# MODELLING PRETRIAL DETENTION

MELISSA HAMILTON*

*Pretrial detention has become normative in contemporary criminal justice, rather than the exception to a rule of release for individuals not convicted of any crime. Even the opportunity for release with a bond amount often eludes the many individuals who are unable to afford to pay. Defendants detained pending trial suffer numerous negative consequences to their own legal cases, such as being more likely to feel pressured to plead guilty and to receive a prison sentence. The high numbers of those detained appear to disproportionately impact minorities and have contributed to mass incarceration. As a result of these issues, the country is in the midst of a third reform movement in terms of policies to increase the rate of pretrial release without financial surety and to incorporate algorithmic risk assessment tools to isolate the few individuals who pose a high likelihood of failure if released pending trial.*

*This Article offers a case study of an important site engaged in pretrial reforms. The research deploys a dataset of defendants booked into jail in Cook County, Illinois (home to Chicago). The study provides an empirical exploration of how the outcome of pretrial detention may be associated with racial and gender disparities and whether any such disparities are ameliorated when considering a host of legal factors that are predictive of pretrial detention. A related research question is how the use of an algorithmic risk tool modifies the relationship between pretrial detention and a combination of demographic factors and judicial decisions about release. Policy implications of the results are informative to debates concerning pretrial reforms in terms of whether risk assessment tools offer the ability to reduce racial/ethnic and gender disparities and to decrease the detention rate. Potential contributions such as this study are timely*

* Professor of Law & Criminal Justice, *University of Surrey School of Law*; J.D., *The University of Texas School of Law*; Ph.D. (criminology), *The University of Texas at Austin*; Fellow, Royal Statistical Society; Fellow, Surrey Institute for People-Centred AI.

*considering the experiment with decarceration due to COVID-19 concerns which has not been associated with an increased risk to public safety.*

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## INTRODUCTION

Pretrial detention poses significant public policy issues and thus is receiving critical attention from policymakers, scholars, and the public.[1] Every year approximately eleven million people who are arrested in America face the possibility of detention prior to trial.[2] The now-normalized practice of incarcerating the unconvicted raises constitutional concerns (e.g., due process, equal protection, excessive bail).[3] A modernist wave of pretrial reforms is also interested in more practical issues, which

> include concern with overincarceration and lengthy periods of detention pretrial, concern regarding the harmful effects of that detention (including for vulnerable populations), and the cost of burgeoning jail populations, as well as suicides by individuals detained and media attention to jail conditions.[4]

These concerns underpin the movement toward pretrial decarceration, albeit in the context of still protecting the public and attempting to ensure that individual defendants are present for their trials.[5] An unexpected twist in the story has emerged with a global

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1. *See, e.g.*, Fred O. Smith, Jr., *Policing Mass Incarceration*, 135 HARV. L. REV. 1853, 1878 (2022) (book review); Josiah Bates, *Eric Adams Wants 'Dangerousness' Factored into New York's Bail Laws. Advocates Say it Will Only Bring More Bias*, TIME (Feb. 10, 2022, 4:03 PM), https://time.com/6146431/eric-adams-bail-reform-dangerousness [https://perma.cc/8D4L-4B3N] (critiquing the New York Mayor's proposal for bail reform); John F. Duffy & Richard M. Hynes, *Asymmetric Subsidies and the Bail Crisis*, 88 U. CHI. L. REV. 1285, 1285 (2021) (identifying the overuse of pretrial detention as a major policy challenge for bail reform); Becca Cadoff, Kevin T. Wolff, & Preeti Chauhan, *Exploring Variation in Factors Associated with Increased Likelihood of Pretrial Detention*, 74 J. CRIM. JUST., May-June 2021, at 1, 9 (noting that pretrial detention is receiving increasingly more attention from scholars, policy makers, and the public); Satana Deberry, *Stop Blaming Crime Increase on Bail Reform: NC Prosecutor*, CRIME REP. (Dec. 22, 2021), https://thecrimereport.org/2021/12/22/stop-blaming-crime-increase-on-bail-reform-nc-prosecutor [https://perma.cc/47HF-NPMV] (acknowledging a trend among prosecutors towards reform of the criminal justice system).

2. WILL DOBBIE & CRYSTAL S. YANG, *The US Pretrial System: Balancing Individual Rights and Public Interests*, 35 J. ECON. PERSPS. 49, 49 (2021).

3. *See generally* Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J.F. 1098, 1102–12 (2019).

4. Brandon L. Garrett, *Evidence-Informed Criminal Justice*, 86 GEO. WASH. L. REV. 1490, 1506 (2018).

5. *See* NAT'L ACADS. OF SCIS., ENG'G, & MED., DECARCERATING CORRECTIONAL FACILITIES DURING COVID-19: ADVANCING HEALTH, EQUITY, AND SAFETY 15 (2020) ("Decarceration is the process of reducing the number of people in correctional facilities by releasing those currently incarcerated and by diverting those who might otherwise be incarcerated.").

health crisis. The COVID-19 pandemic caused a surge in the numbers of inmates released from many jails to alleviate public health risks considering detention occurs in enclosed spaces with forced personal contacts.[6] The situation offers a sort of natural experiment in that jails returned many individuals to their communities who would not in the normal course of operations have been liberated so soon.[7] Conspicuously, this depopulation move has not been associated with negative crime-related consequences, such as a danger to public safety.[8] Hence, COVID-19 is an unintended excuse to comply with reform goals of reducing pretrial inmate numbers and presents a

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6. Carlos Franco-Paredes, Nazgol Ghandnoosh, Hassan Latif, Martin Krsak, Andres F. Henao-Martinez, Megan Robins et al., *Decarceration and Community Re-entry in the COVID-19 Era*, 21 LANCET INFECTIOUS DISEASES e10, e11 (2021); John Eligon, *'It's a Slap in the Face': Victims are Angered as Jails Free Inmates*, N.Y. TIMES (June 16, 2020), https://www.nytimes.com/2020/04/24/us/coronavirus-jail-inmates-released.html [https://perma.cc/9B4M-CF3Q]; Catherine Kim, *Why People are Being Released From Jails and Prisons During the Pandemic*, VOX (Apr. 3, 2020, 2:10 PM), https://www.vox.com/2020/4/3/21200832/jail-prison-early-release-coronavirus-covid-19-incarcerated [https://perma.cc/B975-MXCW].

7. Mary Beth Faller, *Pandemic a 'Natural Experiment' for Reducing Incarceration, Prosecutors Say*, ARIZ. ST. UNIV. SCH. OF CRIMINOLOGY & CRIM. JUST. (May 6, 2020, 5:00 PM), https://ccj.asu.edu/content/pandemic-natural-experiment-reducing-incarceration-prosecutors-say [https://perma.cc/W8P9-EKEZ].

8. *See, e.g.*, Eli Miller, Bryan D. Martin & Chad M. Topaz, *New York City Jails: COVID Discharge Policy, Data Transparency, and Reform*, 17 PLOS ONE, Jan. 2022, at 4 (finding a lower readmission rate for individuals released during a specified week during the pandemic compared to previous time periods); Karen Yi, *Study: NJ's Early Prison Releases to Ease Crowding During COVID Didn't Raise Public Safety Risks*, GOTHAMIST (June 17, 2022), https://gothamist.com/news/study-njs-early-prison-releases-to-ease-crowding-during-covid-didnt-raise-public-safety-risks [https://perma.cc/M23N-ZVRB] (referring to unpublished study finding the recidivism rate of those released early during the pandemic was not higher than the pre-pandemic rates); Conrad Wilson, *Preliminary Report Shows No Spike in Recidivism for Prisoners Released Early by Oregon Governor*, OR. PUB. BROAD. NEWS (Mar. 28, 2022 8:13AM), https://www.opb.org/article/2022/03/28/report-no-spike-in-recidivism-prisoners-released-early-by-oregon-governor-kate-brown [https://perma.cc/FXE2-E89W] (referring to a report by the Oregon Criminal Justice Commission finding that individuals released early because of the pandemic were not more likely to commit crimes); Amanda Klonsky & Eric Reinhart, *As Covid Surges Again, Decarceration is More Necessary than Ever*, NATION (Dec. 22, 2021), https://www.thenation.com/article/society/covid-prisons-decarceration [https://perma.cc/GUE4-BEG5] (noting that despite a 14% drop in prison population fueled by concerns of the pandemic amongst prison populations, there was no associated rise in crime rates but in fact crime rates continued to decline); DECARCERATING CORRECTIONAL FACILITIES, *supra* note 5, at 61 (insisting that decarceration is possible without an increase in crime rates).

revealing backdrop to potentially sustain an increased rate of release of pretrial detainees.[9]

Nonetheless, while the pandemic scenario might provide an anecdotal case study of an apparently successful major release initiative during a unique time frame, empirical research conducted in normal times is still needed to educate the broader public exchanges addressing criminal justice reforms. This Article offers an original empirical study to answer calls for systematic research using diverse and high-volume pretrial jail populations to provide insights into pretrial detention practices.[10]

Much of the recent rhetoric concerning pretrial initiatives focuses upon the injustices imposed by bail systems because they disproportionately burden already disadvantaged groups, such as racial minorities and the poor.[11] Another salient piece of the reform puzzle has been to remodel the judicial decision-making process to render it more fair in terms of sociodemographic parity and to encourage a higher rate of rulings in favor of release without financial impediments.[12] Algorithmic risk assessment tools offer an important new strategy to address inequalities in pretrial outcomes and increase the rate of judicial rulings in favor of nonmonetary forms of release.[13] The algorithmic turn is part of the evidence-based practices movement in which developers draw on scientific studies identifying factors that are statistically predictive of pretrial failure (i.e., rearrest if released and failure to appear for court dates).[14] The developers weigh the predictors in a model (which creates the algorithm) that forms the risk

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9. Doug Colbert & Colin Starger, *A Butterfly in COVID: Structural Racism and Baltimore's Pretrial Legal System*, MD. L. REV. (forthcoming) (manuscript at 1), http://ssrn.com/abstract=4070712 [https://perma.cc/FD6Y-7PCY] (commenting that the COVID-19 pandemic contributed to "a once-in-a-generation opportunity for meaningful decarceration"); Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, 115 NW. U. L. REV. ONLINE 59, 75 (2020) ("Practitioners, activists, and scholars across the nation have renewed their call for detention reform in light of the current COVID-19 crisis.").

10. *See* Cadoff et al., *supra* note 1, at 1; Katherine Hood & Daniel Schneider, *Bail and Pretrial Detention: Contours and Causes of Temporal and County Variation*, 5 RSF: RUSSELL SAGE FOUND. J. SOC. SCI. 126, 131-32 (2019).

11. *See infra* Section I.A.

12. *See infra* Section I.A.

13. *See* Samantha A. Zottola & Sarah L. Desmarais, *Comparing the Relationships Between Money Bail, Pretrial Risk Scores, and Pretrial Outcomes*, 46 L. & HUM. BEHAV. 277, 277 (2022).

14. Faye S. Taxman, *The Partially Clothed Emperor: Evidence-Based Practices*, 34 J. CONTEMP. CRIM. JUST. 97, 97–98 (2018).

assessment tool.[15] With such a tool in hand, criminal justice officials can more consistently input relevant data and receive software-produced risk classifications to inform their decisions, such as whether to release or detain individuals.[16]

Still, despite the importance of understanding the impact on pretrial incarceration from the presence of monetary bail and judicial decisions, an alternative lens deserves more attention than received to date. Investigating who is actually detained and what particular circumstances correlate with detention should equally drive reform debates, whether such detention is due to an ability to pay bail, to a judicial decision to deny any opportunity for release, or the various other reasons for which release is not actually attained (e.g., statutory presumptions of detention or some other form of detainer).[17] This Article is thereby addressing pretrial detention as the outcome of interest, which in turn is impacted by the existence of monetary bonds, judicial rulings, and demographic influences.

This Article proceeds as follows. Section I provides a summary of pretrial practices with respect to whether individuals are detained or released after booking and initial hearings before judges. The main, legally acceptable aims to retain individuals in custody, despite not having been convicted of a crime, are the protection of public safety and to assure appearance for trial. The Section reviews negative consequences to detention that coexist with those aims.

Section II sets forth an original study using a sample of over 55,000 pretrial defendants in Cook County, Illinois, which stands as an important criminal justice jurisdiction considering its size (the second

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15. An algorithm refers to "computational procedures (which can be more or less complex) drawing on some type of digital data ('big' or not) that provide some kind of quantitative output (be it a single score or multiple metrics) through a software program." Angéle Christin, *Algorithms in Practice: Comparing Web Journalism and Criminal Justice*, BIG DATA & SOC'Y 4(2) at 1, 2 (2017).

16. *See* J. Stephen Wormith, *Automated Offender Risk Assessment: The Next Generation or a Black Hole?*, 16 CRIMINOLOGY & PUB. POL'Y 281, 285–88 (2017) (describing automated tools that may limit calculation errors, transposition errors, and/or human judgement errors in order to make more accurate decisions).

17. *See* Marty Berger, Note, *The Constitutional Case for Clear and Convincing Evidence in Bail Hearings*, 75 STAN. L. REV. (forthcoming 2023) (manuscript at 2-3), https://ssrn.com/abstract=4070185 [https://perma.cc/L2JP-ZVNN] (noting a correlation between a defendant's income level and their inability to secure pretrial release); Stephanie Holmes Didwania, *Discretion and Disparity in Federal Detention*, 115 NW. U. L. REV. 1261, 1306 (2021) (explaining that race and gender alone do not fully explain disparities in detention).

largest county in the United States by population[18]) and multi-ethnic citizenry. Illinois and Cook County have been at the forefront of pretrial criminal justice reforms from the mid-twentieth century and again in recent years. Thus, it offers a healthy case study which can readily inform broader discussions and debates on decarceration strategies.[19] Two recent initiatives in the county include an order from the Circuit Court of Cook County Chief Judge to encourage fewer bonds requiring monetary payments and deploying an algorithmic risk assessment tool.[20] This Section summarizes the methodology underlying the study and reveals the results, including a regression analysis of individuals detained pretrial.

One of the principal research questions motivating this study is to determine whether detention outcomes suggest demographic disparities based on race/ethnicity or gender, and whether any such disparities are ameliorated when controlling various legal factors, including judicial bond decisions and risk assessment tool outcomes. A second major purpose is to measure whether the risk assessment tool itself appears to be effective in terms of having a strong impact on detention outcomes and in the direction expected (higher risk scores being associated with a greater likelihood of detention).

Section III then follows up with comments on relevant policy implications of the results in terms of how the findings might be instructive to stakeholders interested in pretrial reforms more generally. In the end, this Article seeks to offer a seminal contribution to the discussions amongst stakeholders, academics, and the public who favor (or not) substantive changes to the operation of pretrial systems considering the pretrial stage stands as a meaningful component within the criminal justice apparatus.

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18. *US County Populations 2022*, WORLD POPULATION REVIEW (2022), https://worldpopulationreview.com/us-counties (last visited Aug. 28, 2022).

19. *See* Alexa Van Brunt & Locke E. Bowman, *Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next*, 108 J. CRIM. L. & CRIMINOLOGY 701, 761 (2018) ("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.").

20. *Id.* at 763-65; COAL. TO END MONEY BOND, MONITORING COOK COUNTY'S CENTRAL BOND COURT: A COMMUNITY COURTWATCHING INITIATIVE 18 (2018), https://endmoneybond.org/wp-content/uploads/2019/09/courtwatching-report_coalition-to-end-money-bond_final_2-25-18.pdf [https://perma.cc/TC5E-U9H7].

## I. OVERVIEW OF PRETRIAL OUTCOMES

Detaining arrestees for indefinite periods is now commonplace in America.[21] The legal reasons have shifted a bit over time. During much of the country's existence, pretrial detention was permitted only if deemed necessary to ensure a person charged with a crime was present to be adjudicated.[22] Jurists as early as the case of *Ex Parte Milburn*[23] recognized the government's interest in compelling a criminal defendant to "submit to a trial, and the judgement of the court thereon."[24] Much later, the U.S. Supreme Court in *Bell v. Wolfish*[25] confirmed that it was constitutionally permissible to incarcerate an arrestee who presents a flight risk.[26] Certain observers have conceptualized the relevant practical harms to be avoided by flight as follows:

> Of immediate concern is the potential that a defendant has become a fugitive from justice with intent to do harm. The reverberating impacts are realized in the form of greatly increased court costs. Consider the cost of all the criminal justice actors that must assemble in order to administrate even a brief court hearing. When a defendant does not show, those costs are essentially wasted. However, the costs continue and may become exponential . . . as a 'ripple effect' across the system, in the form of the issuance of warrants, the likelihood that someone ends up in jail for the remainder of their pretrial period should they be apprehended, and the remaining needs pertinent to case processing. For example, judges, attorneys, victims, and witnesses must all assemble again in order to process the case.[27]

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21. BAIL PROJECT, AFTER CASH BAIL: A FRAMEWORK FOR REIMAGINING PRETRIAL JUSTICE 3 (2020).

22. *See* Funk, *supra* note 3, at 1104–08 (discussing the history of pre-trial holdings and substantive due process).

23. 34 U.S. (9 Pet.) 704 (1835).

24. *Id.* at 710. An 1879 American treatise on criminal law quotes a judge in an 1841 English case as stating "I conceive that the principle on which parties are committed to prison by magistrates, previous to a trial, is for the purpose of insuring the certainty of their appearing to take their trial." FRANKLIN FISKE HEARD, PRACTICAL TREATISE ON THE AUTHORITY AND DUTIES OF TRIAL JUSTICES, DISTRICT, POLICE, AND MUNICIPAL COURTS IN CRIMINAL CASES 233–34 (1879) (quoting Regina v. Scaife, 9 Dowl. P.C. 553).

25. 441 U.S. 520 (1979).

26. *Id.* at 534.

27. Christopher T. Lowenkamp, Alexander M. Holsinger & Tim Dierks, *Assessing the Effects of Court Date Notifications Within Pretrial Case Processing*, 43 AM. J. CRIM. JUST. 167, 168 (2018). In contrast, others believe there are "relatively low costs associated with apprehending defendants who miss required court appearances." WILL DOBBIE &

An alternative basis for pretrial lockup emerged relatively recently. During the law-and-order movement in the 1980s, Congress and many states modified their laws to permit a form of preventive detention for the purpose of protecting the public from potential new crimes by arrestees.[28] The U.S. Supreme Court upheld this practice in the case of *United States v. Salerno*[29] ruling that due process did not prohibit a judge from ordering pretrial detention reliant upon the judge's own guesstimate of the defendant's future dangerousness.[30] The Court accepted that the government has a compelling interest in preventing crime and thereby justified a balancing: "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[31] The decision endorsed the role of judicial discretion in evaluating which individuals could reasonably be detained or released pending their trials considering their likelihood of failing to appear or being a risk to society.[32]

In recent decades, pretrial detention has markedly shifted from incapacitating a select few individuals deemed likely to abscond or be exceptionally dangerous to a more widespread practice of incarcerating an increasingly higher rate of individuals accused of various crimes, serious or not.[33] The current regime in most jurisdictions is not limited to a judicial decision with a binary scheme of ordering release or detention; instead, several options are available.[34] A judge may allow for release on recognizance in which the individual is discharged based on a personal promise to appear for court dates.[35] A judge may order conditional release with a set of conditions required for compliance, such as electronic monitoring and/or complying with supervisory authorities.[36]

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CRYSTAL YANG, HAMILTON PROJECT, PROPOSALS FOR IMPROVING THE U.S. PRETRIAL SYSTEM 12 (2019), https://www.hamiltonproject.org/assets/files/DobbieYang_PP_20190319.pdf [https://perma.cc/JY5L-65TS].

28. Funk, *supra* note 3, at 1104-05.

29. 481 U.S. 739 (1987).

30. *Id.* at 749, 751–52.

31. *Id.* at 749, 755.

32. *See* Didwania, *supra* note 17, at 1263.

33. *See generally* Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1304–23 (2012) (describing the evolution of pre-trial decisions in their range of punishments and crimes).

34. Lauryn P. Gouldin, *Reforming Pretrial Decision-Making*, 55 WAKE FOREST L. REV. 857, 862-63 (2020).

35. Shima Baradaran Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 973 (2020).

36. *Id.* at 977, 979.

Alternatively, the arrestee may be permitted to earn release through some form of financial security.[37] Bail is often conceptualized as requiring the arrestee to have a financial stake in the case to better ensure compliance and appearance in court.[38] The exact amount of bail required might be systematized in a jurisdiction through a (more or less) formal bail schedule[39] or may be set at an amount within the discretion of the individual judge (both subject to constitutional considerations such as due process, equal protection, and avoiding excessive bail).[40] The exact amount of bail is not always tied to an estimate of the individual's ability to pay it[41] or to the likelihood of compliance with the law.[42] Some systems use the pending criminal

37. RAM SUBRAMANIAN, RUTH DELANEY, STEPHEN ROBERTS, NANCY FISHMAN & PEGGY MCGARRY, VERA INST. OF JUST., INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 29 (2015), https://www.vera.org/downloads/publications/incarcerations-front-door-report_02.pdf [https://perma.cc/3QGU-C4BN] (noting, for example, that in 2009, 61% of felony defendants were required to post financial bail to be released).

38. Insha Rahman, *Undoing the Bail Myth: Pretrial Reforms to End Mass Incarceration*, 46 FORDHAM URB. L.J. 845, 853 (2019); *see also* Aurélie Ouss & Megan Stevenson, Does Cash Bail Deter Misconduct? 2 (Jan. 2022) (unpublished manuscript), https://ssrn.com/abstract=3335138 [https://perma.cc/KZ3H-M8MA] (noting that the requirement of bail is "designed to incentivize *released* defendants to appear in court"); DOBBIE & YANG, *supra* note 27, at 8 (describing monetary amounts as incentivizing court appearance). One account links bail to medieval England where crime was considered a grievance against a private actor who deserved a monetary compensation. The defendant thus had to entrust to a surety the amount of compensation if found guilty, with the surety responsible for transferring the money to the aggrieved if the defendant fled before trial. Rod V. Hissong & Gerald Wheeler, *The Role of Private Legal Representation and the Implicit Effect of Defendants' Demographic Characteristics in Setting Bail and Obtaining Pretrial Release*, 30 CRIM. JUST. POL'Y REV. 708, 709 (2019).

39. Baughman, *supra* note 35, at 1002–03.

40. *See* Gouldin, *supra* note 34, at 864; *see also* Jenny E. Carroll, *The Due Process of Bail*, 55 WAKE FOREST L. REV. 757, 761 (2020) (citation omitted) (noting the reluctance to rely on substantive due process and the U.S. Supreme Court's failure to identify bright-line principles for pretrial sentencing creates a conflict in judicial discretion).

41. LÉON DIGARD & ELIZABETH SWAVOLA, VERA INST. OF JUST., JUSTICE DENIED: THE HARMFUL AND LASTING EFFECTS OF PRETRIAL DETENTION 6 (2019), https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf [https://perma.cc/U7P3-SX4B].

42. COLIN DOYLE, CHIRAAG BAINS & BROOK HOPKINS, HARV. L. SCH., BAIL REFORM: A GUIDE FOR STATE AND LOCAL POLICYMAKERS 7 (2019), https://docslib.org/doc/2562074/bail-reform-a-guide-for-state-and-local-policymakers-by [https://perma.cc/49U9-4B9P].

charge as a proxy for the risk of flight or rearrest, whereas the more serious the charge, the greater the amount of security required.[43]

While many jurisdictions may attempt, by law or policy, to provide guidelines to foster consistency in decision-making, there remains much discretionary leeway in that judges typically remain the final arbiters of pretrial decisions.[44] Research shows that the more common legal factors that are relevant to judicial decisions to detain pretrial include the nature of the pending charge(s),[45] severity of the pending charge(s),[46] past history of failing to appear for court dates,[47] criminal history,[48] and (more recently) algorithmic risk scores.[49]

Judicial decision-making is of importance to the consequences that arrestees may face. However, it is perhaps more salient to distinguish the judicial ruling concerning the conditions of release (if any) from the actual outcome of continued pretrial incarceration.[50] An *order* of detention does not necessarily dictate the individual will remain

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43. Claudia N. Anderson, Joshua C. Cochran & Andrea N. Montes, *The Pains of Pretrial Detention: Theory and Research on the Oft-Overlooked Experiences of Pretrial Jail Stays*, *in* HANDBOOK ON PRETRIAL JUSTICE 13, 17 (Christine S. Scott-Hayward, Jennifer E. Copp & Stephen Demuth eds., 2022); SUBRAMANIAN ET AL., *supra* note 37, at 32.

44. *See* Brandon P. Martinez, Nick Petersen & Marisa Omori, *Time, Money, and Punishment: Institutional Racial-Ethnic Inequalities in Pretrial Detention and Case Outcomes*, 66 CRIME & DELINQ. 837, 839 (2020).

45. Baughman, *supra* note 35, at 996.

46. Jacqueline G. Lee & Rebecca L. Richardson, *Race, Ethnicity, and Trial Avoidance: A Multilevel Analysis*, 31 CRIM. JUST. POL'Y REV. 422, 424 (2020); Sarah Ottone & Christine S. Scott-Hayward, *Pretrial Detention and the Decision to Impose Bail in Southern California*, 19 CRIMINOLOGY, CRIM. JUST., L. & SOC'Y 24, 35 (2018).

47. Baughman, *supra* note 35, at 998; Ottone & Scott-Hayward, *supra* note 46, at 35.

48. Jacqueline G. Lee, *To Detain or Not to Detain? Using Propensity Scores to Examine the Relationship Between Pretrial Detention and Conviction*, 30 CRIM. JUST. POL'Y REV. 128, 129 (2019); Meghan Sacks, Vincenzo A. Sainato & Alissa R. Ackerman, *Sentenced to Pretrial Detention: A Study of Bail Decisions and Outcomes*, 40 AM. J. CRIM. JUST. 661, 665 (2015).

49. Brian P. Schaefer & Tom Hughes, *Examining Judicial Pretrial Release Decisions: The Influence of Risk Assessments and Race*, 20 CRIMINOLOGY, CRIM. JUST., L. & SOC'Y 47, 54 (2019); CarlyWill Sloan, George Naufal & Heather Caspers, *The Effect of Risk Assessment Scores on Judicial Behavior and Defendant Outcomes*, IZA INSTITUTE OF LABOR ECONOMICS DISCUSSION PAPER SERIES 18 (2018), https://docs.iza.org/dp11948.pdf [https://perma.cc/XBM7-E3Q5]; *see also* Jodi L. Viljoen, Melissa R. Jonnson, Dana M. Cochrane, Lee M. Vargen & Gina M. Vincent, *Impact of Risk Assessment Instruments on Rates of Pretrial Detention, Postconviction Placements, and Release: A Systematic Review and Meta-Analysis*, 43 L. & HUM. BEHAV. 397, 402, 403–404 tbl.1 (2019) (citing studies and showing that the implementation of risk tools were not consistently associated with decreasing rates of pretrial detention).

50. Ottone & Scott-Hayward, *supra* note 46, at 27.

detained. The flipside of this is the erroneous assumption that a judicial allowance of release is a necessary—though insufficient—condition for discharge.[51] It is the case that the judicial release decision is insufficient, but it is not always true that it is a necessary condition. For example, a person initially ordered held with no opportunity for release may still be discharged for reasons such as these: the order is later reversed after a reassessment,[52] investigators drop the charges, prosecutors divert the case to less formal processing, a federal civil court order mandates a reduction in the population to alleviate constitutional violations related to population size,[53] or on actions by jail officials to address overcrowding or other concerns.[54] As regards the last variant, a prime example in present times regards the surge in the numbers of detainees freed for non-legal reasons related to the COVID-19 health crisis among jail staff and inmates.[55]

At the same time, judicial orders permitting release do not necessarily mean the individuals will in fact be discharged. Most assuredly, granting an individual the opportunity for release with a bail amount often does not result in freedom for the many individuals who are financially unable to pay it.[56] Release orders without formal bond amounts may still lead to poverty-based detention if other fees are required that individuals cannot show they will be able to pay, such as those associated with electronic monitoring, drug testing, supervisory

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51. *Id.*

52. DON STEMEN & DAVID OLSON, DOLLARS AND SENSE IN COOK COUNTY 15, 28 & n.32 (2020), https://safetyandjusticechallenge.org/wp-content/uploads/2021/06/Report-Dollars-and-Sense-in-Cook-County.pdf [https://perma.cc/C2S7-MW3D].

53. For example, in *Brown v. Plata*, the U.S. Supreme Court approved a court order requiring California to reduce its prison population by 25% in a two-year period in order to alleviate overcrowding, which was found to be contributing to numerous constitutional violations in the medical and mental healthcare treatment of prisoners. 563 U.S. 493, 502 (2011). Partly as a result of this, California's jail populations increased and by 2015, 19 county jails in the state were under court-ordered jail population limits. Mericcan Usta & Lawrence M. Wein, *Assessing Risk-Based Policies for Pretrial Release and Split Sentencing in Los Angeles County Jails*, 10 PLOS ONE, no. e0144967, 2015, at 1-2, https://doi.org/10.1371/journal.pone.0144967.

54. The release of jail inmates on the authority of the Sheriff to alleviate overcrowding or to comply with federal court orders resulting from civil litigation has precedence. Aaron Littman, *Jails, Sheriffs, and Carceral Policymaking*, 74 VAND. L. REV. 861, 910–15 (2021).

55. *Reducing Jail and Prison Populations During the Covid-19 Epidemic*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic [https://perma.cc/BRR8-JSCM].

56. Hissong & Wheeler, *supra* note 38, at 710.

cost reimbursements, or mandated programming.[57] Even a judicial decision allowing release on one's own recognizance may not necessarily mean the individual is discharged. The explanation is that any rulings allowing for some avenue for release (e.g., bond or unconditional release on recognizance) are at times trumped by other considerations, such as a relevant statutory mandate or presumption of detention (e.g., based on the extreme nature of the pending charge),[58] a bail schedule that creates a presumption against release for those receiving a high-risk prediction from an algorithmic risk tool,[59] evidence of an existing bond or probation violation requiring independent judicial action,[60] or an immigration hold.[61] Regardless of the reason(s) that charged individuals are not released, pretrial detention raises the real potential for multiple, often compounding, negative consequences to those individuals who are held.

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57. Jenny E. Carroll, *Beyond Bail*, 73 FLA. L. REV. 143, 187–89 (2021).

58. *E.g.*, OKLA. STAT. ANN. tit. 22 § 1101(C)-(D) (West 2022); GA. CODE ANN. § 17-6-01 (2022); FLA. STAT. ANN. § 903.0351 (West 2016); NEV. REV. STAT. ANN. § 178.484(2) (West 2021).

59. *See e.g.*, HARRIS CNTY. PUB. DEF.'S OFF. & NAT'L ASS'N OF CRIM. DEF. LAWS., HARRIS COUNTY BAIL MANUAL 9 (2018), https://www.nacdl.org/getattachment/e11b870d-0647-4468-a9aa-408204004509/the-harris-county-bail-manual.pdf [https://perma.cc/8EJS-YJDL] (indicating rules adopted by county judges create a presumption of no personal bond and a requirement to detain an individual based on the risk scores from an algorithmic risk tool).

60. *See e.g.*, Note, *The Right to Be Free from Arbitrary Probation Detention*, 135 HARV. L. REV. 1126, 1127 (2022); William F. Henderson, Note, *Probation Detainers in Philadelphia: A Due Process Dud?*, 12 DREXEL L. REV. 129, 130–31 (2020); JON WOOL, ALISON SHIH & MELODY CHANG, VERA INST. OF JUST., PAID IN FULL: A PLAN TO END MONEY INJUSTICE IN NEW ORLEANS 26 (2019), https://www.vera.org/downloads/publications/paid-in-full-report.pdf [https://perma.cc/5QBU-8PWU].

61. Eisha Jain, *Jailhouse Immigration Screening*, 70 DUKE L.J. 1703, 1705, 1707 (2021). These are not the only reasons that individuals ordered released are held. In Cook County itself, the Sheriff has on at least two occasions publicly announced that he would not in fact release individuals that judges assigned to electronic monitoring. In 2018, the Sheriff announced that his staff would scrutinize the criminal history of individuals assigned by judges to electronic monitoring, with "[t]hose who are deemed to be too high a security risk to be in the community will be referred back to the court for further evaluation." Kira Lerner, *As States Look to Cut Jail Populations, Electronic "Miniature Prisons" are on the Rise*, APPEAL (Feb. 28, 2019), https://theappeal.org/chicago-electronic-monitoring [https://perma.cc/8EG6-Y4XK]. Then in 2020, the Sheriff declared that his department had run out of electronic monitoring equipment and thus would continue to incarcerate individuals assigned to the program until a judge modified the release order to remove the requirement. Letter from Thomas Dart, Sheriff, Cook Cnty. Sheriff's Off., to Toni Preckwinkle, President, Cook Cnty. Bd. of Comm'rs, et al. (May 7, 2020), https://www.civicfed.org/sites/default/files/sheriff_letter_on_em_bracelet_shortage.pdf [https://perma.cc/ D995-FG6Z].

### *A. The Harms of Pretrial Detention*

The detention of pretrial defendants raises many concerns, with some overlap among them: overincarceration, due process issues, direct and collateral consequences, deaths in custody, wealth-based disparities, and disparate impact on minorities.

#### *1. Contribution to mass incarceration*

Pretrial detention is a primary driver of mass incarceration in the United States.[62] Twenty percent of the United States' total imprisoned population are pretrial detainees.[63] Pretrial detainees as a proportion of total prison numbers has risen.[64] The "growth in the total jail population over the last 25 years is the direct result of increases in pretrial detention, not increases in the number of convicted people held in jail."[65] Overall, 81% of jail inmates have not been convicted of any crime.[66] In volume, this means that approximately 550,000 individuals at any given time reside in jails around the country awaiting hearings concerning pending charges.[67] The United States is the world leader in this respect, whereby its total pretrial population by count is significantly greater than that of every other country in the world (the next highest count is 323,000 in India).[68]

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62. Garrett, *supra* note 4, at 1506.

63. CATHERINE HEARD & HEATHER FAIR, INST. FOR CRIM. & JUST. POL'Y RSCH., PRE-TRIAL DETENTION AND ITS OVER-USE: EVIDENCE FROM TEN COUNTRIES 3 fig.1 (2019), https://www.prisonstudies.org/sites/default/files/resources/downloads/pre-trial_detention_final.pdf [https://perma.cc/92ZH-6QLR].

64. *Id.* at vii.

65. WENDY SAWYER & PETER WAGNER, PRISON POL'Y INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2022 (2022) [hereinafter SAWYER & WAGNER, PIE 2022], https://www.prisonpolicy.org/reports/pie2022.html [https://perma.cc/4J9F-GH87]. "Pretrial detention is responsible for all of the net jail growth in the last twenty years." WENDY SAWYER & PETER WAGNER, PRISON POL'Y INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2020 (2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/ DJL6-8NHT]. Local jails house more than one-third of the total state prison populations. SAWYER & WAGNER, PIE 2022, *supra*.

66. SAWYER & WAGNER, PIE 2022, *supra* note 65. Local jails typically house defendants detained pending their trials, individuals serving short sentences typically under a year, and convicted prisoners waiting transfer to prison to serve the rest of their sentences. Jaeok Kim, Preeti Chauhan, Olive Lu, Meredith Patten & Sandra Susan Smith, *Unpacking Pretrial Detention: An Examination of Patterns and Predictors of Readmissions*, 29 CRIM. JUST. POL'Y REV. 663, 664 (2018).

67. SAWYER & WAGNER, PIE 2022, *supra* note 65.

68. ROY WALMSLEY, INST. FOR CRIME & JUST. POL'Y RSCH., WORLD PRE-TRIAL/REMAND IMPRISONMENT LIST 6 tbl.2, 9 tbl.3 (4th ed. 2020), https://www.prisonstudies.org/sites/default/files/resources/downloads/world_pre-trial_list_4th_edn_final.pdf [https://perma.cc/65W7-XXEH].

A primary explanation for these significant numbers is that judges tend to be risk-averse, which leads to overestimating the likelihood of non-compliance if released, and consequently may be overly liberal in ordering detention or making release prohibitively expensive.[69] The judicial preference for false positives (incorrect prediction of high risk) over false negatives (incorrect prediction of low risk) may, along with the use of monetary bail, partly account for why a significant majority of unconvicted defendants residing in jails (about three-fourths) are not there for being suspected of committing violent offenses.[70]

A related negative societal consequence is that managing a large pretrial population in detention is expensive,[71] and thus a burden to taxpayers.[72] Detaining those pending trial costs over $13 billion annually in the United States.[73]

*2. Due process considerations*

Despite the U.S. Supreme Court's acceptance in *Salerno* that the purpose of detaining arrestees who are considered dangerous was not meant for punishment,[74] critics continue to view pretrial detention as penalizing the individuals subjected to it.[75] Critics call pretrial detention a shadow carceral state in its reliance on the state's coercive power to strategically utilize administrative practices that are external to the formal adjudicatory procedures permitting punitive treatment

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69. *See* Russell M. Gold & Ronald F. Wright, *The Political Patterns of Bail Reform*, 55 WAKE FOREST L. REV. 743, 746–47 (2020).

70. *See* SAWYER & WAGNER, PIE 2022, *supra* note 65 (indicating that approximately 304,000 of the 445,000 unconvicted persons held in jails are held on property, drug, public order, or other nonviolent offenses).

71. *See* Garrett, *supra* note 4, at 1506.

72. DOBBIE & YANG, *supra* note 27 at 12.

73. Schaefer & Hughes, *supra* note 49, at 48. *See also* DOYLE ET AL., *supra* note 42, at 8 (estimating the daily cost to American taxpayers for pretrial detention at approximately $38 million).

74. United States v. Salerno, 481 U.S. 739, 739 (1987).

75. *E.g.*, Nick Petersen & Marisa Omori, *Is the Process the Only Punishment?: Racial-Ethnic Disparities in Lower-Level Courts*, 42 LAW & POL'Y 56, 58 (2020); Appleman, *supra* note 33, at 1304 ("Pretrial detention in the twenty-first century has evolved from a brief containment for a few accused deemed exceptionally dangerous to punishment for large numbers of accused awaiting trial. The combination of inhumane and degrading conditions, a corrupt and unregulated system of bail surety, bail bondsmen, and bounty hunters, and rising numbers of detainees, with the general absence of criminal due process in the pretrial realm, has resulted in a criminal justice system that punishes before it convicts.").

only after fact-based findings of guilt.[76] Incarceration necessarily impacts rights regarding liberty, privacy, and property.[77] Another fundamental constitutional concern is implicated in that pretrial detention appears to conflict with the principle that individuals should be judged and treated as innocent until adjudicated guilty on the merits.[78] Instead, the scheme of widespread pretrial detention appears to operate as a presumption of "guilty until proven guilty"[79] and thus "incarcerated until proven guilty."[80]

The possibility is real that an individual formally charged with an offense is not guilty. A study from the U.S. Department of Justice's Bureau of Justice Statistics' of felony filings in seventy-five large urban counties found that one out of four of these defendants were never convicted on any of their arrest charges, either having adjudicated as innocent or their cases dropped.[81]

In some ways, spending time in pretrial detention may be experienced as worse than serving a term of incarceration post-conviction. The pretrial detainee's time is more indefinite in length, the process more ambiguous, and they may not have access to the same rehabilitative and supportive programs and services with which the sentenced population may engage.[82]

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76. Anne McDonough, Ted Enamorado & Tali Mendelberg, *Jailed While Presumed Innocent: The Demobilizing Effects of Pretrial Incarceration*, 84 J POL. 1777, 1777 (2022). The legal justification is preventive detention using a regulatory framework to prevent a person from committing some future harm. Megan T. Stevenson & Sandra G. Mayson, *Pretrial Detention and the Value of Liberty*, 108 VA. L. REV. 709, 711 (2022).

77. *See* Bell v. Wolfish, 441 U.S. 520, 537 (1979) ("Once the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention . . . . Whether it be called a jail, a prison, or a custodial center, the purpose of the facility is to detain. Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility.").

78. Dobbie & Yang, *supra* note 27 at 51; SUBRAMANIAN ET AL., *supra* note 37, at 29.

79. *See* Hafsa S. Mansoor, *Guilty Until Proven Guilty: Effective Bail Reform as a Human Rights Imperative*, 70 DEPAUL L. REV. 15, 20-21 (2020).

80. Glen J. Dalakian II, Note, *Open the Jail Cell Doors, HAL: A Guarded Embrace of Pretrial Risk Assessment Instruments*, 87 FORDHAM L. REV. 325, 329 (2018); *see also* Rebekah Durham, Note, *Innocent Until Suspected Guilty*, 90 U. CIN. L. REV. 644, 664 (2021) (indicating that assumptions of dangerousness based on the severity of the charge inappropriately operates as "innocent until suspected guilty").

81. BRIAN A. REAVES, DOJ, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 – STATISTICAL TABLES 1, 24 tbl.21 (2013), https://bjs.ojp.gov/redirect-legacy/content/pub/pdf/fdluc09.pdf [https://perma.cc/FSJ3-93FC].

82. Charles E. Loeffler & Daniel S. Nagin, *The Impact of Incarceration on Recidivism*, 5 ANN. REV. CRIMINOLOGY 133, 141 (2022); Anderson et al., *supra* note 43, at 20.

*3. Direct and collateral consequences of pretrial detention*

The pretrial context is one of the earliest stages setting an individual's path through the criminal justice system.[83] The pretrial decision to release or detain is a "hinge moment" that is one of the most consequential for the defendant's experience in the criminal justice system.[84]

The detention experience is quite harmful.[85] Local jails are less likely than prisons to employ a professional staff, ensure humane conditions, or offer social services.[86] Because of the often "deplorable conditions and overcrowding in some local jails, pretrial detainees are exposed to diseases, physical violence, sexual assault, and face a very real risk of death."[87] Jail may be fatal at the hands of others, but it is also the case that suicide is the leading cause of death in local jails.[88]

Pretrial detention has a "domino effect,"[89] generating cumulative, negative consequences to the individual's legal case.[90] Defendants who are otherwise innocent or have an arguable defense may plead guilty simply to end the proceedings on the hope of gaining an earlier release

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83. *See* Ottone & Scott-Hayward, *supra* note 46, at 25; PRISONER REENTRY INST., PRETRIAL PRACTICE: RETHINKING THE FRONT END OF THE CRIMINAL JUSTICE SYSTEM 14 (2015),https://justiceandopportunity.org/wpcontent/uploads/2016/04/RoundtableReport_web1.pdf [https://perma.cc/FZV6-3A77] ("If arrest is the front door to the criminal justice system, then pretrial detention is its waiting room.").

84. James G. Carr, *Why Pretrial Release Really Matters*, 29 FED. SENT'G REP. 217, 217 (2017); *see also* Stacie St. Louis, *Does Jail Derail? The State of the Literature on Cumulative Disadvantage and Pretrial Detention*, *in* HANDBOOK ON PRETRIAL JUSTICE, *supra* note 43, at 51, 51 ("[Pretrial detention] 'holds the potential to steer the course of the criminal case . . . .'") (citing Meghan Sacks and Alissa R. Ackerman, *Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment?*, 25 CRIM. JUST. POL'Y REV. 59, 64 (2014)).

85. Evan M. Lowder, Carmen L. Diaz, Eric Grommon & Bradley R. Ray, *Effects of Pretrial Risk Assessments on Release Decisions and Misconduct Outcomes Relative to Practice as Usual*, 73 J. CRIM. JUST. 101754, at 2 (2021).

86. Sara Wakefield & Lars Højsgaard Andersen, *Pretrial Detention and the Costs of System Overreach for Employment and Family Life*, 7 SOCIO. SCI. 342, 345 (2020); Muhammad B. Sardar, Note, *Give Me Liberty or Give Me . . . Alternatives?: Ending Cash Bail and Its Impact on Pretrial Incarceration*, 84 BROOK. L. REV. 1421, 1437 (2019).

87. Cynthia E. Jones, *"Give us Free": Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 937 (2013).

88. E. ANN CARSON & MARY P. COWHIG, DOJ, MORTALITY IN LOCAL JAILS 2010-2016 – STATISTICAL TABLES 1, 1 (2020), https://www.bjs.gov/content/pub/pdf/mlj0016st.pdf [https://perma.cc/J9WA-BU9Z].

89. St. Louis, *supra* note 84 at 52.

90. Matthew Baker, *Release Roulette: The Rural-Urban Pretrial Detention Divide in Florida*, 32 U. FLA. J.L. & PUB. POL'Y 1, 16 (2021).

from untenable jail conditions.[91] Pretrial detention incentivizes plea deals as defendants may informally engage in an economic assessment by weighing attendant costs and benefits.[92] The current costs to individuals of their detention, such as in the potential loss of employment and family contacts, may be seen as more important than the potential future benefit of fighting charges while imprisoned.[93] Indeed, prosecutors may contribute to mass pretrial detention by strategically arguing against release in order to spur quicker plea deals, which offer more efficient and cheaper routes to conviction.[94] The less adversarial nature of pretrial proceedings exacerbates inequalities in plea bargaining as pretrial detainees, compared to those who are free, are less able to seek and obtain quality counsel to assist them.[95] Even for detainees enjoying some benefit of legal representation, the fact of their imprisonment impedes a meaningful ability to participate in their own defense by making conditions more difficult to complete tasks associated with preparing their case.[96] A related reason is that attorneys are less likely to meet clients in person who are imprisoned

91. Liana M. Goff, Note, *Pricing Justice: The Wasteful Enterprise of America's Bail System*, 82 BROOK. L. REV. 881, 898 (2017). For instance, defendants who believe that credit for time served will mean an earlier release may plead guilty to achieve that goal, regardless of factual guilt. Samuel R. Wiseman, *Bail and Mass Incarceration*, 53 GA. L. REV. 235, 254 (2018).

92. Wiseman, *supra* note 91, at 254. Researchers interviewed individuals who had pled guilty despite feeling innocent or that there was insufficient evidence against them and highlighted how they weighed non-criminal justice concerns in their decision-making processes. Amy E. Lerman, Ariel Lewis Green & Patricio Dominguez, *Pleading for Justice: Bullpen Therapy, Pre-Trial Detention, and Plea Bargains in American Courts*, 68 CRIME & DELINQUENCY 159, 159 (2022).

93. Smith, *supra* note 1, at 1878 ("[A]waiting trial can mean staying in detention longer, away from one's kids, job, and life. This creates considerable pressure to accept a plea, even if one is innocent."); Nick Petersen, *Do Detainees Plead Guilty Faster? A Survival Analysis of Pretrial Detention and the Timing of Guilty Pleas*, 31 CRIM. JUST. POL'Y REV. 1015, 1018 (2020).

94. Wiseman, *supra* note 91, at 268. Trial avoidance through plea deals can benefit judges, prosecutors, and defendants by saving all of them the time and costs involved in proceeding to trial. Lee & Richardson, *supra* note 46, at 429.

95. Observers note that pretrial detention offers prosecutors significant leverage in plea bargaining. Martinez et al., *supra* note 44, at 854; Goff, *supra* note 91, at 900.

96. Michael R. Menefee, *The Role of Bail and Pretrial Detention in the Reproduction of Racial Inequalities*, 12 SOCIO. COMPASS 1, 4 (2018). Defendants who are uncertain about their prospects at trial might be further incentivized to take plea deals that provide more certainty about their future prospects. Lee & Richardson, *supra* note 46, at 429.

because of the extra time and effort to visit and to gain access to them considering the strictly controlled environment.[97]

Strikingly, pretrial detention exacerbates mass incarceration in ways other than simply through its direct contribution to an increase in the numbers of those detained pending trial, as previously discussed.[98] Pretrial detention is correlated with increasing the likelihood of being convicted at trial.[99] In some cases, defendants who appear at hearings handcuffed and/or dressed in jail clothes may be perceived as a result as dangerous and thus more likely to be adjudged guilty.[100] Whether pleading or being adjudicated guilty at trial, pretrial detention is also associated with receiving a longer prison sentence.[101] Sentencing judges might assume those incarcerated prior to trial are more dangerous even if the detention is based on an inability to pay a financial bond.[102] In the other direction, incarceration may inhibit the person's ability to participate in rehabilitative-oriented activities and thus to earn a potentially lighter sentence:

> [D]etention prevents an accused person from engaging in commendable behavior that might mitigate her sentence or increase the likelihood of acquittal, dismissal, or diversion. Such foreclosed conduct includes paying restitution, seeking drug or mental health

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97. St. Louis, *supra* note 84, at 56–57; Claire Chevrier, *Why Individuals Who are Held Pretrial Have Worse Case Outcomes: How our Reliance on Cash Bail Degrades our Criminal Legal System*, *in* HANDBOOK ON PRETRIAL JUSTICE, *supra* note 43, at 67, 72.

98. *See supra* notes 62–69 and accompanying text.

99. Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L., ECON., & ORG. 511, 512 (2018); Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J.L. & ECON. 529, 546 & tbl.3 (2017); Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 717 (2017).

100. Mia Ortiz, *The Impact of Extralegal Characteristics on Recognizance Release Among Misdemeanants*, 14 J. ETHNICITY CRIM. JUST. 77, 79 (2016).

101. Ellen A. Donnelly & John M. MacDonald, *The Downstream Effects of Bail and Pretrial Detention on Racial Disparities in Incarceration*, 108 J. CRIM. L. & CRIMINOLOGY 775, 791 (2018); Van Brunt & Bowman, *supra* note 19, at 745; Leslie & Pope, *supra* note 99, at 546 & tbl.3; Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, *in* REFORMING CRIMINAL JUSTICE: A REPORT BY THE ACADEMY FOR JUSTICE 21, 22 n.5 (Erik Luna ed., 2017) (citing studies), https://law.asu.edu/sites/default/files/pdf/academy_for_justice/2_Reforming-Criminal-Justice_Vol_3_Pretrial-Detention-and-Bail.pdf.

102. John Wooldredge, James Frank, Natalie Goulette & Lawrence Travis III, *Is the Impact of Cumulative Disadvantage on Sentencing Greater for Black Defendants?*, 14 CRIMINOLOGY & PUB. POL'Y 187, 190 (2015).

> treatment, and demonstrating commitment to educational or professional advancement.[103]

Pretrial detention again exacerbates mass incarceration prospectively as it is criminogenic in nature, thereby increasing the individuals' likelihood of future offending.[104] This is due in part to the jail environment offering opportunities to liaise with antisocial persons who may encourage criminality;[105] in the vernacular, acting as a "school of crime."[106] This correlation is correspondingly related to the common consequence of detention curtailing access to certain crime-reducing benefits such as legitimate employment and safe housing.[107] Any type of incarceration further damages prosocial relationships as it harms the defendant's children,[108] dependents,[109] and other family members.[110] The foregoing examples of breaks in prosocial bonds may act to sever the successful path some of these individuals may otherwise

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103. Heaton et al., *supra* note 99, at 722. Pretrial detainees may be deprived of the opportunity to convince the sentencing judge of their post-offense rehabilitative efforts, which may have reduced their sentencing severity. St. Louis, *supra* note 84, at 56; *see also* Carr, *supra* note 84, at 218 ("Courts with high detention rates fail to give the defendants who need it most the opportunity to live by, and to show the sentencing judge—and even the government—that they can (and more likely will) live by, society's rules and not, as they have in the past, their own outlaw rules. Every time a defendant is given that chance and succeeds, the community, not just the defendant and those dependent on him, benefits. Where not truly needed to ensure appearance and protect the community, pretrial detention withholds this opportunity and its benefits . . . . Success on release means less prison time and may mean no prison time at all.").

104. Evan M. Lowder, Chelsea M. A. Foudray & Madeline McPherson, *Proxy Assessments and Early Pretrial Release: Effects on Criminal Case and Recidivism Outcomes*, 28 PSYCHOL., PUB. POL'Y, & L. 374, 375 (citing studies).

105. HEARD & FAIR, *supra* note 63, at 8; Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 234 (2018).

106. Anderson et al., *supra* note 43, at 43.

107. Beth M. Huebner & Natasha A. Frost, *The Consequences of Sentencing and Punishment Decisions*, *in* HANDBOOK ON THE CONSEQUENCES OF SENTENCING AND PUNISHMENT DECISIONS 3, 4 (Beth M. Huebner & Natasha A. Frost eds., 2018) (citing studies); Hood & Schneider, *supra* note 10, at 128 (citing studies); JOSHUA AIKEN, PRISON POL'Y INITIATIVE, ERA OF MASS EXPANSION: WHY STATE OFFICIALS SHOULD FIGHT JAIL GROWTH (2017) (citing studies), https://www.prisonpolicy.org/reports/jailsovertime.html [https://perma.cc/RF7P-3KKE].

108. Russell M. Gold, *Jail as Injunction*, 107 GEO. L.J. 501, 507 (2019).

109. Lee & Richardson, *supra* note 46, at 429.

110. *See* Goff, *supra* note 91, at 899.

have been heading towards in terms of desistence from a criminal career.[111]

Pretrial incarceration harms democratic ideals in several ways. Ordinary citizens may question the legitimacy of the criminal justice system generally if they perceive that incarcerating the unconvicted operates as an underhanded mechanism to exercise formal control over already marginalized groups.[112] Then, pretrial detention can disrupt the detainees' own democratic involvement; one study found a substantial decrease in voting by individuals after they were detained before trial, particularly for those who were poor and Black.[113] This effect may be due to the experience of dehumanizing detention without feeling sufficient due process, thereby rendering these individuals more likely to reject social norms and question the need to respect the rule of law.[114]

*4. Prolific cases*

Two notable cases of the impact of pretrial detention have been salient in the media. One is the saga of Sandra Bland, whose case began when she was the subject of a traffic stop for allegedly rolling through a stop sign.[115] Ms. Bland stayed in jail as she was unable to post a $500 bond to earn her release.[116] After three days in detention, she committed suicide.[117]

Another high-profile case was that of Kalief Browder, a teenager from the Bronx who languished in a New York jail for three years after being arrested for purportedly stealing a backpack.[118] He and his family

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111. Sandra S. Smith & Cathy Hu, *Exploring the Causal Mechanisms Linking Pretrial Detention and Future Penal System Involvement*, *in* HANDBOOK ON PRETRIAL JUSTICE, *supra* note 43, at 88, 98.

112. Anderson et al., *supra* note 43, at 16.

113. McDonough et al., *supra* note 76, at 1778.

114. Anderson et al., *supra* note 43, at 20.

115. George C. Klein, *On the Death of Sandra Bland: A Case of Anger and Indifference*, SAGE OPEN 1, 1 (2018).

116. Michael Graczyk, *Waller County Cites Sandra Bland's Family Not Paying Bail in her Death*, Austin American-Statesman (Sept. 4, 2016, 12:01 AM), https://www.statesman.com/story/news/2016/09/04/waller-county-cites-sandra-blands-family-not-paying-bail-in-her-death/9832921007 [https://perma.cc/T9Q5-KG3F].

117. *Id.*

118. Joshua Page & Christine S. Scott-Hayward, *Bail and Pretrial Justice in the United States: A Field of Possibility*, 5 ANN. REV. CRIMINOLOGY 91, 92 (2022); David K. Li, *Family of Kalief Browder, Young Man Who Killed Himself After Jail, Gets $3.3M from New York*, NBC News (Jan. 24, 2019, 5:32 PM), https://www.nbcnews.com/news/us-news/family-

were unable to pay the $3,000 bail.[119] The charges were eventually dropped, and he was released.[120] He later committed suicide.[121] Six months before killing himself, Mr. Browder told a reporter that he was still experiencing the side effects of what he perceived as abuse from correctional officers while imprisoned.[122] The story captured national attention for what was believed to constitute an unjust bail system.[123]

The COVID-19 epidemic itself has raised public awareness about the plight of individuals languishing in detention who were unable to escape the virus' devastation.[124] The situation provided an opportunity for critics to highlight pretrial detention itself as a broader public health issue.[125]

*5. Wealth disparities in justice*

Jurisdictions that rely upon some form of financial release create unfortunate wealth-based disparities in the pretrial population, thereby projecting a "two-tiered system of justice."[126] Significant numbers of defendants do not have the resources to post bail or pay related fees and thus remain in custody by virtue of their relative

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kalief-browder-young-man-who-killed-himself-after-jail-n962466 [https://perma.cc/PGM2-KP8Y].

119. Sean Allan Hill II, *Bail Reform and the (False) Racial Promise of Algorithmic Risk Assessment*, 68 UCLA L. REV. 910, 912 (2021).

120. *Id.*

121. *Id.*

122. Miller et al., *supra* note 8, at 2.

123. *E.g.*, Stephanie Wykstra, *Bail Reform, Which Could Save Millions of Unconvicted People from Jail, Explained,* VOX (Oct. 17, 2018, 7:30 AM), https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice-inequality. While the case of Kalief Browder is associated with criticism of bail systems, one account declares that the reason for his continued detention was instead the suspicion of his violating probation. *The Right to Be Free from Arbitrary Probation Detention*, *supra* note 60, at 1126.

124. *See, e.g.*, Eric Reinhart & Daniel L. Chen, *Incarceration and its Disseminations: COVID-19 Pandemic Lessons from Chicago's Cook County Jail*, 39 HEALTH AFFAIRS 1412, 1412 (2020).

125. Kathryn Nowotny, Zinzi Bailey, Marisa Omori & Lauren Brinkley-Rubinstein, Editorial, *COVID-19 Exposes Need for Progressive Criminal Justice Reform*, 110 AM. J. PUB. HEALTH 967, 968 (2020). Though there is a unique downside to releasing more detainees. A recent study revealed evidence of an increase in the rate of COVID-19 cases in zip codes with higher rates of arrest and released jail inmates from Cook County Jail, suggesting "arrest and jailing practices are augmenting infection rates in highly policed neighborhoods." Reinhart & Chen, *supra* note 124, at 1414.

126. Goff, *supra* note 91, at 882.

poverty.[127] The monetary payment thus becomes the "de facto price of freedom while the case is being resolved," ergo creating a wealth divide among pretrial defendants.[128]

Critics have conceptualized the monetary release system as presenting a modern form of jailing debtors[129] or "caging" the poor.[130] The consequence often is a presumption that incarcerated defendants are guilty despite their detainment being based on indigency.[131] There

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127. SARAH PICARD ET AL., CTR. FOR CT. INNOVATION, BEYOND THE ALGORITHM: PRETRIAL REFORM, RISK ASSESSMENT, AND RACIAL FAIRNESS 3 (2019), https://www.courtinnovation.org/sites/default/files/media/document/2019/beyondthealgorithm.pdf [https://perma.cc/7GZF-FXP5]. Notwithstanding, there may also be a select few who are able to fund the bail but choose not to pay:

> A defendant who perceives conviction as likely, or knows that he/she will plead guilty and will be sentenced, may elect to remain in jail understanding that credit for time served in jail (pretrial) will be applied to a subsequent jail sentence. Another possibility is that a defendant may prefer to spend as much of their sentence at the local jail as possible as opposed to post-conviction transfer to a prison (which may be located in a remote part of the state). In other cases, there is the potential that an attorney communicates to the defendant a likely sentence of probation upon conviction and the defendant chooses to remain in jail with the hope of a disposition, if found guilty, with credit for time served in lieu of a probation sentence that could last multiple years and poses the risk of revocation.

Michele Bisaccia Meitl & Robert G. Morris, *Pretrial Incapacitation Duration Impacts the Odds of Recidivism Among Unreleased Bond-Eligible Defendants*, 7 J. L. & CRIM. JUST. 1, 2-3 (2019).

128. Hissong & Wheeler, *supra* note 38, at 722; *see also* Mansoor, *supra* note 79, at 21 (noting monetary bail creates a "tiered system of differential justice that detains individuals primarily, if not exclusively, on the basis of their wealth status"); SUBRAMANIAN ET AL., *supra* note 37, at 32 (2015) ("Money, or the lack thereof, is now the most important factor in determining whether someone is held in pretrial jail."); Wiseman, *supra* note 92, at 242-43 (2018) (discussing the "penal pyramid").

129. Beth A. Colgan, *Fines, Fees, and Forfeitures*, *in* ACAD. FOR JUST., REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 205, 215 (vol. 4, 2017); *see also* Brandon Buskey, *Wrestling with Risk: The Questions Beyond Money Bail*, 98 N.C. L. REV. 379, 379 (2020) (referring to the detention of individuals who cannot afford to financially win their release a "moral outrage").

130. Van Brunt & Bowman, *supra* note 19, at 748. Such a system punishes individuals for their poverty. *Id.* at 743; *see also* Sarder, *supra* note 87, at 1439 ("[I]n operating a system where wealth buys freedom and poverty equals imprisonment, we have condemned and forgotten a troubling number of individuals. A true lost generation.")

131. *See* David J. Reimell III, Comment, *Algorithms & Instruments: The Effective Elimination of New Jersey's Cash Bail System and Its Replacement*, 124 PENN. ST. L. REV. 193, 217 (2019) ("A defendant will be presumed innocent until proven guilty—not indigent.").

is a capitalistic component of market competition as well.[132] Others see a broader systemic problem in the case of bail systems that "use[] the state's monopoly of force to the benefit of publicly unaccountable, economically powerful, private bail companies, at the direct expense of the accused."[133]

A money bail system is problematic, too, in creating a loophole for judges determined to detain individuals despite legal reforms. As critics have argued, "[i]f a proper bail/no bail balance is not crafted through a particular state's preventive detention provisions, and if money is left as an option for conditional release, history has shown that judges will use that money option to expeditiously detain otherwise bailable defendants."[134]

A common, though erroneous, assumption of bail systems is that money necessarily mitigates the risks of noncompliance with conditions (such as nonappearance for hearings) and of committing new crimes.[135] Yet studies do not necessarily support this connection, with some evidence that bail amount is not associated with failure to appear or rearrest.[136] Further, such a presumption ignores differences in financial status.

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132. Natalie Goulette and John Wooldredge, *Collateral Consequences of Pretrial Detention, in* HANDBOOK ON THE CONSEQUENCES OF SENTENCING AND PUNISHMENT DECISIONS, *supra* note 108, at 271, 271 (explaining that "most suspects cannot afford to post their own bond and must seek assistance through a surety company or a bail bondsman").

133. McDonough et al., *supra* note 76, at 1778.

134. Lisa Pilnik, Nat'l Inst. Corr., *A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial System and Agency*, NCIC 12 (2017), https://s3.amazonaws.com/static.nicic.gov/Library/032831.pdf [https://perma.cc/5ZRT-9HYB]. Another problem is that:

> unaffordable bail is inherently counterfactual. It requires a court to extrapolate the effect of a bail amount *if* the defendant could afford it. But arrestees who cannot afford bail go to jail; thus, a judge never knows if the arrestee could have been successfully released with an affordable bail or a nonfinancial condition. Judges consequently cannot develop credible expertise in setting unaffordable bail amounts, as it is impossible to ascertain whether unaffordable bail was truly required in any given case. Unaffordable bail thus only works in the sense that the detained reliably attend their court dates. It otherwise denies any way of knowing who has been properly detained.

Brandon Buskey, *Wrestling with Risk: The Questions Beyond Money Bail*, 98 N.C. L. REV. 379, 384 (2020).

135. An alternatively cynical perspective views pretrial bond as a nefarious means to increase revenue for the government. Colgan, *supra* note 129, at 209.

136. Zottola & Desmarais, *supra* note 13, at 277; Ouss & Stevenson, *supra* note 38, at 3. Another study found that cash bail was unrelated to failure to appear but *increased*

> It seems obvious that a wealthy person accused of the same conduct as a poor one is no more or less likely to be a danger to society, simply because the wealthy can pay for their freedom while the poor cannot. Yet this myth is baked into our current money bail system when bail is set based on amorphous public safety standards.[137]

In other words, "[d]angerous defendants do not become less dangerous by paying bail."[138] Thus, when courts demand unaffordable monetary amounts, continuing detention becomes based on the lack of wealth, not just a high risk of noncompliance.[139] The harsh bail scheme has thereby shifted the focus from risk to wealth.[140]

Besides, the likelihood of intentional absconding from justice may no longer present a legitimate reason to detain in a significant majority of cases. "As a practical matter, flight risk may be less of a concern than it once was because it is hard to truly flee from justice in today's hyper-connected world."[141]

*6. Race/ethnicity and gender*

In theory, the justice system and its officials are blind to extralegal characteristics when managing those who commit dangerous acts.[142] However, there are numerous reasons why the pretrial context appears more open than other criminal law proceedings to discriminatory outcomes against some defendants based on demographic traits. The often high-volume pressure of processing pretrial defendants may allow inequities to flourish.[143] Pretrial is one of the least transparent stages in the criminal process because of little oversight.[144] Judges at

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the likelihood of rearrest. Jake Monaghan, Eric Joseph van Holm & Chris W. Surprenant, *Get Jailed, Jump Bail? The Impacts of Cash Bail on Failure to Appear and re-Arrest in Orleans Parish*, 47 AM J. CRIM. JUST. 56, 69 (2022).

137. Rahman, *supra* note 38, at 865.

138. Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, BYU L. REV. 837, 864 (2016).

139. Loretta E. Lynch, U.S. Att'y Gen., DOJ, Remarks at White House Convening on Incarceration and Poverty (Dec. 3, 2015), https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-white-house-convening-incarceration-and [https://perma.cc/8D7X-VMQL] ("When bail is set unreasonably high, people are behind bars only because they are poor. Not because they're a danger or a flight risk—only because they are poor.").

140. Carroll, *supra* note 40, at 760.

141. Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L. J. 490, 494 (2018).

142. Menefee, *supra* note 96, at 3.

143. Petersen & Omori, *supra* note 75, at 60.

144. Marian R. Williams, *The Effect of Attorney Type on Bail Decisions*, 28 CRIM. JUST. POL'Y REV. 3, 5 (2017); John R. Sutton, *Structural Bias in the Sentencing of Felony*

pretrial rely upon amorphous legal criteria (e.g., estimating an individual's "dangerousness" or determining how to ensure the defendant's appearance for trial).[145] Hence, judges have significant discretion in pretrial hearings and this opens the door to the unconscious influence of extra-legal factors in their decisions.[146] Still, personal bias is not the only concern if institutional bias plagues the system.[147]

Perhaps of greatest concern is the extra-legal role of race/ethnicity. One reason for concern is that minorities suffer from greater barriers to access sufficient financial resources necessary to successfully secure their pre-trial release, resulting in money bail systems disproportionately harming these groups.[148] Another explanation is the application of race-based biases when humans drive pretrial outcomes.[149] It may thereby not be surprising that several studies show that minorities are more likely to be detained pretrial.[150]

In theory, entirely or partially replacing bail systems with risk assessment schemes will ameliorate the wealth-based imbalances in

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*Defendants*, 42 SOC. SCI. RES. 1207, 1209 (2013) (noting pretrial may be more vulnerable to bias because of the significant informality of processes unique to it and fewer restraints from formalized rules and norms).

145. Lydette S. Assefa, *Assessing Dangerousness Amidst Racial Stereotypes: An Analysis of the Role of Racial Bias in Bond Decisions and Ideas for Reform*, 108 J. CRIM. L. & CRIMINOLOGY 653, 658 (2018); Hissong & Wheeler, *supra* note 38, at 710 ("The system also does not work as designed if the courts consider more than the crime [sic] criminal history of the defendant and the flight risk. This occurs if court officials, when assigning bail, consider any of the demographic characteristics of the defendants and assess differential bail amounts for the same crime and history between men and women, across racial and ethnic groups, and across age categories.").

146. John Wooldredge, *Distinguishing Race Effects on Pre-Trial Release and Sentencing Decisions*, 29 JUST. Q. 41, 46 (2012).

147. *See* Jennifer Skeem, Lina Montoya & Christopher Lowenkamp, Understanding Racial Disparities in Pretrial Detention Recommendations to Shape Policy Reform 34 (June 22, 2022) (unpublished manuscript) (finding that most of the disparity in pretrial detentions was due to institutionalized bias), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID4143498_code1633801.pdf?abstractid=4143498&mirid=1 [https://perma.cc/DQ22-UDPM].

148. PRETRIAL JUST. INST., PRETRIAL RISK ASSESSMENT CAN PRODUCE RACE-NEUTRAL RESULTS 2 (2017); Sardar, *supra* note 86, at 1422–23.

149. DOYLE ET AL., *supra* note 42, at 14.

150. *E.g.*, Didwania, *supra* note 17, at 1266; Cadoff et al., *supra* note 1, at 2 (citing studies); David Arnold, Will Dobbie & Crystal S. Yang, *Racial Bias in Bail Decisions*, 133 Q. J. ECON. 1885, 1906 (2018); Leslie & Pope, *supra* note 99, at 550–51; Besiki L. Kutateladze, Nancy R. Andiloro, Brian D. Johnson & Cassia C. Spohn, *Cumulative Disadvantage: Examining Racial and Ethnic Disparity in Prosecution and Sentencing*, 52 CRIMINOLOGY 514, 530 tbl.2 (2014); Sutton, *supra* note 144, at 1214.

releases for minority defendants.[151] Risk tool developers make such promises. "Vendors promote [algorithmic] models to the public and to the agencies that use them as the answer to human bias, arguing that computers cannot harbor personal animus or individual prejudice based on race. . . ."[152] Further discussion of risk assessment tools is further below.[153]

There is also a gender effect. Prior research tends to show that females are less likely to be detained pretrial, even when controlling for legal explanations.[154] Still, monetary bail conditions may impact females more acutely. For example, one study indicates that when detainees are given monetary bonds, women are far less likely to be able to pay them to earn their release.[155]

### *B. Modern Pretrial Reforms*

These troubling issues with pretrial systems have led to bipartisan support for reforms that tend to focus on decreasing rates of detention,[156] restricting or eliminating money bail,[157] improving the

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151. Melissa Hamilton, *Investigating Algorithmic Risk and Race*, 5 UCLA CRIM. JUST. L. REV. 53, 67 (2021).

152. Laurel Eckhouse, Kristian Lum, Cynthia Conti-Cook & Julie Ciccolini, *Layers of Bias: A Unified Approach for Understanding Problems with Risk Assessment*, 46 CRIM. JUST. & BEHAV. 185, 186 (2019).

153. *See infra* Section I.B.

154. John Wooldredge, James Frank & Natalie Goulette, *Ecological Contributors to Disparities in Bond Amounts and Pretrial Detention*, 63 CRIME & DELINQ. 1682, 1700 tbl.3 (2017); Natalie Goulette, John Wooldredge, James Frank & Lawrence Travis III, *From Initial Appearance to Sentencing: Do Female Defendants Experience Disparate Treatment?*, 43 J. CRIM. JUST. 406, 407 (2015) (citing studies).

155. Jennifer L. Kenney & Matthew J. Dolliver, *Time to Bail Out: Examining Gender Differences in the Length of Pretrial Detention Using Survival Analysis*, 43 JUST. SYS. J. 203, 212 (2022) (finding that a higher percentage of bond-eligible women remained in jail during their first 24, 48, and 72 hours after arrest as compared to men).

156. *See* Carr, *supra* note 84, at 220 ("There is no better way to begin to reduce mass incarceration than, whenever and however possible, to avoid pretrial detention."). However, some argue that the amount of jail housing costs saved in reducing pretrial detention may need to be shifted to compensate the increased time and resources of judges, prosecutors, and defense attorneys that will be necessary as more defendants released mean they are better able to file more pretrial motions, engage in lengthier plea negotiations, and trigger more trials. *See* Wiseman, *supra* note 91, at 241–42. Or prosecutors may be forced to select fewer cases to prosecute which may disserve public safety. *Id.* at 242.

157. Rahman, *supra* note 38, at 850 ("Without a doubt, there is growing recognition that money bail itself is a relic of an antiquated pretrial system that perpetuates inequity, bias, and oppression. Justice reform advocates and organizers have made

process to more accurately assess risk,[158] and reducing unwarranted demographic disparities.[159] The bail system itself has undergone several reform movements, each of which move in a slightly different direction.

The first reform in the 1960s advocated to reduce bail requirements for many defendants in lieu of release on recognizance with a promise to appear for court dates.[160] The next reform diverted toward the opposite direction. The law-and-order movement of the 1970s and 1980s publicized the danger of criminals to public safety, ushering in the second reform agenda that permitted judges to detain individuals who were perceived to be a threat to the community.[161] The third bail reform wave remains in vogue today, and entails reducing reliance upon financial resources to mitigate risk by employing automated risk assessment tools.[162]

As part of the latter effort, the evidence-based practices movement encourages jurisdictions to adopt scientifically-created risk assessment tools that might better identify which individuals are more risky than others.[163] At their core, assessment models weigh factors that are predictive of some criminal justice-related failure event to create pools of offenders based on their level of risk.[164] A perceived benefit is that the data-driven science underlying the tools may overcome judges' tendency to overestimate risk and instead to encourage releasing more individuals.[165] For instance, risk tools can reduce reliance on money

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eliminating money bail a central campaign in the fight to end mass incarceration and abolish jails and prisons."). Recent elections have ushered in an unprecedented number of bail-reform proponents as prosecutors. Claire McDowell, *Assessing the Influence of Race on Monetary Bail*, 1 UGA J. ECON. 1, 1 (2019).

158. Ben Green, *The False Promise of Risk Assessments: Epistemic Reform and the Limits of Fairness*, *in* ASS'N FOR COMPUTING MACH., FAT* '20: PROCEEDINGS OF THE 2020 CONFERENCE ON FAIRNESS, ACCOUNTABILITY, AND TRANSPARENCY 594, 594 (2020), https://dl.acm.org/doi/pdf/10.1145/3351095.3372869 [https://perma.cc/C3U2-AXZL].

159. Lowenkamp et al., *supra* note 27, at 168; Pilnik, *supra* note 134, at 1.

160. Monaghan et al., *supra* note 136, at 57.

161. *Id.*

162. Shima Baradaran Baughman, Lauren Boone & Nathan Jackson, *Reforming State Bail Reform*, 74 SMU L. REV. 447, 451–52 (2021).

163. Garrett, *supra* note 4, at 1506; Yoav Mehozay & Eran Fisher, *The Epistemology of Algorithmic Risk Assessment and the Path Towards a Non-Penology Penology*, 21 PUNISHMENT & SOC'Y 523, 524 (2019); Gouldin, *supra* note 138, at 841.

164. Jeremy Luallen, Sharmini Radakrishnan & William Rhodes, *The Predictive Validity of the Post-Conviction Risk Assessment Among Federal Offenders*, 43 CRIM. JUST. & BEHAV. 1173, 1174 (2016).

165. Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 681 (2018).

bail to secure attendance at trial for the vast majority of defendants who are at low risk of absconding.[166]

Further, scientific risk assessment tools are meant to foster more equitable pretrial outcomes by mitigating the potential for discriminatory impacts of decisions driven by judicial discretion.[167] For example, the formalized structure of these new formats and their mathematical computations help temper the influence of cognitive biases on decisions.[168] Automated tools are perceived as ameliorating human biases in judgements on risk[169] and rulings regarding the status of individual defendants.[170] Relatedly, algorithms are seen as far more objective than human predictions.[171] Consider a judge's musings about his perspective in bail hearings: "Sometimes you sit and you stare at the defendant, you get a sense that this defendant is just going to take a hike."[172]

Nonetheless, the risk assessment movement is not limited to efforts to increase pretrial release rates. Increasing the release of defendants will consequently multiply failures to appear and new crimes by those released.[173] This result is just a matter of numbers. Unless a jurisdiction has a population of arrestees in which 100% of them will present for all court dates and avoid being rearrested—a utopia not practically possible in the real world—then sending greater numbers back into their communities will predictably include individuals at greater risk of failure, which will trigger an increase in defaults (either failure to appear or rearrest). Thus, in some pretrial revolutions, a corollary is to motivate judges to detain individuals who pose a significant risk of

166. *See* Lowder et al., *supra* note 85, at 2; John Logan Koepke & David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 WASH. L. REV. 1725, 1729 (2018).

167. Menefee, *supra* note 96, at 6.

168. SARAH PICARD-FRITSCHE, MICHAEL REMPEL, JENNIFER A. TALLON, JULIAN ADLER & NATALIE REYES, CTR. FOR CT. INNOVATION, DEMYSTIFYING RISK ASSESSMENT: KEY PRINCIPLES AND CONTROVERSIES 2 (2017), https://www.courtinnovation.org/sites/default/files/documents/Monograph_March2017_Demystifying%20Risk%20Assessment_1.pdf [https://perma.cc/4BU4-LAG3].

169. PRETRIAL JUST. INST., *supra* note 148, at 2.

170. Richard M. Re & Alicia Solow-Niederman, *Developing Artificially Intelligent Justice*, 22 STAN. TECH. L. REV. 242, 267 (2019); Eckhouse et al., *supra* note 152, at 202; Ric Simmons, *Big Data, Machine Judges, and the Legitimacy of the Criminal Justice System*, 52 U.C. DAVIS L. REV. 1067, 1070 (2018).

171. Jessica Gabel Cino, *Deploying the Secret Police : The Use of Algorithms in the Criminal Justice System*, 34 GA. ST. U. L. REV. 1073, 1078 (2018).

172. Dalakian II, *supra* note 80, at 326 (citation omitted).

173. Lowder et al., *supra* note 85, at 1.

flight or danger to public safety.[174] The utilization of a risk assessment tool in this form is then for preventive detention purposes, though the underlying purpose is to rely more heavily on science than to defer to discretionary estimates by individual humans.

### *C. Pretrial Detention: An Understudied Issue*

Pretrial detention and release remains a "crucial yet understudied part of the criminal case process."[175] The gap is important because pretrial detention outcomes could, for instance, be an unrecognized source of inequality in experiences with the criminal justice system.[176] Further academic research, particularly in jurisdictions who have experimented with reforms, might be enlightening for officials at those sites and for other stakeholders interested in implementing changes in other systems.[177] A particular interest is how detention intersects with pretrial decisions and demographic characteristics.[178]

Most of the existing studies investigating pretrial processes use the State Court Processing Statistics dataset, which compiled samples of cases from seventy-five large counties in the United States.[179] But the Bureau of Justice Assistance, the agency responsible for collecting this data series, cautions that the dataset is limited in that it does not contain information on pretrial risk assessment tools which inform important decisions.[180] In other words, the series does not provide a way to compare the outcomes for defendants who pose equivalent

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174. Gouldin, *supra* note 34, at 885.

175. Ortiz, *supra* note 100, at 77. Scholars from various disciplines agree that pretrial deserves greater attention in the academic literature. *E.g.*, Loeffler & Nagin, *supra* note 82, at 141; Kristin Turney & Emma Conner, *Jail Incarceration: A Common and Consequential Form of Criminal Justice Contact*, 2 ANN. REV. CRIMINOLOGY 265, 266 (2019); Menefee, *supra* note 96, at 2; Dean A. Dabney, Joshua Page & Volkan Topalli, *American Bail and the Tinting of Criminal Justice*, 56 HOW. J. CRIME & JUST. 397, 398 (2017).

176. Hood & Schneider, *supra* note 10, at 126–27.

177. *See* PRISONER REENTRY INST., *supra* note 83, at 23.

178. Donnelly & MacDonald, *supra* note 101, at 777–79; Paul Butler, *Race and Adjudication*, *in* ACAD FOR JUST., REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 211, 226 (vol. 3, 2017).

179. *See* Kristen Bechtel, Alexander M. Holsinger, Christopher T. Lowenkamp & Madeline J. Warren, *A Meta-Analytic Review of Pretrial Research: Risk Assessment, Bond Type, and Interventions*, 42 AM. J. CRIM. JUST. 443, 448 (2017); *State Court Processing Statistics (SCPS)*, BUREAU OF JUST. STAT. [hereinafter *SCPS*], https://bjs.ojp.gov/data-collection/state-court-processing-statistics-scps [https://perma.cc/9WBW-YVUD].

180. *State Court Processing Statistics Data Limitations,* BUREAU OF JUST. STAT. (Mar. 2010), https://www.bjs.gov/content/pub/pdf/scpsdl_da.pdf [https://perma.cc/4G5D-H5QZ].

levels of risk.[181] Further, the series is dated, with the last data collection in 2009.[182]

In light of these concerns, original research on newer datasets in diverse and high-volume pretrial agencies could bring greater transparency to pretrial detention practices.[183] The study reported herein is meant to respond to such a call.

## II. A STUDY OF PRETRIAL DETENTION

This Article reports on a significant case study in pretrial detention. The results may be useful to inform stakeholders considering how various factors interact with those individuals who are detained pending trial. The jurisdiction chosen is Cook County, Illinois. This Section delineates why this location is an enviable option to situate the study, outlines the methodological choices deployed, and reveals results.

### *A. The Jurisdiction*

The site of this study is Cook County, Illinois, home to the city of Chicago. Cook County is an important location as it operates one of the most significant criminal justice systems in the nation. Cook County hosts the country's largest single-site jail and the third largest jail system overall in the United States.[184] Indeed, it represents one of the largest unified court systems in the world.[185] Cook County boasts more than five million residents.[186] The jurisdiction is heterogeneous, hosting "majority minority" demographic composition, with approximately 26% identifying as Hispanic, 24% as Black, and 8% Asian.[187] The per capita median income is less than $40,000 annually,

181. Bechtel, *supra* note 179, at 448.

182. *SCPS*, *supra* note 179.

183. Cadoff et al., *supra* note 1, at 1; *see also* Paul Heaton, *The Expansive Reach of Pretrial Detention*, 98 N.C. L. REV. 369, 370 (2020) (contending use of large administrative databases of nearly all individuals rather than a subset offers an improvement on prior study designs).

184. Reinhart & Chen, *supra* note 124, at 1414.

185. CIVIC FED'N, THE IMPACT OF COOK COUNTY BOND COURT ON THE JAIL POPULATION: A CALL FOR INCREASED PUBLIC DATA AND ANALYSIS 8 (2017), https://www.civicfed.org/sites/default/files/report_publicsafety2017.pdf [https://perma.cc/B3LD-CCDT].

186. *US County Populations 2022*, *supra* note 18.

187. *QuickFacts: Cook County, Illinois*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/cookcountyillinois [https://perma.cc/C3NX-QX4U].

with around 13% living under the federal poverty level.[188] The area presents a melting pot cultural makeup (approximately 21% are foreign born[189]) and an iconic metropolis status.[190] The county represents the increasing diversity that other metropolitan areas are emulating and thus its experiences provide a model for future studies in criminal justice and mass incarceration.

This jurisdiction also presents a valuable case study in pretrial detention as both the state of Illinois generally, and Cook County specifically, are at the forefront of transforming pretrial practices. At the state level, Illinois has placed itself on the leading edge of bail reforms, albeit at times veering in different directions in terms of policies to detain lesser or greater numbers of defendants. In 1963, the state was one of the first to eliminate the commercial bail bond industry by allowing individuals to post 10% of the applicable money bond directly to the court.[191] Illinois remains one of only a few states who prohibit for-profit bond companies.[192] On the other hand, the state was part of the second bail reform wave when, in 1986, an Illinois state constitutional amendment expressly permitted judges to deny bail to those arrested for felonies that carried a mandatory prison term if the judges believed the individuals posed a danger to others.[193] Still, legislation in 1987 aimed to improve processes by requiring each circuit court in the state to implement a pretrial services agency to operate within the local jurisdiction.[194]

Illinois is again at the forefront of the third bail reform movement with a turn to risk assessment practices.[195] The state's Bail Reform Act of 2017[196] reduces reliance upon money bail with the explanation that "decision-making behind pre-trial release shall not focus on a person's wealth and ability to afford monetary bail but shall instead focus on a person's threat to public safety or risk of failure to appear before a

188. *Id.*

189. *Id.*

190. *Cf.* Martinez et al., *supra* note 44, at 843 (recognizing these attributes render a site an attractive one for study).

191. DOYLE ET AL., *supra* note 42, at 53.

192. Joshua Page, Victoria Piehowksi & Joe Soss, *A Debt of Care: Commercial Bail and the Gendered Logic of Criminal Justice Predation*, 5 RSF: RUSSELL SAGE FOUND. J. SOC. SCIS. 150, 156 (2019).

193. ILL. CONST. art. 1, § 9. Subsequent legislation further expanded who could be detained pretrial for their "dangerousness." 725 ILL. COMP. STAT. 5/110-6.3(a) (2021).

194. Pretrial Services Act, 725 ILL. COMP. STAT. 185/1 (1987).

195. *See* Van Brunt & Bowman, *supra* note 19, at 761.

196. 2017 ILL. LEGIS. SERV. P.A. 100-1 (West).

court of appropriate jurisdiction."[197] The bill thus encourages the state's counties to adopt an evidence-based risk assessment tool to aid in the effort to estimate an individual's likelihood of dangerousness and failure to appear.[198]

The Pretrial Fairness Act,[199] a more recent piece of legislation passed in 2021, further limits the use of monetary bail and further restricts the use of pretrial detention.[200] This law will not go into full effect until 2023 and thus does not impact the study that is reported herein.[201]

Cook County itself has evolved in its pretrial policies. Cook County had a history of heavy reliance upon monetary bonds. As an illustration, an analysis of a sample of cases terminated in Cook County Circuit Court in 1982 and 1983 found that monetary detainer bonds requiring individuals post 10% of the amount set as a condition of release were assigned in 82% of cases.[202] In 2004, approximately 60% of the Cook County pretrial population were assigned money bonds, with about half requiring a cash outlay from the defendants of at least $10,000, despite two-thirds of this population being unemployed.[203] In 2011, a three judge federal district court panel, in a case brought by the Department of Justice challenging the conditions of the Cook County jail, in dicta made the following comment:

> Many of the pretrial detainees in the Cook County Jail would . . . 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 . . . .[204]

As a general rule, the historically challenging conditions of local criminal justice system led Chicagoans to offer a nickname of "Crook County" to deride the perceived illegitimacy of its practices.[205] Cook County's reputation in this respect does not render it an outlier.

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197. *Id.*

198. *See* 725 ILL. COMP. STAT. 5/110-5(f) (2022) (referencing a risk assessment evaluation of a pretrial defendant using a recognized evidence-based instrument).

199. 2020 ILL. LEGIS. SERV. P.A. 101-652 (West).

200. *Id.*

201. *Id.*

202. CHRISTINE A. DEVITT, JOHN D. MARKOVIC & JAMES R. COLDREN, ILL. CRIM. JUST. INFO. AUTH., THE PRETRIAL PROCESS IN COOK COUNTY: AN ANALYSIS OF BOND DECISIONS MADE IN FELONY CASES DURING 1982-83, at 45 (1987).

203. CHARLES D. EDELSTEIN, ERNEST C. FRIESEN, RICHARD B. HOFFMAN, CAROLINE S. COOPER & JOSPEH A. TROTTER, JR., BUREAU OF JUST. ASSISTANCE, REVIEW OF THE COOK COUNTY FELONY CASE PROCESS AND ITS IMPACT ON THE JAIL POPULATION 7 (2005).

204. United States v. Cook County, 761 F. Supp. 2d 794, 800 (2011) (per curiam).

205. Nicole Gonzalez Van Cleve, *Due Process & the Theater of Racial Degradation: The Evolving Notion of Pretrial Punishment in the Criminal Courts*, 151 DÆDALUS 135, 147 (2022).

Rather, it is one of many American jail systems that are "ordinary in their dysfunction" amidst a national culture of mass incarceration.[206] The culture, though, convinced the Illinois Supreme Court to intervene in 2013, establishing a working group of stakeholders to implement significant changes to Cook County pretrial practices.[207]

In more recent years, Cook County has implemented significant changes to its pretrial regime, partly in response to pressure from community activists, lawsuits, and media attention:

> 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 Money Bond. The Coalition has undertaken lobbying and organizing efforts to end the overuse of pretrial detention in the County. 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.[208]

Community action might itself have been galvanized by a class action lawsuit filed the same year challenging what the plaintiffs' filing described as racially-discriminatory practices of pretrial detention in Cook County.[209] (The class action was later dismissed on procedural grounds without a decision on its legal merits.)[210] In summer 2017, a publicly-released statement co-authored by former Attorney General Eric Holder named Cook County specifically as operating "an unconstitutional wealth-based pretrial system that is irrational, unjust, costly, and disproportionately affects minority communities."[211]

Nonetheless, concerns about Cook County's pretrial system are not always on behalf of defendants. Critics have contended that the high

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206. *Id.* at 139 (citation omitted).

207. CIVIC FED'N, *supra* note 185, at 19.

208. Van Brunt & Bowman, *supra* note 19, at 761–63 (citations omitted).

209. *Id.* at 762 (referring to Robinson v. Martin, No. 2016 CH 13587 (Ill. Cir. Ct. 2016)).

210. *Id.*

211. Memorandum from Eric H. Holder, Jr., Kevin B. Collins, Ryan O. Mowery & Kyle Haley, Covington & Burling LLP, to Amy J. Campanelli, Cook Cnty. Pub. Def. (July 12, 2017), https://www.chicagoappleseed.org/wp-content/uploads/2017/11/Holder_Cook-Countys-Wealth-Based-Pretrial-System-2017-07-12.pdf [https://perma.cc/883E-47W3].

financial expenses to taxpayers are untenable.[212] On average it costs about $142 per day to house an inmate in the jail.[213]

Perhaps pressured by the then-pending civil rights litigation and grassroots community activism, the Chief Judge of the Circuit Court of Cook County acted decisively in 2017 to change practices by announcing several different measures.[214] In mid-2017, the Chief Judge replaced the judges then serving on the Cook County Central Bond Court (the then-current name of the tribunal for pretrial detention hearings), separated the bond court from the Circuit Court's criminal division which tries defendants, and assigned a presiding judge to oversee the bond court.[215] The Chief Judge further issued General Order 18.8A (the "General Order"), effective for felony cases as of September 18, 2017, mandating that the pretrial services division would score each detained individual on an approved algorithmic risk assessment tool and enquire about their ability to post monetary bail.[216] The General Order instructed judges when setting bail to presume that conditions of release were to be non-monetary and least restrictive in nature.[217]

A community advocacy group hailed the General Order as representing that "Cook County sought to become a national leader in righting the injustices caused by money bond that target impoverished individuals and communities of color."[218]

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212. Editorial, *Improving Justice in Cook County*, CHI. TRIB. (May 24, 2015, 5:40 PM), https://www.chicagotribune.com/opinion/editorials/ct-cook-county-courts-reform-0526-20150524-story.html [https://perma.cc/99CM-U3E7]; BRYAN L. SYKES, COST SAVINGS TO COOK COUNTY WHEN ARRESTED PERSONS ACCESS THEIR RIGHT TO LEGAL DEFENSE WITHIN 24 HOURS 2 (2014), https://condor.depaul.edu/bsykes1/Publications_files/ Cost_savings_report.pdf [https://perma.cc/EKB8-LJQS].

213. OFF. OF THE CHIEF JUDGE, CIR. CT. OF COOK CNTY., BAIL REFORM IN COOK COUNTY: AN EXAMINATION OF GENERAL ORDER 18.8A AND BAIL IN FELONY CASES 2 (2019), https://www.cookcountycourt.org/Portals/0/Statistics/Bail%20Reform/Bail%20Reform%20Report%20FINAL%20-%20%20Published%2005.9.19.pdf [https://perma.cc/8Q6E-74DA].

214. Van Brunt & Bowman, *supra* note 19, at 763–64.

215. CIVIC FED'N, *supra* note 185, at 23.

216. Timothy C. Evans, *General Order No. 18.8A - Procedures for Bail Hearings and Pretrial Release*, CIR. CT. OF COOK CNTY. (July 17, 2017), https://www.cookcountycourt.org/Manage/Division-Orders/View-Division-Order/ArticleId/2562/GENERAL-ORDER-NO-18-8A-Procedures-for-Bail-Hearings-and-Pretrial-Release [https://perma.cc/ZXY6-DXJK].

217. *Id.*

218. COAL. TO END MONEY BOND, SHIFTING SANDS: AN INVESTIGATION INTO THE FIRST YEAR OF BOND REFORM IN COOK COUNTY 3 (2018), https://chicagobond.org/wp-content/uploads/2018/10/shiftingsands.pdf [https://perma.cc/PVV8-6BBS].

Cook County had at the time of the Chief Judge's order already begun preparing to use predictive technology. In March 2016, Cook County authorities adopted an automated risk assessment tool for use on its pretrial population.[219] This tool is the Public Safety Assessment ("PSA") developed by the Laura and John Arnold Foundation and offered nationally specifically for use on pretrial populations.[220] According to an official Circuit Court report, the "PSA has become the cornerstone of pretrial reform efforts in Cook County."[221] At the request of the judge during a bail hearing, the Cook County pretrial services staff report the results of the PSA outcomes.[222]

Despite the general acknowledgement that the General Order was mainly intended to reduce reliance upon monetary bail,[223] this memorandum could also have increased the rate of No Bond rulings. The General Order recognizes that a judge could order detention without opportunity for release (i.e., no bond amount and not electronic monitoring) with a finding that the individual "poses a real and present threat to any person or persons."[224]

This background is meant to set up the original study that is set forth in the next Section.

### *B. Study Methodology*

The secondary data analysis offered herein uses a study sample of new felony filings in Cook County for individuals who were scored on the PSA and appeared in bond court from July 1, 2016, through December 31, 2018. The dataset contains information compiled from: (a) the electronic docket records maintained by the Clerk of the Circuit Court, (b) PSA outcomes scored by the Adult Probation-Pretrial Services Unit and maintained by the Office of the Chief Judge,

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219. DOYLE ET AL., *supra* note 42, at 56.

220. Jennifer E. Copp and William Casey, *Pretrial Risk Assessment Instruments in the United States: A Critical Lens on Issues of Development, Performance, and Implementation*, *in* HANDBOOK ON PETRIAL JUSTICE, *supra* note 43, at 253, 259.

221. OFF. OF THE CHIEF JUDGE, *supra* note 213, at 3.

222. Assefa, *supra* note 145, at 662. Also, based on a combination of the score for new criminal activity and failure to appear, a Decision Making Framework Matrix recommends an appropriate level of monitoring by pretrial services personnel if released. *Id.*

223. *Cook County Seeks Consulting Services to Review Electronic Monitoring Practices*, CIVIC FED'N (May 28, 2020), https://www.civicfed.org/civic-federation/blog/cook-county-seeks-consulting-services-review-electronic-monitoring-practices [https://perma.cc/8RJK-9P9K].

224. Evans, *supra* note 216.

and (c) monthly release files provided by the Cook County Sheriff's Office.[225]

*1. The risk assessment tool: The PSA*

Cook County uses the PSA to assess the risk potential of arrestees, with judges receiving the results bond hearings. The non-profit Laura and John Arnold Foundation funded the development of the PSA with an intent to design an efficient, evidence-based instrument to assist in a pretrial context:

> From the beginning, we believed that an easy-to-use, data-driven risk assessment could greatly assist judges in determining whether to release or detain defendants who appear before them. And that this could be transformative. In particular, we believed that switching from a system based solely on instinct and experience to one in which judges have access to scientific, objective risk assessment tools could further our central goals of increasing public safety, reducing crime, and making the most effective, fair, and efficient use of public resources.[226]

The PSA's developmental sample drew on data from approximately 750,000 pretrial defendants released from 300 jurisdictions.[227] The PSA is purported to be a "universal tool,"[228] meaning it is intended to be used in pretrial jurisdictions across the country.[229] The PSA is the most commonly used pretrial risk assessment tool in the United States,[230] having been adopted in at least four states and many major metropolitan areas.[231] According to a recent report, of the jail systems

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225. The Office of the Chief Judge merged the records from the three sources into a single dataset.

226. ARNOLD FOUND., DEVELOPING A NATIONAL MODEL FOR PRETRIAL RISK ASSESSMENT 2 (Nov. 2013), https://cjcc.doj.wi.gov/sites/default/files/subcommittee/LJAF-research-summary_PSA-Court_4_1.pdf [https://perma.cc/AK7W-ZJMB].

227. *About the Public Safety Assessment*, ADVANCING PRETRIAL POL'Y & RSCH., https://advancingpretrial.org/psa/about [https://perma.cc/DS32-54KJ].

228. Jessica Reichart & Alysson Gatens, *An Examination of Illinois and National Pretrial Practices, Detention, and Reform Efforts*, ILL. CRIM. JUST. INFO. AUTH. 6 (June 7, 2018), https://icjia.illinois.gov/researchhub/articles/an-examination-of-illinois-and-national-pretrial-practices-detention-and-reform-efforts [https://perma.cc/3V4G-Y3ZL].

229. Matthew DeMichele, Peter Baumgartner, Micahel Wenger, Kelle Barrick & Megan Comfort, *Public Safety Assessment: Predictive Utility and Differential Prediction by Race in Kentucky*, 19 CRIMINOLOGY & PUB. POL'Y 409, 414 (2020).

230. PRETRIAL JUST. INST., *supra* note 148, at 4.

231. Cary Coglianese & Lavi M. Ben Dor, *AI in Adjudication and Administration*, 86 BROOK. L. REV. 791, 801 (2021).

using a pretrial risk tool, almost one-third employed the PSA.[232] The PSA is actuarial in nature, reliant solely upon static factors, and designed to be scored based on available criminal history records without requiring an interview with the individuals scored.[233]

The PSA offers three scales. The Failure to Appear scale ("FTA") scores and weights four risk factors: the existence of a pending charge at the time of the offense of arrest, prior conviction, prior failure to appear in the last two years, and prior failure to appear older than two years.[234] The new criminal arrest instrument ("NCA") represents a "broad-band" instrument in that it predicts general recidivism rather than any specific type of recidivist activity.[235] The NCA tool contains seven factors: age at first arrest and six related to criminal history (pending charge at time of offense, prior misdemeanor conviction, prior felony conviction, prior violent conviction, prior failure to appear in the prior two years, and prior sentence to incarceration).[236] These two PSA scales (FTA and NCA) produce scores, with more points indicating a higher likelihood of arrest.[237] The third scale is the New Violent Criminal Arrest ("NVCA") tool that incorporates five data points: current violent offense, current age, pending charge, prior conviction, and prior violent conviction.[238] This scale operates dichotomously, with an NVCA flag indicating a risk of a new violence charge and no flag indicating low risk.[239]

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232. PRETRIAL JUST. INST., SCAN OF PRETRIAL PRACTICES 27 (2019), https://static1.squarespace.com/static/61d1eb9e51ae915258ce573f/t/61df3e19dc500a1e42344351/1642020381052/Scan+of+Pretrial+Practices.pdf [https://perma.cc/QT4G-Z7LU].

233. Matthew DeMichele, Peter Baumgartner, Kelle Barrick, Megan Comfort, Samuel Scaggs & Shilpi Misra, *What Do Criminal Justice Professionals Think About Risk Assessment at Pretrial?*, 83 FED. PROBATION 32, 35 (2019).

234. ADVANCING PRETRIAL POL'Y & RSCH., PUBLIC SAFETY ASSESSMENT: HOW IT WORKS 2 (May 2020), https://cdn.filestackcontent.com/security=policy:eyJleHBpcnkiOjQwNzg3NjQwMDAsImNhbGwiOlsicGljayIsInJlYWQiLCJ3cml0ZSIsIndyaXRlVXJsIiwic3RvcmUiLCJjb252ZXJ0IiwicmVtb3ZlIiwicnVuV29ya2Zsb3ciXX0=,signature:9df63ee50143fbd862145c8fb4ed2fcc17d068183103740b1212c4c9bc858f63/5gCeQzRTuWKKCf5WL7mg [https://perma.cc/8BM7-238E].

235. *See id.* at 3; Grant Duwe, *Better Practices in the Development and Validation of Recidivism Risk Assessments: The Minnesota Sex Offender Screening Tool–4*, 30 CRIM. JUST. POL'Y REV. 538, 539 (2019).

236. ADVANCING PRETRIAL POL'Y & RSCH., *supra* note 234, at 3; DeMichele et al., *supra* note 229, at 415.

237. ADVANCING PRETRIAL POL'Y & RSCH., *supra* note 234, at 2.

238. *Id.* at 4.

239. *Id.*

*2. Judicial pretrial bond decisions*

This study concerns detention practices for new felony filings. In the midst of reform debates about decarceration, it appears more difficult to argue for such policies as presumptions of unconditional release when the individuals are charged with felonies as compared to more minor misdemeanors. Felony crimes are generally graded higher in terms of severity of penalties, often because they are perceived as causing more harm to society, and therefore the public safety element is heightened. It was also important to investigate how algorithmic risk assessment practices impacted detention and Cook County had only been applying its adopted risk tool to felony cases during most of the relevant period of study.[240]

A summary rendering of the practice of judicial bond decisions in Cook County for felony cases may help contextualize the chosen methodology for this study, including the specific variables selected. Each individual arrested and jailed on a felony charge is brought before a judge within 24 to 72 hours.[241] The judge reads the charges out loud and receives the PSA risk assessment scores from the pretrial services professional.[242] The prosecutor can make statements, such as about past convictions or failures to appear for court dates, and may provide a recommendation to the judge on whether to offer the possibility of release and under what conditions.[243] A defense attorney may also present evidence, such as mitigating evidence or reasons to believe the person will be successful if released.[244] The judge will then make a decision regarding bond. These are rather hasty affairs, lasting about a few minutes each, largely due to large numbers of arrestees cycling through Cook County jail on a daily basis.[245] To provide some context, in 2017 (a year within the sampling frame used in this study) more than 33,500 individuals were seen in the Cook County bond court.[246]

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240. *See* Press Release, Cir. Ct. of Cook Cnty., Evans Changes Cash-Bail Process for more Pretrial Release (July 17, 2017), https://www.cookcountycourt.org/MEDIA/View-Press-Release/ArticleId/2561/Evans-changes-cash-bail-process-for-more-pretrial-release [https://perma.cc/EAR6-Y688].

241. COAL. TO END MONEY BOND, *supra* note 20, at 15.

242. *Id.* at 16.

243. *Id.*

244. *Id.*

245. Van Cleve, *supra* note 205, at 135. Other court watchers claim that each pretrial case in front of Cook County judges only "lasts a matter of seconds." Erin Eife & Beth E. Richie, *Punishment by Association: The Burden of Attending Court for Legal Bystanders*, 47 LAW & SOC. INQUIRY 584, 584 (2022).

246. COAL. TO END MONEY BOND, *supra* note 20, at 15.

Decisions deploy several options. At the initial hearing, judges face five alternatives in their rulings: (a) deny release ("No Bond"); (b) release on the defendant's own recognizance (in Cook County labeled an I-Bond, but for ease of reference will be referred to herein as "ROR"), (c) a deposit bond whereby the defendant personally pays 10% of the bail amount to secure release (a D-Bond), (d) a cash bond requiring the defendant pay the full face value of the bail amount ordered (a C-Bond), or (e) release with electronic monitoring.[247]

*3. The dependent variable: The outcome of detention*

The main analytical method using regression statistics (discussed further below) requires the selection of an outcome variable, also known as a dependent variable. While it would be appropriate to study judicial decisions in bond court as the dependent variable, the focus here is instead on the outcome of continued detention pending trial. The reform movement does target increasing the rate of judicial decisions toward release, but the ultimate aim is to alter actual detention/release outcomes. It is noted that the judicial decision on the type of bond to order (if any) is expressly used as a predictive factor as a result, with the detention outcome as the focus of analysis. In sum, the judicial decision is important and thus is included in the statistical model.

This differentiation preferring to select detention as the main focus is explained by several situations that occur in actual practice which render the judicial decision itself as relevant, yet not dispositive, to the outcome. For one, those with an initial No Bond order may still be released if, for example, all charges are dropped, the prosecutor agrees to divert the case using an alternative to formal adjudication, or the individual is released to relieve overcrowding. By Illinois state statute, individuals charged with an offense in which the potential punishment is death or life imprisonment are not bailable until a hearing in which the individual has the burden of overcoming specified presumptions, which requires a showing that "proof of his guilt is not evident" and that the presumption of guilt is not great to earn release.[248] Such a showing may lead to a reversal of an initial No Bond order. A county

247. OFF. OF THE CHIEF JUDGE, *supra* note 213, at 4, 11.
248. 725 ILL. COMP. STAT. 5/110-4(b) (2013).

report for the first quarter of 2019 showed that 14% of those initially ordered No Bond were released within a short period.[249]

It is also the case that many individuals given orders with some opportunity for release will continue to be detained. A defendant who cannot meet the financial obligation of the D-bond or C-bond will not earn their release as a result. Individuals suspected of not being legally in the United States might be held for immigration authorities.

The order of electronic monitoring likewise does not dictate the individual will in fact be discharged considering certain circumstances. Individuals ordered released with electronic monitoring may remain in jail because of the existence of a more restrictive bond on another current case, a detainer requested by another jurisdiction, being ineligible by program restrictions, or refusing placement in the program.[250] For instance, individuals may not be released because they cannot meet—or decline to comply with—various requirements that must be met before pre-trial release.[251] These requirements often mandate electronic monitoring, and require other elements such as the showing of intent to move to a pre-approved and eligible residence (which must be a house, apartment, or condominium — thus disqualifying homelessness or communal living), obtaining consent to the placement from the homeowner or leaseholder, providing a telephone number, consenting to warrantless searches of the premises, and paying court-ordered fees.[252] In terms of fees, judges may require that defendants given an electronic monitoring order pay an advance fee[253] and/or an ongoing "daily participation fee," basically a monitoring charge that accumulates over time.[254] Thus, while an electronic monitoring order may be labeled a form of nonfinancial

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249. CIR. CT. OF COOK CNTY., CIRCUIT COURT OF COOK COUNTY MODEL BOND COURT DASHBOARD 3 (2019), https://www.cookcountycourt.org/Portals/0/Chief%20Judge/Model%20Bond%20Court/Q1%202019/2019%20Q1%20MBC%20Public%20Facing%20Dashboard%2005.22.19.pdf [https://perma.cc/6432-PDER].

250. OFF. OF THE CHIEF JUDGE, *supra* note 213, at 24 fig.9 (see note accompanying table).

251. COOK CNTY. SHERIFF'S OFF., COMMUNITY CORRECTIONS – ELECTRONIC MONITORING (EM) PROGRAM (GPS) INFORMATION SHEET 2 (2020), https://www.cookcountysheriff.org/wp-content/uploads/2020/09/Electronic-Monitoring-Unit-Information-Sheet-rev.docx.pdf [https://perma.cc/56ZT-L24Y].

252. *Id.*

253. STEMEN & OLSON, *supra* note 52, at 3.

254. *See Electronic Monitoring Program (GPS) Participant Agreement*, COOK CNTY. SHERIFF'S OFF. 2 (2020), https://twww.cookcountysheriff.org/wp-content/uploads/2020/08/EM-Rules-and-Acknowledgement-Packet-GPS-8.20.20.pdf [https://perma.cc/G6TF-PPMR].

bond,[255] in the case of Cook County this fee mandate required for release with electronic monitoring renders it a de facto monetary bond, albeit one that is not refundable. These conditions may be why a prior study over a three-month period in 2019 showed that of those individuals assigned an electronic monitoring bond during their bond court appearances, 39% were not soon discharged.[256]

Then, a new wrinkle emerged in 2018 when the Cook County Sheriff announced that he would not immediately release defendants who were ordered to be released under community supervision and electronic monitoring because he believed too many of them were charged with serious offenses..[257] Hence, the sheriff determined that his office would first review such cases and refer any back to the court that his agents believed posed too high of a risk to the community.

Even when the initial decision is an I-Bond (release on one's recognizance without a monetary payment or electronic monitoring), the individual may in fact continue to be detained. Individuals with a preexisting unpaid bond amount or an outstanding probation violation are generally not eligible for release.[258] Individuals assigned an I-Bond may be held because of warrants from other jurisdictions.[259] A sample in 2019 showed that 6% of individuals with an I-Bond (and no electronic monitoring) were not immediately released.[260]

For these reasons, the dependent variable chosen for this study is the outcome of continued detention after the bond hearing. More specifically, the dependent variable of pretrial detention was coded if the individual remained in the jail after the bond hearing until case disposition or at the end of the study period (February 28, 2019).

*4. Independent variables*

Three groups of independent variables were analyzed, either as predictors of interest or as controls: demographic characteristics; legal predictors; and risk assessment predictions.

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255. Assefa, *supra* note 145, at 663.

256. CIR. CT. OF COOK CNTY., *supra* note 249, at 3.

257. Lerner, *supra* note 61.

258. These two are referred to as Accompanying Matters, which have significance in bond decisions apart from felony class and type of current charge. *See* OFF. OF THE CHIEF JUDGE, *supra* note 213, at 6.

259. STEMEN & OLSON, *supra* note 52, at 27 n.18.

260. CIR. CT. OF COOK CNTY., *supra* note 249, at 3.

*a. Demographic predictors*

The available demographic data points were gender, race/ethnicity, and age. *Gender* is dichotomous as male versus female, with female being the reference group. *Race/ethnicity* was divided into four categories according to the Cook County records' method of categorization: White, Black, Hispanic, and Other (Asian, Pacific Islander, Alaskan Native, and those with race information missing).[261] Note that officials in this jurisdiction count Hispanics only if also identified as White, whereas Hispanics who are Black are designated within the Black defendant group.[262] Cook County reports that less than 1% of individuals in its jail population reporting as Black also identified as Hispanic.[263] Race/ethnicity are set as a series of dummy variables with Whites being the reference group. *Age* was grouped in an ordinal fashion: age 25 or younger, 26-35, 36-45, and 46 and older. Age 25 or younger is the reference group.

*b. Legal predictors*

Several legal predictors are included. The initial judicial *bond decision* was included through a collection of dummy variables: C-Bond (cash bond), D-Bond (deposit bond), electronic monitoring, and I-Bond (ROR). No Bond was the reference category.

Prior research has shown that charge type and severity can have different impacts on the likelihood of pretrial detention.[264] *Offense type* options were drugs, violent, property, and other. Drugs were the reference category. The *offense severity* variable was based on an ordinal felony grade basis. Illinois ranks felonies from most serious to least in this order: first degree murder, Class X, and then Classes 1 through 4.[265] These categories were transformed into a scale variable. This choice was to allow severity of arrest offense to act as a control rather than an attempt to directly evaluate the size of the relationship between individual felony grades and pretrial detention.[266]

A predictor was included if the defendant at the time of the bond hearing for the instant offense had an accompanying matter, meaning

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261. OFF. OF THE CHIEF JUDGE, *supra* note 213, at 6.

262. *Id.*

263. *See id.*

264. Cadoff et al., *supra* note 1, at 1 (citing studies); Goulette et al., *supra* note 154, at 411 tbl.2; Kutateladze et al., *supra* note 150, at 530 tbl.2.

265. OFF. OF THE CHIEF JUDGE, *supra* note 213, at 6.

266. Treating offense severity as a continuous variable to serve as a covariate has precedence in the relevant empirical literature. *E.g.*, Lowder et al., *supra* note 85, at 10; Martinez et al., *supra* note 44, at 846.

a *prior violation* outstanding, being an existing violation of a bail bond and/or a probation violation. Both conditions would likely impact detention outcomes in addition to the judicial decisions on bond.[267]

A dichotomous variable was included to differentiate pre- and post-*General Order* periods. Here, we used the periods July 1, 2016, through September 30, 2017 (pre-General Order) and then October 1, 2017, through December 31, 2018 (post-General Order). The short lag between the implementation of General Order on September 17 and the October 1 cutoff was simply to allow some time for the new guidance to be understood and implemented by the bond court judges. This is used as a control and not to directly investigate the association between the Chief Judge's order and detention considering other factors in the legal culture that were occurring during this period yet could not be so easily controlled. As an illustration, a grass-roots community group called the Coalition to End Money Bond initiated its Community Court-watching Initiative over the months of August to October 2017.[268] The cutoff can act as an imperfect proxy to many events occurring around the time period but appeared important in the model to include some temporal control to acknowledge potential differences in surrounding circumstances between those two temporal frames.

*c. Risk assessment predictors*

The PSA risk assessment predictions from each of the three scales were included.[269] These are also legal predictors but will be included in the model separately (see further below) as they are of interest in this study in terms of their relationship to detention outcomes and whether they modify the association between demographic characteristics and/or judicial decisions with detention. Each of the FTA and NCA predictions were packaged in a three-category ordinal fashion—low, medium, high—with the low bin as the reference category. The NVCA variable is a dichotomous violence risk flag of yes or no, with no acting as the reference category.

*5. Analytical methods*

The main analyses use regressions to test the influence among the predictor variables of interest while controlling other factors that are

267. *See supra* note 258 and accompanying text.
268. COAL. TO END MONEY BOND, *supra* note 20, at 5.
269. *See supra* notes 234-239 and accompanying text.

not a focus but may still have relevance to detention.[270] Logistic regression is the appropriate form when the outcome of interest is dichotomous in nature.[271] "[L]ogistic regression . . . examines the relationship of a binary (or dichotomous) outcome (e.g., alive/dead, success/failure, yes/no) with one or more predictors which may be either categorical or continuous."[272] This technique allows the researcher to analyze whether one or more predictors has a significant relationship to the outcome of interest, whether independently or together.[273] More specifically, regression can provide valuable information:

> If the overall model works well, how important is each of the independent variables? Is the relationship of the dependent variable to any of the independent variables attributable to random sample variation? If not, how much does each independent variable contribute to our ability to predict the dependent variable? Which variables are stronger or weaker, better or worse predictors of the dependent variable?[274]

For this study, the independent variables (excluding those acting as controls) are factors expected to be predictive of the outcome of pretrial detention. Logistic regression results provide coefficients for each of the predictors to identify the relationship to the outcome.[275] Coefficients in raw form are themselves difficult to interpret and thus it is common to translate and provide them in the form of odds ratios. Odds ratios indicate the direction and the strength of the association

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270. *See generally* JOSEPH M. HILBE, LOGISTIC REGRESSION MODELS 1 (2009) ("Regression is a statistical method by which one variable is explained or understood on the basis of one or more other variables.").

271. *Id.* at 2.

272. Priya Ranganathan, C. S. Pramesh & Rakesh Aggarwal, *Common Pitfalls in Statistical Analysis: Logistic Regression*, 8 PERSPS. CLINICAL RSCH. 148, 148 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5543767/. A logistic regression "enables us to disentangle the effects of several predictor variables on a binary outcome." JANET L. PEACOCK & PHILIP J. PEACOCK, OXFORD HANDBOOK OF MEDICAL STATISTICS 420 (2d ed. 2020).

273. *See* SCOTT MENARD, LOGISTIC REGRESSION: FROM INTRODUCTORY TO ADVANCED CONCEPTS AND APPLICATIONS 1 (2010) ("In a broad range of scientific disciplines, a common problem is how to predict a categorical outcome when there are two or more *predictors*, which may or may not be *causes* of that outcome.")

274. *Id.* at 83.

275. PEACOCK & PEACOCK, *supra* note 272, at 420 ("[Logistic regression] gives a set of regression coefficients that represent the relationship between each predictor variable and the binary outcome, after adjusting for all of the other variables in the model.").

between the predictors and the outcome of interest.[276] At a simple level, the odds ratio indicates whether someone with that predictor is more or less likely to experience the outcome of interest (i.e., pretrial detention).[277] An odds ratio equal to 1.00 indicates there is no difference.

When the predictor is a categorical variable with groups (such as offense type), the odds ratio is the odds of the outcome in one group versus the odds in the reference group.[278] For instance, an odds ratio indicates whether defendants charged with violent crimes were more likely to be detained than those charged with drug offenses.

Multivariate models used here examine changes to the main effects on detention with different groups of predictors added at separate stages. We conducted three sets of analyses. The first stage of the analysis was in Model 1 to identify the main effects of demographic characteristics on detention. These estimate baseline disparities in the likelihood of detention across the demographic groups studied. Yet, any demographic variations detected may reflect differences in legal case characteristics. We thus wished to explore the extent to which the influence of defendant characteristics differed when legal factors and risk assessment predictions were and were not taken into consideration. In other words, to identify which legal predictors might "explain" demographic effects, it was useful to examine their effects.

Legal predictors (initially excluding risk assessment outcomes) were then added in the second stage. Thus, Model 2 allows us to explore the extent to which the influence of demographic factors differed when legal control factors were taken into consideration—either as predictors themselves or as controls. Finally in the third stage, risk assessment predictors were included for Model 3. Risk assessment results were separately added because there was an interest in understanding how this particular legal reform might alter the impacts of the demographic results and judicial decisions that were included in Models 1 and 2, respectively. The multi-stage strategy allows the researcher to identify how each legally relevant variable impacts the detention outcome generally and whether and how the legally relevant variables in the two groups modify any initial demographic effects.

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276. Edward C. Norton, Bryan E. Dowd & Matthew L. Maciejewski, *Odds Ratios: Current Best Practice and Use*, 320 JAMA 84, 84 (2018).

277. *Id.*

278. PEACOCK & PEACOCK, *supra* note 272, at 420.

Briefly, there were no issues with multicollinearity.[279] All Variance Inflation Factors ("VIFs") were less than 2 and Tolerance was greater than .5.[280]

### *C. Findings*

This Section begins with a summary of the attributes of the sample considering the variables studied in the regression models.

#### *1. Descriptive statistics of the sample*

The entire sample size was 55,280 cases.[281] Table 1 provides descriptive statistics of the sample.

279. If two or more predictor variables are too highly correlated, their effects may in effect cancel each other out. *Id.* at 400.

280. Valsta Bahovec, *Multicollinearity*, *in* INTERNATIONAL ENCYCLOPEDIA OF STATISTICAL SCIENCE 869, 870 (Mlodrag Lovric ed., 2011) ("The multicollinearity problem is serious if $R_j^2 > 0.8$, consequently if $VIF_j > 5$, or equivalently if $TOL_j < 0.2$."): N.A.M.R. Senaviratna & T.M.J.A. Cooray, *Diagnosing Multicollinearity of Logistic Regression Model*, 5 ASIAN J. PROBABILITY & STAT. 1, 1 (2019) ("Tolerance is $1–R^2$. . . . [A] tolerance value less than 0.2 indicates a potential collinearity problem. As a rule of thumb, a tolerance of 0.1 or less is a cause for concern. . . . VIF = 1/Tolerance. . . . Values of VIF exceeding 10 are often regarded as indicating multicollinearity, but in weaker models, which is often the case in logistic regression; values above 2.5 may be a cause for concern..").

281. From the original datafile, 3,699 cases were deleted because of missing data in the variable for the severity of the offense charge. While excluding cases may not be ideal, retaining this factor appeared more important. Offense severity factor was statistically significant in the two models in which it appears (both $p < .001$) and is a common driver as relevant to many decisions in criminal justice from a practical perspective.

Table 1. Descriptive Statistics

*Proportions in categories may not add to 100% due to rounding.

| Variable | *n* | Proportion |
|---|---|---|
| Detained | 13,138 | 23.8% |
| *Demographic Factors* | | |
| Race | | |
| White | 7,297 | 13.2% |
| Hispanic | 8,729 | 15.8% |
| Black | 38,275 | 69.2% |
| Other | 979 | 1.8% |
| Gender | | |
| Female | 6,591 | 11.9% |
| Male | 48,689 | 88.1% |
| Age Category | | |
| 25 and younger | 17,953 | 32.5% |
| 26-35 | 16,259 | 29.4% |
| 36-45 | 9,427 | 17.1% |
| 46 and older | 11,641 | 21.1% |
| *Legal Predictors* | | |
| Initial Decision | | |
| No Bond | 2,285 | 4.1% |
| Cash Bond | 166 | 0.3% |
| Deposit Bond | 21,545 | 39.0% |
| Electronic Monitoring | 9,221 | 16.7% |
| ROR | 22,063 | 39.9% |
| Offense Type | | |
| Drugs | 26,709 | 48.3% |
| Violent | 13,738 | 24.9% |
| Property | 8,191 | 14.8% |
| Other | 6,642 | 12.0% |
| Severity of Offense | -- | -- |
| No Prior Violation | 47,220 | 85.4% |
| Prior Violation | 8,060 | 14.6% |
| Before General Order | 26,681 | 48.3% |
| After General Order | 28,599 | 51.7% |
| *Risk Assessment Outcomes* | | |
| Failure to Appear Risk | | |
| Low | 24,180 | 43.7% |
| Medium | 27,288 | 49.4% |
| High | 3,812 | 6.9% |
| New Criminal Arrest Risk | | |
| Low | 16,820 | 30.4% |
| Medium | 29,929 | 54.1% |
| High | 8,531 | 15.4% |
| No Violence Risk Flag | 50,856 | 92.0% |
| Violence Risk Flag | 4,424 | 8.0% |

During the period of study, 24% of individuals booked into Cook County jail (and were subject to risk assessment and a bond hearing) were subsequently detained. The racial/ethnic makeup was of a majority minority nature, with 70% Black defendants, 16% Hispanic defendants, 13% White defendants, and the remaining 2% as Other (comprising Asian, Pacific Islander, Alaskan Native, or unidentified).[282] Nine out of ten were males. Over 60% were age 35 or younger; just less than one-third were under age 26, meaning the sample skews relatively young.

For the initial bond decision, the most popular was ROR at 40%, followed by 39% with a D-Bond, 17% with electronic monitoring (without an accompanying bond), 4% No Bond, and less than 1% requiring a full C-Bond. This means that proportionally few defendants were entirely denied the opportunity for release at least via the judges' decisions, but reliance upon monetary bonds was still present in four out of ten cases.

Approximately half (48%) were arrested on drug charges and one-quarter (25%) on violent crimes. Fifteen percent were jailed for property offenses and the remaining 12% were for other, miscellaneous felonies. Fifteen percent of the defendants had a prior violation of bond or probation. The sample was relatively evenly split with just over 50% having a bail hearing after the General Order was issued.

Table 1 also provides information on the risk classifications of the sample. For the PSA FTA scale, 44% were at low risk, 49% at medium risk, and 7% at high risk. For the PSA NCA scale, 30% were at low risk, 54% at medium risk, and 15% at high risk. Thus, relatively small subsets were classified by these two tools at high risk of failing to appear or being arrested on any crime if released. The PSA NCVA is a binary measure, here with 8% of defendants being given a tool outcome of being likely to be arrested for a violent crime if released.

Table 1 contains descriptive statistics for the entire study period, before and after the General Order was issued that pushed for fewer monetary bonds and more heavily reliance upon risk assessment. This study is not intending to make any causal attributions for differences in judicial decisions based on the General Order itself considering that

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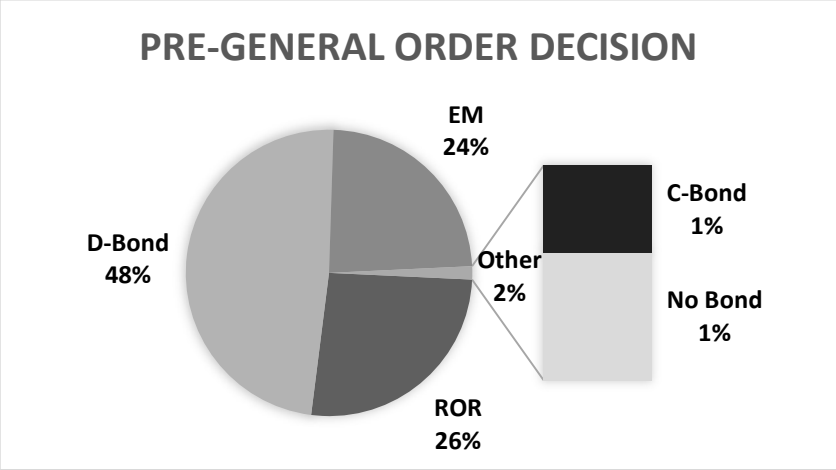
282. Technically, the category of Whites used in the table are White, Non-Hispanics and the category of Hispanics in the table are White, Hispanics. Cook County officials combine Black, Non-Hispanics and Black Hispanics into a single category of Blacks, presumably because only .009% of those identified as Blacks also were Hispanics. *See* OFF. OF THE CHIEF JUDGE, *supra* note 213, at 6.

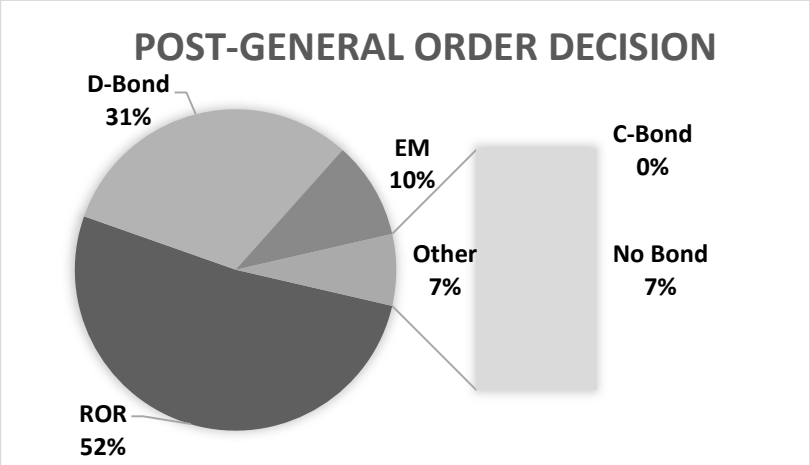
there were other important events occurring in pretrial around that time. Still, it might be of interest to use the General Order date itself as a sort of proxy to observe whether pretrial decisions experienced any variations. In separate analyses, Figures 1 and 2 provide a visual representation, along with statistics on judicial decisions before and after the General Order, respectively.

Figure 1. Bond Decisions Pre-General Order




In the period studied prior to the issuance of the General Order, almost half of decisions were a D-Bond (48%), followed by about a quarter each for the ROR (26%) and EM (24%). Both the full cash bond—the C-Bond—and No Bond were rarely used (1% each). Compare these to the results after the General Order in Figure 2.

Figure 2. Bond Decisions Post-General Order




After the temporal proxy for the issuance of the General Order, half of cases were then ROR (52%) and slightly less than one-third were D-Bonds (31%). One of ten were electronic monitoring (10%), with a smaller subset of No Bond (7%). No C-Bonds were given.

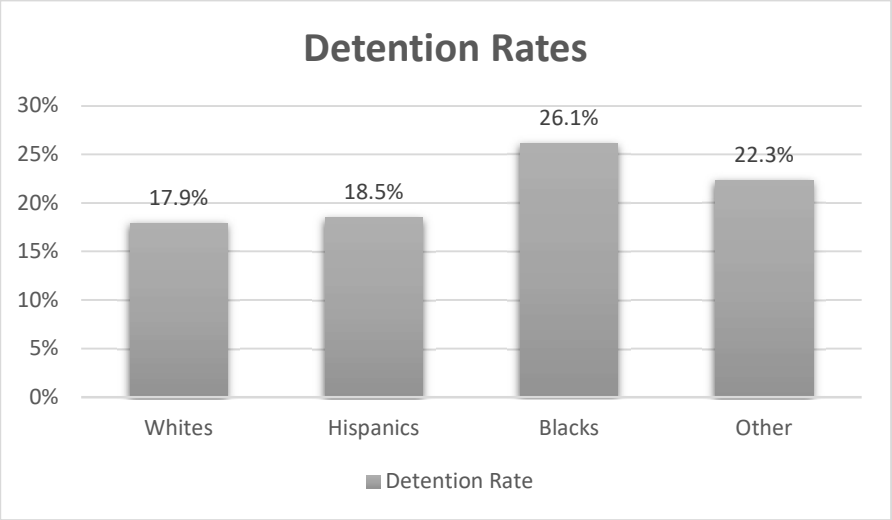
To compare the two time periods, the changes were to increase both the rate of RORs significantly (26% up to 52%) and the use of No Bonds (1% up to 7%). The displacement then allowed for large reductions in the use of D-Bonds (48% down to 31%) and electronic monitoring (from 24% down to 10%). C-Bonds, which were insignificant in the pre-General Order period disappeared altogether post-General Order. Overall, these shifts meant a significant decline in the use of monetary bonds and electronic monitoring, but they were not entirely displaced by ROR as the use of No Bond increased by a factor of 7, though No Bonds still in the post-General Order period were in the minority at 7%.

In a further supplemental analysis, the actual detention rate shrunk, from 29% before the General Order to 19% afterward. This is an interesting data point, though as suggested earlier, there is no attempt here to infer causation from the issuance of the memorandum.

*2. Simple statistics for race/ethnicity*

Figure 3 contains simple proportions for the rates of detention based on racial/ethnic grouping for the entire sample.

Figure 3. Detention Rate by Race/Ethnicity




The simple statistics suggest disparities when not considering any other factors or controls. Black defendants have a higher detention rate at 26%, followed by Other at 22%, Hispanics at 19%, and Whites the lowest at 18%. The differences in proportions are statistically significant ($p < .001$).

Figure 4 contains simple statistics on the initial bond orders from judges for race/ethnicity groups for the full sample.

Figure 4. Bond Decision by Race/Ethnicity

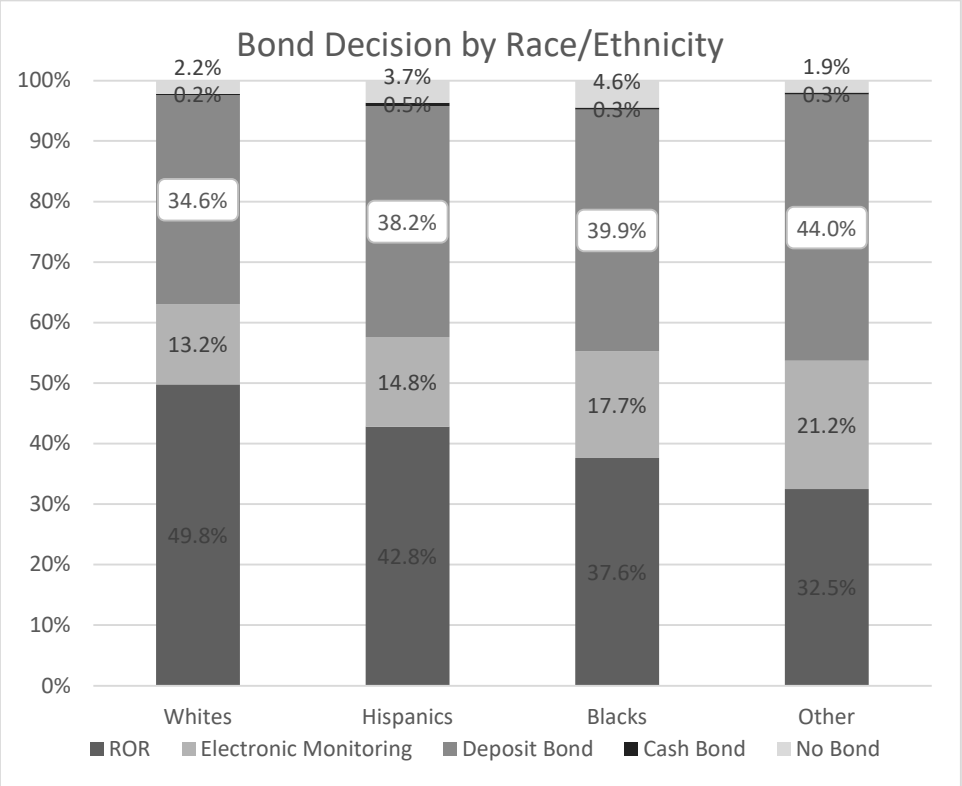



Figure 4 shows that the types of bonds vary by race/ethnicity (statistically significant differences $p < .001$). C-Bonds are not easily visible as they were issued in 0.5% of cases for each group. ROR varied, from half of Whites to a low of about one-third for Other. The opposite effect is observed for electronic monitoring and D-Bonds, with the highest proportions for Other and the lowest for Whites. No Bonds varied, with Blacks most likely for those decisions at 5% and Whites and Other the lowest at 2%.

By looking solely at the bivariate statistics in Figures 3 and 4, one might conclude that this jurisdiction is rife with racial disparities. However, that judgement is premature. It could be that legally cognizable factors explain the differences. A better practice is to engage with a more highly sophisticated statistical model that can control for legal and case characteristics, as is provided next.

*3. Modelling pretrial detention outcomes*

Table 2 contains the results of the main analyses using the three specified models. Model 1 contains demographic predictors, Model 2 added a group of legal predictors, and Model 3 supplemented with risk assessment classifications. Overall model statistics indicated significantly stronger models as the legal predictors and the risk assessment predictors were added (-2 Log Likelihood statistics growing smaller across Models 1-3 indicate the added variable groups improve performance and increasing pseudo $R^2$'s reflect better model fit).[283] These results indicate that a direct relationship between race/ethnicity and detention is too simplistic.

283. *See generally* ALAN AGRESTI & BARBARA FINLAY, STATISTICAL METHODS FOR THE SOCIAL SCIENCES 584 (3d ed. 1997); William J. Meuer & Juliana Tolles, *Logistic Regression Diagnostics: Understanding How Well a Model Predicts Outcomes*, 317 JAMA 1068, 1069 (2017)

Table 2. Logistic Regression Results for the Outcome of Pretrial Detention*

| | Model 1 | | Model 2 | | Model 3 | |
|---|---|---|---|---|---|---|
| Predictor | OR | S.E. | OR | S.E. | OR | S.E. |
| *Demographic Factors* | | | | | | |
| Race (White) | | | | | | |
| Hispanic | .94 | .042 | .83** | .051 | .86* | .052 |
| Black | 1.50** | .033 | 1.15* | .040 | 1.03 | .042 |
| Other | 1.20 | .083 | .81 | .100 | .80 | .102 |
| Gender (Female) | | | | | | |
| Male | 2.30** | .039 | 1.80** | .047 | 1.59** | .049 |
| Age Category (≤ 25) | | | | | | |
| 26-35 | .82** | .026 | .93 | .032 | .79** | .033 |
| 36-45 | .85** | .030 | 1.22** | .038 | .97 | .040 |
| 46 and older | .76** | .028 | 1.64** | .037 | 1.32** | .039 |
| *Legal Predictors* | | | | | | |
| Initial Decision (No Bond) | | | | | | |
| Cash Bond | | | .21** | .176 | .26** | .183 |
| Deposit Bond | | | .18** | .060 | .20** | .062 |
| Electronic Monitoring | | | .06** | .067 | .07** | .069 |
| ROR | | | .01** | .073 | .02** | .075 |
| Offense Type (Drugs) | | | | | | |
| Violent | | | 1.55** | .033 | 1.61** | .036 |
| Property | | | 1.95** | .037 | 1.89** | .038 |
| Other | | | .72** | .048 | .75** | .048 |
| Severity of Offense | | | 1.24** | .176 | 1.21** | .012 |
| Prior Violation | | | 7.45** | .032 | 5.79** | .033 |
| After General Order | | | .60** | .027 | .57** | .027 |
| *Risk Assessment Outcomes* | | | | | | |
| Failure to Appear Risk (Low) | | | | | | |
| Medium | | | | | 1.05 | .033 |
| High | | | | | 1.27** | .057 |
| New Criminal Arrest Risk (Low) | | | | | | |
| Medium | | | | | 2.51** | .039 |
| High | | | | | 3.03** | .053 |
| Violence Risk Flag | | | | | 1.82** | .043 |
| -2 Log Likelihood | 59554.94 | | 41046.27 | | 39632.35 | |
| Nagelkerke $R^2$ | .029 | | .448 | | .474 | |

* $p < .01$.
** $p < .001$. OR = Odds Ratio. S.E. = Standard Error.
*** Reference categories for dummy variables are designated in (parentheses).

*4. Main effects of demographic characteristics*

In Model 1, the results indicated the main effects of demographic factors were statistically significant, with the exceptions in race/ethnicity for the Hispanic and Other categories. Defendants who were Hispanic or in the Other racial category were at the same likelihood of pretrial detention as Whites. (Note that this may seem contradictory to the simple statistics which shows that Hispanics and Others were at slightly higher rates of detention than Whites. Here, these statistics are not zero-order effects as the likelihood of detention has controls whereby gender and age modify the simple relationship between race/ethnicity and detention.) In contrast, Black defendants experienced 50% greater odds of detention than White defendants. This result suggests racial disparity, but it does not yet account for a host of legal factors introduced in Models 2 and 3.

There is a gender effect whereby males faced 2.3 times (130% in percentage terms) the odds of detention than females. Individuals in every grouping over age 25 were less likely to be subject to pretrial detention than those 25 years and younger. In sum, considering only these demographic characteristics, the outcome of pretrial detention is significantly more likely for young, male, and Black defendants. The next steps then load in a host of legal factors to observe whether they help explain these demographic disparities.

*5. Adding a block of legal factors to the model*

Model 2 tests whether those demographic impacts remain after adding a block of legal predictors (excluding risk assessment outcomes for now). Black defendants were still more likely to be detained, but the legal factors have reduced the effect whereby their odds of detention are 15% higher than the odds for White defendants when controlling for such legal factors, with statistical significance ($p = .001$). Yet, Model 2 shows the Hispanic group statistic is now statistically significant but in the opposite direction than Blacks: the odds of detention for Hispanic defendants were 17% lower than White defendants (odds ratio = .83, thus the formula $[(.83 - 1) \times 100]$ to obtain the relevant proportion).

Model 2 also shows that males continued to be more likely to be detained than females, though the inclusion of legal factors curtailed the effect whereby the odds of males being detained were 1.8 times higher than for females (compared to 2.3 times in Model 1). The inclusion of legal factors altered the results for age. Those age 26-35 were no more likely to be detained than those 25 and younger, but the effect for the oldest two groupings changed direction. Those age 36

and above were more likely to be detained than the youngest group. This means that the previous finding that those in the youngest age group were more likely to be detained failed to hold after accounting for various legal factors.

Aside from changes in demographic impacts, Model 2 indicates the judicial bond decision is material across categories. Compared to No Bond, every other form of potential release greatly reduced the likelihood of detention. As might be expected, electronic monitoring and ROR rulings are associated with decreasing detention more so than either form of monetary bond (D-Bond or C-Bond). Each of the odds ratios are statistically significant ($p < .001$), thus confirming that judicial decisions strongly influence whether individuals are detained, even after controlling for demographic and other legal variables.

In terms of (charged) offense characteristics, drug offenders were less likely to be detained compared to violent and property offenders, an outcome that might be of interest considering the vestiges of the drug war, but is not an issue that is further addressed in this study.[284] As expected, the severity of the charged offense on a felony grade scale was positively associated with detention and an outstanding violation greatly increased the odds of detention by a factor of 7 for each higher felony grade.

The variable that compared the post-General Order period suggests that this action by the Chief Judge was associated with a decreasing detention rate (a 40% reduction in the odds of detention after the General Order was issued). However, as the Chief Judge engaged in other actions around the same time period (e.g., replacing the judicial team assigned to bond court and segregating bond court from the criminal court adjudicatory functions)[285] and other events happening that could be relevant (e.g., shifts in the economic environment rendering bail more affordable), one cannot make firm conclusions about the effect of the General Order in isolation. Still, the variable was useful as a proxy control for relevant events occurring around the time of the General Order that were meant to impact bond decisions and detention rates.

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284. The 'Other' offense type was less likely to be detained, but no definitive conclusions are reasonable because of its miscellaneous nature. However, the category exists in the model to include those individuals for purposes of studying the other factors.

285. CIVIC FED'N, *supra* note 185, at 23.

*6. The role of risk assessment predictions*

In the full Model 3, taking into consideration a host of legal variables plus adding the risk assessment predictions as a group, the impacts of some of the demographic factors shifted again. For race/ethnicity, Hispanics are still at lower risk of detention compared to Whites, with statistical significance ($p$ = .004), albeit at a slightly lower odds differential than in the more limited models. The odds of Hispanic defendants being detained were 14% less than White defendants. However, Black and Other race defendants are no more likely to be detained pretrial compared to White defendants after including the effects of a host of legal variables *plus* risk assessment predictions. This means that the initial racial disparity for Blacks in Model 1 was negated by a function of a combination of judicial bond decision, offense type and severity, a prior violation, the issuance of the General Order, *and* risk assessment outcomes.

The gender effect remained, albeit at a reduced level. Males were still at higher odds of detention. Yet the risk assessment tools further reduced the effect from 2.3 times in the original model with only demographic traits down to 1.6 times the odds than females with the legal factors including risk.

With the risk tools added, the effects of the age groupings shifted again. In the end, compared to the youngest group age 25 and younger, those age 26-35 had 21% lesser odds of being detained, those ages 36-45 were no different, and those age 46 and over had 32% higher odds of detention. This undercuts any theory that age impacts detention decision in a linear fashion when considering the additional predictors. However, the shape of the curvilinear results does not mimic an age-crime curve as it was U-shaped, with those in the middle age groups at lower odds of detention while the highest age group was at higher odds of detention compared to the youngest age group. This suggests that age may still play a role in detention outcomes.

The strength and direction of the association for all of the legal predictors in Model 3 were relatively similar to those in Model 2. In Model 3, the effects of the initial bond decision by judges were all statistically significant and still in the directions expected. Compared to an initial No Bond decision, individuals in all other decision categories were far less likely to be detained. Like Model 2, the results were strongest for defendants initially given ROR or an electronic monitoring order, who were at 98% and 93% lesser odds, respectively, of being detained. Arrest offense type was salient in that the category of crime with which defendants were charged was relevant to pretrial detention outcomes. Compared to drug crimes, those who were

arrested for violent or property offenses were at increased odds of pretrial detention. Thus, drug offenders in this sample were more likely to be released than violent and property offenders. But the drug offenders were not the least likely to be detained overall as the odds were lower for the miscellaneous bucket of all other crimes.

As expected, the severity of the offense increased the odds of detention in a linear fashion: the more severe the offense charge, the greater the odds of pretrial detention. A particularly strong predictor was the existence of a prior violation of a bond or probation order, with the odds increased by a multiple factor compared to those without such a violation. The post-General Order period, when also considering risk assessment results, reduced the odds of detention by 43% as compared to the time period preceding the General Order.

Model 3 added the three PSA risk assessment predictions as a block to determine if the inclusion of algorithmic risk predictions impacted detention outcomes over and above the legal predictors entered in Model 2. Model 3 provides strong support that all three PSA risk outcomes heavily influence whether defendants are subject to pretrial detention as the overall model statistics for Model 3 (-2 Log Likelihood and Nagelkerke $R^2$) significantly improved model fit over Model 2.[286] Moreover, the effect of risk assessment classifications were in the expected directions. Higher risk predictions for all three scales increased the odds of pretrial detention, with statistical significance, with the one exception for the medium risk classification (compared to low risk) from the PSA FTA scale. The PSA FTA tool is evidently the least salient of the three risk tools, with a high risk associated with a 1.3 times higher risk than a low-risk rating. Among the three risk scales, the NCA predictions appeared to serve the strongest effects, with medium and high risk associated with 2.5 times and 3.0 times the odds of arrest, respectively, than the low risk bin. The PSA NCVA increased the odds of detention by 1.8 times compared to no violence flag.

### *7. Limitations*

Section III will explore policy implications of the results. Before that discussion, a summary of the limitations of this study provides some context.

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286. A reduction in the -2 Log Likelihood from Model 2 to Model 3 means the Model 3 is a better fit to the data, confirmed by a separate $\chi^2$ difference test for nested models with a $p < .001$. In addition, the increase in the Nagelgerke $R^2$ statistics from Model 2 to 3 also indicates a higher correlation in Model 3. *See* FRED C. PAMPEL, LOGISTIC REGRESSION: A PRIMER 46-47, 50 (2000) (discussing model statistics).

This was a secondary data analysis and thus we were unable to observe or otherwise control the quality of the initial data gathering. Still, because of the difficulty in obtaining access to primary data, the availability of any dataset that appears to have been collected in a systematic way provides a distinct advantage in favor of adding to public knowledge about how pretrial detention operates in a real-world setting. We were likewise unable to ascertain statistics on interrater reliability for the PSA risk tool scoring. While true, as the PSA risk scale outcomes were calculated in a field setting by corrections professionals trained in scoring the tool, the results are enlightening about how the tool performs based on given scores in an operational setting. For purposes of this study's research objectives, whether the risk scores are errors is not as important as seeing the effect of the risk predictors that are actually provided to judges in real cases. The study was limited to a single site and thus results may not generalize well to other jurisdictions with different detention practices.

Cases are nested within judges, meaning that the assignment of which judge made the initial bond decision would be highly relevant to that decision and the outcome of detention considering the correlation between the two events. Some judges might, for instance, simply be more likely than others to issue No Bond orders given the same subset of arrestees. It would have been preferable to control for the assignment of judges either as predictors in the models provided or in a hierarchical design. However, the dataset does not identify individual judges or any proxy to so distinguish them. This is unfortunately a common lapse in criminal justice statistics in that jurisdictions commonly do not release data on individual judge assignments.

It is also noted that Illinois' Bail Reform Act of 2017 went into effect on January 1, 2018, in the middle of the time frame of this study (July 1, 2016, to December 1, 2018). Thus, changes to detention outcomes could have been impacted by this legislation. This study used October 1, 2017, as the cut-off as a control for the General Order memorandum. This does not act, then, as an identical proxy for the January 1, 2018, law considering there is a three-month overlap. Still, this situation does not significantly undermine the findings considering it is a short overlap and it was not a purpose of this study to measure the impact of either the General Order or the newest reform act. The independent variable acted instead as a control to minimize its impact while still observing the correlation between the other variables of interest and the outcome of detention.

## III. POLICY IMPLICATIONS AND CONCLUSIONS

The results of the study help inform the debate about pretrial justice and the current reform movement in several policy issues.

### *A. Moderating Racial/Ethnic Bias*

Consistent fears by critics of criminal justice outcomes regarding bias may be justified considering the existence of empirical studies and anecdotal evidence to support their suspicions.[287] However, it is also evident that bias may not be universal. This study was able to investigate demographic bias in an important population considering its heterogeneous makeup, its significant size, its optics as a recognizable city, and the relatively recent introduction of certain reforms regarding bail practices and risk assessment instrument adoption.[288]

By using a stepped model design, the results revealed that what appeared to be racial disparity in detention outcomes negatively impacting Black defendants (Model 1) disappeared when controlling for a host of legal variables, albeit only when risk assessment outcomes were included. In contrast, while the risk assessment tools reduced the disparity regarding Hispanic defendants (who faced a lesser likelihood of detention than Whites), the differential was still statistically significant. The pathway to this observation suggests that algorithmic risk tools, in the right circumstances, can play a positive role in ameliorating racial and ethnic bias, though may not necessarily be able to entirely eliminate relative inequities. The detention rate for Hispanics was statistically different than Whites but in the direction against a negative bias toward Hispanics. It is important to note that the results here do not speak to whether the risk tool (the PSA specifically) is accurate or even fair in its predictions.[289] The point, instead, is that the risk tool did offer a benefit in reducing racial disparities in pretrial detention.

This point is relevant to the broader debate about whether algorithmic risk assessment tools do more harm than good in terms of fairness. A few years ago, a coalition of more than 100 civil rights organizations (including the ACLU and NAACP) jointly issued a press

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287. *E.g.*, Didwania, *supra* note 17, at 1261; Zamir Ben-Dan, *When True Colors Come Out: Pretrial Reforms, Judicial Bias, and the Danger of Increased Discretion*, 64 HOWARD L. J. 83, 86 (2020); Arnold et al., *supra* note 150, at 1885.

288. *See supra* Section II.A.

289. *See generally* Melissa Hamilton, *Evaluating Algorithmic Risk Assessment*, 24 NEW CRIM. L. REV. 156 (2021) (evaluating the validity of the PSA failure to appear scale on three data sets, including Cook County).

release siding against the use of risk assessment tools due to the fear that the algorithms embedded systematic biases and thus would exacerbate racial and ethnic disparities in criminal justice.[290] In contrast, an alliance of prominent criminal defense groups (e.g., National Association of Criminal Defense Lawyers, American Council of Chief Defenders) advocate the use of algorithmic tools in pretrial so long as there is evidence that they can help simultaneously reduce detention rates and racial/ethnic disparities in pretrial outcomes.[291] The findings herein contribute to such evidence of a risk assessment tool's contribution to both types of reductions.

A supplemental insight, not often expressly emphasized, pertains to how empirical designs should define racial and ethnic groupings. The findings intimate that criminal justice statisticians might be overlooking interesting avenues when they study racial/ethnic disparities by aggregating minorities together into a single combination to compare to Whites. The alternative dichotomies of Whites versus non-Whites[292] or Whites versus Blacks (either ignoring Hispanic ethnicity by using only the racial grouping or entirely excluding identified Hispanics)[293] is unfortunately a common practice in investigating potential racial disparities in criminal justice research. Such a dichotomous choice may be combining different minorities groups together that will hide potential variations in ways relevant to

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290. Press Release, The Use of Pretrial "Risk Assessment" Instruments: A Shared Statement of Civil Rights Concerns 1 (July 30, 2018), http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf [https://perma.cc/99KS-8H2K].

291. Press Release, Joint Statement: Pretrial Risk Assessment Instruments 2 (Mar. 2019), https://www.nacdl.org/getattachment/c80216bf-84e0-429d-9750-9e49f502913d/joint-statement-on-pretrial-risk-assessment-instruments-march-2019-.pdf [https://perma.cc/5TQ2-3XLG].

292. *E.g.*, Zachary Hamilton, Grant Duwe, Alex Kigerl, Jason Gwinn, Neal Langan & Christopher Dollar, *Tailoring to a Mandate: The Development and Validation of the Prisoner Assessment Tool Targeting Estimated Risk and Needs (PATTERN)*, 39 JUST. Q. 1129, 1135 (2021); Ashlee R. Barnes, Nordia A. Campbell, Valerie R. Anderson, Christina A. Campbell, Eyitayo Onifade & William S. Davidson, *Validity of Initial, Exit, and Dynamic Juvenile Risk Assessment: An Examination Across Gender and Race/Ethnicity*, 55 J. OFFENDER REHAB. 21, 29 (2016); Till Speicher, Hoda Heidari, Nina Grgic-Hlaca, Krishna P. Gummadi, Adish Singla, Adrian Weller & Muhammad Bilal Zafar, *A Unified Approach to Quantifying Algorithmic Fairness: Measuring Individual & Group Unfairness via Inequality Indices*, KDD 2239, 2239 (2018).

293. *E.g.*, Zottola & Desmarais, *supra* note 13, at 277; JENNIFER SKEEM, LINA MONTOYA, & CHRISTOPHER LOWENKAMP, UNDERSTANDING RACIAL DISPARITIES IN PRETRIAL DETENTION RECOMMENDATIONS TO SHAPE POLICY REFORM 1 (2022), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID4143498_code1633801.pdf?abstractid=4143498&mirid=1; Schaefer & Hughes, *supra* note 49, at 47.

the analysis. Here, in the full models, compared to Whites, Black defendants were more likely to be detained, while Hispanic defendants were less likely to be detained; if these groups had been combined, these bidirectional results might have canceled each other out to some degree and consequently have suggested equal treatment. This would have obscured understanding of real differences between the specific racial/ethnic groups. A different point is to pay more attention to Hispanics as a group (or to subsets as it is too often a myth that Latinx are homogenous). The Hispanic population is an understudied area in criminal justice, despite the significant role they play in America.[294]

It is noted that even this study was unable to separately investigate all possible racial and ethical subgroups. Indeed, like many other designs there was an "Other" category. But this was due to practical reasons in that, despite Cook County's civilians representing a richly diverse population, in this pretrial sample less than 2% were not designed as White, Black, or Hispanic.[295]

### *B. Moderating Gendered Differences*

Results suggest that a combination of legal factors somewhat ameliorate gendered differences in detention, though did not fully account for them. Taking into consideration the variety of legal factors, males remained at a higher probability of detention. Risk assessment outcomes helped a bit more to moderate the difference. It is theoretically possible that the risk assessment did not entirely overcome the gap as other research provides evidence that risk tools that do not differentiate by gender tend to overpredict recidivism for females.[296] In sum, the algorithmic risk tool appears beneficial as it was able to help reduce both race/ethnicity and gender disparities.

The lingering gendered disparity is not surprising considering a host of research showing that females are often treated differently than males in criminal justice processes, including in pretrial stages.[297] Commonly cited reasons are that judges perceive women as less

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294. *See* Melissa Hamilton, *The Biased Algorithm: Evidence of Disparate Impact on Hispanics*, 56 AM. CRIM. L. REV. 1553, 1560 (2019) ("Importantly, Hispanics comprise a significant portion of the American population, making them a reasonable population to analyze. Plus, reasons exist to suspect that an algorithm may not assess an ethnic minority group very well.").

295. *See* OFF. OF THE CHIEF JUDGE, *supra* note 213, at 6.

296. *See generally* Melissa Hamilton, *The Sexist Algorithm*, 37 BEHAV. SCI. & L. 145 (2019) (finding gender bias in a risk tool and citing other studies).

297. Anderson et al., *supra* note 43, at 21–22.

blameworthy, less able to withstand the harshness of incarceration, and more successful at rehabilitation.[298]

Norms appear to be shifting away from the strict delineation of gender (or sex) as a binary structure to such pronoun options as she/he/they. The study herein was unable to accommodate the progressive terms as the criminal justice dataset used only counts males or females, with no other options.

### *C. The Potential for Reform Changes*

Detention was far less likely overall after the General Order was implemented. This might be seen as a positive sign of the reforms the General Order was intended to implement. Caution is justified, though, considering this type of study was unable to fully control for other events and circumstances occurring around the same time frame as the issuance of the General Order. In empirical terms, this is known as omitted variable bias.[299] The consequence is that no causal conclusion can or should be made. On the other hand, the evidence here does not refute the possibility that such reforms can have the result intended, at least with respect to the goal of reducing detention rates. While this study does not address the issue, a report from the Chief Judge of Cook County in 2019 asserted that the increase in pretrial release that occurred subsequent to the General Order had not led to an increase in crime.[300] A separate study by academic researchers found that in the post-General Order period to April 30, 2019, even though the rate of defendants released increased: (a) the rate of new arrests of the released population did not increase, and (b) more generally the Chicago area did not experience an increase in crime.[301]

Together, these results may help moderate the concerns of critics about the potential downsides of reforms seeking to reduce reliance upon pretrial incapacitation. Indeed, such evidence may encourage reformers to venture further in challenging other existing (official and

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298. St. Louis, *supra* note 84, at 58.

299. *See generally* Kevin A. Clarke, *The Phantom Menace: Omitted Variable Bias in Econometric Research*, 22 CONFLICT MANAGEMENT & PEACE SCI. 341 (2005).

300. OFF. OF THE CHIEF JUDGE, *supra* note 213, at 1. Other researchers disputed the Chief Judge's findings and conclusions. *See* Paul G. Cassell & Richard Fowles, *Does Bail Reform Increase Crime? An Empirical Assessment of the Public Safety Implications of Bail Reform in Cook County, Illinois*, 55 WAKE FOREST L. REV. 933 (2020). However, the Cassell & Fowles' assessment suffers from making questionable assumptions about data and imputing statistics. *See id.*

301. STEMEN & OLSON, *supra* note 52, at 2.

unofficial) presumptions against pretrial release and unraveling the cognitive connection between monetary bail as a necessary stick to discourage nonappearance for court hearings.

On the other hand, prudence is justified in that reforms may not always be unidirectional, here in terms of only increasing nonfinancial release options. While the focus was on detention outcomes, results on changes to judicial decisions are still informative to discussions about pretrial processes. The findings illustrated that the reductions in the proportions of both monetary bail and electronic monitoring decisions after the General Order were significantly, but not entirely, displayed by ROR recommendations. There was a seven-fold increase in the rate of No Bond orders (albeit the size is still relatively small as its proportion among all decisions increased from 1% to 7%). This result might suggest that some judges remained convinced of an unreasonable chance that at least a subset of defendants would fail to appear for court hearings or commit new crimes without the monetary commitment of bond or supervisory control via electronic monitoring. Yet, the bond court judges here are not necessarily indicating defiance of the reforms. The General Order itself, while substantially aimed at reducing pretrial detention, also expressly authorized judges to order detention based on factual findings either that no condition(s) would assure the defendant's appearance for court dates or the "defendant poses a real and present threat to any person or persons."[302] Overall, despite the uptick in No Bond orders, the proportion of them were overwhelmed by the much more substantial increased rate of ROR (from 26% to 52%).

This study was not able to test for it, but the General Order's wording might have curtailed the size of the increase in No Bond orders. The law and policy surrounding pretrial detention for purposes of dangerousness is relatively vague. There generally is a lack of specificity (in empirical terms operationalizing) in delineating what "dangerousness" actually means.[303] There is no relevant U.S. Supreme Court precedent[304] to define the idea and relevant statutes are inherently vague.[305] The Illinois state statute during the study period refers to "safety of any other person or the community."[306] Does this

302. Evans, *supra* note 216.

303. Koepke & Robinson, *supra* note 166, at 1742.

304. *See* Appleman, *supra* note 33, at 1334 (suggesting the U.S. Supreme Court in *United States v. Salerno* "conflated future crime prevention and community safety into one amorphous concept").

305. Stevenson & Mayson, *supra* note 76, at 724–27.

306. 725 ILL. COMP. STAT. 5/110-5(a) (2022).

mean a risk of any criminal offense, even victimless crimes, and no matter how minor? Commentators often discuss public safety as if it means any new offense.[307] The PSA—the most popular tool in pretrial in the US, and the one subject to the study presented here—predicts any type or severity of rearrest, thus also conflating public safety with any rearrest.[308]

The General Order at least provides some limits in the frame of implying a risk of interpersonal violence (i.e., "threat to any person or persons").[309] Future research might helpfully investigate the possibility that such a constricted framing of dangerousness correlates with a reduction in judicial pretrial detention decisions as compared to either a more diffuse, or even lack of any, definition.

### *D. Possible Lessons from the COVID-19 Experiment*

The time period studied here pre-dates the COVID-19 pandemic. Still, reflections from the study results, combined with the experience of decarceration necessitated for health and safety concerns, justify some further thought.

> This era of mass incarceration has been recognized as a crisis for America, and consequently, criminal justice reform is one of the few issues in US society that has bipartisan support. The COVID-19 pandemic that began in 2020 pushed this issue even more to the forefront as large numbers of correctional staff and inmates were infected with the virus amid growing awareness that jails and prisons were amplifiers of viral spreading. Prior to the pandemic, laws were being passed to reform the criminal justice system, and for the first time in decades, we began to see decreases in incarceration rates. The pandemic ushered in a period of further decarceration, as prisons and jails began to release those with complex medical issues, those nearing the end of their sentences, and those jailed for non-violent or misdemeanor crimes.[310]

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307. Page & Scott-Hayward, *supra* note 118, at 94 (referring to endangering public safety as committing a crime); Anne Milgram, Alexander M. Holsinger, Marie Vannostrand & Matthew W. Alsdorf, *Pretrial Risk Assessment: Improving Public Safety and Fairness in Pretrial Decision Making*, 27 FED. SENT'G REP. 216, 216 (2015) (discussing detention for public safety as justified for those at high risk of committing new crime).

308. *See supra* Section II.B.1.

309. Evans, *supra* note 216.

310. Elizabeth L. Jeglic & Cynthia Calkins, *Introduction: The Need for Criminal Justice Reform*, *in* HANDBOOK OF ISSUES IN CRIMINAL JUSTICE REFORM IN THE UNITED STATES 1, 3 (Elizabeth Jeglic & Cynthia Calkins eds., 2022).

Importantly, there were no observable increases in crime rates during this time of COVID-19-related decarceration.[311] A report by the National Commission on COVID-19 and Criminal Justice uses individual-level data from 375 jails in thirty-nine states to compare release statistics before and after the White House warned of increased risks of transmission in close quarters where people congregated.[312] Results indicated that, while jails began to release more individuals during the pandemic and those at higher risk of recidivism (greater proportion of felonies and having served longer periods of pretrial incarceration), rebooking rates did not exceed those prior to the warning.[313]

311. Samantha A. Zottola, Sarah E. Duhart Clarke & Sarah L. Desmarais, *Bail Reform in the United States: The What, Why, and How of Third Wave Efforts*, *in* HANDBOOK OF ISSUES IN CRIMINAL JUSTICE REFORM IN THE UNITED STATES, *supra* note 310, at 143, 154. Reduced jail populations were a function both of higher rates of releases and lower numbers of admissions as the public sheltered and the police made fewer arrests. Alex R. Piquero, *The Policy Lessons Learned from the Criminal Justice Response to COVID-19*, 20 CRIMINOLOGY & PUB. POL'Y 385, 387-89, 394 (2021).

312. ANNA HARVEY & ORION TAYLOR, NAT'L COMM'N ON COVID-19 & CRIM. JUST., COVID-19, JAILS, AND PUBLIC SAFETY 6-7 (2020), https://build.neoninspire.com/counciloncj/wp-content/uploads/sites/96/2021/07/Covid-19-Jails-and-Public-Safety-Anna-Harvey-and-Orion-Taylor.pdf [https://perma.cc/D4JC-MD9B].

313. *Id.* at 21, 24.