in the pretrial system, so too has the continued reliance on money bond. Studies of bail outcomes beginning in the 1980s showed that black defendants received

²⁰⁶ Subramanian et al., *supra* note 12, at 32.

²⁰⁷ See Eric H. Holder, Jr. et al., *Memorandum to Amy J. Campanelli, Cook County Public Defender, Re: Cook County’s Wealth-Based Pretrial System* 3 (July 12, 2017) [hereinafter, *Holder Memo*], available at http://www.chicagoappleseed.org/wp-content/uploads/2017/11/Holder_Cook-Countys-Wealth-Based-Pretrial-System-2017-07-12.pdf [<http://perma.cc/7TS7-SJGP>] [hereinafter, *Holder Memo*] (“Despite the [Illinois] Bail Statute’s requirement that money bond be a last resort, and that when necessary, it be ‘not oppressive’ and set in consideration of the financial resources of the accused, Cook County judges set financial conditions for numerous defendants as a matter of course.”). In finding that Cook County had “wealth-based pretrial detention practices[,]” *id.* at 2, the Holder Memo cited, among other sources, a 2016 study of Cook County Central Bond Court, which concerned a sample of 880 defendants who received money bonds, of which only 25% were able to post that bond and secure their release within 31 days. *Id.* at 6 (citing SHERIFF’S JUSTICE INSTITUTE, CENTRAL BOND COURT REPORT 2 (Apr. 2016)). The Holder Memo is discussed in more detail in *infra* Section III(B).

²⁰⁸ *Id.* at 4 (citing U.S. BUREAU OF JUSTICE ASSISTANCE AND AM. UNIV. SCH. OF PUB. AFFAIRS, CRIMINAL COURTS TECHNICAL ASSISTANCE PROJECT, REVIEW OF THE COOK COUNTY FELONY CASE PROCESS AND ITS IMPACT ON THE JAIL POPULATION (2005), <https://auislandora.wrlc.org/islandora/object/auislandora%3A63624/datastream/PDF/view> [<http://perma.cc/G8TU-KAGM>]). Data from 2004 showed that almost half of all Cook County defendants who received a money bond had to pay \$10,000 or more for their release, even though 72% of the sampled population was unemployed. *Id.* at 5.

²⁰⁹ David E. Olson & Sema Taheri, *Population Dynamics and the Characteristics of Inmates in the Cook County Jail*, 2012 COOK COUNTY SHERIFF’S RE-ENTRY COUNCIL RESEARCH BULLETIN 6 https://ecommons.luc.edu/cgi/viewcontent.cgi?article=1000&context=criminaljustice_facpubs [<https://perma.cc/5XUU-VVHT>]

²¹⁰ *United States v. Cook Cty.*, 761 F. Supp. 2d 794, 800–801 (N.D. Ill. 2011) (“Many of the pretrial detainees in the Cook County Jail would, moreover, be bailed on their own recognizance, or on bonds small enough to be within their means to pay, were it not for the unexplained reluctance of state judges in Cook County to set affordable terms for bail . . .”).

worse bail outcomes than similarly situated whites, including by being charged higher monetary bonds for release.²¹¹ These trends have only continued their upward trajectory, in Illinois and nationally.²¹²

It is these inherently discriminatory outcomes that have motivated the most recent wave of bail reforms.

II. “THIRD WAVE” LEGAL THEORIES IGNITE FRESH DEBATE ABOUT THE WISDOM AND LEGALITY OF THE TRADITIONAL SYSTEM OF PRETRIAL RELEASE.

For decades following the 1980s changes to bail administration, most reform advocates saw only a bleak legal landscape. With its casual and undeveloped yet definitive finding that “preventing danger to the community is a legitimate regulatory goal,”²¹³ *Salerno* seemed firmly to shut the door to any constitutional argument against the use of pretrial detention to prevent the commission of future crime.²¹⁴ The notion that bail set above an indigent defendant’s means to pay was “excessive” in violation of the Eighth Amendment had long proven to be a non-starter in historical and legal terms.²¹⁵ Reformers might be forgiven for failing to envision systemic legal challenges to the pretrial release process in the midst of the “second wave” embrace of preventive detention and expanding pretrial incarceration.

²¹¹ See Jones, *supra* note 16, at 939–40 (citing to what Jones calls the “First Generation Studies of Race and Bail,” including urban bail studies from the mid-1980s).

²¹² *Id.* at 941 (citing data from the DOJ’s State Court Processing Statistics Project, which found that, in 2003, when controlling for legal and extralegal factors, black defendants were sixty-six percent more likely to be in jail pretrial than white defendants, and Latino defendants were ninety-one percent more likely to be detained pretrial); Eaglin & Solomon, *supra* note 204, at 12–13 (discussing the overrepresentation of black and Hispanic defendants in jails nationwide as a result of discrimination in policing, front end charging and sentencing, and probation and parole revocation); Olson, *supra* note 209, at 4 (Black men make up 66.7% of the Cook County Jail population, well over their representative population in the County—only one in four County residents are black, see *Holder Memo*, *supra* note 207, at 25 (citing studies showing that people of color represent 93% of all individuals detained for more than two years in the Cook County Jail); Michael Lucci, *Cook County Black Population Falls by 12,000 From 2015–2016*, ILL. POL’Y (June 24, 2017), <https://www.illinoispolicy.org/cook-county-black-population-falls-by-12000-from-2015-2016/> [<http://perma.cc/GAY8-N7BX>]; The authors of this paper, in collaboration with statistical experts, analyzed data from the Circuit Court of Cook County covering the years 2011 to 2013, which revealed that only 15.8% of black defendants charged with Class 4 felonies were released on bond pretrial, compared to 32.4% of non-black defendants. See *infra* note 325.

²¹³ *Salerno*, 481 U.S. at 747.

²¹⁴ *Id.* at 750–51.

²¹⁵ See *supra* Section I(B)(2).

But change is afoot. The emerging near-consensus against mass incarceration and the criminalization of poverty has fueled widespread skepticism of reflexive pretrial detention among legislators and criminal justice stakeholders. It has also renewed the creative energy of legal reformers and grassroots organizers.

A. ESTABLISHED LEGAL PRINCIPLES FOR REFORM: MONEY BOND AS A FORM OF WEALTH DISCRIMINATION UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES

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.²¹⁶ Under that system, the wealthy are able to remain free pending trial; the poor, whom are most defendants, stay behind bars. This begs a question left undecided in *Salerno*: is the cash bond system fundamentally unfair because it punishes poverty and discriminates against the poor? At this writing, early indications are that there is substantial traction for such an argument.

Two separate lines of authority support the argument that the use of money bail orders to detain those who cannot pay violates equal protection and due process.

The first line of cases concerns the well-established entitlement of indigent criminal defendants to what has been termed the “basic tools” necessary to mount a defense to the charges against them.²¹⁷ The Sixth Amendment, of course, has long been held to require the appointment of counsel for an indigent defendant.²¹⁸ Due process and equal protection also require the leveling of the playing field between the indigent and the

²¹⁶ This was among the findings in *ODonnell v. Harris County*, a class action suit challenging the practice of setting unaffordable money bonds for indigent defendants without a meaningful, individualized determination of whether the bond set was necessary to serve an interest of the County. 251 F. Supp. 3d 1052 (S.D. Tex. 2017). Granting the plaintiffs’ motion for a preliminary injunction, the district court determined that Harris County has “a custom and practice of using secured money bail to operate as de facto orders of detention in misdemeanor cases.” *Id.* at 1131.

²¹⁷ *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (An indigent defendant is entitled to the “basic tools of an adequate defense,” which must be provided to him if he cannot afford to pay for them) (citation omitted).

²¹⁸ *Gideon v. Wainwright*, 372 U.S. 335 (1963). The Sixth Amendment right extends not only to felony trials, but to first appeals of right, (*Douglas v. California*, 372 U.S. 353 (1963)), and to misdemeanor prosecutions in which the punishment may include imprisonment, (*Argersinger v. Hamlin*, 407 U.S. 25 (1972)). Counsel, whether appointed or retained, must perform effectively both at trial, (*Strickland v. Washington*, 466 U.S. 668 (1984)), and on appeal, (*Evitts v. Lucey*, 469 U.S. 387 (1985)).

wealthy. In *Griffin v. Illinois*, the Court held that these principles require the provision of a free transcript to an indigent criminal appellant who seeks to pursue the first appeal to which state law affords him a right.²¹⁹ The Court's decision used emphatic, ringing language: "Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'"²²⁰ Further: "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color."²²¹

Griffin has been extended and applied on many occasions over the latter part of the twentieth century. In *Burns v. Ohio*, the Supreme Court held that the same principles required the State to furnish an indigent criminal appellant with a transcript for use in seeking discretionary review by a state supreme court.²²² The Court observed, "[t]here is no rational basis for assuming that indigents' motions for leave to appeal will be less meritorious than those of other defendants."²²³ *Rinaldi v. Yeager* prohibits the State from seeking reimbursement of transcript costs from the institutional wages of imprisoned indigent defendants whose appeals are unsuccessful.²²⁴ In *Mayer v. Chicago*, the Supreme Court refused to limit *Griffin* to appeals where incarceration was the punishment: "The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed."²²⁵

Into the 1980s and 1990s, the judiciary continued to rely upon and expand *Griffin's* principles to undermine wealth-based distinctions in the criminal justice system. In *Little v. Streater*, the Court ruled that an indigent putative father in a paternity suit was entitled to "blood grouping tests" at State expense to defend against the allegation of paternity,²²⁶ and in *M.L.B. v. S.L.J.*, the Court concluded that an indigent mother whose parental rights had been terminated in a trial proceeding could not be barred from appealing that determination by virtue of her inability to pay a fee to cover the preparation of the record.²²⁷ Employing both equal protection and

²¹⁹ 351 U.S. 12 (1956).

²²⁰ *Id.* at 17.

²²¹ *Id.*

²²² 360 U.S. 252 (1959).

²²³ *Id.* at 257–58.

²²⁴ 384 U.S. 305 (1966).

²²⁵ 404 U.S. 189, 197 (1971).

²²⁶ 452 U.S. 1 (1981).

²²⁷ 519 U.S. 102 (1996).

due process precedents, the Court found that the mother's interests were fundamental and could not be outweighed by the state's fiscal concerns.²²⁸ Meaningfully for the discussion of bail reform, in *Ake v. Oklahoma*, which required the State to furnish a criminal defendant with a consulting psychiatrist to assist in evaluating and formulating an insanity defense, the Court explained the principle of *Griffin* and its progeny in these terms:

[W]hen a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.²²⁹

Griffin provides the obvious foundation for a challenge to cash bail. For a court to deploy the *Griffin* line of authority to defeat the use of money to incarcerate the indigent (but not the wealthy), prior to trial it would have to accept two basic propositions. The first is set out in the *Salerno* decision itself: not only is there an "important[t] and fundamental" right to liberty prior to conviction, but such liberty should be "the norm" in our criminal justice system.²³⁰ Deprivation of an accused person's liberty prior to trial should be an exception and limited to specific circumstances in which the state has a compelling need to confine the defendant.²³¹

The second basic proposition is that pretrial confinement grievously disadvantages the defendant in his criminal case. It has long been recognized that a defendant in pretrial custody is "hampered" in his ability to prepare a defense: consulting with counsel becomes difficult and the defendant loses the ability to assist in finding witnesses or otherwise investigating his case.²³² Recent studies have repeatedly shown that defendants incarcerated prior to trial are more likely to be convicted and more likely to spend time in prison than defendants who were at liberty—in part because pretrial custody incentivizes defendants to plead guilty to avoid additional time in jail.²³³ Thus, at least as a normative matter,²³⁴ the

²²⁸ *Id.* at 119–24.

²²⁹ 470 U.S. 68, 76 (1985).

²³⁰ *Salerno*, 481 U.S. at 750, 755.

²³¹ *Id.* at 755.

²³² *Barker v. Wingo*, 407 U.S. 514, 533 (1972); *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (The "traditional right to freedom before conviction permits the unhampered preparation of a defense . . .").

²³³ See Heaton et al., *supra* note 16, at 714; BAUGHMAN, *supra* note 14, at 161–62; Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2491–93 (2004). In *ODonnell v. Harris County*, for example, the district court found that,

opportunity to be at liberty prior to trial—free of the constraints and the coercive pressures of incarceration—is a “basic tool” to which all but a narrowly circumscribed minority of defendants are entitled. To afford this opportunity to the wealthy but deny it to the poor is invidious discrimination and fundamentally unfair.

The second line of cases is a trilogy of Supreme Court decisions that squarely prohibits confinement of an indigent person who, through no fault of his or her own, is unable to pay a fee or a fine. In *Williams v. Illinois*, the first of these cases, the petitioner was sentenced to the one-year maximum for the offense of petty theft.²³⁵ In addition, he was fined \$500 and ordered to pay court costs in the amount of \$5.²³⁶ Because he lacked the ability to pay the fine and the fee, he spent an extra 101 days in prison beyond the statutory maximum to “work off” those financial obligations at the rate of \$5 per day.²³⁷ The Court viewed the extra confinement as a violation of Equal Protection: “once the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency.”²³⁸ To do so “works an invidious discrimination.”²³⁹

over a recent two year period, 84% of detained misdemeanor defendants pled guilty (many of them, likely, to avoid continued detention and secure their freedom), whereas most of the misdemeanor defendants who were not detained avoided conviction. 251 F. Supp. 3d at 1105. In Cook County, Illinois, data from the court clerk’s office pertaining to cases filed in the criminal court between 2011 and 2013 reveal that those who remained in custody pretrial were half as likely to be found not guilty or to have their charges dismissed as defendants who were never in custody. Similarly, persons facing the least serious felony charges who were kept in custody were one-fourth as likely to be found not guilty or have their charges dismissed as defendants who were never in custody. *See* Robinson et al. v. Martin et. al., No. 2016 CH 13587 (data on file with authors); *see also* Dobbie et al., *supra* note 26, at 234 (finding that being released pretrial positively affects a defendant’s “bargaining position” in criminal case negotiations, and that released defendants are more likely to be convicted of a less charger and fewer total offenses).

²³⁴ As we explained in Section I, there has been a disconnect between the aspirations and assumptions of judicial opinion writing and the realities of quotidian practice in local courthouses around the country. The reality—before and after *Salerno*—has been that a wide swath of criminally charged, indigent persons are given bonds with no inquiry or concern as to their ability to pay or the appropriateness of their detention. But, of course, it is *Salerno*’s assessment of reality, not the reality itself, which forms the starting point for litigation.

²³⁵ 399 U.S. 235 (1970).

²³⁶ *Id.* at 236.

²³⁷ *Id.* at 236–37.

²³⁸ *Id.* at 241–42.

²³⁹ *Id.* at 242.

The rationale in *Williams* was applied the next year in *Tate v. Short*, in which the petitioner was imprisoned for failing immediately to pay the fine for a traffic offense.²⁴⁰ Like *Williams*, Tate was incarcerated at a municipal prison farm to work off, at the rate of \$5 per day, a fine that he was unable to pay.²⁴¹ The Court had little difficulty concluding that, even though the offense in question was not punishable by imprisonment, the incarceration of a person unable to pay the fine was discriminatory.²⁴² The Court implied that the use of imprisonment was irrational; not only did the imprisonment serve no penological purpose, it also served no fiscal one, as the State's revenues were depleted by the cost of housing the indigent person.²⁴³

The last in the trilogy of Supreme Court cases regarding imprisonment for non-payment of a monetary penalty is *Bearden v. Georgia*.²⁴⁴ There, an indigent person was sentenced to probation and ordered to pay a fine and restitution.²⁴⁵ When he was unable to make the payments, his probation was revoked and he was sentenced to prison.²⁴⁶ The Court followed and amplified the reasoning of *Tate* and *Williams*, concluding that probation revocation in these circumstances could not be squared with "fundamental fairness."²⁴⁷ Noting that *Tate* and *Williams* had been decided on Equal Protection grounds, the Court nonetheless concluded that "the issue cannot be resolved by resort to easy slogans or pigeonhole analysis"—a point on which Justice Harlon had insisted in his concurrence in *Williams*.²⁴⁸ Instead, the practice should be seen as violating not only Equal Protection (inflicting imprisonment upon the indigent, but not upon those able to pay) but also Due Process (by virtue of the simple and fundamental unfairness of imprisoning a person for failing to pay a fine that, through no fault of his own, he cannot afford).²⁴⁹ The Court's holding captured both equal

²⁴⁰ 401 U.S. 395 (1971).

²⁴¹ *Id.* at 395–97 (1971).

²⁴² *Id.* at 397–98 ("Although the instant case involves offenses punishable by fines only, petitioner's imprisonment for nonpayment constitutes precisely the same unconstitutional discrimination since, like *Williams*, petitioner was subjected to imprisonment solely because of his indigency.") (citing *Williams*, 399 U.S. at 235).

²⁴³ *Id.* at 399 ("[T]he defendant cannot pay because he is indigent and his imprisonment, rather than aiding collection of the revenue, saddles the State with the cost of feeding and housing him for the period of his imprisonment").

²⁴⁴ 461 U.S. 660 (1983).

²⁴⁵ *Id.* at 662.

²⁴⁶ *Id.* at 663.

²⁴⁷ *Id.* at 673.

²⁴⁸ *Id.* at 667.

²⁴⁹ *Id.* at 665–67 ("Due process and equal protection principles converge in the Court's analysis in these cases.").

protection and due process concerns: “the State cannot justify incarcerating a probationer who has demonstrated sufficient *bona fide* efforts to repay his debt to society, solely by lumping him together with other poor persons and thereby classifying him as dangerous. This would be little more than punishing a person for his poverty.”²⁵⁰

The State, of course, has no penological interest in confining a person who has yet to be convicted. The State’s regulatory interest in protecting the community may, in very limited cases, be advanced by explicitly requiring the pretrial confinement of a small number of extremely dangerous defendants.²⁵¹ *Salerno* authorizes a defendant’s detention without bail where the defendant should be confined for the protection of the community or because he presents too great a risk of flight.²⁵² In contrast, money bond (in theory if not in practice) exists in order to facilitate the pretrial *release* of the defendant while providing an incentive for him to return to court for proceedings in his case.²⁵³ Thus, the setting of a monetary bail amount must necessarily reflect the court’s judgment that the defendant is an appropriate risk for release with conditions that will, to the degree possible, ensure the defendant’s return to court and the safety of the community. What *Williams*, *Tate*, and *Bearden* prohibit is the use of a financial hurdle that guarantees the pretrial confinement of those in that larger group of charged persons who are fit candidates for release to the community but who are indigent and cannot pay the price of freedom.

Currently, reformers are employing the above-described principles in litigation around the United States to attack what one leader of this movement calls “human caging” of poor arrestees.²⁵⁴ A first line of attack has been against the employment of fixed “bail schedules” for persons accused of misdemeanor and other low-level offenses.²⁵⁵ Under this

²⁵⁰ *Id.* at 671.

²⁵¹ *See infra* Conclusion.

²⁵² *Salerno*, 481 U.S. at 748–49.

²⁵³ *See NCJRS Report*, *supra* note 6, at xiii (“Originally conceived as a device to free accused persons prior to conviction by a court of law, bail ha[s] degenerated into a two-way door, opening outward to pretrial liberty for defendants with funds, but inward to prolonged confinement for defendants without money to post bond.”).

²⁵⁴ The reformer is Alec Karakatsanis, the Executive Director of Civil Rights Corps, and the undisputed inspirational and intellectual catalyst of current legal reform efforts. *See* Michael Zuckerman, *Criminal Injustice*, HARV. MAG. (Sept.–Oct. 2017), <https://harvardmagazine.com/2017/09/karakatsanis-criminal-justice-reform>. [<https://perma.cc/DK7P-EMCP>] *See also* Civil Rights Corps, *Challenging the Money Bail System*, <http://www.civilrights.org/work/wealth-based-detention> (last visited Oct. 1, 2018).

²⁵⁵ As a general matter, bail schedules are “procedural schemes that provide judges with standardized money bail amounts based upon the offense charged, regardless of the

procedure, judges automatically and without exception impose a pre-determined bail amount (typically less than \$500) for all persons accused of particular listed offenses.²⁵⁶ Those who can pay the amount gain their freedom; the rest remain in jail. This practice seems impossible to square with the *Williams/Tate/Bearden* line of authority. Those jurisdictions employing a fixed bail schedule for low-level offenses ensure the pretrial confinement of the indigent for no purpose. Nothing supports the proposition that a person able to raise a few hundred dollars is more deserving of pretrial freedom than a person without those funds. Faced with litigation, several jurisdictions have agreed to consent judgments banning the practice, while in other cases, lower courts have issued rulings invalidating the use of fixed bail schedules against the indigent.²⁵⁷

Perhaps the most precedential decision at this writing (at least on the issue of bail schedules), is the Fifth Circuit's anemic opinion in *ODonnell v. Harris County*, which held that Harris County, Texas' fixed bail schedule for misdemeanor arrestees was constitutionally infirm in practice.²⁵⁸ *ODonnell* refused to find a state-created due process liberty interest in pretrial release, and declined an invitation to categorically bar the use of a fixed bail schedule to detain indigent misdemeanor arrestees.²⁵⁹ Nonetheless, the Court did hold that the mechanical application of the schedule to require the confinement of an indigent person while affording

characteristics of an individual defendant.” Lindsey Carlson, *Bail Schedules*, 26-SPG CRIM. JUST. 12, 14 (2011).

²⁵⁶ *Id.*; see also Heaton et al., 16 note 16, at 730, 733 (noting that use of a schedule specifying bail amounts based on the charge and prior convictions “is not uncommon.”).

²⁵⁷ See, e.g., *ODonnell v. Harris Cty.*, 251 F. Supp. 3d 1052 (S.D. Tex. 2017); Pierce v. Velda, Case No. 15cv570, 2015 WL 10013006 (E.D. Mo. June 3, 2015) (parties entered in settlement agreement in which court issued declaratory judgment affirming that holding an arrestee in custody because the person is too poor to post a monetary bond violates equal protection); *Thompson v. Moss Point*, Case No. 15cv182, 2015 WL 10322003 (S.D. Miss. Nov. 6, 2015) (entering declaratory judgment against City's use of secured bail schedule as applied to the indigent); *Cooper v. City of Dothan*, No. 15cv425, 2015 WL 10013003 (M.D. Ala. June 18, 2015) (granting temporary restraining order and releasing plaintiff on his own recognizance or subject to an unsecured bond); see also *Buffin v. City and Cty. of San Francisco*, No. 15cv4959, 2018 WL 424362 (N.D. Cal. Jan. 16, 2018) (denying City's motion for summary judgment and concluding that the sheriff's use of a bail schedule implicated the plaintiffs fundamental right to liberty); *Walker v. City of Calhoun*, Case No. 15cv00170, 2017 WL 2794064 (N.D. Ga. June 16, 2017) (granting preliminary injunction prohibiting City from detaining misdemeanor or ordinance arrestees otherwise eligible for release who are unable to afford bond), *appeal filed*, No. 17-13139 (11th Cir. July 13, 2017).

²⁵⁸ 882 F.3d 528, 541 (2018). The Fifth Circuit thus vacated the District Court's injunction, which barred Harris County from continuing to use the schedule. See *supra* note 233.

²⁵⁹ *Id.* at 544.

release to a similar arrestee with means to pay violated equal protection.²⁶⁰ Case-by-case evaluation, taking into account the arrested person's ability to pay, is a constitutional necessity, the court concluded, but how and whether such individualized evaluation could coexist with a fixed bail schedule was left unaddressed.²⁶¹

Other decisions are less equivocal and herald positive change in America's bail system. Advocates in California argued in *In re Humphrey*, a habeas corpus case, against the pretrial confinement of an indigent, elderly defendant with substance abuse issues who was unable to pay the massive bond set in his robbery case.²⁶² The California attorney general declined to defend the bond proceedings below,²⁶³ and the California Court of Appeals responded with a resounding condemnation of local practices, where bail is routinely set in an amount impossible for the defendant to pay.²⁶⁴ In the court's view, setting unaffordable bail amounted to nothing more than "a *sub rosa* detention order lacking the due process protections constitutionally required."²⁶⁵ The court was firm: due process requires that the presiding judge determine the amount a defendant can pay and then set bail within that threshold, unless the state can show by "clear and convincing evidence" that a higher amount is necessary to ensure the defendant's future appearances in court.²⁶⁶

It is, of course, too soon to tell whether the principles in the *Humphrey* opinion will gain nationwide acceptance. What is clear, though, is that the issues will continue to be pressed, and courts around the country will be forced to decide the legitimacy of cash-based pretrial procedures.

B. PRETRIAL DETENTION MAY ONLY BE IMPOSED WITH SUFFICIENT PROCEDURAL PROTECTIONS

Third wave reformers have also reinvigorated the legal protections mandated by *Salerno*, using the decision offensively to promote individual due process and challenge cash bond. This is a particularly significant

²⁶⁰ *Id.* at 543–44.

²⁶¹ *Id.* at 546.

²⁶² *In re Humphrey*, 19 Cal. App. 5th 1006, 1017, 1019 (2018), *rev. granted*, 417 P.3d 769 (Cal. 2018).

²⁶³ *Id.* at 1016.

²⁶⁴ *Id.* at 1014 (“[A]s this case demonstrates, there now exists a significant disconnect between the stringent legal protections state and federal appellate courts have required for proceedings that may result in a deprivation of liberty and what actually happens in bail proceedings in our criminal courts.”).

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 1037.

trend given that *Salerno* has traditionally been understood as significantly undermining pretrial rights.²⁶⁷

The *Salerno* decision was premised on the assumption that the assignment of a person to the presumptively small group who should *not* be released would be made following a stringent evidentiary hearing pursuant to the 1984 Bail Reform Act.²⁶⁸ Under this legislation, the judge was to provide written findings, supported by “clear and convincing evidence,” that no conditions of pretrial release could reasonably assure the safety of other persons and the community.²⁶⁹ Obviously, the arbitrary imposition of an unaffordable bond—without inquiry or explanation—does not comport with the Court’s expectation that persons deprived of their pretrial liberty receive specific and robust procedural protections.

Thus, recently, reform advocates have challenged over-detention by relying on *Salerno*’s edict that proper procedures be employed in issuing detention orders.²⁷⁰ In *Lopez-Valenzuela v. Arpaio*, for instance, the en banc Ninth Circuit considered the legality of an Arizona statute that barred bail for illegal immigrants who were found to have committed certain serious felony offenses “if the proof is evident or the presumption great” that the defendant committed the specified crime.²⁷¹ The court applied a “heightened scrutiny” standard derived from *Salerno*.²⁷² Construing *Salerno* to apply a three-part test, the court concluded that the challenged law did not address a “particularly acute problem” (i.e., illegal immigrants are not particularly likely to flee or threaten public safety).²⁷³ It was not limited to “a specific category of extremely serious offenses”,²⁷⁴ and it failed to afford the individualized determination of flight risk or dangerousness mandated by *Salerno*.²⁷⁵ The Ninth Circuit struck down

²⁶⁷ See, e.g., Keith Eric Hansen, *When Worlds Collide: The Constitutional Politics of United States v. Salerno*, 14 AM. J. CRIM. L. 155, 206 (1987) (“The rejection of Salerno’s facial claim was in fact a rejection of the categorical depiction of criminal justice rights that has long characterized the pro-defense argument.”).

²⁶⁸ *Salerno*, 481 U.S. at 750–52.

²⁶⁹ *Id.* at 750.

²⁷⁰ See, e.g., Corrected Brief of Appellants at 22, *Lopez-Valenzuela et al. v. Maricopa Cty. et al.*, No. 11-16487 (9th Cir. Oct. 28, 2011) (“Proposition 100 [an Arizona statute barring bail for illegal immigrants found to have committed certain serious felony offenses] grossly violates [the] core principle [of *Salerno*], by imposing a categorical no-release rule without any individualized determination relating to flight risk, resulting in detention even when a state court would find that the particular circumstances warrant release.”).

²⁷¹ 770 F.3d 772, 775 (9th Cir. 2014) (en banc).

²⁷² *Id.* at 779–80.

²⁷³ *Id.* at 782–83.

²⁷⁴ *Id.* at 784.

²⁷⁵ *Id.* at 784–85.

Arizona's statute, holding that its provisions barring bail for illegal immigrants "[were] not narrowly tailored to serve a compelling interest."²⁷⁶

Among the striking features of *Lopez-Valenzuela* is that, in the Ninth Circuit opinion, *Salerno*—long felt to shield pretrial detention practices from meaningful review—became a tool to further the rights of pretrial detainees.²⁷⁷ The due process analysis that necessitated invalidation of the Arizona statute derived from *Salerno*'s holding that the interest in pretrial liberty is "fundamental" and, therefore, cannot be infringed without narrow tailoring to serve a compelling state interest.²⁷⁸ *Salerno*, remarkably, is becoming part of the bulwark against reflexive, unexamined pretrial detention of disfavored defendants.²⁷⁹

These early litigation results suggest that there is judicial openness to two civil libertarian propositions: (a) that the use of money bond to preventively detain the indigent (while allowing freedom to the wealthy) is unacceptable; and (b) that the pretrial detention of any individual defendant is only legitimate to the extent the state can demonstrate to a high degree of probability that detention is necessary to assure the defendant's future appearance or the safety of the community. It will be up to litigators to confirm judicial acceptance of those propositions in future cases. But, even with successful outcomes in court, meaningful reform is far from assured, as past experience makes painfully clear.

²⁷⁶ *Id.* at 791.

²⁷⁷ *Id.* ("The 'narrowly focus[e]d' pretrial release statute upheld in *Salerno* provided a 'careful delineation of the circumstances under which detention will be permitted.'") (quoting *Salerno*, 481 U.S. at 750–51). See also *Simpson v. Miller*, 387 P.3d 1270 (Ariz. 2017) (rejecting *Lopez-Valenzuela*'s application of what the court considered to be a strict scrutiny standard to pretrial detention but still striking down an Arizona law categorically denying bail to those charged with an offense of sexual conduct with a minor, as the crime was "not inherently predictive of future dangerousness" and thus a case-specific inquiry was mandated by *Salerno*).

²⁷⁸ *Lopez-Valenzuela*, 770 F.3d at 791–92.

²⁷⁹ This observation applies to the *Humphrey* opinion as well. *Salerno*, which, the court noted, was essential to the petitioner's argument, drove the court's analysis. As the opinion explained: "The *Bearden* line of cases, together with *Salerno* and *Turner*, compel the conclusion that a court which has not followed the procedures and made the findings required for an order of detention must, in setting money bail, consider the defendant's ability to pay and refrain from setting an amount so beyond the defendant's means as to result in detention." 19 Cal. App. 5th 1006, 1037 (2018), *rev. granted*, 417 P.3d 769 (Cal 2018).

III. RESULTS ON THE GROUND: WILL THE REARTICULATION OF LIBERTY PRINCIPLES TRANSLATE TO GENUINE SYSTEMIC TRANSFORMATION?

We turn in this section to an assessment of the preliminary results of, and predictions for, the “third wave” of bail reform. Commentators have suggested that the country has reached a “tipping point” in pretrial administration, where money bail will no longer be the ultimate determinant of release.²⁸⁰ Instead, release decisions will be based on an empirical assessment of an individual defendant’s risk level.²⁸¹ Recent changes in the bond laws of certain states seem to confirm this sea change.²⁸²

But this new era of pretrial release is not without its own set of risks and challenges. Judges may simply replace the money bond system with one in which release (and detention) decisions are predicated on empirically-based risk-assessment models, and the level of pretrial detention is affected only marginally, if at all. Even where rates of pretrial detention are curtailed under the new system of risk assessment, jurisdictions may make unfounded determinations about who is a viable risk—and thus about who is subject to detention without ever having been convicted of a crime.²⁸³ Similarly, highly-restrictive conditions, including GPS tracking and electronic monitoring, may be used more freely in lieu of money bond, but with the same restrictive effects on people’s lives.²⁸⁴ Or, money bail may remain a determinative part of the pretrial release equation.²⁸⁵ We see reason for concern in all such outcomes.

²⁸⁰ See Gouldin, *supra* note 1, at 839 (describing the “tipping point” in the reform movement, in recognition of the country’s vast system of pretrial incarceration) (citing Lisa Foster, Dir. Office for Access to Justice, Remarks at ABA’s 11th Annual Summit on Public Defense (Feb. 6, 2016)).

²⁸¹ See Mayson, *supra* note 1, at 92–93 (stating that there is a movement underway to replace the system of monetary bail with one based on risk that the defendant may recidivate).

²⁸² For instance, New Jersey, as discussed in Section III(A), *infra*, has led the nation in moving away from cash bond. See Megan Thompson & Mori Rothman, *New Jersey Eliminates Most Cash Bail, Leads Nation in Reforms*, PBS (July 22, 2017, 3:26PM), <https://www.pbs.org/newshour/show/new-jersey-eliminates-cash-bail-leads-nation-reforms> [<http://perma.cc/X2TQ-EHP5>]; see also Megan Stevenson & Sandra G. Mayson, *Bail Reform: New Directions for Pretrial Detention and Release*, U. PA. FAC. SCHOLARSHIP 1, 15, 15 n.92 (March 13, 2017).

²⁸³ Bail scholars Megan Stevenson and Sandra Mayson note that the question of pretrial detention is also “a moral one,” as states grapple with when pretrial detention is warranted. Stevenson and Mayson, *supra* note 282, at 16.

²⁸⁴ See *supra* note 23.

²⁸⁵ See BAUGHMAN, *supra* note 14, at 46.

A. THIRD WAVE BAIL REFORM EFFORTS AND THEIR RAMIFICATIONS FOR PRETRIAL LIBERTY

To be sure, the current reform movement is producing important changes, both in and outside the courtroom. In 2014, New Jersey passed the Criminal Justice Reform Act (CJRA), which replaced the traditional system of money bail with one centered on defendant risk.²⁸⁶ The passage of the CJRA was accompanied by a law enforcement directive disseminated by the state's attorney general, informing prosecutors that they could seek the imposition of financial conditions only if "the defendant is reasonably believed to have financial assets that will allow him or her to post monetary bail in the amount requested by the prosecutor without having to purchase a bond from a surety company or to obtain a loan."²⁸⁷ Colorado altered its bail statutes in 2013 to encourage the use of risk-assessment over monetary conditions in the bail process.²⁸⁸ New court rules were recently implemented in Maryland, New Mexico, and Arizona prohibiting the assignment of cash bond beyond what a defendant could pay.²⁸⁹ In Cook County, the chief judge of the Circuit Court instituted an administrative

²⁸⁶ For an overview of the CJRA and the history of its adoption into New Jersey law, see *Holland v. Rosen*, 277 F. Supp. 3d 707, 714–21 (D. N.J. 2017), *aff'd*, 895 F.3d 272 (3d Cir. 2018), in which plaintiffs challenged the state law's constitutionality, discussed *infra*.

²⁸⁷ Memorandum from N.J. Att'y Gen. Christopher S. Porrino to Dir., Div. of Crim. Justice et al 55 (May 24, 2017), http://www.state.nj.us/lps/dcj/agguide/directives/ag-directive-2016-6_v2-0.pdf [<http://perma.cc/942P-XC5C>].

²⁸⁸ H.B. 13-1236, 69th Gen. Assem., Reg. Sess. (Colo. 2013); *see also* Joshua J. Luna, *Bail Reform in Colorado: A Presumption of Release*, 88 U. COLO. L. REV. 1067, 1093 (2017) (noting that while the new legislation promotes the use of pretrial services programs to avoid pretrial detention, it does not go so far as to prevent the imposition of money bond, even for low-risk, low-income defendants).

²⁸⁹ MD. R. 4-216.1(e)(1)d)(1)(B) (effective July 1, 2017), <http://mdcourts.gov/rules/rodocs/ro192.pdf> [<http://perma.cc/2BJ2-4LBX>] ("A judicial officer may not impose a financial condition in form or amount that the judicial officer knows or has reason to believe the defendant is financially incapable of meeting and that will result in the defendant being detained solely because of that financial incapability."); N.M. R. 5-401(E)(1)(c) (effective July 1, 2017), http://www.nmcompcomm.us/nmrules/NMRules/5-401_6-5-2017.pdf [<http://perma.cc/L8QD-3VX8>] ("The court shall not set a secured bond that a defendant cannot afford for the purpose of detaining a defendant who is otherwise eligible for pretrial release."); ARIZ. R. CRIM. PROC. 7.3(b)(2) (effective April 3, 2017), http://www.azcourts.gov/Portals/20/2016%20December%20Rules%20Agenda/R_16_0041.pdf [<http://perma.cc/DWQ2-PCBF>] ("The court must not impose a monetary condition that results in unnecessary pretrial incarceration solely because the person is unable to pay the bond."). Similarly, Indiana passed a rule that prohibits the assignment of money bond, but only where the arrestee does not present a risk of flight or danger to themselves or others. IND. CRIM. R. 26 (effective Sept. 7, 2016) <http://www.in.gov/judiciary/files/order-rules-2016-0907-criminal.pdf> [<http://perma.cc/JFW9-ADQD>].

General Order in 2017 that barred the imposition of unaffordable bond.²⁹⁰ In January 2018, Governor Cuomo of New York announced he would be asking the legislature to eliminate cash bail for certain crimes.²⁹¹ Very recently, California passed criminal justice legislation making it the first state to abolish cash bail, and instead giving significant discretion to judges to detain people, without financial conditions, if they are considered a public safety or flight risk.²⁹²

In certain ways, these latest efforts, aimed at the cessation of burdensome financial conditions, imitate those of the 1960s. But the two eras are different. Unlike in Professor Foote's time, when risk prediction was in its infancy, many jurisdictions today are relying on sophisticated predictive risk assessments in rendering release decisions.²⁹³ The theory of these tools is that the defendant's risk of recidivating and risk of flight can be objectively calculated without inserting judicial intuition or subjective beliefs into the process.²⁹⁴ It is beyond the scope of this Article to evaluate the validity of the assessments, different models of which have been implemented throughout the country. Needless to say, there has been an amassing of scholarship on the topic, including normative and empirical critiques of the tools.²⁹⁵

²⁹⁰ *General Order*, *supra* note 21.

²⁹¹ James C. McKinley, Jr., *Cuomo, in Bid to Help Poor, Proposes Ending Cash Bail for Minor Crimes*, N.Y. TIMES (Jan. 2, 2008), <https://www.nytimes.com/2018/01/02/nyregion/cuomo-ending-cash-bail-state-of-the-state.html> [<http://perma.cc/L6EW-T342>]. The district attorneys in Brooklyn and Manhattan thereafter announced that they would not seek cash bond on non-felony charges. Jamiles Lartey, *New York City to End Cash Bail for Non-Felony Cases in Win for Reform Advocates*, GUARDIAN (Jan. 10, 2018), <https://www.theguardian.com/us-news/2018/jan/10/new-york-city-to-end-cash-bail-for-non-felony-cases-in-win-for-reform-advocates> [<http://perma.cc/4TWE-3SZQ>].

²⁹² California Money Bail Reform Act, S.B. 10 (Cal. 2018), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB10. [<https://perma.cc/7BG4-CQTW>].

²⁹³ *See, e.g., Where Pretrial Improvements are Happening*, *supra* note 19, at 19 (finding that currently 30 local jurisdictions rely on the Laura and John Arnold Foundation's Public Safety Assessment-Court (PSA) tool; it is in use statewide in New Jersey); PRETRIAL JUSTICE INST., *Resource-Based to Risk-Based Pretrial Justice*, PREZI (Aug. 7, 2015), <https://prezi.com/h6beoff0oyhx/resource-based-to-risk-based-pretrial-justice> [<http://perma.cc/R9XK-RMZU>]; GIDEON'S PROMISE, ET AL., JOINT STATEMENT IN SUPPORT OF THE USE OF PRETRIAL RISK ASSESSMENT INSTRUMENTS (May 10, 2017), <https://www.nacdl.org/Defenders-May-2017-RAI-Statement/> [<http://perma.cc/Q8PJ-9G7J>]. By 2015, about 10% of United States jurisdictions were using actuarial risk-assessments instruments to make release decisions, a number that is "rapidly growing[.]" Gouldin, *supra* note 1, at 867.

²⁹⁴ *See HARVARD LAW SCHOOL PRIMER*, *supra* note 75, at 18.

²⁹⁵ These critiques suggest that the pretrial assessments (often called "PSAs") are far from foolproof in their predictive capabilities and run the risk of recreating pervasive structural inequities in society writ large. *See, e.g., Marie VanNostrand & Gena Keebler, Pretrial Risk Assessment in the Federal Court* 73 FED. PROB. 7 (2009), <http://www.us>

What *is* pertinent here is how the recent trend toward risk assessment may be prompting a renewed fervor for pretrial detention. The trend has been developing for some time. Since the 1980s, many states have instituted preventive detention measures based on the charged offense.²⁹⁶ Currently, twenty-two states in addition to the District of Columbia statutorily authorize such findings.²⁹⁷ Recent state efforts are novel, however, in that they seek to expand the use of preventive detention by relying heavily on empirical assessments that have pervaded the pretrial “market,” in order to ascertain defendant “risk.”²⁹⁸ In New Mexico, where the state Supreme Court instituted the rule outlawing the use of unaffordable money bail, voters in 2016 amended the state Constitution to allow judges to hold suspects if they are deemed at high risk of pretrial failure.²⁹⁹ Under New Jersey’s CJRA, the judiciary is permitted to

courts.gov/sites/default/files/73_2_1_0.pdf [https://perma.cc/MMH6-CGG2] (advocating the use of standardized assessment tools to “reduc[e] the disparity in risk assessment practices and provide a foundation for evidence based practices relating to release and detention recommendations and the administration of the alternatives to detention program”); Gouldin, *supra* note 1, at 871 (describing the problems of risk assessment tools that merge evaluations of risk of flight and risk of recidivism); SCHNACKE, *supra* note 60, at 106 (describing the convolution of risk of flight and dangerousness and PSAs’ failure to define protective factors mitigating risk); Mayson, *supra* note 1, at 557 (analyzing what level of actuarial risk should justify pretrial detention in the era of empirical risk assessments); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803 (2014) (raising constitutional and normative arguments against the use of risk prediction assessments based on demographic and socioeconomic factors); Julia Angwin et al., *Machine Bias*, PRO PUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [http://perma.cc/7DCK-KTDC]; Jeff Larsen et al., *How We Analyzed the COMPAS Recidivism Algorithm*, PRO PUBLICA (May 23, 2016), <https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm> [http://perma.cc/5877-BDFP] (empirically assessing racial differences in a specific risk assessment algorithm); Heaton et al., *supra* note 16, at 772 (2017) (asserting that risk-based assessment will not eliminate racial and socioeconomic inequalities as they “import the effects of race and class disparities earlier in the system”).

²⁹⁶ Gouldin, *supra* note 1, at 879–81.

²⁹⁷ See HARVARD LAW SCHOOL PRIMER, *supra* note 75, at 25, 25 n210 (listing state statutory schemes).

²⁹⁸ New Jersey, Washington D.C., and New Mexico are the only jurisdictions that allow for preventive detention based on pretrial risk, in addition to charge. See *Where Pretrial Improvements are Happening*, *supra* note 19, at 12. But in the recent environment, more states are likely to implement preventive detention based on risk assessment. See HARVARD LAW SCHOOL PRIMER, *supra* note 75, at 25.

²⁹⁹ N.M. CONST. art. II, § 13, (amended 2016), <http://www.sos.state.nm.us/nmconst2017.pdf> [http://perma.cc/E9V6-P8EL]. Judges may use risk assessment tools to determine whether a defendant may be released. See ACLU OF NEW MEXICO, *Beyond the Myths: Making Sense of the Public Debate About Crime in New Mexico* 3 (Jan. 18, 2018), <https://www.aclu->

preventively detain certain defendants after a hearing on a defendant's likelihood to appear and his risk to public safety.³⁰⁰ California's new bill allows the wholesale pretrial incarceration of anyone a judge deems "high risk."³⁰¹ The result is that a significant pretrial population in these jurisdictions may never have the opportunity to obtain release pending trial.³⁰²

Strikingly, unlike the push for "public safety" detention in the 1980s, which was spurred in large part by crime control advocates, this new wave of reform has sometimes been propelled by advocacy groups and policy organizations committed to removing financial conditions from the pretrial release decision.³⁰³ This position can create strange alliances, as suggested by the 2017 case of *Holland v. Rosen*, in which a federal district court in New Jersey addressed the constitutionality of the CJRA on a preliminary injunction motion.³⁰⁴ In a twist, the plaintiff in *Holland* sought recognition of a constitutional right to pretrial release on money bail, in lieu of release

nm.org/sites/default/files/field_documents/criminal_justice_reform_report_draft.pdf [http://perma.cc/3DW4-AQVF].

³⁰⁰ N.J. REV. STAT. § 2A:162-15 (2014). See also *Holland v. Rosen*, 277 F. Supp. 3d 707, 716–21 (D.N.J. 2017). A full review of New Jersey's recent changes to pretrial procedures, including the amendment to the state's constitution that permitted detention and paved the way for the passage of the CJRA, can be found in *State v. Robinson*, 160 A.3d 1, 5–6 (N.J. 2017).

³⁰¹ *Id.*; see also Meagan Flynn, *California Abolishes Money Bail with a Landmark Law. But Some Reformers Think it Creates New Problems*, WASH. POST. (Aug. 29, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/08/29/california-abolishes-money-bail-with-a-landmark-law-but-some-reformers-think-it-creates-new-problems/?utm_term=.7464e008c1fa [https://perma.cc/L8NZ-TTGM] (Bail reformer Alec Karakatsanis noted that the new law "replaces detention based on poverty with detention based on algorithm.").

³⁰² In D.C., for instance, which allows for risk-based pretrial detention, 12% to 15% of all charged defendants are held preventively. See Spurgeon Kennedy, PRETRIAL SERVICES AGENCY FOR THE DISTRICT OF COLUMBIA, *Freedom and Money – Bail in America*, <https://www.psa.gov/?q=node/97> [http://perma.cc/Q3CP-7KXB]; see also Beau Beaudin, PRETRIAL SERVICES AGENCY FOR THE DISTRICT OF COLUMBIA, *The D.C. Pretrial Services Agency: Lessons from Five Decades of Innovation and Growth 2* (2009), <https://www.psa.gov/sites/default/files/PJI-DCPSACaseStudy.pdf> [http://perma.cc/FD3S-WKAZ].

³⁰³ See Mayson, *supra* note 1, at 4, 6 ("A generation ago, pretrial restraint to prevent non-case-related future crime . . . was a matter of intense controversy. Today's bail reform movement, by contrast, has assumed the legitimacy of pretrial preventive restraint and advocates preventive detention as a basic component of a model pretrial system. Advocacy groups like the American Civil Liberties Union (ACLU) have sporadically voiced concerns but have nonetheless signed on to the reform agenda.").

³⁰⁴ *Holland v. Rosen*, 277 F. Supp. 3d at 707, 713 (D.N.J. 2017), *aff'd*, 895 F.3d 272 (3d Cir. 2018).

on electronic monitoring, which he found unduly burdensome.³⁰⁵ Holland also challenged the CJRA's insertion of safety considerations into the pretrial release determination, which allowed for the assignment of "severe" pretrial restrictions on those out on bail.³⁰⁶ Holland's suit was brought in conjunction with a bail bond insurer who attempted to veil its blatant financial interest in a constitutional claim for monetary bail.³⁰⁷

On the other side, advocacy organizations, including the ACLU of New Jersey and the NAACP, filed an amicus brief in support of the State, citing to *Salerno* and arguing for the validity of the CJRA partly on the grounds that public safety considerations were well-established factors in the pretrial release decision.³⁰⁸ Prior to the filing of the *Holland* case, these organizations had engaged in dogged efforts in support of the eradication of a pretrial system based on money bail, including through the public promotion of the CJRA.³⁰⁹ In accordance with the amici position, the *Holland* court ultimately denied the preliminary injunction, and finding there was no implied right to monetary bail under the U.S. Constitution and

³⁰⁵ *Id.* at 723, 726, 739–46.

³⁰⁶ *Id.* at 741–42 (“Plaintiffs argue that ‘nothing in *Salerno* provides any support for the CJRA’s sweeping provisions authorizing severe liberty restrictions of non-dangerous defendants—i.e., anyone charged with a covered crime whose risk of flight can be negated through house arrest and an ankle monitor.’”).

³⁰⁷ *Id.* at 723, 727–29.

³⁰⁸ See Brief of Proposed Amici Curiae American Civil Liberties Union of New Jersey, Drug Policy Alliance, Latino Action Network, and NAACP at 20–24, *Holland*, 277 F. Supp. 3d at 707 (“*Salerno* remains good law and, despite Plaintiffs’ suggestion to the contrary, does not merely stand for the proposition that some people may be detained without bail. It also makes clear that the government may legitimately consider public safety in the regulation of pretrial release.”) (citation omitted).

³⁰⁹ See *id.* at 7–9 (Statement of Interest of Amici). See also, e.g., *Bail System Reform*, ACLU OF NEW JERSEY, <https://www.aclu-nj.org/legislation/bail-system-reform1> [http://perma.cc/KW6Z-ZGSM]; Alexander Shalom, *ACLU-NJ: N.J. Bail Praised But Mass Incarceration Persists*, N.J.COM (Dec. 5, 2017), http://www.nj.com/opinion/index.ssf/2017/12/aclu-nj_the_problem_with_njs_a_grade_on_bail_refor.html [http://perma.cc/9PQL-XZ6P] (ACLU of New Jersey’s senior staff attorney discussing his work on the nonpartisan committee that proposed recent bail reforms); David Matthau, *If you Can Afford to Pay, Should You Be Let Out of Jail? NJ Court Will Decide*, NEWJERSEY101.5 (Aug. 21, 2017), <http://nj1015.com/if-you-can-afford-to-pay-should-you-be-let-out-of-jail-nj-court-will-decide/> [http://perma.cc/6GTL-29BG] (interviewing Alexander Shalom, voicing support for CJRA); *Groups File Friend-of-the-Court Brief in Lawsuit by Insurance-Backed Bail Industry to Overturn Landmark Reforms*, ACLU (July 28, 2017), <https://www.aclu.org/news/aclu-nj-other-civil-rights-groups-push-back-against-bail-industry-challenge-pretrial-justice> [http://perma.cc/T4UE-KFZL]; Alexander Shalom, *ACLU: Why N.J.’s New Pretrial Justice System is Fairer and Smarter*, N.J.COM (Apr. 20, 2017), http://www.nj.com/opinion/index.ssf/2017/04/aclu_why_njs_new_pretrial_justice_system_is_fairer.html [http://perma.cc/49MD-3C2D].

affirming the government's prerogative to implement restrictive pretrial measures.³¹⁰

The *Holland* case exemplifies the dynamics of this new era of bail reform, where advocates may accede to, or even promote, the government's right to enforce risk-based incarceration in exchange for the elimination of cash bail. Given the egregious and well-documented consequences of financial detention,³¹¹ there is obvious merit to this position. There are risks involved as well. With their tactical compromise, reformers risk rubber-stamping an expansion of the system of preventive detention. In 1970, Laurence Tribe decried a federal scheme of pretrial detention aimed at minimizing recidivism as a slippery slope:

Once the government has instituted a system of imprisonment openly calculated to prevent crimes committed by persons awaiting trial, the system will appear to be malfunctioning only when it releases persons who prove to be worse risks than anticipated . . . But when the system detains persons who could safely have been released, its errors will be invisible.³¹²

Harkening to Tribe's warning, any enlargement of the pretrial carceral state now will be difficult to reverse in the future. Its success will be assumed by virtue of its existence. This is of particular concern for a system of bond administration based on empirical risk assessment, since the system's primacy will be bolstered by the data on which it ostensibly relies. The lack of an alternative reality in which there are measurable positive outcomes stemming from more widespread pretrial release will serve as a roadblock to successful legal challenge and reform.

The third wave reform position also risks trading away the right to release on recognizance for release subject to other conditions that, while not involving money, are nonetheless restrictive and damaging.³¹³ Most

³¹⁰ 277 F. Supp. 3d. at 741–43.

³¹¹ See, e.g., *supra* notes 233 and 244.

³¹² Laurence H. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 375 (1970). Tribe further stated: "The pretrial misconduct of these persons will seem to validate, and will indeed augment, the fear and insecurity that the system is calculated to appease." *Id.*

³¹³ The burden inflicted by pretrial release "services," including drug testing and 24-hour electronic monitoring and GPS tracking, have been well-documented. See, e.g., Robin Steinberg & David Feige, *The Problem with NYC's Bail Reform*, THE MARSHALL PROJECT (July 9, 2015, 4:16 PM), <https://www.themarshallproject.org/2015/07/09/the-problem-with-nyc-s-bail-reform> [http://perma.cc/3EC6-BKR7] ("In the pretrial services model, released defendants are steered to an agency that can impose conditions on their freedom. Failure to maintain compliance with mandated services can lead to violations of supervised release, reincarceration, and other penalties. The problem with the pretrial-services model is that these 'services,' which are a condition of one's release, are often identical to, and sometimes far more onerous than the sentence one would receive for actually being guilty of the

bail statutes already contain numerous alternatives to pretrial detention, many of which are quite onerous.³¹⁴ Again, the *Holland* suit is illustrative.³¹⁵ Mr. Holland was faced with a prosecutor's petition to preventively detain him prior to trial, pursuant to the CJRA.³¹⁶ In order to avoid being held in jail, Mr. Holland agreed to electronic monitoring, a form of state control that intruded significantly on his privacy rights and his liberty.³¹⁷ The state effectively forced Mr. Holland into a "pretrial plea bargain"—an exchange of one type of custody for another.³¹⁸ This is the very type of coercion that the recent changes to money bail were intended to eradicate.³¹⁹ Thus, the focus in *Holland* on the money bail issue distorted

crime."); McCoy, *supra* note 118, at 144 ("In the name of humane reform of bail practices and therapeutic help for addicts, the Philadelphia courts have designed a system in which an entire class of offenders is subjected to intrusive state control *while on release and while they have not been convicted of anything.*") (emphasis in original); *Punishment is Not a "Service": The Injustice of Pretrial Conditions in Cook County*, CHICAGO COMMUNITY BOND FUND (Oct. 24, 2017), <https://chicagobond.org/docs/pretrialreport.pdf> [http://perma.cc/YCH3-EFR2] [hereinafter, *Bond Fund Report*] ("Under the guise of helping accused people come back to court and avoid re-arrest, pretrial conditions restrict the liberty of innocent people and even mimic the same harms as pretrial incarceration, causing loss of jobs, housing, access to medical care and putting severe strain on social support networks and family members."); see also Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L. J. 291, 349–50 (2016) ("The critique of Progressive-inspired rehabilitation programs, however, was that they did make poor people vulnerable by granting the state huge amounts of discretionary power over their lives."); Wiseman, *Right to Be Monitored*, *supra* note 23, at 1375 (arguing for a constitutional right to pretrial monitoring, in lieu of financial conditions of release, despite acknowledging that a system of pretrial represents a "serious intrusion" into a defendant's privacy). Such intrusive state action imposed on those who have not yet been convicted of any crime tend to raise serious constitutional concerns as well. See *United States v. Scott*, 450 F.3d 863, 868 (9th Cir. 2006) ("[O]ne who has been released on pretrial bail does not lose his or her Fourth Amendment right to be free of unreasonable seizures . . .") (alteration in original) (quoting *Cruz v. Kauai County*, 279 F.3d 1064, 1068 (9th Cir. 2002)).

³¹⁴ Gouldin, *supra* note 1, at 853–54. Gouldin notes that "[t]ypical nonfinancial conditions include requiring a defendant to: remain in the custody of a third party; seek or maintain employment or education; refrain from associating with particular people; abide by restrictions on travel and housing; comply with curfews or restrictions on living arrangements; refrain from excessive alcohol use; avoid all drug use; not possess weapons; report regularly to supervising authorities; and undergo medical, psychiatric and/or substance abuse treatment." Judges are also generally allowed to craft their own conditions on top of any prescribed alternatives. *Id.* at 854.

³¹⁵ 277 F. Supp. 3d 707 (2017).

³¹⁶ *Id.* at 722, 742.

³¹⁷ *Id.* at 742–43.

³¹⁸ *Id.* at 742 ("Holland waived his claims to have money bail be considered as one possible condition for his pretrial release when he agreed to accept . . . monitoring in exchange for the prosecution dropping its request for detention.").

³¹⁹ See *supra* note 234, on the coercive aspects of money-based pretrial detention.

consideration of an equally pressing right—namely, the right of pretrial defendants to be released on the least-restrictive conditions necessary.³²⁰ It is particularly important to pay heed to this concern given that the efficacy of many pretrial conditions, and in particular electronic monitoring, in preventing recidivism, are at best uncertain.³²¹

B. CASE STUDY: CAMPAIGN TO ELIMINATE THE USE OF CASH BOND IN COOK COUNTY, ILLINOIS

Cook County, where reform efforts have been underway for some time at this writing, provides a useful case study of third wave reform efforts. Illinois, both historically and in the present, has been preoccupied with bail reform. Advocates, criminal justice stakeholders, and judicial officers have widely criticized Cook County's bail practices for years.³²² Stakeholders and opinion leaders have decried the exorbitant financial costs,³²³ and the

³²⁰ *Holland*, 277 F. Supp. 3d at 717 (citing to the CJRA's requirement that pretrial release include "the least restrictive condition, or combination of conditions" that the court determines necessary).

³²¹ See Gouldin, *supra* note 1, at 854–55. See also Lisa Pilnik, *A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial System and Agency*, NAT'L INST. OF CORRECTIONS 45 (Feb. 2017), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=c8bd044e-0215-9ab6-c22e-b1a4de912044>. [<https://perma.cc/Q5M6-2AQY>].

³²² See BEELEY, *supra* note 65; see also, e.g., Sharon Grace, *Introducing Principles of Bail reform in Cook County* (Apr. 25, 2017), <http://www.chicagoappleseed.org/introducing-principles-for-bail-reform-in-cook-county/> [<http://perma.cc/6ZNC-FHMS>]; *Pub. Hearing Notice & Agenda*, Crim. Just. Comm., Bd. of Comm'rs of Cook Cty., at 3 (Nov. 17, 2016), http://cook-county.granicus.com/MediaPlayer.php?view_id=2&clip_id=1676 [<http://perma.cc/R5EF-5Q3E>]; Mitch Dudek, *Experts, Attorneys Keep Up Push to Abolish Cash-for-Bond System*, CHI. SUN-TIMES (Nov. 17, 2016), <https://chicago.suntimes.com/chicago-politics/increasing-momentum-to-abolish-cash-for-bond-system/> [<http://perma.cc/YTT8-6DYV>]. In a 2016 speech, Illinois Supreme Court Justice Anne Burke stated, "Judges—apparently distrustful of the information provided to them by pretrial services—refuse to allow eligible individuals to be released on their own recognizance and, instead, continue to require large cash bonds, even for relatively minor, nonviolent crimes. But even low bonds are too large if you are poor." Frank Main, *Cook County Judges Not Following Bail Recommendations: Study*, CHI. SUN TIMES (July 3, 2016), <https://chicago.suntimes.com/chicago-politics/cook-county-judges-not-following-bail-recommendations-study-find/> [<http://perma.cc/HZB6-FU3X>].

³²³ On February 1, 2017, 95% of Cook County's jail population was detained pretrial. The average cost of a jail stay is \$143 per day, and the average length of stay was 57 days, for a total cost of \$8,151. See Hilary Gowins, *Cook County Judge Unveils Change to Cash Bail*, ILL. POL'Y (July 18, 2017), <https://www.illinoispolicy.org/cook-county-judge-unveils-change-to-cash-bail/> [<http://perma.cc/ED6L-GEYU>]; Lili Holzer-Glier, *Inside the Massive Jail that Doubles As Chicago's Largest Mental Health Facility*, VERA (2016), <https://www.vera.org/the-human-toll-of-jail/inside-the-massive-jail-that-doubles-as-chicagos-largest-mental-health-facility> [<http://perma.cc/GC2U-MFEJ>] ("taking into account

human toll on families and the accused³²⁴ of the monetary bond system that was, until recently, employed pervasively in the County's Central Bond Court.³²⁵

We filed the class action lawsuit *Robinson v. Martin* in October 2016 in Illinois state court.³²⁶ Grounded in the principles of equal protection and due process outlined in Section III, the suit challenged the extensive and racially-discriminatory use of pretrial detention in Cook County.³²⁷ The suit claimed that de facto bail policies disproportionately and negatively impacted black defendants in the County.³²⁸ *Robinson* sought to force the County to ameliorate these conditions.

Although the case was dismissed on procedural grounds without a decision on the merits,³²⁹ as often happens, the litigation further propelled the efforts of grassroots organizers and advocates, who are also seeking an end to the County's system of wealth-based detention. In 2016, community groups working on issues of mass incarceration and racial justice—including Chicago Appleseed Fund for Justice, the Sargent Shriver National Center on Poverty Law, the People's Lobby, A Just Harvest, and many others—joined to form the umbrella organization, the Coalition to End

the treatment, medication, and security required to incarcerate a mentally ill person, the daily cost doubles and even triples.”)

³²⁴ See, Saneta deVuono-powell et al., *Who Pays? The True Cost of Incarceration on Families*, Ella Baker Center for Human Rights 8–9 (2015); see also *supra* note 58.

³²⁵ See *Holder Memo*, *supra* note 207, at 2–7 (describing the prevalence of cash bond in Cook County through 2016).

³²⁶ No. 2016 CH 13587 (Ill. Cir. Ct. 2016).

³²⁷ See *Robinson*, No. 2016 CH 13587 at n.3. The suit was brought on behalf of two men who were arrested on theft charges and held for months in jail because they could not afford to post bonds of \$1,000 and \$5,000.

³²⁸ Data collected from the Circuit Court of Cook County, *supra* note 212, revealed that of those defendants against whom Class 4 felony charges were instituted from 2011 to 2013, only 15.8% of the black defendants were released on bond. Conversely, 43.9% of the black Class 4 defendants remained in custody throughout the pretrial period, while only 29.8% of non-black Class 4 felony defendants remained in pretrial custody. The bond versus custody outcomes for those charged with other classes of felonies is likewise stark in this period. See *Robinson*, No. 2016 CH 13587 at para. 36 and 37.

³²⁹ See Order Granting Section 2-619.1 Motion to Dismiss, *Robinson*, No. 2016 CH 13587 (filed on June 26, 2017). The Plaintiffs have since chosen to pursue a challenge to the Cook County pretrial procedures in another forum, rather than seek appeal at the state appellate level. As described in the text, the filing and litigation of the suit precipitated significant reforms to Cook County's pretrial system as well as political action on the issue, see *infra* Section III(B).

Money Bond.³³⁰ The Coalition has undertaken lobbying and organizing efforts to end the overuse of pretrial detention in the County.³³¹ Their efforts have been supplemented by those of the Chicago Community Bond Fund, a founding member of the Coalition, and an organization dedicated to harm reduction for those in the jail complex by raising funds to pay bail amounts for those who cannot afford them.³³²

This advocacy has produced results in the political arena. On June 9, 2017, then-Illinois Governor Bruce Rauner signed new legislation, the Bail Reform Act of 2017, intended to address the persistence of cash bail in pretrial decision-making.³³³ The Act did not place hard limits on the use of monetary bail, but it did recommend that any pretrial conditions imposed be non-monetary in nature.³³⁴ Its passage was a sign of the growing mainstream acceptance of non-cash alternatives in bail setting. In July 2017, the Cook County Public Defender released a memorandum prepared by former Attorney General Eric Holder criticizing the court system's reliance on financial conditions and its consequent over-detention of the poor.³³⁵ The memo called for "sorely needed" reforms in Cook County, where "pretrial detention outcomes have long been detached from valid criminal justice concerns."³³⁶

That same month, Circuit Court of Cook County Chief Judge Timothy Evans announced his intention to issue General Order 18.8A, which prohibits judges within the County from setting cash bail in amounts

³³⁰ See The Coalition to End Money Bond, *About the Coalition*, CHICAGO APPLESEED <http://www.chicagoappleseed.org/coalition-to-end-money-bond/> [<http://perma.cc/84GX-9M5N>].

³³¹ *Id.*

³³² See CHICAGO COMMUNITY BOND FUND, <https://www.chicagobond.org> [<http://perma.cc/9JZS-PX4W>].

³³³ The Bail Reform Act of 2017, S.B. 2034, 100th Gen. Assembly (Ill. 2017), <http://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=91&GA=100&DocTypeId=SB&DocNum=2034&GAID=14&LegID=105495&SpecSess=&Session=> [<http://perma.cc/GY84-LV4J>] (signed into law on June 9, 2017). Members of the Coalition to End Money Bond had a significant role in shaping and improving the Bail Reform Act signed by the Governor. See Coalition to End Money Bond, *Monitoring Cook County's Central Bond Court: A Community Courtwatching Initiative 4* (Feb. 27, 2018), http://www.chicagoappleseed.org/wp-content/uploads/2018/02/Courtwatching-Report_Coalition-to-End-Money-Bond_FINAL_2-25-18.pdf [<http://perma.cc/F2RE-47BU>] [hereinafter, *Courtwatching Report*].

³³⁴ The Bail Reform Act of 2017 *supra* note 333. For more information on the Act and its implications, see Sharlyn Grace, *Illinois Takes Small First Step Toward Bail Reform*, CHICAGO APPLESEED (June 9, 2017), <http://www.chicagoappleseed.org/illinois-takes-small-first-step-toward-bail-reform/> [<http://perma.cc/WY46-BYT8>].

³³⁵ *Holder Memo*, *supra* note 207.

³³⁶ *Id.* at 2, 32.

beyond what defendants could afford.³³⁷ This judicial directive was an anomaly in reform efforts; it was promulgated pursuant to the chief judge's administrative authority, rather than as legislation or a court rule.³³⁸ Following the Order's implementation on September 18, 2017, no person who was arrested on a felony charge in Cook County, and who was otherwise bailable by statute, was to be incarcerated prior to trial because of inadequate funds to pay for release.³³⁹ The Order was to be read in conjunction with the statutes that govern bail in the state.³⁴⁰

In its first year, the Order appears to have produced a dramatic reduction of those incarcerated in the Cook County Jail for inability to post bond. The population of the Jail, which is the country's second largest single site jail correctional facility and houses the vast majority of the County's pretrial population,³⁴¹ declined by more than 1,100 inmates in the

³³⁷ See GENERAL ORDER, *supra* note 21; see also Press Release, Office of the Chief Judge, Circuit Court of Cook County, Evans Names Judges to Serve in Pretrial Division (Sept. 15, 2017), <http://www.cookcounty.org/MEDIA/ViewPressRelease/tabid/338/ArticleId/2573/Evans-names-judges-to-serve-in-Pretrial-Division.aspx> [<http://perma.cc/S62X-SNUX>]. The Order contains a presumption "that any conditions of release imposed shall be non-monetary in nature" and that the court "shall impose the least restrictive conditions or combination of conditions necessary to reasonably assure the appearance of the defendant for further court proceedings. GENERAL ORDER, *supra* note 21 at ¶ 6.

³³⁸ Compare Supreme Court of Illinois, 2015 Annual Report of the Illinois Courts, Administrative Summary, at 4, 31, http://www.illinoiscourts.gov/SupremeCourt/AnnualReport/2015/2015_Admin_Summary.pdf [<http://perma.cc/6B9U-LPHE>] with *supra* Section III(A) (discussing other state reforms). See notes 291–293 for a discussion of other states' reform initiatives in bond release decision-making.

³³⁹ Megan Crepeau, *Bond Court Gets Underway in Cook County with Different Judges, New Guidelines*, CHI. TRIB. (Sept. 18, 2017, 5:45 PM), <http://www.chicagotribune.com/news/local/breaking/ct-met-cook-county-cash-bond-20170918-story.html> [<http://perma.cc/3S5T-RHSS>]. GENERAL ORDER, *supra* note 21, ¶ 7 ("When the Court determines that monetary bail is a necessary condition of release, the court shall, in substance, make the following findings . . . b. the amount of bail is not oppressive, is considerate of the financial ability of the defendant, and the defendant *has the present ability to pay the amount necessary to secure his or her release on bail*[.].") The Order took effect for all misdemeanors on January 1, 2018. *Id.* at ¶ 1.

³⁴⁰ See GENERAL ORDER, *supra* note 21, Comments. In that vein, the Order affirmed who is entitled to bail and who may be detained without release during pretrial proceedings. See 725 ILCS 5/110-4, delineating "bailable offenses" in Illinois. Those who commit certain serious felonies may be detained without bail where "the proof is evident or the presumption great that the defendant has committed [the] offense" and where the State has demonstrated by clear and convincing evidence that the defendant poses an immediate threat to the safety of other persons and that no conditions of release would effectively protect the public. 725 ILCS 5/110-6.1.

³⁴¹ Olson, *supra* note 209, at 1.

first two months after the Order took effect.³⁴² In one week in December 2017, the Jail held 5,900 detainees—the lowest level at the facility in decades and a decrease of 1,500 detainees since just September 2017.³⁴³ The Office of the Chief Judge also released statistics near the end of 2017 showing that 60% of the 3,500 defendants processed through the criminal court system since the Order’s implementation received individual recognizance bonds (I-bonds) and thus were released without any financial conditions.³⁴⁴ Moreover, according to a study conducted by the Cook County Sheriff’s Justice Institute, the median bond amount in the County fell to \$8,500 in the first two months the Order was in effect—a sharp decline from the \$75,000 median bond amount recorded one year prior.³⁴⁵

Despite these positive developments, however, a deeper look at the quotidian operation of the County’s bond hearings leaves room for concern. In furtherance of litigation in the *Robinson* suit, we obtained transcripts of the weekday felony bond hearings held in the first month after the Order’s implementation from September 19, 2017 to October 17, 2017, a total of 2,118 pretrial release hearings.³⁴⁶ We assessed an additional 684 release

³⁴² See Amanda Vinicky, *Cook County Jail Population Down 15 Percent After Bond Reforms*, CHICAGO TONIGHT, WTTW (Nov. 20, 2017, 6:45 PM), <https://news.wttw.com/2017/11/20/cook-county-jail-population-down-15-percent-after-bond-reforms> [<https://perma.cc/GNZ9-SK7H>]; see also The Civic Federation, *The Impact of Cook County Bond Court on the Jail Population: A Call for Increased Public Data and Analysis* 3 (Nov. 15, 2017) [hereinafter, *Civic Federation Report*]. The population decline was reported by the Cook County Sheriff’s Office, which is responsible for operating the Jail. The Cook County Circuit Court is not expected to review any statistical effects of the Order until after its first year of implementation. See Press Release, Office of the Chief Judge, Circuit Court of Cook County, *Evans Changes Cash-Bail Process for More Pretrial Release* (July 17, 2017), <http://www.cookcountycourt.org/MEDIA/ViewPressRelease/tabid/338/ArticleId/2561/Evans-changes-cash-bail-process-for-more-pretrial-release.aspx> [<http://perma.cc/6ZRZ-RLWV>].

³⁴³ Andy Grimm, *Bond Court Reforms Lead Record-Low Inmate Count in Cook County*, CHI. SUN-TIMES (Dec. 22, 2017, 9:27 PM), <https://chicago.suntimes.com/chicago-politics/bond-court-reforms-lead-to-record-low-inmate-count-in-cook-county/> [<http://perma.cc/GA73-JSDF>].

³⁴⁴ *Id.*

³⁴⁵ *Id.*; see also Ward Room, *Bond Court Reforms Lead to Record-Low Inmate Count in Cook County Jail*, NBC5 News (Dec. 23, 2017, 12:00 PM), <https://www.nbcchicago.com/news/local/bond-court-reforms-record-low-inmate-count-cook-county-jail-466134743.html> [<http://perma.cc/N6EX-4G64>].

³⁴⁶ Plaintiffs’ counsel conducted a review of the bond court hearings following the implementation of the General Order, in order to challenge a motion to dismiss filed by the Judicial Defendants (the results are on file with the authors.). In particular, the Defendants argued that the imposition of General Order 18.8A rendered the *Robinson* lawsuit “moot,” because there was no longer a case or controversy stemming from the detention of individuals based on the failure to pay a set bond amount. Plaintiffs argued otherwise, citing preliminary analysis of the bond court review. Plaintiffs asserted that the Defendants

hearings in two weeks in January 2018. The results were, to some extent, sobering.

In the fall of 2017, bond court judges set an unaffordable condition of release in 15% of cases.³⁴⁷ That statistic was higher for certain judges than others.³⁴⁸ One judge assigned unaffordable monetary conditions of release in approximately 17% of his cases; another did so in almost a quarter of his cases. The judge who assigned the most unaffordable bonds in the sample would regularly state on the record that such bonds were “not oppressive” or “excessive” and considered “the defendant’s ability to pay.” This litany, repetitive and unvarying, seemed to be an attempt to stave off future challenges to his pretrial release decisions. But the vast majority of the defendants who came before that judge were still in custody in the weeks after the bond hearing—a clear sign that the bond amount was not, in fact, “considerate of the financial ability of the accused.”³⁴⁹

By January 2018, circumstances had improved.³⁵⁰ Most judges followed the Order, setting unaffordable cash bonds rarely, if ever. Yet, certain judges continued to flout the Order’s authority. In 204 of the 684 sampled hearings, defendants were not asked what they could afford to pay to obtain release, and the defendant’s attorney did not offer that information. One judge in particular set a bond amount above what the arrestee could pay in 52 hearings. The highest assigned bond amount above what someone said they could pay was approximately \$10,000. The minority of judges who consistently ignored the Order’s mandate and assigned unaffordable financial conditions seemed to evince a belief (well-

failed to show “voluntary cessation” of the unlawful conduct sufficient to moot the case, since “Cook County Judges overseeing bond court have regularly disregarded Judge Evans’ admonition against setting oppressive cash bonds.” See Plaintiffs’ Suppl. Br. in Opp. to Defs.’ Supp. 2-619 Mot. to Dismiss for Mootness at 1, *Robinson v. Martin*, No. 2016 CH 13587 (Ill. Cir. Ct. 2016).

³⁴⁷ This statistic was determined by evaluating the number of times each judge set a bail amount above what the defendant, through his attorney, stated he could pay on the record. The data from this admittedly small sample is on file with the authors.

³⁴⁸ The lack of consistency between bond court judges is another enduring problem in Cook County’s bond court administration. See Injustice Watch Staff, *Jail Roulette: Cook County’s Arbitrary Bond Court System* 3, INJUSTICE WATCH (Nov. 29, 2016), <https://injusticewatch.org/interactives/jail-roulette/> [http://perma.cc/E22X-65TS] (The bond system in Cook County is “a strikingly arbitrary system under which defendants’ fates—whether they are released or held in jail—depend on which judge they happen to draw and what the judge’s mood happens to be at the time.”).

³⁴⁹ 725 ILCS 5/110-5(b).

³⁵⁰ Plaintiffs’ counsel again conducted a review of bond court hearings in that month, analyzing 684 hearings in a two-week period for compliance with the General Order. Those results are also on file with the authors.

founded or not) as to the defendant's high level of risk. In such circumstances, money bond was still being used implicitly to ensure preventive detention.

These findings, though limited in scope and empirical precision, are in line with a court-watching report released in February 2018 by the Coalition to End Money Bond.³⁵¹ In September and October 2017, while there was a vast increase in the number of defendants who are asked about their ability to pay a monetary bond, court observers found that judges continued to assign money bonds in 23% of all cases.³⁵² Moreover, anecdotal evidence suggests that the Order is being entirely disregarded in County courtrooms beyond Central Bond Court, including in the felony preliminary hearing courtrooms, where motions to reconsider unaffordable bond amounts are heard.³⁵³ And as of December 15, 2017, there were 3,289 people in the jail incarcerated pretrial because they could not afford a money bond.³⁵⁴

³⁵¹ Members of the Coalition to End Money Bail tracked outcomes for felony defendants in bond hearings in the weeks following the implementation of the General Order and similarly found that judges overseeing bond hearings set bond amounts above what people could pay, even over the objections of defense counsel. See Chicago Community Bond Fund, *Advocates Say Illinois Bond Court Judges Continue to Fail at Implementation of Reform* [hereinafter, *Community Bond Fund Observations*], ENEWS PARK FOREST (Oct. 3, 2017), <https://www.enevspf.com/latest-news/latest-local-news/advocates-say-illinois-bond-court-judges-continue-fail-implementation-reform/> [<https://perma.cc/B62F-C826>]; see also *Civic Federation Report*, *supra* note 342, at 24. Chief Judge Evans reported that judges may be setting overly high bond amounts in cases where they believed the defendants could afford more than they claimed. *Id.* at 35 (citing Statement by Timothy C. Evans, Cook Cty. Bd. Comm'rs Fin. Comm. Mtg. (Oct. 27, 2017)). However, the large number of pretrial detainees in the jail, discussed *supra*, belie this assertion. Moreover, there has been no action taken by the court system to address the thousands of pretrial detainees who attended bond hearings prior to the September 2017 implementation of the Order and who remain imprisoned for failure to pay. See *Community Bond Fund Observations*, *supra* note 349; see also Kevin Gosztola, *Interview with Max Suchan of Chicago Community Bond Fund on Failure of Judges to Implement Bail reforms*, SHADOWPROOF (Oct. 22, 2017), <https://shadowproof.com/2017/10/22/interview-max-suchan-bond-court-reforms-chicago/> [<http://perma.cc/5D8V-8NGV>] (noting that of the 180 cases in which defendants were given monetary bonds and that The Coalition to End Money Bond tracked in the weeks following the Order's implementation, only half were able to pay the set amount within seven days).

³⁵² See *Courtwatching Report*, *supra* note 333, at 28. Of those who were asked what they could afford, only 46% were given affordable bond amounts. *Id.* at 32.

³⁵³ Detainees may seek modification of their bail orders at any point in the criminal proceedings. See 725 ILCS 5/110-6(a) (2018).

³⁵⁴ *Courtwatching Report*, *supra* note 333, at 29.

The Circuit Court of Cook County's own data on the General Order's implementation confirms that judges persist in disregarding its mandate.³⁵⁵ In the first three months of 2018, 25.6% of defendants appearing in bond court still received a D-bond, or cash bond, and of that contingent, only 54.1% of defendants were actually able to post the bond.³⁵⁶ Between November 2017 and June 2018, more than 1,350 people were still being held in the Cook County Jail, unable to afford the judge-assigned bond.³⁵⁷ Further, these numbers underreport the extent to which pretrial arrestees in Cook County remains incarcerated pretrial. While 16.3% of arrestees received an electronic monitoring order, allowing them to be released into the community, only 35% were ever actually placed on monitoring – meaning the other 65% of defendants stayed in custody.³⁵⁸ The chief judge, at this time, has taken no measures to address the failure of certain judges to follow the Order or the continued incarceration of those unable to purchase freedom.

The initial results from Cook County have several implications for future reform efforts more broadly. The first is that an unenforceable administrative order or other procedural directive that lacks the force of law will not be sufficient to change ingrained patterns of state court judges.³⁵⁹ Systemic reform in Illinois will require the adoption of a judicial order or the passage of a state supreme court rule that plainly proscribes the use of

³⁵⁵ See *Circuit Court of Cook County Model Bond Court Dashboard: January – March 2018*, COURT STATISTICS AND REPORTS, <http://www.cookcountycourt.org/Portals/0/Portal/MBC%20Dashboard%20CY18%20Q1.pdf> [<http://perma.cc/5D7C-54R5>].

³⁵⁶ *Id.* at 2.

³⁵⁷ COALITION TO END MONEY BOND, SHIFTING SANDS: AN INVESTIGATION INTO THE FIRST YEAR OF BOND REFORM IN COOK COUNTY 6 (Sept. 18, 2018), <https://www.chicagobond.org/reports/ShiftingSands.pdf>. [<https://perma.cc/36GE-8BFD>].

³⁵⁸ *Id.*; Model Bond Court Dashboard, Circuit Court of Cook County (January – March 2018) (on file with author).

³⁵⁹ In *Robinson*, the Defendants moved to dismiss the suit partly on grounds of mootness, citing the General Order. Plaintiffs responded in opposition, citing both the failure of certain judges to set affordable bonds and the lack of legal authority for the General Order. See Plaintiffs' Response in Opposition to Defendants Supplemental 2-619 Motion to Dismiss for Mootness, *Robinson v. Martin*, No. 2016 CH 13587 (filed Aug. 14, 2017). Though laudable, there is evidence that the General Order exceeds Judge Evans' administrative authority, provided under Article VI of the Illinois Constitution and Illinois Supreme Court Rule 21(c). Those provisions do not permit him to impose substantive obligations on Cook County judges concerning how to hold bail proceedings. *Id.* Consequently, the defendants remain free to ignore the order and continue incarcerating the poor. This, it seems, is exactly what has happened.

money to detain.³⁶⁰ Half measures, however well-intentioned, will not suffice.

The second implication is that even in a jurisdiction like Cook County, where reform appears to be warmly embraced by the vast majority of the stakeholders, there is a significant risk of “backsliding” that must be guarded against. This requires constant vigilance—by advocates willing to publicly expose officials who fail to abide by pretrial standards,³⁶¹ by defense attorneys, who must work daily to enforce the rights of their detained clients via motion practice and appeals, and by civil rights attorneys willing to bring suit against municipal actors.³⁶² It also requires the implementation of regular trainings for Pretrial Division employees and judges in the administration of non-monetary bail. Finally, and of particular importance in Cook County where there is a lack of transparency as to the operation of criminal justice systems,³⁶³ reform mandates public dissemination of data concerning pretrial division operations.

The state of reform in Cook County remains in flux. The authors continue to press forward with legal bond reform efforts and organizers continue to advocate for decreased pretrial detention. While the initial venture away from a cash-bail system has not been an unparalleled success, there is no doubt that the reform movement is well underway and still gaining momentum. But it is also true that effecting lasting change to the

³⁶⁰ Reformers, with the support of former AG Eric Holder, have called for the passage of such a Supreme Court rule in Illinois. See Sharlyn Grace, *Advocates Urge Illinois Supreme Court to Issue Rule Change to Stop Jailing People Due to Poverty*, CHICAGO APPLESEED (Nov. 14, 2017), <http://www.chicagoappleseed.org/more-than-70-organizations-individuals-call-for-supreme-court-rule-on-bail/> [<http://perma.cc/AN54-YZYC>].

³⁶¹ Advocates in Cook County regularly rely on the media to promote transparency in bail reform efforts. See, e.g., Alan Mills & Alexa Van Brunt, *Dart's Misguided Approach to Jail Reform*, CHI. TRIB. (Mar. 12, 2018, 5:25 PM), <http://www.chicagotribune.com/news/opinion/commentary/ct-perspec-dart-misguided-jail-reform-toni-preckwinkle-0313-story.html> [<http://perma.cc/7JMJ-N4JH>]; David Baltmanis & Alexandra Black, *Letter: Is Cook County's Bail Reform Working?*, CHI. TRIB. (Mar. 2, 2018, 1:52 PM), <http://www.chicagotribune.com/news/opinion/letters/ct-cook-county-bond-jail-dart-20180302-story.html> [<https://perma.cc/8TQA-29ZQ>]; Rev. Dwayne Grant, *Letter: How Cook County's Sheriff is Failing His Community*, CHI. TRIB. (Mar. 19, 2018, 3:01 PM), <http://www.chicagotribune.com/news/opinion/letters/ct-tom-dart-cook-county-sheriff-bond-reform-20180319-story.html> [<http://perma.cc/F8P3-HGDT>].

³⁶² Conditions of release, including monetary bail, may be modified or eliminated on a defendant's petition. See *supra* note 350. A defendant may also appeal a bond order to the state Appellate Court, pursuant to Illinois Supreme Court Rule 604(c)(1).

³⁶³ See generally *Civic Federation Report*, *supra* note 342, at 44 (decrying the lack of data transparency in the Circuit Courts of Cook County and recommending that the Chief Judge “develop and publicly release data reports . . . [including] anonymous breakdowns of bond orders by judge”).

County criminal justice system remains, as ever, a moving target. The County has seen an uptick in the number of people held on “no bond” orders since the General Order went into effect.³⁶⁴ This trend toward outright detention, should it continue, suggests that advocates and attorneys will have to deploy new tactics geared toward deincarceration.³⁶⁵

Finally, while the observations detailed here are of course specific to Cook County, they raise greater questions about the trajectory of bail reform writ large, as cities across the country adopt measures intended to end the ignominious pay-for-release money bond system.³⁶⁶ The recent decisions of certain Cook County judges harken back to the previous waves of bail reform, in which attempts to eradicate the use of money in the pretrial process failed, ultimately due to the obduracy of the judiciary. Moving forward, attention must be paid to how reform efforts can serve as a counterweight to such tendencies.

CONCLUSION: OBSERVATIONS IN SUPPORT OF A JUST SYSTEM OF PRETRIAL ADMINISTRATION

The presumption of innocence is obvious in theory, but counterintuitive in practice. The rule of law insists that the facts not be prejudged and due process respected. Those who are merely accused, convicted of no crime, are entitled to the fair process that can only occur when the state is held strictly to its burden of proof and acquittal is assured if the state’s proof falls short. Experience breeds the cynical view that, since many arrestees may be guilty in fact, it is expedient to presume the guilt of all. In a sense, the history of bail reform is the story of the war between these opposing visions.

³⁶⁴ See *SHIFTING SANDS*, *supra* note 357, at 7. Between November 2017 and June 2018, 522 people were denied the possibility of release on a “no bond order.” *Id.* This represents a fourfold increase (from 2% to 8%) in the number of people held preventatively since the General Order went into effect. *Id.*

³⁶⁵ This trend has certainly been observed in other jurisdictions experimenting with bail reform. In 2017, Maryland adopted a court rule, 4-216.1, which promotes the release of defendants on their own recognizance or on an unsecured money bond. MD. RULE 4-216.1(b). Analysis of pretrial administration in the state since the rule’s adoption reveals that while the use of cash bail and bail amounts have decreased dramatically, the number of defendants being held without bail has increased. See Christine Blumauer et al., *Advancing Bail Reform in Maryland: Progress and Possibilities*, PRINCETON UNIV. SCHOOL OF PUBLIC AND INT’L AFFAIRS, Feb. 27, 2018, at 22, http://www.princeton.edu/sites/default/files/content/Advancing_Bail_Reform_In_Maryland_2018-Feb27_Digital.pdf [http://perma.cc/NZT3-PHBH].

³⁶⁶ See generally *Where Pretrial Improvements are Happening*, *supra* note 19 (describing reforms to pretrial practice through legislative, judicial, and executive branches of various states).

The tug of expedience, abetted by the public's insistence on community safety, has proven extremely powerful over the centuries. "Third wave" reformers must understand that their efforts to transform pretrial detention practices will continue to face powerful forces of inertia and resistance. We believe, though, that history indeed "rewards our research."³⁶⁷ It offers useful guidance as to a path toward meaningful reform of the pretrial detention apparatus with a lasting and substantial reduction in cruel and unnecessary detention of legally innocent people.

The current attacks on monetary bond as unconstitutional wealth discrimination have moral and legal traction. We hope and expect to see additional judicial rulings that strike down reliance on wealth as the arbiter of who remains in custody facing trial. This important and necessary litigation strategy is, however, insufficient standing alone. Advocates must anticipate and resist the systemic inertia that, without vigilance and vigorous advocacy, will produce hollow victories in which wealth-based detention is merely exchanged for a system of pretrial detention of the same indigent defendants—now because they are explicitly deemed too dangerous, too controversial, too unattractive, or too risky to release.

We offer several observations, based on the review of history and our own personal experience advocating for change on the ground. *First*, reformers should never fear too much justice.³⁶⁸ The detention of any legally innocent person prior to his criminal trial should be an exceptional event. That event should only occur when, after a hearing and proof by an exacting standard, it is determined that detention is essential to ensure the proper functioning of the criminal process or to protect members of the public from specific, articulable threats to their safety. *Salerno* may have authorized preventive, pretrial detention, but it should not be read as enabling such detention as a matter of routine practice. As evidence, *Salerno* deemed pretrial liberty—not detention—to be the "norm" in our system.³⁶⁹ It assumed that preventive detention would only occur where the state satisfied its burden to show by clear and convincing evidence that nothing short of detention could reasonably assure the safety of the community.³⁷⁰ Reformers must not lose sight of the bottom line: we seek a

³⁶⁷ See *supra* note 28.

³⁶⁸ Justice William Brennan famously criticized the majority in *McCleskey v. Kemp*, 481 U.S. 279 (1987) for its "fear of too much justice" in rejecting the race-based challenge to the death penalty. *Id.* at 339 (Brennan, J., dissenting).

³⁶⁹ *Salerno*, 481 U.S. at 755 ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.").

³⁷⁰ *Id.*; U.S.C. § 3142(f)(2)(B).

system in which pretrial liberty actually *is* the norm and the number of persons detained is dwarfed by the vast majority who are granted liberty.

Some risk to public safety is necessarily associated with this model. But the assumption of that risk is essential if practice is to conform to constitutional principles of due process, equal protection, and the presumption of innocence.³⁷¹ As Justice Jackson opined in his concurrence in *Stack v. Boyle*: “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.”³⁷² Reformers should not shrink from demanding that stakeholders accept the necessity of minimal risk to public safety, which is inevitable if we are to fundamentally transform pretrial detention practices.

Second, the rules requiring the elimination of cash bond and placing strict limits on preventive detention must be mandatory and enforceable. If history has taught us anything, it is that the pull of custom, political calculation, and even bias will override systems of change that depend upon or give wide range to judicial discretion.³⁷³ Where judges can employ discretion to detain, there is every reason to fear that they will do so.

Stakeholders who are truly committed to changing conditions of pretrial administration should commit to the negotiation of rules or statutes that cannot be easily subverted by the judicial officers presiding over bond hearings. Rules must be clear and unambiguous, both in prohibiting the imposition of money bonds that defendants cannot afford and in barring the detention of any person without the most exacting demonstration that the detention is imperative to the proper functioning of the system or the safety of the community.

Third, whatever the terms of the applicable statutes or court rules, ensuring long-lasting reform will require constant vigilance by all concerned advocates and parties. History and experience teach that the case-by-case fight in the trenches to effectuate the rights of individual defendants will be an essential piece of the reform efforts. Where statutes require, for example, that the defendant not be detained without clear and convincing proof, criminal defense counsel must insist on the requisite

³⁷¹ *Stack*, 342 U.S. at 8 (1951) (Jackson, J. concurring); *see also* Schnacke, *supra* note 4, at 8 (“[T]he fears associated with even the smallest amount of pretrial failure cause those leaders to focus first and almost entirely on mitigating perceived risk, which in turn leads to unnecessary pretrial detention. But these fears misapprehend the entire concept of bail, which requires us first to embrace the risk created by releasing defendants . . . and then to seek to mitigate it only to reasonable levels.”).

³⁷² *Stack*, 342 U.S. at 8 (Jackson, J., concurring).

³⁷³ *See, e.g., supra* notes 132 and 191.

proof. They must also appeal cases in which the requirements are disregarded by prosecutors and judges. Otherwise, statutes and rules that sound progressive on paper will be reduced to dead letter. Reformers must engage with the criminal defense bar, while defense counsel must carry the banner of reform in every individual case.

Fourth, reformers should engage with pretrial services agencies and work within the system to transform those agencies, so the focus is less on ascertaining risk and more on ensuring the success of those who are in the community pending trial. Certain pretrial services could easily and inexpensively be directed to assist those released on recognizance in returning to court—for instance, through the implementation of text or phone call reminders of court dates, travel vouchers, courthouse childcare, job assistance, and drug treatment.³⁷⁴ These interventions have already proved successful in various jurisdictions in bolstering return rates.³⁷⁵ In this same vein, risk prediction instruments may be utilized to determine

³⁷⁴ See *supra* note 371; see also Nissa Rhee, *Has Bail Reform in America Finally Reached a Tipping Point?*, THE CHRISTIAN SCIENCE MONITOR (Apr. 3, 2017), <https://www.csmonitor.com/USA/Justice/2017/0403/Has-bail-reform-in-America-finally-reached-a-tipping-point> [<http://perma.cc/RQ3C-4VT8>] (describing the effectiveness of mail and phone call reminders about court dates); Bond Fund Report, *supra* note 313, at 3 (recommending bus passes, child care and work-friendly court hearings and citing to successful such initiatives in Manhattan); Jocelyn Simpson, *Bail Nullification*, 115 MICH. L. REV. 585, 603-04 (2017) (citing to local bail funds that provide social services, like drug treatment, counseling, and job referrals, to those on pretrial release); Esmond Harmsworth, *Bail and Detention: An Assessment and Critique of the Federal and Massachusetts Systems*, 22 NEW ENG. J. CRIM. & CIV. CONFINEMENT 213, 223 (1996) (noting that the most “important supervisory technique may be the provision of bilingual information.”); see also Brian H. Bornstein et al., *Reducing Courts’ Failure-to-Appear Rate by Written Reminders*, 19 PSYCH., PUB. POL’Y, & LAW 70 (2013); HARVARD LAW SCHOOL PRIMER, *supra* note 75, at 16 (reviewing high rates of effectiveness in court reminder programs). In the probation context, scholars have noted that “some standard conditions operate differently on poor defendants,” as poor defendants often have difficulty meeting fixed appointments because of work obligations and childcare responsibilities and due to a lack of reliable transportation. Doherty, *supra* note 313, at 350.

³⁷⁵ See Bornstein et al., *supra* note 374, at 76; Daniel Bernal, *Taking the Court to the People: Real-World Solutions for Nonappearance*, 59 ARIZ. L. REV. 547, 562–70 (2017) (describing the success of Arizona initiatives, including reminders of court dates and expanding court hours, in reducing failure-to-appear rates); HARVARD LAW SCHOOL PRIMER, *supra* note 75, at 16 (describing significant reduction in failure to appear rates in three jurisdictions that employed reminder systems); Marie VanNostrand et. al, *State of the Science of Pretrial Release Recommendations and Supervision*, PRETRIAL JUST. INSTIT., 16–20, [<https://perma.cc/QFK5-8UGG>] (reviewing reminder studies in six jurisdictions and finding that each study “concluded that court date notifications in some form are effective at reducing failures to appear in court”).

individual defendants' particular needs while on release.³⁷⁶ A human rights approach to pretrial reform posits that job training, rather than monitoring, and substance abuse counseling, rather than house arrest, are the means of ensuring compliance with court conditions and, more importantly, preventing recidivism after the termination of the criminal proceedings.³⁷⁷ In any event, pretrial conditions should not be used to punish, and they certainly should not be used subjectively by judges who are trading one form of custody (i.e. jail) for another (i.e. state monitoring).

The decision whether to release a defendant prior to trial is, in the great majority of cases, the most consequential ruling that will occur in the case—in terms of its effect on the defendant's life, on his or her family, on his or her future prospects, and on the particular case in which the defendant stands charged. At this moment in history, there is widespread revulsion toward the unnecessary cruelty of a system that depends far too heavily on incarceration. We should not squander the moment by demanding less than what justice requires.

³⁷⁶ See Starr, *supra* note 295, at 871 (“Compared to the use of risk prediction in determining whether or not to detain an arrestee, it is easier to defend the use of risk prediction instruments in the assignment of prisoners, probationers, and parolees to correctional . . . programming (e.g., job training) and in the shaping of conditions of supervised release (e.g., drug tests).”).

³⁷⁷ See Melissa Aubin, *The District of Oregon Reentry Court: An Evidence-Based Model*, 22 FED. SENT'G REP. 39, 42 (2009) (discussing evidence-based programming in the federal context aimed at reducing recidivism).