

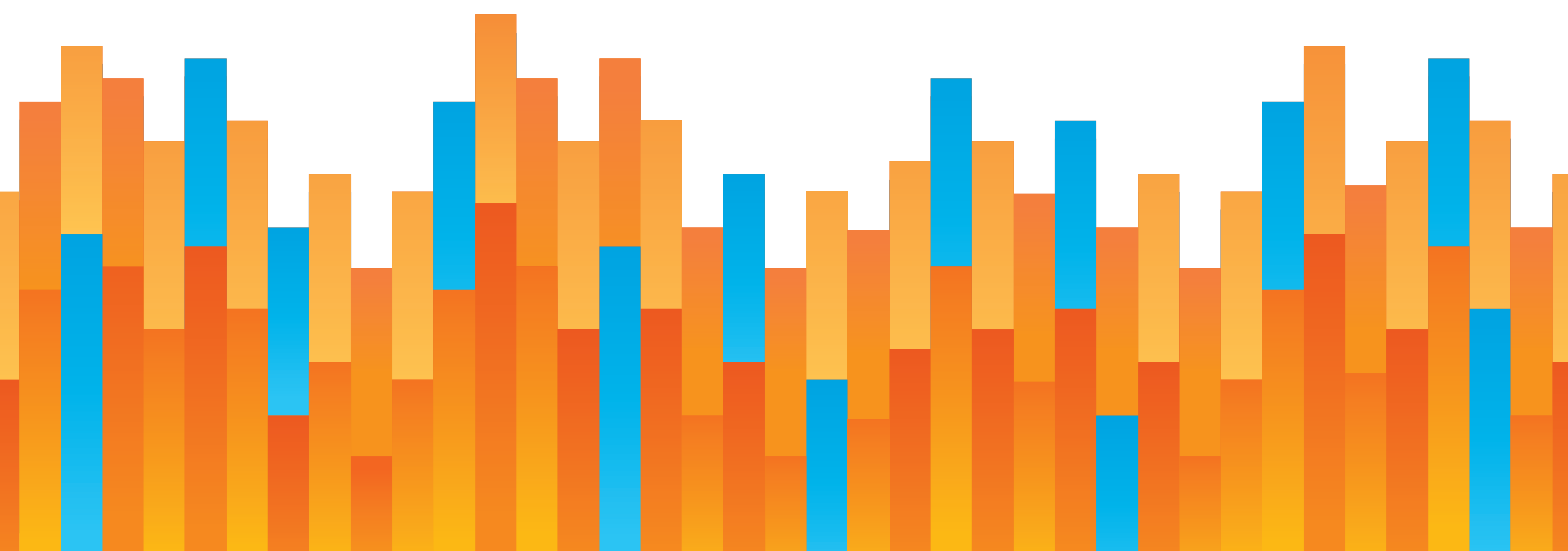


# THE EFFECTS OF CASH BAIL ON CRIME AND COURT APPEARANCES: A REVIEW OF RECENT RESEARCH EVIDENCE

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by Vittorio Nastasi

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# EXECUTIVE SUMMARY

On any given day, approximately 514,000 people are held in local jails across the United States. Though defendants are presumed innocent until proven guilty, more than 80% of the jail population are awaiting trial and have yet to be convicted of a crime. Defendants who are accused of particularly serious violent crimes or who pose a credible threat to public safety may be detained in jail while awaiting trial. However, most defendants are entitled to pretrial release. Judges may impose conditions on a defendant's release, such as electronic monitoring or supervision through a pretrial services agency.

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Monetary release conditions, commonly referred to as “cash bail” or “money bail,” are among the most common type of pretrial release conditions in the United States. Cash bail allows defendants to secure their release by depositing a specified amount of money with the court as collateral, providing a financial incentive for compliance during the pretrial phase. If a defendant appears as required through the disposition of their case, the bail

amount is returned to them. If a defendant fails to appear in court as required, the bail amount is forfeited, and the defendant may face additional criminal charges or penalties.

Cash bail was historically intended to provide a financial incentive for defendants to show up at required court dates, but reforms adopted in the 1970s and 1980s allow judges to also consider potential risks to public safety when making bail decisions. Under the right circumstances, cash bail is an appropriate tool for ensuring that defendants cooperate throughout the pretrial period. However, many defendants are unable to afford the cost of bail and are consequently detained for no reason other than their inability to pay.

Recent research suggests that bail decisions can result in defendants losing their jobs, coerce defendants into accepting plea bargains, and increase the probability that are defendants are convicted. Given the potential negative consequences of pretrial detention resulting from an inability to afford cash bail, reform advocates have suggested limiting the use of monetary release conditions. Reforms to pretrial policy require policymakers to balance several competing interests, many of which are difficult to quantify. For example, it is not possible to quantify the normative value of the presumption of innocence or American's Constitutional right to reasonable bail. However, research evidence can shed some light on the efficacy of cash bail for ensuring compliance during the pretrial period.



*With some caveats, the studies included in this review collectively suggest that monetary release conditions like cash bail do not consistently improve court attendance and may not result in net crime reduction.*



With some caveats, the studies included in this review collectively suggest that monetary release conditions like cash bail do not consistently improve court attendance and may not result in net crime reduction. Other factors, including indigence, drug use disorders, and criminal history, are generally stronger predictors of court attendance than the imposition of monetary release conditions. Conservatively, we can conclude that the United States relies too heavily on monetary release conditions. The bulk of available evidence suggests that curtailing the use of monetary release conditions among low-risk defendants would

not result in dramatic drops in court attendance or increased risk of reoffending. There is even some evidence that pretrial reforms that reduce detention of low-risk, bond-eligible defendants may actually improve public safety. Additional research is needed to evaluate more ambitious reform proposals.

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# PART 1

## INTRODUCTION

The incarceration rate of the United States is among the highest in the world.<sup>1</sup> The most recent available data indicate that, on any given day, there are nearly two million people held within federal, state, local, and tribal justice systems.<sup>2</sup> Local jail inmates comprise about one-third of the country's incarcerated population. Among the approximately 514,000 people held in local jails in mid-year 2020, more than 80% were awaiting trial. Longer term trends reveal that the local jail population rose dramatically between the 1980s and late 2000s, driven primarily by an increase in pretrial detention (see Figure 1).<sup>3</sup> The local jail population leveled off in the 2010s before a steep drop in 2020. These population counts provide only snapshots in time and fail to capture the full extent of citizen interaction with local jails. Between 2011 and 2019 there were more than 10 million admissions into local jails each year.<sup>4</sup> However, as with inmate population counts, jail admissions fell precipitously during the COVID-19 pandemic in 2020 (8.7 million admissions) and 2021 (6.9 million admissions).<sup>5</sup>

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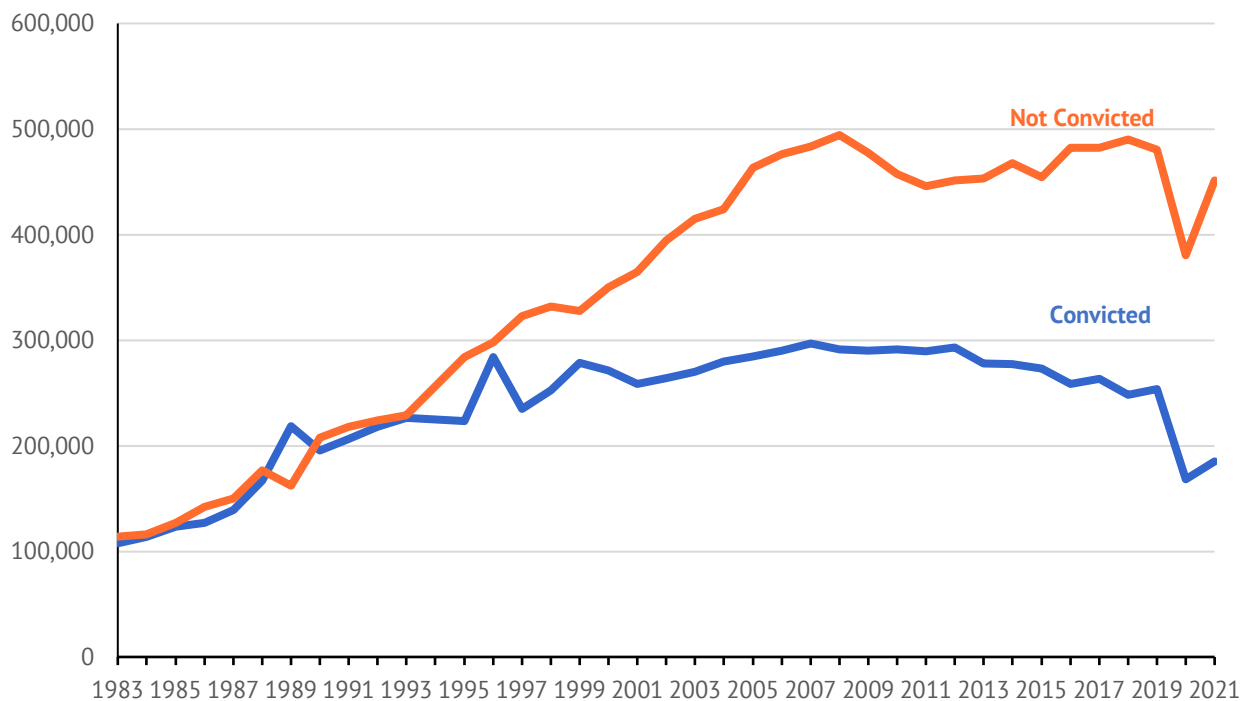
<sup>1</sup> Helen Fair and Roy Walmsley, "World Prison Population List: Thirteenth Edition," Institute for Crime and Justice Policy Research, 2021. Available at [www.prisonstudies.org](http://www.prisonstudies.org).

<sup>2</sup> Wendy Sawyer and Peter Wagner, "Mass Incarceration: The Whole Pie 2023," Prison Policy Initiative, 2023. <https://www.prisonpolicy.org/reports/pie2023.html>. (Accessed 8 Jan. 2024)

<sup>3</sup> Ibid.

<sup>4</sup> Zhen Zeng, "Jail Inmates in 2021 – Statistical Tables," Bureau of Justice Statistics, December 2022. <https://bjs.ojp.gov/library/publications/jail-inmates-2021-statistical-tables>.

<sup>5</sup> Ibid.

**FIGURE 1: MIDYEAR JAIL POPULATION BY CONVICTION STATUS**

Source: U.S. Bureau of Justice Statistics, Jail Inmates series 1983-2021; Prison Policy Initiative, “Mass Incarceration: The Whole Pie, 2023.”

“*... the United States (alongside the Philippines) is one of only two countries in the world with a “monetary bail” or “cash bail” system dominated by private bail bondsmen.*”

The United States is also distinguished by the widespread use of monetary conditions to secure pretrial release, commonly in the form of privately secured bail bonds. In fact, the United States (alongside the Philippines) is one of only two countries in the world with a “monetary bail” or “cash bail” system dominated by private bail bondsmen.<sup>6</sup> Critics of monetary release conditions point to a large number of non-convicted people held in jail

<sup>6</sup> Adureh Onyekwere, “How Cash Bail Works,” Brennan Center for Justice, 2019.  
<https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works>.



simply because they cannot afford to pay their bail, not because they're at risk of reoffending or missing court appearances. To reduce the incidence of pretrial detention in the United States, reform advocates have recommended limiting or even eliminating the use of cash bail.

Reforms to pretrial policy require policymakers to balance several competing interests, many of which are difficult to quantify. From a normative perspective, the presumption of innocence afforded to defendants in the United States suggests that pretrial release ought to be the default condition. Moreover, the Eighth Amendment to the United States Constitution provides protection against the imposition of excessive bail, mandating a consideration of fairness.

Yet, courts must also consider practical applications of pretrial release systems and the need of the community to be protected from harm. Court attendance is required for the proper functioning of the justice system. Court systems routinely operate above their capacity, meaning that missed court appearances can be highly disruptive to the timely administration of justice. Policymakers must also consider the implications of pretrial release on public safety. Pretrial detention may improve public safety by removing dangerous individuals from the community while they await trial. However, some research finds that pretrial detention may ultimately result in higher rates of reoffending, thereby unintentionally harming public safety in the long run. This report aims to summarize current research evidence regarding the efficacy of cash bail for assuring future appearance in court and protecting public safety.

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## PART 2

# WHAT IS CASH BAIL?

In the United States, individuals suspected of a crime are presumed innocent until proven guilty. Nevertheless, under certain circumstances, individuals may be held in jail during the pre-trial phase. When an individual is arrested on suspicion of committing a crime, he or she is typically given an arraignment hearing within 48 hours of being booked in jail. At their arraignment hearings, defendants appear before a judge who informs each defendant of the charges against them, notifies them of their rights, and determines whether they will be detained in jail or released back into the community while awaiting trial. In some cases, a judge may release a defendant on his or her own recognizance (essentially, the individual simply promises to show up for future court dates). Judges may also impose some conditions on their release, such as electronic monitoring or supervision through a pretrial services agency.

The United States' justice system is particularly reliant on monetary release conditions, or "cash bail." Cash bail allows defendants to secure their release by depositing a specified amount of money with the court as collateral, providing a financial incentive for compliance during the pretrial phase. If a defendant appears as required through the disposition of their case, the bail amount is refunded. If a defendant fails to appear in court as required, the bail amount is forfeited, and the defendant may face additional criminal charges or penalties.

In most jurisdictions, if an individual is unable to pay the bail-bond amount, they may secure bond through a commercial bail-bond company. Defendants are typically required to

pay around 10% of the bail amount to the company as a fee. For instance, a defendant with a \$5,000 bail amount would be required to pay about \$500 to a bail-bond company to secure their release. If the defendant complies with the other conditions of their release, the bail amount is returned to the bail-bond company, but the service fee paid to the company is not returned to the defendant.



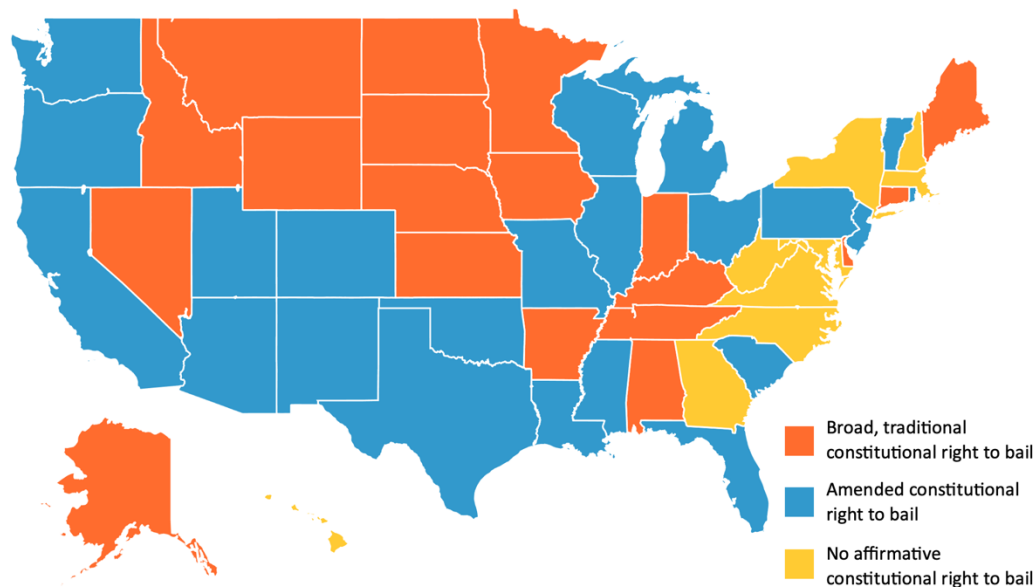
*The Eighth Amendment of the U.S. Constitution provides defendants protections against excessive bail amounts, and state constitutions include similar provisions. However, constitutional provisions, statutes, and court policies regarding bail eligibility vary across jurisdictions.*



The Eighth Amendment of the U.S. Constitution provides defendants protections against excessive bail amounts, and state constitutions include similar provisions. However, constitutional provisions, statutes, and court policies regarding bail eligibility vary across jurisdictions. According to the National Conference of State Legislatures, defendants in 19 states have a constitutional “right to bail”—or pretrial release—unless they are accused of a capital offense (see Figure 2).<sup>7</sup> Twenty-two other states provide an “amended” constitutional right to bail with additional exceptions for a variety of serious non-capital offenses. Judges in these 22 states typically may also consider the likelihood that a defendant will show up for future court dates and potential threats to public safety. In the remaining nine states, defendants do not have a constitutional right to bail. In addition to these constitutional provisions, state statutes also set out parameters for judicial decision-making and establish limits on pretrial detention.

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<sup>7</sup> National Conference of State Legislatures, (2022), “Pretrial Release: State Constitutional Right to Bail.” <https://www.ncsl.org/civil-and-criminal-justice/pretrial-release-state-constitutional-right-to-bail> (Accessed 8 Jan. 2024).

**FIGURE 2: CONSTITUTIONAL RIGHT TO BAIL PROVISIONS**

Source: National Conference of State Legislatures (NCSL), 2022.

While the principal purpose of cash bail conditions was historically to provide a financial incentive for individuals to show up at future court dates, state and federal reforms in the 1970s and 1980s provided for consideration of public safety in addition to flight risk.<sup>8</sup> Bail decisions are explicitly not intended as punishment because individuals are presumed innocent during the pretrial phase. In practice, most defendants are eligible for release, but judges exercise broad discretion to impose release conditions based on perceptions of risk. This discretion allows judges to detain defendants who are perceived as dangerous by denying bail or by setting high bail amounts that result in de facto detention.

Many jurisdictions are adopting standardized risk-assessment tools that use observable defendant and case characteristics to predict an individuals' likelihood of appearing in court or reoffending while on pretrial release. In some other jurisdictions, bail amounts are instead set through bail schedules that assign bail based on offenses but do not consider the individual-level risk or ability to pay. Regardless of how bail amounts are determined, many defendants are offered bail but remain in jail because they cannot afford to pay.

<sup>8</sup> For a succinct overview of the structure and history of the pretrial system in the United States, see: Megan Stevenson and Sandra G. Mayson, "Pretrial Detention and Bail," *Reforming Criminal Justice: Punishment, Incarceration, and Release* (Vol. 4). Eds. Erik Luna (Phoenix: Arizona State University, 2017). 23. Available at: <https://academyforjustice.asu.edu/project/reforming-criminal-justice/>.

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*Regardless of how bail amounts are determined, many defendants are offered bail but remain in jail because they cannot afford to pay.*

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In sum, cash bail is intended to provide defendants with a financial incentive to appear in court and refrain from criminal activity while awaiting trial in the community. The functional utility of monetary release conditions for achieving these purposes must be weighed against their implications for fairness and equity within the justice system. For example, recent research suggests that bail decisions can result in defendants losing their jobs, coerce defendants into accepting plea bargains, and increase the probability that are defendants are convicted.<sup>9</sup> It is not possible to quantify the normative value of the presumption of innocence and rights to reasonable bail. However, research evidence can shed some light on the efficacy of cash bail for ensuring compliance during the pretrial period.

<sup>9</sup> Will Dobbie, Jacob Goldin, and Crystal S. Yang, “The Effects of Pretrial Detention on Conviction, Future Crime, and Employment,” *The American Economic Review* 108(2) (2018). 201-240; Nick Peterson, “Do Detainees Plead Guilty Faster? A Survival Analysis of Pretrial Detention and the Timing of Guilty Pleas,” *Criminal Justice Policy Review* 30(7) (2022). 1015-1035; Stephen Koppel, Tiffany Bergin, René Ropac, Imani Randolph, and Hannah Joseph, “Examining the Causal Effect of Pretrial Detention on Case Outcomes: A Judge Fixed Effect Instrumental Variable Approach,” *Journal of Experimental Criminology* (2022). <https://doi.org/10.1007/s11292-022-09542-w>.

## PART 3

# EVIDENCE REGARDING CASH BAIL AND FAILURE TO APPEAR IN COURT

Is cash bail more effective at ensuring court appearance than other forms of release? To confidently answer this question, we would ideally like to know whether the same defendant is more likely to appear when released on cash bail as opposed to another form of release. Of course, it is impossible to simultaneously subject the same defendant to alternative bail decisions. Instead, researchers commonly rely on comparisons between defendants on different forms of release.

As section 2 described, judges may consider an individual's risk for pretrial misconduct when making bail decisions. This fact makes it challenging to compare defendants under various forms of release because there are systematic differences when evaluating their underlying level of risk. For example, defendants with a history of failure to appear (FTA) at required court dates are more likely to do so in the future.<sup>10</sup> If judges are more likely to

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<sup>10</sup> See: Thomas Cohen and Brian Reaves (2007) "Pretrial Release of Felony Defendants in State Courts," Bureau of Justice Statistics, Bureau of Justice Statistics, November 2007. <https://bjs.ojp.gov/library/publications/pretrial-release-felony-defendants-state-courts>; Brian Reaves and Jacob Perez (1994), "Pretrial Release of Felony Defendants, 1992," Bureau of Justice Statistics, November 1994; and Haley Zettler and Robert Morris, "An Exploratory Assessment of Race and Gender-Specific Predictors of Failure to Appear in Court Among Defendants Released via a Pretrial Services Agency," *Criminal Justice Review* 40(4) (2015). 417-430.

assign cash bail to defendants with a history of FTA, researchers must account for this potential source of bias when making comparisons between defendants who were assigned cash bail and those who were not.

### 3.1

## CAN WE PREDICT FAILURE TO APPEAR?

Assessing the effects of monetary release conditions requires researchers to account for risk factors other than whether a defendant is required to pay bail. Easily observed characteristics associated with FTA include criminal history, offense type, and indigent status.<sup>11</sup> Many other characteristics associated with FTA are more difficult to measure or otherwise not available from existing data sources.



*As with many criminal justice policy questions, there is a severe lack of representative data available to examine the effects of cash bail due to varying legal environments and inconsistent reporting practices across a large number of jurisdictions.*



As with many criminal justice policy questions, there is a severe lack of representative data available to examine the effects of cash bail due to varying legal environments and inconsistent reporting practices across a large number of jurisdictions. The Bureau of Justice Statistics' State Court Processing Statistics program once regularly collected and reported court processing data on felony defendants in state courts within the 75 most populous counties in the United States. The SCPS program was discontinued in the mid-2000s due to "concerns about cost and representativeness."<sup>12</sup>

<sup>11</sup> Ibid.

<sup>12</sup> KiDeuk Kim, Rob Santos, Bill Adams, Annie Gurvis, and Miriam Becker-Cohen, Shebani Rao, "National Pretrial Reporting Program, Final Report," U.S. Bureau of Justice Statistics, February 2019. <https://www.ojp.gov/ncjrs/virtual-library/abstracts/national-pretrial-reporting-program-final-report>.

In 2010, BJS released a Data Advisory on the limitations of SCPS data that summed up the data challenges with studying the effects of cash bail:

*[T]he data are insufficient to explain causal associations between the patterns reported, such as the efficacy of one form of pretrial release over another. To understand whether one form of pretrial release is more effective than others, it would be necessary to collect information relevant to the pretrial release decision and factors associated with individual misconduct.*<sup>13</sup>

Due to high levels of variation across jurisdictions and a lack of representative datasets, most studies of pretrial defendants generally examine patterns between case characteristics and outcomes within particular jurisdictions or programs. For example, a recent analysis published in *Criminal Justice Review* assessed predictors of FTA among defendants released via the pretrial services agency of Dallas County, Texas.<sup>14</sup> In this setting, defendants were generally not required to pay bail, so the authors did not examine the efficacy of cash bail. However, their findings are relevant to understanding other risk factors associated with FTA. Pretrial services defendants were more likely to FTA if they were indigent, male, or charged with misdemeanors rather than felonies. The study authors did not find any differences in FTA rates across races after other factors, including criminal history, marital status, and length of criminal involvement, were considered.<sup>15</sup> These findings are broadly representative of other studies examining the risk factors associated with FTA in other contexts.

To examine whether cash bail has an effect on FTA, researchers attempt to separate the effects of cash bail from these other potential predictors of FTA. A recent study published in the *American Journal of Criminal Justice* offers a clear example.<sup>16</sup> The study included 2,977 felony defendants in Orleans Parish, Louisiana, 1,922 of which received cash bail. The remaining 1,055 were released on their own recognizance (ROR). The average inmate spent

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<sup>13</sup> “State Court Processing Statistics Data Limitations,” U.S. Bureau of Justice Statistics, *BJS.OJP.gov*, March 2010. Retrieved from: [https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/scpsdl\\_da.pdf](https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/scpsdl_da.pdf) (2 October 2023).

<sup>14</sup> Haley Zettler and Robert Morris, “An Exploratory Assessment of Race and Gender-Specific Predictors of Failure to Appear in Court Among Defendants Released via a Pretrial Services Agency,” *Criminal Justice Review* 40(4) (2015). 417-430.

<sup>15</sup> Ibid.

<sup>16</sup> Jake Monaghan, Eric Joseph van Holm, and Chris w. Surprenant, “Get Jailed, Jump Bail? The Impacts of Cash Bail on Failure to Appear and re-Arrest in Orleans Parish,” *American Journal of Criminal Justice* 47 (2020). 56-74. <https://doi.org/10.1007/s12103-020-09591-9>.



six days in jail prior to being released. Eighteen percent of defendants failed to appear on at least one occasion, but those who were released on cash bail had a lower rate of FTA. However, the study concluded that this “relationship is explained by other factors, particularly whether the individual was required to take drug tests.”<sup>17</sup> Individuals required to take a drug test had 336% higher odds of having an FTA. Defendants accused of property crimes were also more likely to FTA, holding other factors constant. The Orleans Parish study highlights challenges posed by missing data. The authors were unable to obtain information about the criminal histories of defendants and whether they had a lawyer. In light of these and other limitations, the study concluded that its findings “should be interpreted cautiously,” but that the findings are supported by their consistency with other recent research.<sup>18</sup>

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... there is growing evidence that individuals with drug-related cases  
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Indeed, there is growing evidence that individuals with drug-related cases require specialized consideration in pretrial settings. For example, another recent study examined the relationships between substance use disorders, pretrial release, and FTA, finding that both substance use disorders and release on recognizance were associated with FTA.<sup>19</sup> Participants who met diagnostic criteria for severe amphetamine use disorder and were released without financial conditions were 3.91 times more likely to FTA.<sup>20</sup> The study concluded that monitoring drug use through drug-testing programs is insufficient to improve court attendance outcomes.<sup>21</sup> Combined with the Orleans Parish study and other similar research, these findings suggest that specialized substance use disorder treatment interventions through pretrial service agencies may be beneficial.

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<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Albert M. Kopak and Alexa J. Singer, “Substance Use Disorder, Bail Reform, and Failure to Appear in Court: Results from a Naturalistic Study,” *Journal of Drug Issues* 53(2) (2022). 183-195.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.



*Combined with the Orleans Parish study and other similar research, these findings suggest that specialized substance use disorder treatment interventions through pretrial service agencies may be beneficial.*



## 3.2

### EMERGING EVIDENCE ON THE EFFECT OF MONETARY RELEASE CONDITIONS ON FTA

While valuable for identifying factors associated with FTA, much of the existing research is not strong enough to draw confident conclusions about the efficacy of cash bail.

Specifically, research that draws comparisons between defendants under various forms of release while attempting to adjust for underlying variations in risk cannot provide us with causal explanations (i.e. whether monetary release conditions themselves cause a change in FTA outcomes). The ideal approach for reaching causal conclusions at the individual level would be to set up an experiment that randomly assigns bail decisions to defendants regardless of risk. If the assignment of bail decisions were truly random, we could confidently conclude that any observed differences in outcomes between defendants released on cash bail versus on ROR were a result of the randomly assigned bail decision.

Such an experiment is, of course, infeasible and unethical, but researchers have devised some creative strategies to set up “natural experiments” that allow for causal inference. For example, some recent studies exploit the quasi-random assignment of judges to approximate random assignment of bail conditions.<sup>22</sup> Because judges vary in their leniency, the same defendant might receive different bail decisions depending on which judge happened to be assigned to their bail hearing. A 2018 study published in the *American Economic Review* offers an illustrative example.<sup>23</sup> Defendants in the study were able to

<sup>22</sup> Arpit Gupta, Christopher Hansman, and Ethan Frenchman, “The Heavy Costs of High Bail: Evidence from Judge Randomization.” *Journal of Legal Studies* 45(2) (2016). 471–505; Will Dobbie, Jacob Goldin, and Crystal S. Yang, “The Effects of Pretrial Detention on Conviction, Future Crime, and Employment,” *The American Economic Review* 108(2) (2018). 201-240.

<sup>23</sup> Will Dobbie, Jacob Goldin, and Crystal S. Yang, “The Effects of Pretrial Detention on Conviction, Future Crime, and Employment,” *The American Economic Review* 108(2) (2018). 201-240.

appeal their initial bail decision, so there are some defendants who were eventually released pretrial after being initially detained. The study compares these different groups of defendants to examine the effect of an initial period of pretrial detention. The authors find that defendants who were initially released are more likely to FTA than defendants who were initially detained.<sup>24</sup> These findings are not consistent with prior research that suggests even short periods of pretrial detention are associated with greater risk of FTA.<sup>25</sup>



*... some recent studies exploit the quasi-random assignment of judges to approximate random assignment of bail conditions. Because judges vary in their leniency, the same defendant might receive different bail decisions depending on which judge happened to be assigned to their bail hearing.*



Other natural experiments or “quasi-experimental” studies examine the effect of pretrial reforms in one or more jurisdictions by comparing FTA outcomes before and then after a policy reform is implemented. Both proponents and opponents of pretrial reforms often point to simple before-and-after comparisons in pretrial misconduct to make the case for or against reform.<sup>26</sup> However, drawing causal conclusions about a policy change requires some assumptions about what would have happened without the policy change. It is possible to approximate this alternative scenario by extrapolating from trends in similar jurisdictions that did not experience the policy change. Alternatively, researchers could identify the effect of a policy change by comparing FTA among eligible and ineligible defendants before and after the policy change. A recent study used this approach to examine the

<sup>24</sup> Ibid.

<sup>25</sup> Christopher T. Lowencamp, Marie VanNostrand, and Alexander M. Holsinger, (2013), “The Hidden Costs of Pretrial Detention,” Laura and John Arnold Foundation. Available at: <https://nicic.gov/resources/nic-library/all-library-items/hidden-costs-pretrial-detention>; Christopher T. Lowencamp, (2022), “The Hidden Costs of Pretrial Detention Revisited,” Laura and John Arnold Foundation. Available at: <https://www.arnoldventures.org/stories/the-longer-you-spend-in-pretrial-detention-the-poorer-outcomes-you-have>.

<sup>26</sup> See for example: Sandra S. Smith and Isabella Jorgenson, “It’s time for Mass. to eliminate cash bail,” *CommonWealth Magazine*, April 30, 2022; and Jim Quinn, “Bail reform has failed, and advocates saying otherwise ignore the facts,” *New York Post*, September 27, 2022.

effects of a 2018 reform initiative in led by Philadelphia District Attorney Larry Krasner.<sup>27</sup> As the study's authors explained, the initiative did not make any formal changes to judicial discretion:

*On February 21st, 2018, Philadelphia's newly-elected "progressive-prosecutor" declared that his office would no longer seek monetary bail for defendants charged with a long list of eligible offenses. Nicknamed the "No-Cash-Bail" policy, this reform applied to nearly 2/3 of all cases filed in the city of Philadelphia, including both misdemeanors and nonviolent felonies.*<sup>28</sup>

Prosecutors stopped asking judges to impose monetary bail conditions on eligible defendants, but judges retained the power to use their discretion to set release conditions. The study found that Krasner's No-Cash-Bail initiative did, in fact, increase the number of defendants who were released on recognizance (ROR) among those who were eligible. However, the reform had no discernable effect on FTA among eligible defendants relative to non-eligible defendants. The reform had no effect on pretrial detention because the impacts were most concentrated among low-risk defendants who would have previously been released on relatively low bail amounts.<sup>29</sup> These findings suggest that many relatively low-risk defendants could be released on recognizance rather than monetary bail without increasing the risk that they will fail to appear.

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A similar analysis examines of the rollout of Kentucky's Administrative Release program between 2013 and 2017.<sup>30</sup> In contrast to Krasner's prosecutor-led initiative in Philadelphia,

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<sup>27</sup> Aurélie Ouss and Megan Stevenson, "Does Cash Bail Deter Misconduct?" *American Economic Journal: Applied Economics* 15(3) (2023). 150-182.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Alex Albright, "No Money Bail, No Problems? Trade-offs in a Pretrial Automatic Release Program," Working Paper (2022). <https://doi.org/10.31235/osf.io/42pbz>.

the Administrative Release program explicitly limited judicial discretion in certain cases. Taking advantage of the programs staggered rollout across Kentucky jurisdictions, the study examined changes in ROR and FTA rates among jurisdictions before and after implementation. The analysis revealed that, post-reform, 90% of eligible defendants received ROR compared to just 20% of defendants prior to reform. The use of monetary release conditions fell by 50.5 percentage points, but the FTA rate increased by a modest 3.3 percentage points. Notably, hours spent in pretrial detention declined among eligible defendants, suggesting that the reform was successful at reducing the detention due to an inability to afford bail.<sup>31</sup>

Collectively, the findings of these few but relatively rigorous quasi-experimental studies suggests that limiting the use of monetary release conditions is unlikely to result in substantial change in the rate at which defendants fail to appear in court. The Philadelphia and Kentucky studies examine reforms that limited the use of monetary release conditions among relatively low-risk defendants. While their findings suggest that judges may overly rely on monetary release conditions, they do not provide much evidence regarding reforms targeted at higher-risk defendants or more sweeping changes to pretrial systems. However, states and local jurisdictions are increasingly experimenting with broader pretrial reforms. Illinois, for example, recently became the first state to eliminate the use of cash bail.<sup>32</sup> Future research is needed to evaluate the impacts of these more ambitious reform efforts.

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*An additional caveat to the evidence on FTA is that existing research is often unable to distinguish between instances where defendants miss court appearances due to forgetfulness or practical reasons like a lack of transportation versus willful flight in an effort to evade justice.*



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<sup>31</sup> Ibid.

<sup>32</sup> Chip Mitchell, “Illinois is now the first state to eliminate cash bail,” *All Things Considered*, National Public Radio, September 18, 2023. <https://www.npr.org/2023/09/18/1200223477/illinois-is-now-the-first-state-to-eliminate-cash-bail>.

An additional caveat to the evidence on FTA is that existing research is often unable to distinguish between instances where defendants miss court appearances due to forgetfulness or practical reasons like a lack of transportation versus willful flight in an effort to evade justice. Some research evidence suggests that private bail-bondsmen are more effective at tracking down fugitives than public law enforcement agencies, suggesting potential benefits to cash bail secured through bail-bond companies not examined by the studies reviewed in this report.<sup>33</sup> Other studies have found that simple changes to court processes such as sending text-message reminders can reduce unintentional FTAs resulting from mere forgetfulness.<sup>34</sup>

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<sup>33</sup> Eric Helland and Alexander Tabarrok, "The Fugitive: Evidence on Public versus Private Law Enforcement from Bail Jumping," *The Journal of Law and Economics* 47(1) (2004). 93-122. <https://doi.org/10.1086/378694>.

<sup>34</sup> Alissa Fishbane, Aurelie Ouss, and Anuj K. Shaw, "Behavioral Nudges Reduce Failure to Appear for Court," *Science* 370 (2020). <https://doi.org/10.1126/science.abb6591>.

## PART 4

# EVIDENCE REGARDING CASH BAIL AND EFFECTS ON CRIME

Section 3 discussed significant challenges faced by research seeking to examine the effects of pretrial release conditions on failure to appear. The same challenges apply when studying the effect of pretrial release conditions on crime. Moreover, outcomes aren't straightforward because monetary release conditions could potentially impact public safety in a number of ways that are difficult to measure in isolation. Monetary release conditions provide a financial incentive for defendants to avoid rearrest while on pretrial release. High bail amounts also may effectively imprison high-risk defendants through de facto pretrial detention if they cannot afford to pay bail. On the other hand, lower-risk defendants who cannot afford bail may also remain detained even when it's unlikely they'll reoffend while released. If spending time in jail causes defendants to lose their jobs, severs community

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*High bail amounts also may effectively imprison high-risk defendants through de facto pretrial detention if they cannot afford to pay bail.*

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ties, and exposes low-risk individuals to negative social influences, pretrial detention could unintentionally lead to higher rates of reoffending later in life.<sup>35</sup> Finally, proponents of cash bail sometimes argue that it provides a more general deterrence effect among would-be criminals. This section discusses recent research examining each of these potential impacts of cash bail and pretrial detention.

## 4.1

## TRADEOFFS IN PRETRIAL DETENTION AND RELEASE: INCAPACITATION AND CRIMINOGENIC EFFECTS

As with research on FTA, some research on the effects of monetary conditions and pretrial detention identifies patterns among defendant characteristics, case details, and criminal behavior. Broadly, many of the risk factors associated with FTA are also associated with pretrial rearrest and longer-term risk of reoffending.<sup>36</sup> Some recent research attempts to assess the impacts of cash bail, after accounting for other factors such as age, gender, race, and criminal history. For example, the Orleans Parish study discussed in Section 3.1 also examined rearrest outcomes among felony defendants.<sup>37</sup> Comparing those who were released with monetary conditions (cash bail) with those who were released on their own recognizance, the study concluded that release on recognizance was not associated with higher rates of rearrest, and “when including other factors, it actually lowers the odds (though the difference is [statistically] insignificant).”<sup>38</sup> These findings suggest that cash bail does not provide a strong financial incentive against reoffending while on pretrial release. Other similar research also finds that even short periods of pretrial detention may be associated with higher risk of being rearrested while awaiting trial.<sup>39</sup> These results may

<sup>35</sup> Michele B. Meitl and Robert G. Morris, “Pretrial Incapacitation Duration Impacts the Odds of Recidivism among Unreleased Bond-Eligible Defendants,” *Journal of Law and Criminal Justice* 7(2) (2019). 1-11.

<sup>36</sup> See: Thomas Cohen and Brian Reaves (2007) “Pretrial Release of Felony Defendants in State Courts,” Bureau of Justice Statistics, Bureau of Justice Statistics, November 2007. <https://bjs.ojp.gov/library/publications/pretrial-release-felony-defendants-state-courts>; Brian Reaves and Jacob Perez (1994), “Pretrial Release of Felony Defendants, 1992,” Bureau of Justice Statistics, November 1994.

<sup>37</sup> Jake Monaghan, Eric Joseph van Holm, and Chris w. Surprenant, “Get Jailed, Jump Bail? The Impacts of Cash Bail on Failure to Appear and re-Arrest in Orleans Parish,” *American Journal of Criminal Justice* 47(2022). 56-74.

<sup>38</sup> Ibid.

<sup>39</sup> Christopher T. Lowencamp, Marie VanNostrand, and Alexander M. Holsinger, (2013), “The Hidden Costs of Pretrial Detention,” Laura and John Arnold Foundation. Available at: <https://nicic.gov/resources/nic-library/all-library-items/hidden-costs-pretrial-detention>; Christopher T. Lowercamp, (2022), “The Hidden Costs of Pretrial Detention Revisited,” Laura and John Arnold Foundation. Available at: <https://www.arnoldventures.org/stories/the-longer-you-spend-in-pretrial-detention-the-poorer-outcomes-you-have>



be biased to the extent that defendants who are granted ROR are generally lower risk than defendants released on money bail.

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*These findings suggest that cash bail does not provide a strong financial incentive against reoffending while on pretrial release.*

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A 2019 study published in the *Journal of Law and Criminal Justice* examined future reoffending among bond-eligible defendants who remained detained pretrial because they failed to pay their bail.<sup>40</sup> The study included nearly 3,000 defendants in Dallas County, Texas, who were offered release on cash bail but remained detained through the disposition of their case. Among the study participants, 70% were rearrested within two years of their release. After accounting for other relevant factors, any time beyond three days of pretrial detention was associated with higher odds of rearrest.<sup>41</sup> The authors do not observe rearrests during the pre-trial phase, so they do not consider the incapacitation effects of pretrial detention. As with the Orleans Parish study, these results are suggestive of a “criminogenic” effect. In other words, pretrial detention may itself increase the likelihood of future criminal behavior. Both studies, however, are limited to identifying patterns and fall short of providing causal evidence of a criminogenic effect.

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*After accounting for other relevant factors, any time beyond three days of pretrial detention was associated with higher odds of rearrest.*

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<sup>40</sup> Michele B. Meitl and Robert G. Morris, “Pretrial Incapacitation Duration Impacts the Odds of Recidivism among Unreleased Bond-Eligible Defendants,” *Journal of Law and Criminal Justice* 7(2) (2019). 1-11.

<sup>41</sup> Ibid.

## 4.2

## EMERGING EVIDENCE ON THE EFFECT OF PRETRIAL DETENTION AND MONETARY RELEASE CONDITIONS ON CRIME

Fortunately, some of the recent quasi-experimental research discussed in Section 3.2 also provides evidence regarding the effects of pretrial detention on crime outcomes. For example, a 2018 study published in *The American Economic Review* exploits the quasi-random assignment of judges and cases where judges disagree on whether to detain a defendant.<sup>42</sup> Among defendants who were initially detained but later released after an appeal, the study found that “the marginal released defendant is 18.9 percentage points more likely to be rearrested for a new crime prior to disposition.”<sup>43</sup> These results indicate the pretrial detention has some incapacitation effect. In other words, defendants who are detained pretrial are unsurprisingly less likely to reoffend pretrial. However, the same study found that even short periods of pretrial detention resulted in loss of employment and a greater likelihood of reoffending in the future. The study concluded that these criminogenic effects may offset the incapacitation effects of pretrial detention, resulting in no net effect on reoffending two years after release.<sup>44</sup>

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*The prosecutor-led initiative was effective at increasing the number of defendants released on their own recognizance with no effect on the rate of pretrial rearrest.*

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Another recent quasi-experimental study examining Philadelphia’s 2018 bail reform initiative led by District Attorney Larry Krasner did not find any effect on pretrial rearrest.<sup>45</sup> As explained earlier in Section 3.2 of this report, prosecutors in Philadelphia stopped asking judges to impose monetary bail conditions on eligible defendants, but judges retained the

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<sup>42</sup> Will Dobbie, Jacob Goldin, and Crystal S. Yang, “The Effects of Pretrial Detention on Conviction, Future Crime, and Employment,” *The American Economic Review* 108(2) (2018). 201-240.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Aurélie Ouss and Megan Stevenson, “Does Cash Bail Deter Misconduct?” *American Economic Journal: Applied Economics* 15(3) (2023). 150-182.

power to use their discretion to set release conditions. The prosecutor-led initiative was effective at increasing the number of defendants released on their own recognizance with no effect on the rate of pretrial rearrest. Notably, the initiative did not reduce the number of defendants detained pretrial as it mostly impacted low-risk defendants who, prior to the reform, would have been released on relatively low bail amounts or under pretrial supervision.<sup>46</sup>

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*... another quasi-experimental analysis of Kentucky’s Administrative Release program found no negative impacts on public safety.*

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Likewise, another quasi-experimental analysis of Kentucky’s Administrative Release program found no negative impacts on public safety.<sup>47</sup> The program had no negative effect on reoffending, despite 90% of eligible defendants receiving ROR post-reform compared to just 20% of defendants prior to reform. The program also reduced the total number of hours defendants spent in pretrial detention and increased the number of defendants released within one day of their arrest.<sup>48</sup> Unlike Philadelphia’s prosecutor-led initiative, Kentucky’s Administrative Release program explicitly eliminated judicial discretion in certain cases. These varying degrees of judicial discretion may explain why Kentucky’s Administrative Release program reduced pretrial detention while the Philadelphia initiative had no effect.

To the extent that policy shapes the perceived consequences of criminal behavior, pretrial reforms may impact overall patterns in crime. For example, another recent quasi-experimental study examined the effect of pretrial reform in New Jersey on property crime rates across the state.<sup>49</sup> In 2014, New Jersey passed two legislative measures which both, upon their implementation in January 2017, substantially changed the state’s pretrial process:

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<sup>46</sup> Ibid.

<sup>47</sup> Alex Albright, “No Money Bail, No Problems? Trade-offs in a Pretrial Automatic Release Program,” Working Paper (2022). <https://doi.org/10.31235/osf.io/42pbz>.

<sup>48</sup> Ibid.

<sup>49</sup> Jung K. Kim and Yumi Koh, “Pretrial Justice Reform and Property Crime: Evidence from New Jersey,” *Applied Economics*, 53(6) (2021). 663-675.

*The first legislative measure, S946/A1910, moves New Jersey's pretrial release process from a largely money-based one to a risk-based one and sets speedy trial limits with respect to pretrial detention. ... The second legislative measure, SCR128, places a constitutional amendment to authorize pretrial detention of a person in criminal case under certain circumstances.<sup>50</sup>*

The study compares trends in New Jersey's property crime rates to trends in the 10 other Northeastern states before and after January 2017. The study's most conservative estimates indicated that New Jersey experienced a 22.5% increase in the overall property crime rate post-reform, but there was no effect on violent crime.<sup>51</sup> While these findings raise important questions on the potential unintended consequences pretrial reform, bail decisions are constitutionally bound to managing the risk of individual defendants rather than providing general deterrence.

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*Collectively, the available research suggests that many low-risk defendants could be released on their own recognizance without increasing the rate of pretrial rearrest.*

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Collectively, the available research suggests that many low-risk defendants could be released on their own recognizance without increasing the rate of pretrial rearrest. In other words, there is evidence that monetary release conditions do not provide meaningful financial incentive for these low-risk defendants to refrain from criminal activity while awaiting trial. Moreover, even relatively short periods of pretrial detention resulting from difficulty paying bail are associated with higher rates of reoffending.

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<sup>50</sup> Ibid; "ACLU-NJ Hails Passage of NJ Bail Reform as Historic Day for Civil Rights," American Civil Liberties Union, 2014. <https://www.aclu.org/press-releases/aclu-nj-hails-passage-nj-bail-reform-historic-day-civil-rights>. (Accessed 5 Dec. 2022).

<sup>51</sup> Ibid.

## PART 5

# PROMISING APPROACHES TO TARGETED REFORM

It is simple to say that monetary release conditions are too frequently imposed upon low-risk defendants. Identifying which defendants are actually “low risk” is another challenge altogether. As discussed in this report, research evidence can be useful for identifying patterns between defendant characteristics, case details, and pretrial misconduct. In fact, many jurisdictions have implemented standardized risk-assessment tools that rely on similar information to train actuarial algorithms that may inform judicial decision-making. These tools can be helpful for targeting pretrial reforms and specialized interventions. However, great care is needed when designing and implementing standardized risk assessment tools.

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*It is simple to say that monetary release conditions are too frequently imposed upon low-risk defendants. Identifying which defendants are actually “low risk” is another challenge altogether.*

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## 5.1

## THE PROMISE AND PERIL OF STANDARDIZED RISK ASSESSMENTS

There are a variety of approaches to designing risk assessments, but most consider a defendant's age, criminal history, prior FTA, employment, living situation, and other characteristics associated with risk of misconduct.<sup>52</sup> Although rigorous evaluative studies of risk assessment tools are lacking, the available evidence does support their predictive validity.<sup>53</sup> Importantly, these standardized tools are considered to be more consistent, fair, and transparent than the subjective perceptions of judges, so their adoption is often viewed as a progressive reform. As law professors Megan Stevenson and Sandra Mayson have explained:

*The overarching reform vision is to shift from the “resource-based” system of money bail to a “risk-based” system, in which pretrial interventions are tied to risk rather than wealth. To accomplish this, jurisdictions are implementing actuarial risk assessment and reducing the use of money bail as a mediator of release. The idea is that defendants who pose little statistical risk of flight (i.e., fleeing the jurisdiction) or committing pretrial crime can be released without money bail or onerous conditions. Riskier defendants can be released under supervision, and detention can be reserved for those so likely to flee or commit serious harm that the risk cannot be managed in any less intrusive way.<sup>54</sup>*

Standardized risk-assessment tools may help judges form more accurate perceptions of defendants' risk of pretrial misconduct, but they have potential drawbacks and limitations. The accuracy of risk assessment tools relies on their design and the quality of data used to develop actuarial models. While risk-assessment algorithms do not explicitly include race

<sup>52</sup> Sarah L. Desmarais and Evan M. Lowder, “Pretrial Risk Assessment Tools: A Primer for Judges, Prosecutors, and Defense Attorneys,” Safety and Justice Challenge, 2019. <https://safetyandjusticechallenge.org/resources/pretrial-risk-assessment-tools-a-primer-for-judges-prosecutors-and-defense-attorneys/>

<sup>53</sup> Desmarais, S. L., Zottola, S. A., Duhart Clarke, S. E., and Lowder, E. M. “Predictive Validity of Pretrial Risk Assessments: A Systematic Review of the Literature.” *Criminal Justice and Behavior*, 48(4) (2021), 398-420. <https://doi.org/10.1177/0093854820932959>; Lowder, E. M., Diaz, C. L., Grommon, E., & Ray, B. R. Effects of Pretrial Risk Assessments on Release Decisions and Misconduct Outcomes Relative to Practice as Usual. *Journal of Criminal Justice*, 73, (2021). 101754. <https://doi.org/10.1016/j.jcrimjus.2020.101754>.

<sup>54</sup> Megan Stevenson and Sandra G. Mayson, “Pretrial Detention and Bail,” *Reforming Criminal Justice: Punishment, Incarceration, and Release* (Vol. 4). Eds. Erik Luna (Phoenix: Arizona State University, 2017). 23. Available at: <https://academyforjustice.asu.edu/project/reforming-criminal-justice/>

as an indicator of risk, some researchers and pretrial reform advocates are concerned that they may reinforce racial disparities.<sup>55</sup> Research evidence regarding potential racial biases in risk assessment tools is mixed but suggests that careful implementation is important to avoiding potential biases.<sup>56</sup>



*While risk-assessment algorithms do not explicitly include race as an indicator of risk, some researchers and pretrial reform advocates are concerned that they may reinforce racial disparities. Research evidence regarding potential racial biases in risk assessment tools is mixed but suggests that careful implementation is important to avoiding potential biases.*



The efficacy and potential biases of risk-assessment tools may also depend on the extent to which judges rely upon the tools to guide their decision-making.<sup>57</sup> Outside of the pretrial context, a recent analysis of felony sentencing decisions in Virginia highlights the importance of judicial discretion in determining the success of efforts to implement standardized risk assessments in the criminal justice system more broadly.<sup>58</sup> Pretrial

<sup>55</sup> Desmarais, S. L., Zottola, S. A., Duhart Clarke, S. E., and Lowder, E. M. "Predictive Validity of Pretrial Risk Assessments: A Systematic Review of the Literature." *Criminal Justice and Behavior*, 48(4) (2021), 398-420. <https://doi.org/10.1177/0093854820932959>; Picard, S., Watkins, M., Rempel, M., and Kerodal, A. (2019) "Beyond the Algorithm: Pretrial Reform, Risk Assessment, and Racial Fairness." Center for Justice Innovation; McCoy, E. (2023) "The Risks of Pretrial Risk Assessment Tools: Policy Considerations for Michigan." Policy Brief. Science, Technology, and Public Policy Program, Gerald R. Ford School of Public Policy, University of Michigan.

<sup>56</sup> Ibid.

<sup>57</sup> Megan Stevenson. "Assessing Risk Assessment In Action." *Minnesota Law Review*, 103(1), (2018) 303-384. <https://heinonline.org/HOL/P?h=hein.journals/mnlr103&i=313>; Alex Albright, "If You Give a Judge a Risk Score: Evidence from Kentucky Bail Decisions," Working Paper, (2019). Available at: [http://www.law.harvard.edu/programs/olin\\_center/Prizes/2019-1.pdf](http://www.law.harvard.edu/programs/olin_center/Prizes/2019-1.pdf).

<sup>58</sup> Megan Stevenson and Jennifer Doleac, "Algorithmic Risk Assessment in the Hands of Humans," IZA Institute of Labor Economics Discussion Paper No. 12853. December 2019. Available at: <https://www.iza.org/publications/dp/12853/algorithmic-risk-assessment-in-the-hands-of-humans>; See also: Jodie L. Viljoen, Dana M. Cochrane, and Melissa R. Jonnson, "Do Risk Assessment Tools Help Manage

reforms that promote the use risk-assessment tools should be designed and implemented with these potential pitfalls in mind. Moreover, risk-assessment tools should be continuously evaluated and adapted to ensure and improve their validity for assessing risk of pretrial misconduct.

## 5.2

## TARGETED PRETRIAL EARLY RELEASE AND DIVERSION PROGRAMS

Given evidence that that even relatively short periods of pretrial detention can have severe negative consequences, some jurisdictions are experimenting with targeted early release and diversion programs informed by standardized risk-assessment tools. For example, a recent study examined the effects of a jail-based early release program that relies on a proxy risk-assessment tool to inform early release decisions within an average of 3.5 hours after booking.<sup>59</sup> Individuals eligible for early release under the program are not formally admitted and never come in contact with the general jail population. The study found that early release was associated lower risk of rearrest while awaiting trial. But when analysis of these rearrests is limited to arrests for new criminal offenses (and excluding extra-jurisdictional arrests, FTAs, or technical violations during pretrial release), there was no evidence of a relationship between early release and pretrial rearrest. In other words, it appears that the early release program did not have any negative short-term effects on public safety.<sup>60</sup>

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... it appears that the early release program did not have any negative short-term effects on public safety.  
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And Reduce Risk Of Violence And Reoffending? A Systematic Review.” *Law And Human Behavior*, 42(3), (2018). 181–214. <https://doi.org/10.1037/Lhb0000280>.

<sup>59</sup> Evan M. Lowder, Chelsea M. A. Foudray, and Madeline McPherson, “Proxy Assessments and Early Pretrial Release: Effects on Criminal Case and Recidivism Outcomes,” *Psychology, Public Policy, and Law* 28(3) (2022). 374-386.

<sup>60</sup> Ibid.



Another recent study examined the effects of four prosecutor-led pre-trial diversion programs in Cook County, Ill., Milwaukee County, Wis., and Chittenden County, Vt.<sup>61</sup> The authors examine two alternative approaches to measuring recidivism outcomes. The first approach measures recidivism as whether an individual reoffended over a two-year follow-up period. The second approach measures the period between an individual's release and their first subsequent arrest ("time to first rearrest") among those who do reoffend. Relative to non-participants, individuals who participated in prosecutor-led pre-trial diversion programs were less likely to be rearrested within two years following their release. Among those who were rearrested, program participation significantly delayed the time to rearrest. While the effects of program participation on reoffending were relatively small in magnitude, the authors argue that:

*even a small or null effect on re-arrest confers a benefit to society, in that it would indicate that diversion poses no risk to public safety, while helping defendants avoid the collateral consequences of conviction and making some effort to address their needs.”<sup>62</sup>*

This point raises the importance of considering individual-level outcomes other than FTA and criminal conduct when evaluating the costs and benefits associated with pretrial policy.

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<sup>61</sup> Two of the four programs were located in Milwaukee County. Robert C. Davis, Warren A. Reich, Michael Rempel, and Melissa Labriola, "A Multisite Analysis of Prosecutor-Led Diversion: Effects on Conviction, Incarceration, and Recidivism," *Criminal Justice Policy Review* 32(8) (2021). 890-909.

<sup>62</sup> Ibid.

## PART 6

# CONCLUSION AND POLICY IMPLICATIONS

Beyond the broader societal interests in minimizing FTAs and crime, it is necessary to consider the normative values associated with the administration of justice in the United States. The Eighth Amendment to the United States Constitution explicitly prohibits excessive bail requirements. While not explicitly enshrined by the U.S. Constitution, the Supreme Court has recognized that the presumption of innocence is a necessary component of fair trials as required by the Due Process Clause of the Fourteenth Amendment.<sup>63</sup> In a unanimous landmark ruling in *Coffin v. United States*, the Court wrote:

*The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law. It is stated as unquestioned in the textbooks, and has been referred to as a matter of course in the decisions of this Court and in the courts of the several states.*<sup>64</sup>

Pretrial release decisions may have a multitude of negative consequences for individual defendants who have not been convicted of a crime. Even short periods of pretrial detention may result in loss of employment, disrupted family life, and psychological

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<sup>63</sup> See *Taylor v Kentucky*, 436 U.S. 478 (1978).

<sup>64</sup> See *Coffin v. United States*, 156 U.S. 432 (1895).

distress. Those who are offered release on bond may face financial hardship or remain in detention simply because they are unable to afford the price of their freedom. Clearly, these consequences indicate relevant costs at the individual level. There are also societal benefits associated with maintaining system of justice that considers outcomes aside from FTA and various measures of crime.

Considering that approximately 98% of federal convictions and 94% of state convictions are obtained through plea bargains, the bargaining power of defendants is highly relevant to the fair administration of justice in the United States.<sup>65</sup> Research suggests that relatively short periods of detention may increase the likelihood that defendants will agree to plead guilty.<sup>66</sup> These findings are consistent with the notion that pretrial detention weakens a defendant's bargaining power in plea negotiations.<sup>67</sup>



*Research suggests that relatively short periods of detention may increase the likelihood that defendants will agree to plead guilty. These findings are consistent with the notion that pretrial detention weakens a defendant's bargaining power in plea negotiations.*



There is further evidence that the more time defendants spend in pretrial detention, the more likely they are to be found guilty.<sup>68</sup> Pretrial detention is disruptive to maintaining community ties, consulting with legal counsel, and mounting an effective defense. Some evidence suggests that prosecutor-led diversion programs and jail-based early release

<sup>65</sup> Clark Neily, "Prisons Are Packed because Prosecutors Are Coercing Plea Deals. And, Yes, It's Totally Legal," Cato Institute, 2019. <https://www.cato.org/commentary/prisons-are-packed-because-prosecutors-are-coercing-plea-deals-yes-its-totally-legal>. (Accessed 8 Jan. 2024)

<sup>66</sup> Will Dobbie, Jacob Goldin, and Crystal S. Yang, "The Effects of Pretrial Detention on Conviction, Future Crime, and Employment," *The American Economic Review* 108(2) (2018). 201-240.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid; Michele B. Meitl and Robert G. Morris, "Pretrial Incapacitation Duration Impacts the Odds of Recidivism among Unreleased Bond-Eligible Defendants," *Journal of Law and Criminal Justice* 7(2) (2019). 1-11.

programs may be an effective tool for avoiding the collateral consequences of pretrial detention without risk to public safety.<sup>69</sup>

With some caveats, the studies included in this review collectively suggest that monetary release conditions do not consistently reduce FTAs and may not result in net reductions in reoffending. Other factors, including indigence, drug use disorders, and criminal history, are generally stronger predictors of FTA than the imposition of monetary release conditions. Regarding crime outcomes, it is important to consider the potentially competing incapacitation and criminogenic effects of pretrial detention. The research reviewed in this report provides some evidence in support of the incapacitation effect of pretrial detention.<sup>70</sup> However, among relatively low-risk defendants, monetary conditions do not appear to reduce the likelihood of pre-trial rearrest.<sup>71</sup>

The immediate public safety benefits of incapacitation through pretrial detention must be weighed against potential criminogenic effects of detention. Even short periods of detention are associated with higher odds of future reoffending.<sup>72</sup> Research suggests that this longer-term criminogenic effect may, on the margin, offset the public safety benefits of pretrial incapacitation.<sup>73</sup> However, there is some evidence that pretrial reforms may alter the behavioral incentives to the extent that pretrial policy affects individuals' expectations of sanction upon arrest.<sup>74</sup> Once again, the implications of bail policy in terms of these behavioral incentives must be weighed against the normative values associated with the fair administration of justice.

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<sup>69</sup> Robert C. Davis, Warren A. Reich, Michael Rempel, and Melissa Labriola, "A Multisite Analysis of Prosecutor-Led Diversion: Effects on Conviction, Incarceration, and Recidivism," *Criminal Justice Policy Review* 32(8) (2021). 890-909.

<sup>70</sup> Will Dobbie, Jacob Goldin, and Crystal S. Yang, "The Effects of Pretrial Detention on Conviction, Future Crime, and Employment," *The American Economic Review* 108(2) (2018). 201-240.

<sup>71</sup> Jake Monaghan, Eric Joseph van Holm, and Chris w. Surprenant, "Get Jailed, Jump Bail? The Impacts of Cash Bail on Failure to Appear and re-Arrest in Orleans Parish," *American Journal of Criminal Justice* 47. 56-74. <https://doi.org/10.1007/s12103-020-09591-9>; Aurélie Ouss and Megan Stevenson, "Does Cash Bail Deter Misconduct?" *American Economic Journal: Applied Economics* 15(3) (2023). 150-182; and Alex Albright, "No Money Bail, No Problems? Trade-offs in a Pretrial Automatic Release Program," Working Paper (2022). <https://doi.org/10.31235/osf.io/42pbz>.

<sup>72</sup> Michele B. Meitl and Robert G. Morris, "Pretrial Incapacitation Duration Impacts the Odds of Recidivism among Unreleased Bond-Eligible Defendants," *Journal of Law and Criminal Justice* 7(2) (2019). 1-11.

<sup>73</sup> Ibid; Will Dobbie, Jacob Goldin, and Crystal S. Yang, "The Effects of Pretrial Detention on Conviction, Future Crime, and Employment," *The American Economic Review* 108(2) (2018). 201-240.

<sup>74</sup> Jung K. Kim and Yumi Koh, "Pretrial Justice Reform and Property Crime: Evidence from New Jersey," *Applied Economics*, 53(6) (2021). 663-675.



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*...there is promising evidence suggesting that the use of standardized risk-assessment tools by courts, prosecutor-led diversion programs, and jail-based early release programs can effectively identify low-risk defendants and reduce the collateral consequences associated with their detention without sacrificing public safety.*

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Finally, there is promising evidence suggesting that the use of standardized risk-assessment tools by courts, prosecutor-led diversion programs, and jail-based early release programs can effectively identify low-risk defendants and reduce the collateral consequences associated with their detention without sacrificing public safety.<sup>75</sup> Importantly, the promise of these programs—and the results of this review more broadly—highlight the role of individual-level discretion (i.e. decisions made by judges, prosecutors, and jail staff) in facilitating optimal pretrial outcomes.

In sum, recent research tells us a considerable amount about the effects of pretrial release decisions on FTA and crime but offers limited guidance in terms of setting bail policy that strikes the right balance between several competing interests that are often difficult to quantify.

Conservatively, we can conclude that the United States relies too heavily on monetary release conditions. Cash bail is a tool which, in the right circumstances, can be effective at disincentivizing pretrial misconduct. However, when cash bail is treated as a default condition of pretrial release, there are likely to be collateral consequences. In cases where a defendant poses a credible threat to public safety, pretrial detention is more effective at protecting public safety than monetary release conditions. On the other hand, it is clearly desirable and beneficial to avoid pretrial detention among those who pose little risk to

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<sup>75</sup> Evan M. Lowder, Chelsea M. A. Foudray, and Madeline McPherson, “Proxy Assessments and Early Pretrial Release: Effects on Criminal Case and Recidivism Outcomes,” *Psychology, Public Policy, and Law* 28(3) (2022). 374-386; Robert C. Davis, Warren A. Reich, Michael Rempel, and Melissa Labriola, “A Multisite Analysis of Prosecutor-Led Diversion: Effects on Conviction, Incarceration, and Recidivism,” *Criminal Justice Policy Review* 32(8) (2021). 890-909.

public safety. The bulk of available evidence suggests that curtailing the use of monetary release conditions among low-risk defendants would not result in dramatic effects on FTA or pretrial rearrest. There is even some evidence that pretrial reforms that reduce avoid detention among of low-risk, bond-eligible defendants may actually improve public safety. Additional research is needed to evaluate more ambitious reform proposals.

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*In cases where a defendant poses a credible threat to public safety, pretrial detention is more effective at protecting public safety than monetary release conditions.*

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# ABOUT THE AUTHOR

**Vittorio Nastasi** is the director of criminal justice policy at Reason Foundation. Nastasi works on criminal justice reform, healthcare regulation, occupational licensing, and environmental policy issues at Reason Foundation. His work has been published in the *Wall Street Journal*, *Orange County Register*, *Palm Beach Post*, and *Tallahassee Democrat*, among others. Prior to joining Reason, Nastasi worked with the James Madison Institute and the DeVoe L. Moore Center focusing on land-use regulation, occupational licensing, and criminal justice reform. Nastasi graduated from Florida State University with bachelor's degrees in economics and political science. He is based in Tallahassee, Florida, and is pursuing a Ph.D. in public administration and policy.

