In the Rush to Reform, Prudence Is Among the Highest Duties: How to Responsibly Reform Cash Bail

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Other Views:

• Insha Rahman, *Undoing the Bail Myth: Pretrial Reforms to End Mass Incarceration*, 46 Fordham Urban L.J. 845 (2019), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2767&context=ulj.

• Tiana Herring, *Releasing people pretrial doesn't harm public safety*, Prison Pol'y Initiative (Nov. 17, 2020), https://www.prisonpolicy.org/blog/2020/11/17/pretrial-releases/.

• *After Cash Bail: A Framework for Reimagining Pretrial Justice,* Bail Project (2020), https://bailproject.org/after-cash-bail/.

• Sean Kennedy, *This bail reform is a bad idea*, N.Y. Daily News, Mar. 27, 2019, https://www.nydailynews.com/opinion/ny-oped-bail-reform-is-a-bad-idea-20190327-xjdpo3ynanhtzpmi4l7icqrzky-story.html.

• Jamiles Lartey, *New York Tried to Get Rid of Bail. Then the Backlash Came.*, Politico, Apr. 23, 2020, https://www.politico.com/news/magazine/2020/04/23/bail-reform-coronavirus-new-york-backlash-148299.

• Chelsey Sanchez, *As Donations Pour in, Bail Fund Organizers Want to Overhaul the System,* Harpers Bazaar (June 8, 2020), https://www.harpersbazaar.com/culture/politics/a32782804/bail-funds-george-floyd-protests-pretrial-detention/.

• Note, *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 Harv. L. Rev. 1125 (2018), https://harvardlawreview.org/2018/02/bail-reform-and-risk-assessment-the-cautionary-tale-of-federal-sentencing/.

Over the last two decades, the politics of American criminal law has made strange bedfellows. Christian conservatives and libertarians have found common cause with progressives and left-wing criminal justice activists to reduce America's jail and prison population. For Christian reformers, their faith commitments inform their advocacy, "as evidenced by the prominent role that Prison Fellowship Ministries has played in nearly all the efforts" at reform.[1] Libertarians, with their maximalist view of freedom, support "the repeal of all laws creating 'crimes' without victims" and, thus, were reformers before reform was a movement.[2] Progressives and left-wing activists view the American criminal justice system as structurally racist because it "has the highest incarceration rate in the world, and the overwhelming burden of contact with the system has fallen on communities of color, especially African Americans."[3] Plainly, if our system is racist, as left-of-center reformers allege, reform is a moral imperative.

The reform lobby seeks a host of changes to the status quo, from reducing prison populations through abolition of mandatory minimum sentences to scaling back proactive law enforcement, such as broken-windows policing and the lawful use of *Terry* stops to remove guns from the street.[4] Other reforms appear more calibrated toward improving the electoral fortunes of the

1 Eli Lehrer, *The Party of Prison Reform*, The Weekly Standard (Mar. 18, 2013), *available at* https://www.washingtonexaminer.com/weekly-standard/the-party-of-prison-reform.

2 Libertarian Party Platform, *available at* https://www.lp.org/platform (last visited March 2021).

3 Connor Maxwell & Danyelle Solomon, *Mass Incarceration, Stress, and Black Infant Mortality: A Case Study in Structural Racism*, Center for American Progress, (June 5, 2018), *available at* https://www.americanprogress.org/issues/race/reports/2018/06/05/451647/mass-incarceration-stress-black-infant-mortality.

4 *See, e.g.*, Press Release, ACLU, ACLU Advocates For Abolition Of Mandatory Minimums Before U.S. Sentencing Commission (May 27, 2010), *available at* https://www.aclu.org/press-releases/aclu-advocates-abolition-mandatory-minimums-us-sentencing-commission; Justin Peters, *Loose Cigarettes Today, Civil Unrest Tomorrow: The racist, classist origins of broken windows policing*, Slate, Dec. 5, 2014, *available at* https://slate.com/news-and-politics/2014/12/edward-banfield-the-racist-classist-origins-of-broken-windows-policing.html; Vincent Warren, *The Case against Stop-and-Frisk*, Open Society Foundations (2016), *available at* https://www.opensocietyfoundations.org/voices/case-against-stop-and-frisk.

reformers, such as restoring the voting rights of convicted felons.[5] Reformers have recently turned their attention to cash bail.[6]

When someone is arrested, courts are empowered to impose cash bail conditions on the defendant to ensure that he appears at his next court appearance and does not commit future crimes while at liberty. Reformers argue that cash bail disadvantages the poor while privileging those who can afford to make money bail, and, thus, that it disproportionately harms communities of color. They further argue that criminal defendants who cannot make bail are more likely to accept coercive guilty pleas and sacrifice their constitutional right to trial. Taken together, they reason, the cash bail system is fundamentally unfair. These claims have merit and have long deserved a hearing. To mitigate these harms, states should eliminate the cash bail system and replace it with a regime that permits judges to release or detain criminal defendants based on an analysis of the risk that they will fail to appear for their court appearances or commit crimes while at liberty.

I. Bail in the United States

Bail reform has the potential to be a noble enterprise. Where its purpose is to reduce the number of criminal defendants who are incarcerated awaiting trial for nonviolent offenses for lack of financial resources, it is worthy of support. Defendants who can afford to make bail are released while they await trial. Defendants who cannot afford to make bail remain incarcerated. This is concerning because it creates the appearance, if not the reality, of a two-tiered system of justice. As a result, the public's faith in the criminal justice system erodes.[7] This is a compelling reason to reform the cash bail system. It has the added virtue of being race neutral and, therefore, consonant with the demands of our color-blind Constitution.[8]

But reform for reform's sake is not necessarily a virtue. Reform must be carefully crafted, with an eye toward mitigating the harm it aims to address, but equally watchful for the unintended consequences that can attend dramatic change.[9] To that end, it is important to examine the history of bail and its evolution from a system to ensure a criminal defendant's appearance in court to a regulatory means of crime control.

A. The Purpose of Bail From the Colonial Era to the Present

In the early 17th century, when the English began to settle in what would become the United States, they brought English common law with them.[10] An 1876 American Law Register explained:

> The power belonging to the English Court of King's Bench to bail in all cases, belongs equally to the courts of general jurisdiction in the states of this country, deriving their systems of jurisprudence from the common law of England, except as the same may be controlled, or limited by constitutional or statutory provisions. This power is necessarily incident to the power to try, acquit, and finally discharge a prisoner.[11]

Thus, "the American understanding of bail is derived from 1,000-year-old English roots."[12]

The historic object of bail is to allow a presumptively innocent criminal defendant to remain at liberty pretrial while ensuring his future appearance in court. With monetary skin in the game, a defendant has an incentive not to abscond. If he fails to appear in court, then his bail is forfeited. Accordingly, bail works

5 Nicole D. Porter, *Top Trends in State Criminal Justice Reform, 2019*, The Sentencing Project (2020), *available at* https://www.sentencingproject.org/publications/top-trends-in-state-criminal-justice-reform-2019.

6 Some modest reform efforts have garnered mainstream acceptance. On December 21, 2018, President Donald Trump signed into law "The First Step Act," which passed the House and Senate with wide margins of support. *See* Adam Shaw & Judson Berger, *Trump signs criminal justice reform bill*, Fox News, Dec. 21, 2018, *available at* https://www.foxnews.com/politics/trump-signs-criminal-justice-reform-bill. The legislation primarily provides for (1) correctional reform to prevent recidivism among federal prisoners, (2) downward adjustments for mandatory minimum prison sentences for certain federal drug offenders, and (3) reauthorization of the Second Chance Act, which provides federal grants for reintegration programs for adult and juvenile offenders. *See The First Step Act of 2018: An Overview*, Congressional Research Service, Mar. 4, 2019, *available at* https://crsreports.congress.gov/product/pdf/R/R45558.

7 *See* Brief of Amici Curiae Current and Former District, State, and Prosecuting Attorneys, and State Attorneys General in support of Plaintiff-Appellee at 3, filed February 14, 2020, Booth v. Galveston Cnty., Dkt. No. 19-40785 (5th Cir. Sept. 18, 2019), *available at* https://fairandjustprosecution.org/wp-content/uploads/2020/02/FJP-Booth-v.-Galveston-County-Amicus-Brief-Appeal-File-Stamped.pdf ("More broadly, a system that is perceived as unfair will erode a community's confidence in law enforcement and the justice system."). *Cf.* State v. Medina, 197 Vt. 63, 103 (2014) ("The public's faith in the criminal justice system to treat the accused fairly is bolstered through the use of identification techniques that lend greater accuracy to the process.").

8 City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520-21 (1989) (Scalia, J., concurring) ("I share the view expressed by Alexander Bickel that '[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.' At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates—can justify an exception to the principle embodied in the Fourteenth Amendment that '[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens," *Plessy v. Ferguson,* 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)."). (internal citations omitted).

9 James Q. Wilson, *A Life in the Public Interest*, Wall St. J., Sept. 21, 2009, *available at* https://www.wsj.com/articles/SB10001424052970204488304574424752913834312 (When considering changes to social policy, we do well to meditate on "the law of unintended consequences. Launch a big project and you will almost surely discover that you have created many things you did not intend to create.").

10 Lawrence M. Friedman, Law in America 23-24 (2002).

11 *The Power of Courts to Let to Bail,* The American Law Register (January 1876), *available at* https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2730&context=penn_law_review.

12 Timothy R. Schnacke, Michael R. Jones, & Claire M. B. Brooker, *The History of Bail and Pretrial Release*, Pretrial Justice Institute 1 (2010), *available at* https://b.3cdn.net/crjustice/2b990da76de40361b6_rzm6ii4zp.pdf.

to "accommodate both the defendant's interest in pretrial liberty and society's interest in assuring the defendant's presence at trial."[13]

B. Pretrial Detention as a Means of Regulatory Crime Control

This rationale remained in place for centuries until America experienced the great crime wave of the 1960s. Barry Latzer, a criminologist and emeritus professor of criminal justice at the John Jay College of Criminal Justice, explained the nature of the 1960s crisis:

> By the end of the [1960s], all of this optimism evaporated in a blizzard of violence and killings. Riots, crime, and disorderly protests accompanied increasingly audacious challenges to authority figures and, indeed, authority itself. In 1968, an astonishing 81 percent of the American public told interviewers that law and order had broken down altogether in the United States.
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> Between 1960 and 1970, rates of violent crime (essentially, murder, rape, robbery, and serious assaults) in the United States more than doubled, from 161 per 100,000 to 364. Murder rates rose 55 percent, while robbery rates climbed over 91 percent.[14]

On December 10, 1969, the National Commission on the Causes and Prevention of Violence, which was created by President Lyndon Johnson on June 6, 1968, to address political assassinations and individual acts of violence, among other disorders, issued its final report, stating, "Violent crime (particularly street crime) engenders fear—the deep-seated fear of the hunted in the presence of the hunter. Today this fear is gnawing at the vitals of urban America."[15]

Amid the ruins of the crime epidemic, President Richard Nixon, who won election in 1968 on a platform that emphasized law and order, issued a statement to Congress on January 31, 1969, concerning the District of Columbia. Under the rubric of "Crime and Administration of Justice," he asserted that "a meaningful assault on crime requires actions on a broad array of fronts."[16] To make police more effective and "to make justice swifter and more certain," he proposed 12 major proposals for action.[17] On "Bail Reform," President Nixon highlighted that:

> Increasing numbers of crimes are being committed by persons already indicted for earlier crimes, but free on pretrial release. Many are now being arrested two, three, even seven times for new offenses while awaiting trials. This requires that a new provision be made in the law, whereby dangerous hard core recidivists could be held in temporary pretrial detention when they have been charged with crimes and when their continued pretrial release presents a clear danger to the community.[18]

This presidential call to action resulted in the District of Columbia Court Reform and Criminal Procedures Act of 1970, in which "Congress for the first time permitted judicial officers to consider danger to the community in establishing conditions of release in noncapital cases."[19] Based upon this statute, Congress enacted the Bail Reform Act of 1984, which "provided for pretrial detention based solely on future danger to the community for the first time on a nationwide scale."[20]

C. Fat Tony Salerno Constitutionalizes Regulatory Pretrial Detention

In 1987, the Supreme Court addressed a constitutional challenge to the 1984 act that was brought by Anthony "Fat Tony" Salerno—then the boss of the Genovese crime family, a powerful organization within the Italian-American Mafia—who was indicted for violating the Racketeer Influenced and Corrupt Organizations Act and detained pretrial for dangerousness. He argued that pretrial detention based upon a defendant's likeliness "to commit future crimes" violates due process because the Constitution "holds persons accountable for past actions, not anticipated future actions."[21]

In *Salerno v. United States*, Chief Justice William Rehnquist stated that the due process question turned on whether the 1984 act provides for pretrial detention as a regulatory matter or as a punitive one. Punitive detention without conviction, he reasoned, violates due process; regulatory detention with appropriate procedural safeguards does not. Writing for the Court, the Chief Justice approved of the procedural protections the act afforded defendants to challenge pretrial detention and found that the law "clearly indicates that Congress did not formulate the pretrial detention provision as punishment for dangerous individuals."[22] Congress instead "perceived pretrial detention as a potential solution to a pressing societal problem"—specifically, "the alarming problem of crimes committed by persons on release."[23]

On firm constitutional ground, the 1984 act represented a watershed moment for bail in the United States. At the federal level, bail would no longer be employed solely to ensure criminal defendants appeared in court, but it would also be set to protect the public from defendants with a propensity to keep offending while under the court's jurisdiction on pending criminal matters.

13 Ariana K. Connelly & Nadin R. Linthorst, *The Constitutionally of Settling Bail Without Regard To Income: Securing Justice Or Social Injustice?*, 10 Ala. C.R. & C.L. L. Rev. 115, 118 (2019) (alterations omitted).

14 Barry Latzer, The Rise and Fall of Violent Crime in America 106-10 (2016).

15 *To Establish Justice and To Ensure Domestic Tranquility*, National Commission on the Causes and Prevention of Violence (1969), *available at* https://www.ojp.gov/pdffiles1/Digitization/275NCJRS.pdf.

16 Richard M. Nixon, *Statement by the President on Actions and Recommendations for the Federal City*, January 31, 1969, *available at* https://books.google.com/books?id=52QgAAAAMAAJ&pg=PA265&lpg=PA265&dq.

17 *Id.*

18 *Id.*

19 Michael Harwin, *Detaining for Danger under the Bail Reform Act of 1984: Paradoxes of Procedure and Proof*, 35 Ariz. L. Rev. 4, 1091, 1093 (1993).

20 *Id.* at 1094.

21 Salerno v. United States, 481 U.S. 739, 744-45 (1987).

22 *Id.* at 747.

23 *Id.* at 742-47.

Today, in the federal system, the District of Columbia, and every state in the Union—except New York—judges are empowered, in some way or another, to consider the threat a criminal defendant presents to public safety when ruling on the conditions of a defendant's pretrial release.[24] It is axiomatic that, by virtue of his detention, a jailed defendant is denied the opportunity to harm the public. Likewise, he is deprived of the opportunity to abscond.

II. Racial Disparities and Bail Determinations in Practice

Any serious discussion of bail reform requires an examination of bail's historical pedigree and purpose, particularly where this system is being scrutinized in the present for "racial disparities on pretrial and bail outcomes," as the U.S. Commission on Civil Rights recently explored.[25] As a threshold matter, bail's historical roots and aim are race neutral. A legal regime "derived from 1,000-year-old English roots" is, by definition, unconcerned with the complex racial dynamics of the American experiment.

A. In Modern America, Judges Decide Conditions of Release on Principle

In deciding bail, judges are not lawfully permitted to consider the race of a criminal defendant.[26] Rather, a judicial determination on a defendant's pretrial status is controlled, in the main, by two questions: (1) whether the defendant is likely to appear in court when his presence is required, and (2) whether he poses a risk to the public. The late legal scholar and D.C. Circuit Judge Robert Bork explained the centrality of neutral legal principles in the application of law:

> A principled decision . . . is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved. The legal principle to be applied is never neutral in its content, of course, because it embodies a value that is to be applied to the exclusion of other contending values. . . . [But] the value-laden principle must be *applied* neutrally.[27]

When a judge decides questions of pretrial release, neutral principles require that he ignore extraneous factors—such as the race or ethnicity of the defendant—that have no bearing on whether a defendant will return to court or threaten the public. One's racial identity is an accident of birth. It has no predictive outcome on how likely one is to flee or commit additional crimes. As a result, a judge must apply the bail laws "consistently and without regard to his sympathy or lack of sympathy with the parties before him."[28]

In my law practice, I have represented nearly 1,000 criminal defendants. Many of my clients have been black or Hispanic. Many have had limited financial resources. I cannot think of a case in which a judge appeared to factor in my client's race when determining bail.[29] I have certainly had cases where I believed my clients should have been released on their own recognizance. I argued vigorously for their release, but the judges thought otherwise. That, however, is the nature of discretion and the multifactor analysis that bail decisions entail.[30] My disagreement with the wisdom of these determinations does not a civil rights violation make.[31]

B. Cash Bail Disproportionately Affects Poor Defendants

Whether a "cash bail system disproportionately results in the pre-trial incarceration of poor individuals and people of color" is a legitimate question, but it has an obvious answer.[32] It should go without saying that cash bail disproportionately results in poor people being incarcerated more than people of means.[33] Poor people are poor; thus, they generally do not have the money to

24 Rafael A. Mangual, *Reforming New York's Bail Reform: A Public Safety-Minded Proposal*, Manhattan Institute (March 5, 2020), *available at* https://www.manhattan-institute.org/reforming-new-yorks-bail-reform ("New York is now the only state that does not allow judges to consider public safety in any pretrial release decisions.").

25 Letter from Katherine Culliton-Gonzalez, Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, to author (January 4, 2021) (on file with author).

26 Washington v. Davis, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.").

27 Robert H. Bork, The Tempting of America: The Political Seduction of the Law 78 (1997) (quoting Professor Herbert Wechsler).

28 *Id.* at 151.

29 This observation naturally takes into account that "'[o]utright admissions of impermissible racial motivation are infrequent.'" William v. Dart, 967 F.3d 625, 638 (7th Cir. 2020) (quoting Hunt v. Cromartie, 526 U.S. 541, 553 (1999)). Rather, my experience hews closely to the standard courts use when interrogating claims of intentional racial discrimination: "A policy's use of facially neutral criteria raises an inference of impermissible intent when those criteria map so closely onto racial divisions that they allow racial targeting 'with almost surgical precision.'" *Id.* (quoting North Carolina State Conference of the NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016)).

30 Under New York's pre-reform bail system, a defendant had a right to seek release on his own recognizance or bail, with a public policy presumption in favor of pretrial release. People v. Mohammed, 171 Misc. 2d 130, 134 (Kings Cnty. Sup. Ct. 1996). The court enjoyed wide discretion in fixing the terms of release upon considering the criteria set forth in Criminal Procedure Law § 510.30(2)(a)—specifically, (1) the defendant's character, reputation, habits, and mental condition; (2) his employment and financial resources; (3) his family ties and the length of his residence, if any, in the community; (4) his criminal record; (5) whether he failed to appear for prior court appearances; (6) the severity of the crime charged; and (7) the likelihood of conviction and the length of sentence to follow.

31 If a criminal defendant has a good-faith basis to believe that a judge did factor in his (the defendant's) race in making a bail determination, he can seek relief under 42 U.S.C. § 1983 for a denial of equal protection in violation of the Fourteenth Amendment. *See* Williams, 967 F.3d at 637-39.

32 Culliton-Gonzalez Letter, *supra* note 25.

33 Given some of the rhetoric on bail reform, it bears noting that "pretrial detention based on wealth is unconstitutional." Russell v. Harris Cnty., No. H-19-226, 2020WL6585708, at *23 (S.D. Tex. Nov. 10, 2020) ("Although pretrial detention based on wealth is unconstitutional, a state may detain a felony arrestee before trial if it has a compelling reason to do so," namely, "to ensure the arrestee's presence at trial," and "if the arrestee presents a danger of committing new crimes.") (internal citations and quotation marks omitted). *Cf.* United States v. Weigand, 492 F. Supp. 3d 317, 319 (S.D.N.Y. 2020) ("But equal protection works both ways. If defendants are to be treated similarly, without regard to wealth,

make cash bail when they are arrested.[34] I have had white clients who could not afford to make bail and were detained pretrial. The same was true for my black clients who could not afford to make bail. In my experience, disparate cash bail outcomes between black and white criminal defendants are explained by economics, not race.

Assuming a black defendant and a white defendant are similarly situated by offense charged and criminal history, cash bail disparities fall harder on black defendants because of the higher proportion of black people living below the poverty line.[35] The United States Census Bureau released a study in 2020 that found, on the one hand, the poverty rate for blacks and Hispanics reached historic lows in 2019. But on the other hand, the "poverty rate for blacks was 18.8%; for Hispanics, it was 15.7%"; and for whites and Asians, it was "7.3%."[36] This state of affairs is a larger and far more complex question than that of racially disparate outcomes in pretrial detention.

C. The Cash Bail Debate Should Focus on Poverty, Not Racial Politics

Some in the reform camp, however, reject economic reality in favor of a more sinister narrative—namely, the criminal justice system is systemically racist. According to the Aspen Institute, systemic or "structural racism is defined as a system of public policies, institutional practices, cultural representations, and other norms that work in reinforcing ways to perpetuate racial inequality."[37] If one accepts this definition, as the Center for American Progress does, then our "criminal justice system is perhaps the clearest example of structural racism in the United States" because "[1] African American adults are five times more likely to be imprisoned than white Americans," and "[2] African Americans are twice as likely as their white counterparts to have a family member imprisoned at some point during their childhood."[38]

These are sobering statistics, to be sure, but they do not reveal much about the *causes* of these disparities. The idea that racial disparities in the criminal justice system are the result of racism is taken for granted, rather than proved, including in arguments about cash bail. For instance, Color of Change, which describes itself as a racial justice organization, claims that:

> The money bail system perpetuates racism in the justice system that disproportionally targets people of color, especially Black people. Reliance on a money-based pretrial system disadvantages people of color who are more likely to be living in poverty, allows the system to exacerbate overcharging and coerce guilty pleas, deprives people of rights to defend their innocence, and extracts wealth from poor and Black communities.[39]

This searing indictment is heavy on rhetoric, but it does not attempt to prove its claim that cash bail targets people of color. In this way, it is representative of arguments put forth by activists who insist on making cash bail reform about race, rather than about color-blind justice for all regardless of wealth.

D. Eliminating Cash Bail Will Not Alleviate the Problem of Violent Crime in the Black Community

Yet the facts about racial disparities in the criminal justice system are deeply troubling, particularly as they relate to violent

then Weigand cannot be detained when an otherwise similarly situated indigent defendant would be released.").

34 Bail conditions that are "unaffordable" do not offend the Constitution. Walker v. City of Calhoun, 901 F.3d 1245, 1258 (11th Cir. 2018) ("The basic test for excessive bail is whether the amount is higher than reasonably necessary to assure the accused's presence at trial, and that as long as the primary reason in setting bond is to produce the defendant's presence, the final amount, type, and other conditions of release are within the sound discretion of the releasing authority.") (quoting United States v. James, 674 F.2d 886, 891 (11th Cir. 1982)) (internal quotation marks and alterations omitted).

35 The lack of economic parity among groups explains disparities that result in poorer defendants being held on bail when all things are equal except the racial identity of the offender. But neither material poverty nor racism explains bail disparities among defendants who have prior criminal convictions or previous warrants for failing to appear in court. In these instances, a court is more likely to set a high bail on a defendant because of his demonstrated inability to follow the law. The defendant's past behavior compels the present result. Even criminologists sympathetic to claims of racism have found that "'Racial differences in patterns of offending, not racial bias by police and other officials, are the principal reason that such greater proportions of blacks than whites are arrested, prosecuted, convicted and imprisoned.'" Heather Mac Donald, *Is the Criminal Justice System Racist?*, City J. (Spring 2008), *available at* https://www.city-journal.org/html/criminal-justice-system-racist-13078.html (quoting Michael Tonry, Malign Neglect (1996)).

36 John Creamer, *Inequalities Persist Despite Decline in Poverty for All Major Race and Hispanic Origin Groups*, U.S. Census Bureau (Sept. 15, 2020), *available at* https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html.

37 Maxwell & Solomon, *supra* note 3 (citing Aspen Institute Staff, *11 Terms You Should Know to Better Understand Structural Racism*, Aspen Institute Blog, July 11, 2016, https://www.aspeninstitute.org/blog-posts/structural-racism-definition).

38 *Id.* Although growing in popularity, the concept of structural or systemic racism in the United States is far from settled. *E.g.,* Harvey C. Mansfield, *The 'Systemic Racism' Dodge*, Wall St. J., Sept. 18, 2020, *available at* https://www.wsj.com/articles/the-systemic-racism-dodge-11600454532 ("Systemic racism ignores the agency of black citizens, leaving them nothing to do except protest in the streets or cheer from the sidelines. Meanwhile, whites are told by the same idea that all their past efforts against whites supremacy have been in vain. . . . 'Systemic racism' is a bogus description that issues in an accusation made in doubtful faith that contradicts itself."); Shelby Steele, *The Inauthenticity Behind Black Lives Matter*, Wall St. J., Nov. 22, 2020, *available at* https://www.wsj.com/articles/the-inauthenticity-behind-black-lives-matter-11606069287 ("Thus, for many blacks today—especially the young—there is a feeling of inauthenticity, that one is only thinly black because one isn't racially persecuted. 'Systemic racism' is a term that tries to recover authenticity for a less and less convincing black identity. This racism is really more compensatory than systemic. It was invented to make up for the increasing absence of the real thing."); Thomas D. Klingenstein & Ryan P. Williams, *America is Not Racist*, American Mind, June 3, 2020, https://americanmind.org/salvo/america-is-not-racist/ ("America is not a racist country. America is a country that has strived, imperfectly but passionately, to live up to its founding promise that all men are created equal. There is not—and will never be—a greater barrier to racism, or to tyranny in any form, than this American idea. The reckless charge that American law enforcement is 'systemically racist' is also not true.").

39 Testimony of Erika Maye, Deputy Senior Campaigns Director for Criminal Justice, Color of Change, before the U.S. Commission on Civil Rights (Feb. 26, 2021), *available at* https://www.usccr.gov/pubs/briefing-reports/2021-02-26-The-Civil-Rights-Implications-of-Cash-Bail.php.

crime, which is the offense category most likely to land a criminal defendant in pretrial detention. The Bureau of Justice Statistics, an agency within the United States Department of Justice, reports that "more than half of all homicides in the U.S. are committed by black people, despite the fact that they make up only 13 percent of the population."[40] Moreover, "most of their victims are also black. FBI data also reveal that blacks disproportionately commit a range of other crimes, including manslaughter, rape, robbery, and aggravated assault."[41]

According to the Center for Disease Control, in 2015, "the homicide rate for blacks aged 10 to 34 was 13 times the rate for whites."[42] The same study found that "violence also exacts enormous and disproportionate social and economic costs in minority communities" that "include medical, educational, and justice system costs, reduced labor market productivity, decreased property values, and disruption of community services."[43] There was nothing about the systemic racism of the criminal justice system—or the cash bail system specifically—in the report.

Until American society is ready to contend honestly with these facts, overheated rhetoric and totalizing explanations and solutions advanced by partisan interest groups will do little more than stir up division and alienate good-faith stakeholders trying to address tough issues that do, in fact, disproportionately affect minority communities.[44] Where to strike the balance between a defendant's pretrial liberty interest and the public's interest in safety is such a question. This debate would benefit from epistemic humility—accepting that our knowledge is provisional and contingent, and that we should engage reform with caution because, as Edmund Burke admonished, the "private stock of reason . . . in each man is small" and "individuals would do better to avail themselves of the general bank and capital of nations and ages."[45]

III. Eliminating Cash Bail Would End a Two-Tiered Justice System

With Burkean virtue in mind, we can acknowledge our limitations, proceed prudentially, but still engage in bold reform. After all, the Old Whig himself observed that "A state without the means of some change is without the means of its conservation."[46] To the extent that the cash bail system creates unnecessary disparities based upon defendants' financial conditions, then eliminating cash bail is the most sensible response to the concerns of stakeholders on all sides, provided appropriate measures are implemented in tandem with ending bail.

Cash bail visits a hardship on defendants based on their poverty rather than their dangerousness. As previously discussed, poverty falls harder on the black community, which already has an understandable "distrust" of the police "given the history in this country," according to former Attorney General William Barr.[47] The harm is compounded by the civil disabilities that attend detention, including the risk of losing one's job, housing, or parental custody. These negative consequences apply to incarcerated pretrial defendants in jurisdictions that have eliminated cash bail, of course; but when judicial options are narrowed by the primacy of cash bail, the instances of pretrial detention increase, along with the parallel consequences, given the general material deprivation of the majority of people who commit crimes.[48] These facts militate in favor of eradicating cash bail.

The principal argument against ending a money bail system is that judges should have the option to impose it in individual

40 Christine Rosen, *Accepting Crime, Abolishing Punishment*, Commentary (Mar. 2021), *available at* https://www.commentarymagazine.com/articles/christine-rosen/crime-police-prison-liberalism/. *See also* FBI, 2019 Crime in the United States Expanded Homicide Data Table 3, *available at* https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/expanded-homicide-data-table-3.xls.

41 Rosen, *supra* note 40.

42 Kameron J. Sheats, et al., *Violence-Related Disparities Experienced by Black Youth and Young Adults: Opportunities for Prevention*, Am. J. Prev. Med. (Oct. 2018), *available at* https://stacks.cdc.gov/view/cdc/80674/cdc_80674_DS1.pdf.

43 *Id.*

44 Although the issue of crime in the black community has become increasingly taboo, serious academics and commentators have recognized the necessity of addressing the problem earnestly. Writing in *The Public Interest*, political scientist John DiIulio observed:

> America does not have a crime problem; inner-city America does. The poverty gap between blacks and whites in this country may be shrinking, but the crime gap between them has been growing. No group of Americans suffers more when violent and repeat criminals are permitted to prey upon decent, struggling, law-abiding inner-city citizens and their children than what Hugh Pearson, writing in the *New York Times*, called "black America's silent majority." As Harvard Law Professor Randall Kennedy keenly observed recently in the *Wall Street Journal*: "what is really at stake in many controversies with racial overtones is not simply an interracial dispute but an actual or incipient intraracial conflict. Although blacks subject to draconian punishment for crack possession are burdened by it, their black law-abiding neighbors are presumably helped by it . . . ."

John J. DiIulio, Jr., *The question of black crime*, The Public Interest (Fall 1994), *available at* https://www.nationalaffairs.com/storage/app/uploads/public/58e/1a4/e52/58e1a4e5280b2928520075.pdf. *See also* Heather Mac Donald, *A Grim—and Ignored—Body Count*, City J. (Nov. 2, 2020), *available at* https://www.city-journal.org/media-silence-on-black-on-black-violence ("When I speak on policing, I have been told repeatedly by white listeners that hearing the data on disproportionate black crime makes them 'uncomfortable.' This feeling is not the response of a white supremacist; it is the response of someone who is in the dark about racial disparities in criminal offending or who wishes that those disparities would go away in the service of racial harmony and equality.").

45 Edmund Burke, Reflections on the Revolution in France 76-77 (Pocock ed. 1987).

46 *Id.* at 19.

47 Devan Cole, *Top Trump officials claim there's no systemic racism in US law enforcement agencies as Americans flood streets in protest*, CNN, June 10, 2020, *available at* https://www.cnn.com/2020/06/07/politics/systemic-racism-trump-administration-officials-barr-carson-wolf/index.html. Notably, in the same interview, Attorney General Barr rejected the notion that "the law enforcement system is systemically racist."

48 The Prison Policy Initiative, a left-wing advocacy group, found that "people in jail had a median annual income of $15,109 prior to their incarceration, which is less than half (48%) of the median for non-incarcerated people of similar ages. People in jail are even poorer than people in prison and are drastically poorer than their non-incarcerated counterparts." They concluded that "examining the median pre-

cases where detention is unduly harsh but release without adequate incentive is insufficient to ensure a defendant appears in court.[49] This is fair, but the option itself is the source of reform discontent: defendants who cannot afford bail cannot afford bail, no matter where they fall on the spectrum of risk. Moreover, there exists a middle ground between bail and detention—supervised release. Release on supervision allows a defendant to return home pretrial but requires an accredited pretrial services agency monitor him to ensure he appears in court and provide him, if necessary, with social and mental health services and drug treatment to reduce the risk of pretrial recidivism.[50]

At any rate, judges often have to make tough calls—prudential judgements—and deciding where to fall on detention or release is one of them. As in life, the criminal justice system is comprised of pragmatic trade-offs, in which ambiguities and conflicts are resolved imperfectly. Bail reform is no exception.

IV. With the End of Cash Bail, Judges Must Be Empowered to Detain Pretrial Defendants Who Threaten Public Safety

There is a necessary corollary to eliminating cash bail: Responsible reform must empower judges to remand criminal defendants where they present a strong risk for failure to appear in court or danger to the public.[51] New Jersey's pretrial release system serves as a blueprint for how to eliminate cash bail without sacrificing public safety.

A. New Jersey's Bail Reform Is a Model for the Nation

On January 1, 2017, New Jersey implemented bail reform. The new law eliminated cash bail, allowing judges to determine the conditions of a defendant's release based on specified risk: (1) the likelihood the defendant will fail to appear in court; (2) the likelihood the defendant will commit another crime while on release; and (3) the likely effect releasing the defendant will have on public safety.[52]

To assess these risk levels, the state uses a risk evaluation tool called a "Public Safety Assessment" or "PSA."[53] The PSA uses an algorithm that assesses nine factors—including a defendant's age and previous criminal history, whether there are allegations of violence in the current charge, and whether he has a history of failing to appear in court—to determine whether a defendant should be released pretrial with or without conditions or detained.[54] Defendants deemed dangerous can be remanded to pretrial detention. Defendants who pose a lower risk to the public or for failure to appear in court can be released with court-mandated monitoring (supervised release), which might involve reporting by phone to pretrial services or weekly in-person reporting while wearing an electronic ankle bracelet.

As a result of this reform, New Jersey's pretrial detainee population plunged from 7,137 on January 1, 2017, to 4,967 on January 31, 2017, a decrease of 30 percent.[55] From January 2018 to September 2018, the state saw a 32 percent decrease in homicides, 13 percent decrease in rapes, 18 percent decrease in assaults, 37 percent decrease in robberies, and 30 percent decrease in burglaries, when compared with statistics from the same period in 2016.[56]

The Garden State's experience teaches that states can responsibly eliminate cash bail, reduce its attending disparities, and keep more nonviolent offenders at liberty pretrial, while also protecting the public from recidivist defendants. Pretrial incarceration rates in lower-income and minority communities will inevitably decrease as a result.

B. Don't Let the Perfect Be the Enemy of the Good

This regime is not without objection, particularly with respect to alleged racial bias when determining an individual's risk score. The concern emanates from ProPublica's reporting on Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) software.[57] COMPAS uses an algorithm to assess a defendant's pretrial risks or a convicted inmate's propensity for recidivism. ProPublica, an investigative journalism outfit, reviewed "more than 10,000 criminal defendants in Broward County, Florida, and compared their predicted recidivism rates with the rate that actually occurred over a two-year period."[58] Although the journalists found that "the algorithm correctly

incarceration incomes of people in jail makes it clear that the system of money bail is set up so that it fails: the ability to pay a bail bond is impossible for too many of the people expected to pay it." Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time*, Prison Pol'y Initiative, May 10, 2016, *available at* https://www.prisonpolicy.org/reports/incomejails.html.

49 *Cf.* Sean Kennedy, *No, Maryland's cash bail system doesn't hurt the poor. It's a great equalizer.*, Wash. Post, Dec. 9, 2016, *available at* https://www.washingtonpost.com/opinions/no-marylands-cash-bail-system-doesnt-hurt-the-poor-its-a-great-equalizer/2016/12/09/88312ba0-bc03-11e6-91ee-1adddfe36cbe_story.html ("If a defendant has no means to pay, he or she is likely to have little else to stay for, either. Property . . . is an incentive for the accused to stay as much as cold, hard cash being bonded over to the state as security against a defendant skipping town.").

50 *See, e.g.,* Supervised Release, NYC Mayor's Office of Criminal Justice, *available at* https://criminaljustice.cityofnewyork.us/programs/supervised-release/.

51 Any state's bail regime is subject to constitutional constraints, which means criminal defendants enjoy the full panoply of procedural safeguards that attend detention, such as a detention hearing with the right to counsel, the right to provide testimony, present witnesses, and offer evidence to ensure detention is warranted as the least restrictive condition necessary to accomplish the regulatory goal of protecting the community from dangerous persons and ensuring defendants appear in court. *See Salerno*, 481 U.S. at 742.

52 Criminal Justice Reform Information Center, N.J. Courts, *available at* https://njcourts.gov/courts/criminal/reform.html.

53 *Id.*

54 *Id.*

55 Blair R. Zwillman, *New Jersey Leads the Way in Bail Reform*, N.J. Lawyer, No. 318, at 16 (June 2019).

56 *Id.*

57 Julia Angwin et al., *Machine Bias*, ProPublica, May 23, 2016, *available at* https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing.

58 Julia Angwin et al., *How We Analyzed the COMPAS Recidivism Algorithm*, ProPublica, May 23, 2016, *available at* https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm.

predicted recidivism for black and white defendants at roughly the same rate (59 percent for white defendants, and 63 percent for black defendants)," it also found that "Black defendants were often predicted to be at higher risk of recidivism than they actually were," and that "White defendants were often predicted to be less risky than they were."[59]

Despite the unsettling nature of these findings, it is judges, not algorithms, that determine the conditions of a defendant's release. The algorithm provides an intelligent recommendation, but it does not replace judicial discretion in which the neutral principles that guide release control. Moreover, the article mentions in passing the most compelling rejoinder to the claims of racial bias: COMPAS does not know the race of the defendant being assessed. Among the 137 variables COMPAS examines, from employment and criminal history to education levels, from whether a defendant grew up with both parents to whether he is quick to anger, race is not one of the factors, and rightfully so. While no software is perfect, COMPAS relies upon historical data, and that is a neutral and largely scientific enterprise. Journalist Christopher Caldwell examined this controversy and observed that "to obtain a less 'biased' result . . . one would need to 'unknow' facts that were present in the data set."[60] In general, we want more facts, not fewer. The choice is not between impersonal artificial intelligence, on the one hand, and the existing and now controversial system, on the other hand. Rather, it is between the status quo and striking a sensible balance that ensures a defendant appears in court and does not commit additional crimes while on release, while also making certain that a nonviolent defendant who does not pose a risk as to either gets the benefit of pretrial liberty.

In the end, there are no ideal solutions in human affairs, only trade-offs. As eminent economist and social theorist Thomas Sowell explained, "trade-offs are all that we can hope for, [and] prudence is among the highest duties. Edmund Burke called it 'the first of all virtues.' 'Nothing is good,' Burke said, 'but in proportion and with reference'—in short, as a trade-off."[61] New Jersey's example demonstrates that successful reform in which cash bail is eliminated calls for employing smart risk assessment software, even with its imperfections. That is a trade-off reform advocates of good will should welcome.

C. The Tragedy of New York's Bail Reform Experiment

If New Jersey is a national model for how to create intelligent, effective, and fair bail reform, then New York is a cautionary tale showing how not to do it. On January 1, 2020, New York's bail reform took effect, eliminating pretrial detention and cash bail for most nonviolent felonies and almost all misdemeanor offenses (except for sex offenses, domestic offenses, and hate crimes).[62] Unlike the federal government, the District of Columbia, and 49 other states, New York does not permit its judges to set bail or detain pretrial defendants who pose a threat to the public. The deleterious effects on public safety were immediate.

On March 5, 2020, New York Police Department Commissioner Dermot Shea publicly shared proof that bail reform was harming public safety. The commissioner noted that, when considering these statistics, "Each number represents a victim":[63]

- Since January 1, 2020, 482 suspects who had been arrested for serious felonies were released without bail only to commit another 846 new crimes. Over a third of these crimes (299 of them) were among the seven most serious offenses: murder, rape, robbery, felony assault, burglary, grand larceny, and grand larceny auto.
- All of the 482 suspects could have had bail set on them prior to January 1, 2020, so they could have been incarcerated without the ability to commit more crimes.
- Crime in January 2020 spiked 30% from January 2019. Crime in February 2020 spiked 20% over the previous year. In total, the first two months of 2020 saw 803 more serious crimes committed than the same time the year prior.

Crime continued to increase throughout the year. During the 2020 July 4th weekend, there were "44 shooting incidents with 63 victims," which represents 16 more incidents and 21 more shooting victims "over the same three days last year."[64] The prior month was equally Hobbesian. In June 2020, the NYPD recorded 39 murders, nine more than in June 2019.[65] Shootings also doubled, with 89 incidents in 2019 and 205 in 2020.[66] The NYPD reported on July 5 "that all of the nearly 100 gun violence victims have been from minority communities, as were 97 percent of June's shooting victims."[67] By the end of 2020, New York City had seen a 97% increase in shootings and a 45% increase in murders.[68] There were 462 homicides in 2020—143 more

59 *Id.*

60 Christopher Caldwell, The Age of Entitlement: America Since the Sixties 202 (2020).

61 Thomas Sowell, A Conflict of Visions 17 (revised ed. 2007). Aristotle explained that prudence or "practical wisdom" is man's "true and reasoned state of capacity to act with regard to the things that are good or bad for man" and a "reasoned and true state of capacity to act with regard to human goods." Aristotle, The Nicomachean Ethics 106 (Oxford University Press ed. 2009).

62 Mangual, *supra* note 24.

63 Editorial Board, *NYPD provides hard proof that no-bail law is causing crime spike*, N.Y. Post, Mar. 5, 2020, *available at* https://nypost.com/2020/03/05/nypd-provides-hard-proof-that-no-bail-law-is-causing-a-crime-spike/.

64 Brian Price, *9 Dead, at Least 42 Shot in Roughly 15 Hours as Violence Rages Over Weekend*, NBC News, July 5, 2020, https://www.nbcnewyork.com/news/local/bullet-strikes-nypd-patrol-vehicle-misses-officers-sitting-inside/2500243/.

65 *Id.*

66 *Id.*

67 *Id.*

68 Rocco Parascandola & Thomas Tracy, *Violence adds to NYC's 2020 death toll, with 97% jump in shootings and 45% increase in murders—criminal carnage not seen in 14 years*, N.Y. Daily News, Jan. 1, 2021, https://www.nydailynews.com/new-york/nyc-crime/ny-nypd-closes-book-on-2020-20210101-hbaknpnvxfflvj432oum6s3ewe-story.html.

victims than in 2019.[69] The city also had 754 more shootings in 2020 than in 2019.[70]

As NYPD Commissioner Shea explained, "we're seeing significant spikes in crime. So either we forgot how to police New York City, or there's a correlation" with bail reform.[71] "If you let out individuals that commit a lot of crime," he reasoned, "that's precision policing in reverse and we're seeing the effects in a very quick time, and that is why we're so concerned."[72] More emphatically, the NYPD's official press release simply announced: "Criminal justice reforms serve as a significant reason New York City has seen this uptick in crime."[73]

One commentator explored the historical parallels between the urban crime wave of the 1980s and today:

> It wasn't merely scared white folks who were concerned about rising crime; people of color who lived in poor neighborhoods were far more likely to be the victims of crime than anxious suburbanites and had long expressed concerns for their safety. As civil-rights leader A. Philip Randolph said in 1964, "while there may be law and order without freedom, there can be no freedom without law and order."[74]

The criminal justice reform lobby tends to ignore the adverse consequences—which invariably harm poor individuals and people of color disproportionally—that materialize when reform is untethered to public safety, as New York's model demonstrates. Ignoring existential-level violence is not an option for many in our most vulnerable communities.

V. When Engaging Reform, Beware the Wolf and Remember Our Neighbors

The elimination of cash bail is an idea whose time has come. But where cash bail is eliminated, judges must be armed with the legal authority to detain pretrial defendants who pose a threat to the community. New York is an outlier in depriving them of this authority.

The Empire State would have likely remained isolated on this front but for the events of 2020. The tragic death of George Floyd and the resulting protests and riots have fueled more acceptance of eccentric ideas that were initially conceived on the fringe of the criminal justice reform lobby. Progressive prosecutors have campaigned on nullifying provisions of the penal law by refusing to prosecute whole categories of offenses.[75] Primal screams to defund the police and abolish prisons appear, as a matter of logical necessity, to require eliminating pretrial detention completely.

The more extreme voices in the reform camp, to their credit, do not dissemble nor hide their ambitions. They are forthright in their demand for revolutionary change. One prison abolition group explained that "abolition isn't just about getting rid of buildings full of cages. It's also about undoing the society we live in because the PIC [prison industrial complex] both feeds on and maintains oppression and inequalities through punishment, violence, and controls millions of people."[76] One cannot read such assertions without summoning the counsel of Justice Antonin Scalia's greatest dissent:

> Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.[77]

New York's experience demonstrates that the weight of these radical ideas would fall, as they always do, on lower-income and minority communities. That is not an outcome that any of us should tolerate. We can and should reform the cash bail system, but we should do so without placing our vulnerable neighbors in harm's way.

69 *Id.*

70 *Id.*

71 Gabrielle Fonrouge, *NYPD Commissioner Dermot Shea blames bail reform for 2020 crime spike*, N.Y. Post, Jan. 24, 2020, https://nypost.com/2020/01/24/nypd-commissioner-dermot-shea-blames-bail-reform-for-2020-crime-spike/.

72 *Id.*

73 Katie Honan, *NYPD Officials Say New Bail Law Is Leading to a Crime Increase*, Wall St. J., Mar. 5, 2020, https://www.wsj.com/articles/nypd-officials-say-new-bail-law-is-leading-to-a-crime-increase-11583445963.

74 Rosen, *supra* note 40.

75 Craig Trainor, *Taking on "Progressive Prosecutors,"* City J. (Feb. 7, 2021), *available at* https://www.city-journal.org/taking-on-progressive-prosecutors.

76 Rosen, *supra* note 40.

77 Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).