5-2020

Making Freedom Free: A Call for Bail Reform in America's Broken Criminal Justice System

Jordan L. Sharpe
Suffolk University

Making Freedom Free: A Call for Bail Reform in America's Broken Criminal Justice System

Jordan L. Sharpe

Department of Political Science and Legal Studies

College of Arts and Sciences Honors Program, Suffolk University

POLITICAL SCIENCE & LEGAL STUDIES DEPARTMENT STUDENT RESEARCH CONFERENCE 2020, SUFFOLK UNIVERSITY BOSTON

Table of Contents

I. ABSTRACT

Studies have shown that in the past fifteen years, the number of people jailed in the United States has sharply increased, thereby continuing the upward trend of incarceration that erupted in the 1980s. Jail populations are steadily increasing; yet, in the past fifteen years, the number of people *convicted* of crimes has stayed the same. The reason for this phenomenon: individuals are forced to remain in jail not because they are deemed a threat to public safety, but because they cannot afford the cost of bail. This system has drastically deviated from its original purposes and now destroys lives by permitting government-sanctioned economic discrimination against individuals who are predominantly African American and Hispanic. In a day and age of social transformation and restoration, a mass constitutional violation still exists.

The introduction of this paper explains the prevalence of poverty-based incarceration throughout the United States and the imperative nature of reforming the outdated system of bail. Part III of this paper outlines the legal framework of bail implementation through A) bail's original purpose in the criminal justice system and B) modern case law dealing with bail reform. Part IV of this paper examines the excessive costs of a cash bail system by analyzing A) disparities in the prison population and B) the negative effects of incarceration on an individual's mental health and overall wellbeing. Part V of this paper describes reform efforts by discussing A) the elimination of cash bail; B) the creation and success of community bail funds; and C) social reform that emphasizes early intervention and humane approaches like mental health courts and school resources. Part VI of this paper proposes my original idea to restructure the unjust system of cash bail. Part VII of this paper briefly concludes the critical demand for bail reform in America's criminal justice system.

Keywords: bail; reform; incarceration; criminal; justice

II. INTRODUCTION

At this very moment in the United States, approximately four hundred and sixty thousand individuals are being held in local jails despite not having been convicted of a crime or sentenced – many of whom remain there solely because they cannot afford to pay the bail amount set to secure their release.[1] While the cost of bail is typically considered 'low' and set at one thousand dollars or less, most individuals who find themselves caught within the system are legally indigent and cannot provide the court with this payment without sacrificing their basic needs.[2] Defendants who cannot afford bail are faced with the unconscionable choice of either "…sit[ting] in jail until backlogged courts can hear their case – which can take months, or even years – or plead guilty to go free."[3] Regardless of innocence, ninety percent of these defendants go on to submit a guilty plea once considering that just one night in jail can cause someone to lose their job, access to public benefits, healthcare, housing, and custody of their children.[4] The submission of a guilty plea may seem like an adequate short term solution, but this decision has a devastating consequence – a criminal record that follows a person for the rest of their life.[5] "A criminal record can reduce the likelihood of a callback or job offer by nearly *fifty percent* – [and] the negative impact of a criminal record is twice as large for African American applicants."[6] The original purpose of bail in the criminal justice system was to facilitate a defendant's release by incentivizing their appearance at trial; however, today's cash bail system allows for the unlawful

[1] Wendy Sawyer & Peter Wagner, Mass Incarceration: The Whole Pie 2019 (Mar. 19, 2019) https://www.prisonpolicy.org/reports/pie2019.html.

[2] The Bail Project, https://bailproject.org/why-bail/ (last visited Dec. 13, 2019).

[3] Id.

[4] The Bronx Freedom Fund, http://www.thebronxfreedomfund.org/ (last visited Nov. 24, 2019).

[5] Robin Steinberg, What if We Ended the Injustice of Bail? TED (2018) https://www.ted.com/talks/robin_steinberg_what_if_we_ended_the_injustice_of_bail/up-next#t-232200.

[6] NAACP Criminal Justice Fact Sheet, https://www.naacp.org/criminal-justice-fact-sheet/ (last visited Oct. 31, 2019) (emphasis added).

and systematic criminalization of citizens based on poverty and race.[7] According to a study conducted by the National Association for the Advancement of Colored People (NAACP), "[t]hough African Americans and Hispanics make up approximately thirty-two percent of the U.S. population, they comprised fifty-six percent of all incarcerated people in 2015."[8]

III. LEGAL FRAMEWORK

Three generations of Americans have contributed to the judicial advancement of bail reform in the United States.[9] The first generation [hereinafter "First Generation"] (the 1920s–1960s) achieved multiple judicial victories and momentous research by Roscoe Pound and Felix Frankfurter (*Criminal Justice in Cleveland*), Arthur Beeley (*The Bail System in Chicago*), and Caleb Foote (*Compelling Appearance in Court: Administration of Bail in Philadelphia*).[10] The second generation of reform [hereinafter "Second Generation"] (the late 1960s–1980s) produced a report on poverty by Attorney General Robert F. Kennedy and introduced the "…permissibility of public safety considerations as a 'constitutionally valid purpose to limit pretrial freedom.'"[11] The third generation [hereinafter "Third Generation"] (1990–Present) has employed "…legal and evidence-based practices to create a more risk-based system of release and detention," and continues to conduct substantial research sponsored by the U.S. Department of Justice, the Pretrial Justice Institute, the Administrative Office of the U.S. Courts, numerous universities, and many other public, private, and philanthropic organizations.[12]

---

[7] Shima Baradaran, Restoring the Presumption of Innocence, 72 Ohio St. L.J. 723, 730 (2011); Steinberg, supra note 5.

[8] NAACP Criminal Justice Fact Sheet, supra note 6.

[9] Bail Reform: A Practical Guide Based on Research and Experience, National Task Force on Fines, Fees, and Bail Practices 1, 2 (2019).

[10] Id.; [hereinafter "First Generation"].

[11] Id.; [hereinafter "Second Generation"].

[12] Id. at 3; [hereinafter "Third Generation"].

Part III discusses the legal framework of bail through A) the original purpose of implementing bail – to incentivize rather than punish, and B) modern case law dealing with bail reform through an analysis of Stack v. Boyle, United States v. Salerno, and the Bail Reform Acts of 1966 and 1984.

A. Original Purpose of Bail

Following the English Civil War, amid the reign of King Charles II, one of the greatest constitutional reforms of the Restoration period was enacted—the Habeas Corpus Act of 1679.[13] At the height of the Popish Plot, the Act was implemented during a period in which "…men seemingly were more interested in getting their fellow Englishmen into jail than out of it."[14] The Habeas Corpus Act of 1679 was a revolutionary civil rights restoration passed by Parliament that remains enforceable today; the Act was strategically ratified to permanently safeguard individual liberties by "preventing unlawful or arbitrary imprisonment" of persons by higher authorities.[15] Plainly translated, "habeas corpus" means "to produce the body;" therefore, a writ of habeas corpus demands that a public official, such as a warden, deliver an imprisoned individual to the court and show a valid reason for that person's detention.[16] By requiring the early designation of a cause for arrest, the Act provided a suspect with the knowledge of whether their offense was "bailable or not," as the Statute of Westminster "remained the primary definition" of which offenses were eligible for bail.[17]

---

[13] Helen A. Nutting, The Most Wholesome Law—The Habeas Corpus Act of 1679, 65 A.H.R. 527, 527 (1960).

[14] Id.

[15] History of the Magna Carta, https://magnacarta800th.com/history-of-the-magna-carta/the-magna-carta-timeline/1679-the-habeas-corpus-act/ (last visited Oct. 31, 2019).

[16] Writ of Habeas Corpus, https://criminal.findlaw.com/criminal-procedure/writ-of-habeas-corpus.html (last visited Oct. 31, 2019).

[17] George Monks, History of Bail, Professional Bail Agents of the United States, https://www.pbus.com/general/custom.asp?page=14 (last visited Oct. 31, 2019).

Although the Habeas Corpus Act of 1679 drastically improved the administration of bail laws, it failed to provide defendants protection against excessive bail requirements.[18] When bail is fixed at an amount unaffordable to the defendant, the court is not only exhibiting a form of economic discrimination but also aiding in the breakdown of bail's original ideology: to assure that a defendant appears at trial.[19] The substantial lack of excessive bail regulation within the Habeas Corpus Act allowed kings to continue to incarcerate individuals facing "non-bailable" charges based on indigency, not guilt.[20] This was a longstanding practice since the early days of common law development, in which imprisonment was "…scarcely judicial and [] often used *arbitrarily* by the English monarchs."[21] In the centuries following the Magna Carta, however, the standards of due process and the presumption of innocence gained traction in common law; and, "subsequent abuses by the monarch eventually led Parliament to take action to reinforce these common law principles."[22]

Notwithstanding its defects, Parliament's Habeas Corpus Act of 1679 set a fundamental precedent for the Framers of the Judiciary Act of 1789 and the Constitution of the United States, as they too wanted to prohibit any abuse of power within the newly constructed government of the United States.[23] The Framers drafted the U.S. Constitution to include a specific clause that guaranteed "habeas corpus;" a fundamental right that could only be suspended in cases of "…rebellion or invasion the public safety may require it."[24] Furthermore, under the constitutional

---

[18] Id.
[19] Baradaran, supra note 7, at 754.
[20] The Habeas Corpus Act of 1679, 31 Cha. 2 (1679) ("*Copyes were denyed as aforesaid shall deny any Writt of Habeas Corpus by this Act required to be granted being moved for as aforesaid they shall severally forfeite to the Prisoner or Partie grieved the summe of Five hundred pounds to be recovered in manner aforesaid*.").
[21] Baradaran, supra note 7, at 727.
[22] Id.
[23] Writ of Habeas Corpus, supra note 16.
[24] U.S. Const. art. I, § 9, cl. 2.

principles of due process and the presumption of innocence, defendants should only be punished once they are properly convicted of the crime(s) they are accused of by either "…a confession in open court or proof of guilt beyond a reasonable doubt."[25]

In the late 1780s, Congress passed the Judiciary Act of 1789 which established that "bail must be set in all crimes not punishable by death."[26] Section thirty-three of the Act specifically states that "…upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law."[27] Two years later, on December 15, 1791, the Framers ratified the Eighth Amendment of the U.S. Constitution in the interest of circumventing future mistreatment of citizens by their government.[28] The Eighth Amendment prevents the government from setting an excessive bail amount to guarantee the imprisonment of a defendant; the language of the Amendment provides that "…excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[29]

B. Modern Case Law

In the midst of the *First Generation*, over a century after the ratification of the Eighth Amendment, the landmark Supreme Court case Stack v. Boyle called into question the Court's interpretation of the Eighth Amendment and the constitutionality of their ability to fix bail in cases where there was a lack of precedent to base upon "standards relevant to [the] purpose of assuring

[25] U.S. Const. amend. V.; Baradaran, supra note 7, at 734.

[26] An Act to Establish the Judicial Courts of the United States, 1 Stat. 73 (1789); Donald Scarinci, The History of Bail in the United States, Observer (Aug. 6, 2014, 9:22 AM), https://observer.com/2014/08/the-history-of-bail-in-the-united-states/.

[27] An Act to Establish the Judicial Courts of the United States, 1 Stat. 73 § 33 (1789).

[28] U.S. Const. amend. VIII.

[29] Id.

the presence of [] defendant at trial."[30] After being arrested on accusations of conspiring to violate the Smith Act, the United States District Court for the Southern District of California fixed the bail of twelve petitioners at amounts varying from twenty-five hundred dollars to *fifty-thousand dollars* per person.[31] The petitioners filed a motion to reduce bail on the ground that "bail as fixed was excessive under the Eighth Amendment," which was subsequently denied; the petitioners then filed applications for habeas corpus in the same District Court which were denied, and the Court of Appeals for the Ninth Circuit affirmed this decision.[32] Before filing a petition for certiorari, the petitioners filed an "application for bail and an alternative application for habeas corpus seeking interim relief" with Mr. Justice Douglas; both applications were then referred to the Court for "argument on specific questions" and Mr. Chief Justice Vinson granted certiorari in 1951.[33] The Supreme Court held that "…the applicants' pretrial bail in the case against them for conspiring to violate the Smith Act had not been fixed by proper methods," and the case was remanded to the District Court with directions.[34] In delivering the opinion of the Court, Mr. Chief Justice Vinson indicated that "[t]he only evidence offered by the Government was a certified record showing that four persons previously convicted under the Smith Act in the Southern District of New York had forfeited bail…[n]o evidence was produced relating those four persons to the petitioner in this case."[35] Therefore, "[s]ince the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards *relevant to the purpose of assuring the presence of that defendant*."[36] Joining in the Court's opinion, Mr. Justice Jackson and Mr. Justice Frankfurter expressed how "…the spirit of the procedure is to enable them to stay out of jail until a trial has

[30] Stack v. Boyle, 342 U.S. 1, 1 (1951); supra note 10.
[31] See Id. at 3; Alien Registration ("The Smith") Act of 1940, 8 U.S.C. § 137 (1940).
[32] Stack v. Boyle, 342 U.S. at 3-4.
[33] Id. at 4.
[34] Id. at 1.
[35] Id. at 3 (Vinson, C.J., majority).
[36] Id. at 4 (Vinson, C.J., majority) (emphasis added).

found them guilty…[w]ithout this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense."[37] Stack v. Boyle served as a constitutional breakthrough against economic discrimination by affirming that "[b]ail set at [a] higher figure than amount reasonably calculated to fulfill [the] purpose of assuring that accused will stand trial and submit to sentence if found guilty *is* 'excessive' under [the] Eighth Amendment."[38]

One and a half decades later, with the help of Attorney General Robert F. Kennedy's report on *Poverty and the Administration of Justice*, the Bail Reform Act of 1966 successfully "…signified a departure from the traditional eligibility standards utilized for the pretrial release of defendants in noncapital cases."[39] This Act of the *Second Generation* established two central factors for the federal courts in setting bail amounts: "1) that a person's financial status should not be a reason for denying pretrial release; and 2) that danger of nonappearance at trial should be the *only* criterion considered when bail is assessed."[40]

In the early years of the *Third Generation*, the Bail Reform Act of 1984 heightened the government's burden in proving the need for pretrial detention by allowing courts to detain pretrial arrestees who are charged with certain serious felonies only if the Government demonstrates by clear and convincing evidence after an adversary hearing that "no condition or combination of conditions will reasonably assure the safety of any other person and the community."[41] The Act was authorized by Congress to counter "the alarming problem of crimes committed by persons on

[37] Id. at 8 (Jackson, J. & Frankfurter, J., concurring).
[38] Id. at 1 (emphasis added); U.S. Const. amend. VIII.
[39] Warren L. Miller, The Bail Reform Act of 1966: Need for Reform in 1969, 19 Cath. U. L. Rev. 24, 24 (1970).
[40] Id. (emphasis added); supra note 11.
[41] The Bail Reform Act of 1984, 18 U.S.C. § 3142(f) (1984); supra note 12.

release from custody prior to trial," as well as to clarify the three distinct circumstances in which a defendant can be held without bail regardless of their ability to afford it.[42] The three circumstances used by the courts to determine the need for pretrial detention without bail were outlined as follows:

a. Defendant presents a serious flight risk;

b. Defendant presents a serious risk concerning obstruction of justice; or

c. Defendant presents a danger to the safety of any person or the community.[43]

The enactment of parts b. and c. in the above-cited list was critical to the security and functionality of the judicial system, as the authors of the 1984 Bail Reform Act even recognized "…the lack of guidance provided under the 1966 [Bail Reform] Act for judges faced with dangerous defendants who did not pose a flight risk."[44] Generally, "[i]n deciding whether bail is appropriate, the court considers whether there are any conditions (such as a particular bail amount or monitoring by the government) that will ensure that the defendant, if released from custody, will show up for court in the future…[and] whether the defendant's release will compromise the safety of any particular people or the community at large."[45] If a defendant is granted bail and the prosecution elects to argue against their pretrial release based on the potential danger to any person(s) or the community, the prosecution must then present the court with a motion to initiate a detention hearing or Motion for Detention.[46] Upon receiving the motion, the defendant is given a hearing and the judicial officer must make three separate findings of fact to order detention:

a. Probable cause that the person charged committed the offense;

---

[42] Tim J. Vanden Heuvel, The Bail Reform Act of 1984 and Witness Coercion, 25 Cal. W. L. Rev. 149, 149 (1988).

[43] Id.

[44] Id. at 157.

[45] Micah Schwartzbach, Esq., What is a Detention Hearing?, Nolo Network, https://www.nolo.com/legal-encyclopedia/what-detention-hearing.html (last visited Nov. 20, 2019).

[46] Id.

b. Evidence that the accused's crime falls under a specific category set forth in 18 U.S.C.A. § 3142(e)-(f); and
c. A finding that there is no condition or combination of conditions of release which will reasonably assure the safety of other persons or the community.[47]

Three years after its passage, the constitutionality of the Bail Reform Act of 1984 was challenged in United States v. Salerno after the defendants were committed for pretrial detention by the United States District Court for the Southern District of New York.[48] The defendants were detained pursuant to the standard set forth in the Bail Reform Act of 1984 that required courts to "detain prior to trial arrestees charged with certain serious felonies if the Government demonstrates by clear and convincing evidence that no release conditions will reasonably assure the safety of any other person and the community."[49] The Court was asked to interpret whether the Act violated the Fifth Amendment's substantive Due Process guarantee; and, in a 6-3 decision, the Court held that "...given the [Bail Reform] Act's legitimate and compelling regulatory purpose and the procedural protections it offers, section 3142(e) is not facially invalid under the Due Process Clause…[as] the Act's legislative history clearly indicates that Congress formulated the detention provisions not as punishment for dangerous individuals, but as a potential solution to the pressing societal problem of crimes committed by persons on release."[50] Mr. Chief Justice Rehnquist addressed "the alarming problem of crimes committed by persons on release" in the Court's opinion, stating that, "[b]y providing for sweeping changes in [] the way federal courts consider bail applications and the circumstances under which bail is granted, Congress hoped to 'give the courts adequate authority to make release decisions that give appropriate recognition to the danger

[47] Heuvel, supra note 42, at 150.
[48] U.S. v. Salerno, 481 U.S. 739, 739 (1987).
[49] Id.; See The Bail Reform Act of 1984, supra note 41.
[50] United States v. Salerno, supra note 48.

a person may pose to others if released.'"[51] The holding in United States v. Salerno similarly stated that "[p]reventing danger to the community is a legitimate regulatory goal…[and] the incidents of detention under the Act are not excessive in relation to that goal."[52] Accordingly, the current legal framework provides limitations on a court's ability to set a defendant's bail at an exorbitant amount, but still allows them the absolute authority to make release decisions.[53]

IV. THE HIGH COST OF A CASH BAIL SYSTEM

While societal awareness and community funding in support of bail reform are steadily rising, so are the number of detainees in the United States.[54] On any given day, almost two-thirds of the nearly 730,000 people incarcerated in U.S. jails have not been convicted of a crime – most of whom simply cannot afford to pay their money bail even when set at a modest amount.[55]

Part IV examines the high costs of a cash bail system – both financially and emotionally – by A) analyzing the disparate impact of incarceration on African American and Latino communities; and B) the various effects of incarceration on an individual.

A. Disparities in Prison Population

From a global perspective, America's criminal justice system is the front-runner in incarceration rates, consistently holding an average of *2.3 million people*.[56] Mass incarceration has become the country's fix-all solution in response to crime; an assertion evident in that the U.S. incarcerates "…more people per capita than any other nation at the staggering rate of 698 per 100,000 residents."[57] To further assess the gross misuse of confinement by the courts, one may

---

[51] Id. at 742 (Rehnquist, C.J., majority).
[52] Id. at 739.
[53] See Id.
[54] The State of Justice Reform 2018, Vera, https://www.vera.org/state-of-justice-reform/2018/the-state-of-bail (last visited Nov. 20, 2019).
[55] Id.
[56] Incarceration Rates by Country 2019, http://worldpopulationreview.com/countries/incarceration-rates-by-country/ (last visited Nov. 2, 2019).
[57] Wendy Sawyer & Peter Wagner, supra note 1.

look to the court system in Dallas, Texas.[58] Courts in Dallas systematically jail some of its poorest people without conducting a "meaningful inquiry" into their ability to afford bail; and in most cases, the bail hearings last no more than *fifteen seconds*.[59]

Subjecting an individual to incarceration based solely on their inability to afford bail is an inhumane form of economic discrimination; an injustice highlighted by the fact that these injustices disproportionately affect African American and Hispanic populations from lower-income communities.[60] A disturbing study conducted by the NAACP found that "…if African Americans and Hispanics were incarcerated at the same rates as whites, prison and jail populations would decline by almost *forty percent*."[61] These trends are consistent with the youth of these communities as well; "[n]ationwide, African American children represent thirty-two percent of children who are arrested, forty-two percent of children who are detained, and fifty-two percent of children whose cases are judicially waived to criminal court."[62] This cycle affecting entire communities is exacerbated by the evidential fact that "[m]inority children, especially those living in poverty, are significantly undiagnosed for mental illnesses [which] contributes heavily to their overrepresentation in the juvenile justice system…[yet] the knowledge of a mental illness before a detention hearing is more likely to keep a child from detention, because treatment for a child's mental illness or disorder can often prevent or counter the behaviors leading to a child's detention."[63]

---

[58] Mustafa Z. Mirza, The Marshall Project, Texas Tribune (Sept. 5, 2018) https://www.texastribune.org/2018/09/05/Dallas-County-Bail-Machine/.

[59] Id.

[60] NAACP Criminal Justice Fact Sheet, supra note 6.

[61] Id. (emphasis added).

[62] Id.

[63] Dominique Hadley, Implementing School-Based Health Programs to Deter Undiagnosed African American Youth from Juvenile Detention, 11 S. J. Pol'y & Just. 140, 140 (Fall 2017).

When an individual cannot afford to pay their set bail amount and are thereby detained, they are statistically "…*four times* more likely to get a jail sentence than if they were able to initially afford their freedom—and that jail sentence will be three times longer."[64] Furthermore, "…if you are black or Latino and cash bail has been set, you are *two times* more likely to remain stuck in that jail cell than if you were white."[65] In a day and age where global attention is readily attainable, this discriminatory and systematic oppression of nonviolent offenders, a cohort largely made up of African Americans and Latinos, has become alarmingly commonplace.[66]

B. Effects of Incarceration

Incarceration, even for the period of one day, can cause an individual to lose their job, public benefits, healthcare, housing, or custody of their children, and can similarly jeopardize their immigration status.[67] The experience of incarceration may also have profound psychological consequences – especially for those who have experienced prolonged solitary confinement.[68] Incarceration may also "…exacerbate stress-related diseases [or] push those with mental illnesses to psychological extremes," groups of which are already more susceptible to imprisonment.[69] Studies have further demonstrated that "…a third of sexual victimization by jail staff happens in the first three days of jail…and almost half of all jail deaths, including suicides, happen in [the] first week."[70] And while many prisons now offer mental health treatment in their facilities, the efforts often prove ineffective because "prisoners are reluctant to open up in environments where they do not feel physically or psychologically safe."[71]

---

[64] Steinberg, supra note 5.
[65] Id.
[66] See Id.
[67] The Bronx Freedom Fund, supra note 4.
[68] Christopher Wildeman & Christopher Muller, Mass Imprisonment and Inequality in Health and Family Life, 8 Ann. Rev. L. & Soc. Sci. 11, 18 (2012).
[69] Id. at 12, 18.
[70] Steinberg, supra note 5.
[71] Incarceration Nation, 45 Am. Psychol. Assn. 9 (Oct. 2014).

With these realities in mind, it is not surprising that innocent defendants repeatedly choose to submit a guilty plea; this decision is made partly at the instruction of a public defender, and partly due to the "fear of 'the trial penalty' – [the fear] that the punishment will be greater after trial."[72] "The trial penalty" is a real occurrence and poses a serious threat to minority communities, as it has been shown that a person who awaits trial in jail because they cannot afford their release is statistically *four* times more likely to be sentenced in jail than their counterparts on pretrial release.[73] The proclivity of the criminal justice to force an individual to make this choice between submitting a false plea and maintaining their livelihood or custody of their children, as it has been shown, disproportionately affects individuals from low-income African American and Latino communities.[74] This creates a deep-rooted fear towards the criminal justice system throughout the various generations in these communities, to the extent in which "…prison now stands firmly between the young people trying to make it and the fulfillment of the American Dream."[75] These young people do not deserve to live in fear of arrest, "[a]nd certainly not for the same things that other young people with more privilege are doing with impunity."[76] But can you imagine how many college students might have acquired a criminal record "…if the police had stopped those kids and searched their pockets for drugs as they walked to class…or had raided their frat parties in the middle of the night?"[77]

V. BAIL REFORM

[72] Toni Messina, Innocent People Who Plead Guilty, Above the Law (Jul. 23, 2018, 1:35 PM) https://abovethelaw.com/2018/07/innocent-people-who-plead-guilty/.

[73] See The Bronx Freedom Fund, supra note 4.

[74] Steinberg, supra note 5.

[75] Alice Goffman, How We're Priming Some Kids for College—and Others for Prison, TED (2015) https://www.ted.com/talks/alice_goffman_how_we_re_priming_some_kids_for_college_and_others_for_prison/up-next#t-151084.

[76] Id.

[77] Id.

Today, following in the footsteps of those who have fought tirelessly for bail reformation, our generation is described as "devoted to fixing the holes left by states not fully implementing improvements from the first two generations of bail reform [and] using legal and evidence-based practices to create a more risk-based system of release and detention."[78] More than forty states have assembled task forces or commissions considering changes to bail and pretrial detention, gathering significant momentum in past years, while bail reform efforts have received tremendous funding support from both public and private entities.[79] Part IV outlines and describes three areas of modern bail reform: A) eliminating cash bail; B) creating community funds; and C) promoting social reform.

A. Eliminating Cash Bail

One solution to solving the injustices of bail is to eliminate cash bail altogether. In a groundbreaking August 2018 decision, California became the first state to fully eliminate cash bail by incorporating the dynamic precedent set by New Jersey and Arizona.[80] Per the Bill passed by Governor Jerry Brown, a person who is determined "low-risk" to public safety and failure to appear is released with the least restrictive non-monetary conditions possible; thus, effectively combating the prevalence of unequal justice based on wealth within the court system.[81] The Bill, which was set to become effective in October 2019, goes on to specify that "medium-risk" individuals could be held or released depending on local standards, while "high-risk" individuals would remain in custody until arraignment, as would anyone who commits certain sex crimes or violent felonies.[82]

---

[78] Bail Reform: A Practical Guide Based on Research and Experience, supra note 9, at 3.

[79] Id. at 2.

[80] Alexei Koseff, Jerry Brown Signs Bill Eliminating Money Bail in California, Sacramento Bee (Aug. 28, 2018, 12:46 PM).

[81] Id.

[82] Id.

New Jersey's Criminal Justice Reform Act (CJRA), enacted on August 11, 2014, and effective January 1, 2017, successfully "…changed the landscape of the State's criminal justice system relating to pretrial release."[83] The Act essentially eliminated money bail in the state of New Jersey and created a system that emphasized "…the assumption that innocent people should not be in jail…[p]eople can be held *only* if their release poses an unacceptable flight risk or poses a danger to their community."[84] New Jersey's "CJRA" permits that "…a defendant who poses a lesser risk can be released on his or her own recognizance or on conditions that would be monitored by the judiciary's Pretrial Services Program (PSP)."[85] The demand for reform gained notoriety in March 2013 after Marie VanNostrand, Ph.D. authored a study commissioned by the Drug Policy Alliance that analyzed New Jersey's jail population.[86] Among other findings, the study revealed that "more than half of all inmates had been charged with nonviolent offenses…[f]ive thousand inmates, 38.5 percent of the total jail population, were pretrial detainees who had the option of posting bail but were held in custody solely due to their inability to meet the terms of bail."[87] Of this cohort, it was discovered that "twelve percent of the entire jail population was held in custody solely due to their inability to pay $2,500 or less to secure their release rending case disposition."[88] With the enactment of New Jersey's Criminal Justice Reform Act, the system of pretrial release no longer heavily relied on monetary bail or penalized defendants by holding them in custody "because they and their friends/family did not have the financial resources to post even modest amounts of bail."[89]

---

[83] Bail Reform: A Practical Guide Based on Research and Experience, supra note 9, at 53.

[84] Pretrial Justice Reform, ACLU of New Jersey https://www.aclu-nj.org/theissues/criminaljustice/pretrial-justice-reform (last visited Dec. 13, 2019) (emphasis added).

[85] Bail Reform: A Practical Guide Based on Research and Experience, supra note 9, at 53.

[86] Id.

[87] Id.

[88] Id. at 54.

[89] Id.

Like New Jersey, Arizona courts have a history of innovation; local courts began experimenting with pretrial release initiatives around the same time the Conference of State Court Administrations (COSCA) released its *Policy Paper on Evidence-Based Pretrial Release* in 2012-2013.[90] This Policy Paper had a huge impact on Arizona's court system after drawing the attention of Chief Justice Berch (2009-2014) and Chief Justice Bales (2014-Present), who became interested in pursuing pretrial reform; Chief Justice Berch eventually adopted pretrial reform as her five-year plan, and Chief Justice Bales included improving and expanding "the use of evidence-based practices to determine pre-trial release conditions for low-risk offenders" as part of the Arizona Supreme Court's 2014-2019 strategic agenda.[91] "In January 2014, the Arizona Supreme Court modified its Code of Judicial Administration to include a new section on evidence-based pretrial services – [the] new section provided requirements for establishing and operating pretrial services for all courts statewide."[92] In February 2014, it was announced that "…four counties and one city in Arizona would be among the latest jurisdictions to pilot the Public Safety Assessment (PSA) pretrial risk assessment tool," which proved successful in all five pilot sites; the program enhanced the quality and efficiency of risk assessment in the courts to include felony *and* misdemeanor cases – a factor that made Arizona's experience unique.[93]

B. Fund Creation

The second model of modern bail reform efforts involves a community fund that pays bail for pretrial detainees. A bail fund works because it based upon a *revolving* flow of money, which consists of four stages: 1) a defendant's bail is set; 2) the fund pays the defendant's bail; 3) the defendant attends trial and bail returns to escrow at the end of the case; 4) the bail money is put

[90] Id. at 5.
[91] Id.
[92] Id.
[93] Id.

back into the fund to be used to free the next person in need.[94] Community funds have seen consistent success rates in recent years – *ninety-six percent* of defendants that had their bail paid for by the Bail Project returned to court; thereby, proving that individuals are not being detained because they are a flight risk, but because they simply cannot afford their bail.[95]

The Bronx Freedom Fund, a non-profit based in a South Bronx community and founded by Robin Steinberg and David Feige in 2009, has made significant strides in heightening the societal awareness of bail injustice by effectively providing every individual within their backlogged court system the fundamental assumption of "innocent until proven guilty."[96] The program proved enormously successful in its first two years, as the fund posted bail for "over two-hundred defendants…and *ninety-seven percent* of them showed back up to court."[97] Moreover, judges dismissed the defendant's cases or administered a not-guilty judgment over fifty-percent of the time, and not one defendant went to jail pretrial or post-trial.[98] The efficiency of this method lies in the appearance of the ninety-seven percent – the Freedom Fund "post[s] an average bail of seven hundred and eighty-one dollars," which is then reimbursed at the end of the case if the defendant attends their court date(s) to be used over and over again, which the majority was doing.[99]

The success of the Bronx Freedom Fund called into serious consideration "…the notion that defendants show up to court *only* when their own money is at stake."[100] The ability to donate funds to a stranger that can guarantee their freedom from governmental detainment mirrors the

---

[94] The Bail Project, supra note 2.
[95] Id.
[96] The Bronx Freedom Fund, supra note 4.
[97] Logan Abernathy, Bailing Out: The Constitutional and Policy Benefits of Community and Nonprofit Bail Funds, 42 Law & Psychol. Rev. 85, 91 (2018) (emphasis added).
[98] Id.
[99] Id.
[100] Id. (emphasis added).

concept of "jury nullification" – the occurrence in which jurors choose not to follow the law as given to them by the judge by acquitting a defendant despite legal guilt.[101] When juries engage in this form of nullification, they do something "…powerful and controversial, exercising power over government actors and potentially pushing back against larger injustices in the system."[102] The ideology of "jury nullification" mirrors its larger application in society, often described as "community nullification;" this occurs, for example, through community bail funds like the Bronx Freedom Fund that intervene in criminal adjudication.[103] The success of community nullification beyond the jury hints at the success of a community in which one can "…contribute to—and reject—institutional decisions at other moments in a criminal case."[104]

C. Social Reform

A final method of bail reform focuses on 1) addressing the underlying causes of legal system involvement, and 2) employing a humane approach that works with individuals to treat and prevent the cause(s) of their involvement in lieu of punishment. In 2003, for example, Oklahoma City implemented the first mental health court in the Southwest United States in response to the nation's growing trend to divert nonviolent offenders from jail.[105] Within these courts, when persons with mental illnesses are arrested for "trespassing, drug possession and other nonviolent offenses…they are no longer automatically sentenced to jail or probation – where their illness would probably go untreated…[i]nstead, they can opt for a court specifically designed to give them the treatment and supervision they need."[106] Within a mental health court, the judges, attorneys, and community health groups collaborate to organize effective treatments to ensure that offenders

[101] Jocelyn Simonson, Bail Nullification, 115 Mich. L. Rev. 585, 593 (2017).
[102] Id.
[103] Id.
[104] Id. at 594.
[105] Deborah Smith Bailey, Alternatives to Incarceration, American Psychological Association (August 2003) https://www.apa.org/monitor/julaug03/alternatives.
[106] Id.

stay on track.[107] Oklahoma, which has one of the nation's highest percentages of persons with a serious psychological disorder, has reported major success in this societal investment – the average annual cost for a mental health court versus the cost of housing an inmate with mental health needs amounted "…to a savings of seventeen-thousand and six-hundred dollars per participant."[108] These mental health court programs additionally improved Oklahoma's unemployment rates, reduced the number of jail days, and decreased inpatient hospitalization.[109]

Another social reform concentrates on challenging the "school-to-prison pipeline," a disturbing national trend in which children are "…funneled out of public schools and into the juvenile and criminal justice systems."[110] Many cases of youth involvement in the legal system arise from schoolyard brawls or outbursts in class, instances that are regularly attributable to these children having "…learning disabilities or histories of poverty, abuse, or neglect, and would benefit from additional educational and counseling services….[i]nstead, they are isolated, punished, and pushed out."[111] "Zero-tolerance" policies in schools criminalize minor infractions of school rules that are supposed to be handled internally, and students of color are especially vulnerable to these "push-out trends and [] discriminatory application of discipline." [112] Prosecutors are able to avoid the development of "repeat-offenders" in the juvenile system by holding children accountable for their actions and addressing the root of the problem; after a high school senior stole thirty laptops from a store to pay for college enrollment, his prosecutor worked with him to recover "…seventy-five percent of the computers that he sold, gave them back to Best

[107] Id.

[108] Mental Health Court, Oklahoma Department of Mental Health and Substance Abuse Services, https://www.ok.gov/odmhsas/Substance_Abuse/Oklahoma_Drug_and_Mental_Health_Courts/Mental_Health_Court/index.html (last modified Mar. 5, 2018).

[109] Id.

[110] School-to-Prison Pipeline, ACLU https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline (last visited Nov. 11, 2019).

[111] Id.

[112] Id.

Buy and came up with a financial plan to repay for the computers [they] couldn't recover…did community service…and wrote an essay reflecting on how this case could impact his future and the community."[113] This teenager went on to apply to college, obtained financial aid, graduated from a four-year college, and became the manager at a large bank in Boston.[114]

VI. SOLUTION

My idea to reform today's bail system proposes that every state pressures their legislation to follow the groundbreaking precedent set by California, New Jersey, and Arizona and take the steps to eliminate cash bail. While this feat is possible in the future, reform is not a free, or overnight, process. This is where the *"jury nullification theory"* proves useful – through community bail funds, individuals can actively play a role in the criminal justice system by facilitating a person's release – a luxury they would not otherwise be able to afford.[115] When bail nullification is not immediately available, community bail funds should be established in every state to maintain a temporary defense against economic discrimination. Part VI discusses A) potential solutions to discriminatory mass incarceration and B) moral implications of reforming bail in America's criminal justice system.

A. Proposed Solution

Based on the enormous accomplishments of community bail funds such as the Bronx Freedom Fund, every state should be required to establish one. This ability to circumvent judicial norms and exercise decision-making in the adjudication process is a right comparable to the right to vote. Bail Funds should also place emphasis on resources that facilitate the release of nonviolent youth detainees. Those who cannot enter contracts should not enter the prison system;

---

[113] Adam Foss, Esq., A Prosecutor's Vision for a Better Justice System, TED (2016) https://www.ted.com/talks/adam_foss_a_prosecutor_s_vision_for_a_better_justice_system/up-next#t-634724.

[114] Id.

[115] Simonson, supra note 101.

instead, youth offenders should be provided with educational and therapeutic resources to target the root of the problem and deter future involvement. To incentivize public donations to such Funds, states should incorporate such programs into their state lotteries; a fair incentive considering an inmate can cost some taxpayers upwards of sixty-thousand dollars a year.[116] The nation-wide implementation of state bail funds would help promote intrastate commerce, advocate for the public opinion, and help those who are lacking resources stay out of the prison system – a system that is mentally, psychically, and financially draining.

B. Moral Implications

Adversaries of bail reform argue that modifying the current system can "go too far" – for example, some worry that New York's proposed changes effective January 1, 2020, will be dangerous in that "…public safety will no longer be a consideration for setting bail…[s]ome persons accused of robbery and burglary – both violent felonies – will be released without bail…[and] [t]hose defendants may indeed pose a risk to public safety."[117] Persons charged with drug felonies will also be released without bail, including those charged with possession of drugs like fentanyl, substances that "are so deadly, the public may be put in danger."[118] These individuals may also still have access to weapons – this occurred in New Jersey after a man was released from jail upon the state enacting a new reform law; the man and shot someone in the leg just *six days* after his release, and was subsequently charged with attempted murder.[119] Lastly, "bail reforms may erode the public's confidence in the system…[i]f a victim sees the perpetrator back on the street, will the victim feel safe?"[120] This argument addresses the fine line between

---

[116] Abernathy supra note 97, at 97.

[117] Did New York's Bail Reforms Go Too Far?, Pappalardo & Pappalardo, LLP (Oct. 30, 2019), http://pappalardolaw.com/2019/10/bail-reforms-pros-cons/

[118] Id.

[119] Id.

[120] Id.

restorative justice and public safety. The polarizing topic of bail reforms' moral implication results in continuous social and political debate and effectively stalls judiciary reform efforts that could be helping innocent people who are currently sitting in jail.

In the pending state of bail in the U.S., some municipalities have begun to eliminate bail altogether while others have exceedingly dysfunctional criminal justice systems. Regardless of the current situation – the eventual goal for every state should be the nullification of the outdated system of cash bail. Unfortunately, the immediate nullification of cash bail in every American state is a utopian ideal that is unlikely in the imminent future. In the meantime, every state should establish community funds that provide defendants with protection against economic discrimination while the country works on reforming its system.

VII. CONCLUSION

Being that the original purpose of cash bail was to "tie" a defendant to their jurisdiction and guarantee their appearance at trial, it can be argued that "any bail practices that result in incarceration based on poverty violates the Fourteenth Amendment."[121] The economic and racial discrimination seen in bail has furthermore created a "constitutional crisis in bail" in the United States.[122] Despite having over three generations to observe and understand the system of bail, through various acts of reformation, countless hours of litigation, and an observable influx of indigent defendants finding themselves caught in a victor-less system, bail reform is still a prevailing issue in the United States today. The United States' bail system is a broken one, built upon discrimination and systematically unfair to lower-income African American and Latino communities who are targeted by law enforcement.[123] Instead of turning to incarceration as a "fix-

[121] John-Michael Seibler & Jason Snead, The History of Cash Bail, Heritage Foundation (Aug. 25, 2017) https://www.heritage.org/courts/report/the-history-cash-bail; U.S. Const. amend. XIV.

[122] Simonson supra note 101, at 626.

[123] See Steinberg, supra note 5.

all" for nonviolent crimes, society should be aiding those caught in the system by supplying them with resources that prevent the creation of "repeat-offenders." [124] This feat can be achieved through the implementation of community bail funds in every state throughout the U.S. whilst pressuring legislation to nullify cash bail, as well as providing citizens with social and therapeutic resources – resources that humanely deter criminal activity by aiding those citizens who need it the most.

[124] See Foss supra note 113.