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Does Public Health Start Within Jails? A New Incentive for Reform of Wisconsin's Bail System

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DOES PUBLIC HEALTH START WITHIN JAILS? A NEW INCENTIVE FOR REFORM OF WISCONSIN’S BAIL SYSTEM

Wisconsin’s Milwaukee and Dane Counties are among many jurisdictions in the country employing modern bail reforms, specifically the Public Safety Assessment (PSA). Most of these jurisdictions adopted the PSA before the advent of the COVID-19 pandemic in the United States, but are increasingly relevant as the virus continues to derail public health measures. Through the intersection of detainees, correctional officers, judicial officials, attorneys, and visitors, millions of Americans filter in and out of correctional facilities on an annual basis. These facilities serve as a microcosm of society and breeding ground for mass infection. The COVID-19 pandemic amplified an existing need for reform of correctional facilities to better protect the rights and health of pretrial detainees. This Comment examines the efficacy of the PSA and other currently employed bail reform measures and concludes with how the State of Wisconsin can adopt stronger measures to effectively assess risk while maintaining the liberties of pretrial detainees.

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I. INTRODUCTION

What can be done in a space of thirty-five square feet? This list is not exhaustive, but it does include parking small automobiles, putting in place a queen-sized mattress, and housing persons in a correctional facility. In 2021, perhaps the more important question is, what cannot be done in this same amount of space? Effective social distancing and curbing viral transmission of infectious diseases are practically impossible in such confined spaces. The American Correctional Association (ACA), the nation’s largest accrediting body for private correctional facilities, recommends that multi-occupancy cells provide at least thirty-five square feet of unencumbered¹ space per occupant.² The Federal Bureau of Prisons (BOP) echoes this recommendation of thirty-five square feet per occupant,³ yet for both bodies, this figure is no more than a recommendation. In 1991, the BOP conceded that at this thirty-five square foot per occupant figure, the combined facilities under its purview were operating at 60% above “rated capacity.”⁴ In the three decades since that determination, the rate of incarceration and detained population has grown exponentially—further exacerbating the crowded conditions of correctional facilities in America. In 2019, nine states and the BOP all operated at 100% or greater over

1. The ACA defines “unencumbered space” as usable space excluding the square footage of furniture and fixtures such as a mattress or toilet. AM. CORR. ASS’N, CORE JAIL STANDARDS 3 (2010), <http://correction.org/wp-content/uploads/2014/09/Core-Jail-Standards-as-printed-June-2010.pdf> [<https://perma.cc/7HU9-NVQS>].

2. *Id.*

3. U.S. GENERAL ACCOUNTING OFFICE, FEDERAL PRISONS: REVISED DESIGN STANDARDS COULD SAVE EXPANSION FUNDS 5 (1991), <https://www.gao.gov/assets/ggd-91-54.pdf> [<https://perma.cc/Z5RZ-RNU3>].

4. *Id.* The Department of Justice defines “rated capacity” as the number of prisoners or beds a facility can hold, as set by a rating official. Rated capacity is one of three commonly used capacity standards alongside design capacity and operational capacity. *Terms & Definitions: State and Federal Prison Facility Characteristics*, BUREAU OF JUST. STAT., <https://www.bjs.gov/index.cfm/content/acf/index.cfm?ty=tdtp&tid=133> [<https://perma.cc/FMR9-4VR4>].

capacity and forty-one total states operated at least 75% over capacity.⁵ With more and more individuals confined to smaller and smaller spaces, any effort to curb the transmission of infectious diseases will be stymied.

COVID-19, also known as the novel coronavirus, is believed to have initially appeared in the United States in January 2020.⁶ Within weeks, the life-threatening virus quickly spread throughout the country.⁷ While potentially dangerous for all groups of people, the Centers for Disease Control (CDC) has identified a number of groups of whom exposure to COVID-19 is particularly dangerous, including the following: persons over sixty-five years of age and persons with underlying medical conditions such as cancer, Type 2 diabetes, immunological deficiencies, and obesity, among several other medical conditions.⁸ Due to the inherent design of and often inadequate medical resources within jails and prisons, the ability to control and minimize the spread of COVID-19 is considerably limited.⁹ Between March 2020 and March 2021, there were more than 663,000 confirmed cases, amongst both the incarcerated and staff, from approximately 1,200 correctional or detention facilities in the United States.¹⁰ In Fresno, California, one facility alone has led to the infection

5. These figures represent conclusions made upon the highest number of the three capacity standards. In many studies, researchers employ tests based on both the highest and lowest capacity standards to account for variances across the states. For example, Pennsylvania facilities have a rated capacity greater than its operational capacity, while Arizona's operational capacity is greater than in its rated capacity. E. ANN CARSON, U.S. DEP'T OF JUST., PRISONERS IN 2019 24–25 (2020), <https://bjs.ojp.gov/content/pub/pdf/p19.pdf> [<https://perma.cc/P7JQ-KWAJ>]; Emily Widra, *Since You Asked: Just How Overcrowded Were Prisons Before the Pandemic, and at This Time of Social Distancing, How Overcrowded are They Now?*, PRISON POL'Y INITIATIVE (Dec. 21, 2020), <https://www.prisonpolicy.org/blog/2020/12/21/overcrowding/> [<https://perma.cc/2FA4-6AWS>].

6. *A Timeline of COVID-19 Developments in 2020*, AM. J. MANAGED CARE (Jan. 1, 2021), <https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020> [<https://perma.cc/KLV8-XA8D>].

7. *Id.*

8. *COVID-19 Information for Specific Groups of People*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 25, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/index.html> [<https://perma.cc/Z657-8847>].

9. *See How COVID-19 Spreads*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 14, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> [<https://perma.cc/8E3U-JCBT>].

10. *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (Jan. 31, 2021), <https://www.nytimes.com/interactive/2021/04/10/us/covid-prison-outbreak.html> [<https://perma.cc/SY46-7XR9>].

of almost 4,000 individuals in that same time span.¹¹ Within these populations are individuals yet to be convicted of any crime. In March 2020, it was estimated that there were over 470,000 people incarcerated nationwide who had not been convicted of any crime yet. As a result, over 60% of incarcerated individuals have not been found guilty of any crime, yet they remain in jail, subject to heightened risks of transmission and infection.¹²

An increasing need for reform of correctional facilities coupled with a public health disaster creates a new impetus for actionable change to better protect the rights of pretrial detainees. Beyond potentially rampant transmission of diseases among incarcerated individuals, jails and prisons provide an incubating hub for disease for an entire community. In 2018, the average daily population of jails nationwide was just under 750,000 individuals.¹³ In that same year, there were 10,675,400 admissions into American jails.¹⁴ Additionally, in 2018, the weekly inmate turnover rate was 55%, and inmates spent on average twenty-five days in jails per admission.¹⁵

Given the constant rate of entry into jails, these facilities do not just serve as detention centers but revolving doors for the community. As such, the contacts within a jail extend far beyond the walls of the facility.¹⁶ Conceivably, a detainee can enter a jail, which is experiencing a high rate of transmission, remain incarcerated for a week, test positive for COVID-19, get released, return to their home, and infect the remaining members of their household. Additionally, jail staff, attorneys, other law enforcement, and a variety of individuals regularly come in close contact with detainees before returning to their larger communities.¹⁷ With exposure to COVID-19 droplets causing infection in as few as fifteen minutes, the potential for widespread transmission

11. Early Coronavirus Cases in Nursing Homes, Prisons and Other Locations, N.Y. Times (2022) <https://www.nytimes.com/interactive/2021/us/covid-case-outbreaks.html> [https://perma.cc/SUK2-2FBZ]. It is important to note that the tracking of prison and jail related COVID data largely slowed or stopped completely by several media outlets in 2021; thus, these figures represent infection prior to the outbreak of both the Delta and Omicron variants, which witnessed rapid transmission in 2021.

12. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html#slideshow/slideshow1/2> [https://perma.cc/9TW5-XV79].

13. ZHEN ZENG, U.S. DEP'T OF JUST., JAIL INMATES IN 2018 2 (2020), <https://bjs.ojp.gov/content/pub/pdf/ji18.pdf> [https://perma.cc/K5G9-3QD3].

14. *Id.* at 1–2.

15. *Id.* at 8.

16. Camilla Strassle & Benjamin Berkman, *Prisons and Pandemics*, 57 SAN DIEGO L. REV. 1083, 1091 (2020).

17. *Id.*

in—and subsequently outside of—jails is tremendously high.¹⁸ Thus, increasing attention towards curbing the spread of COVID-19 in correctional facilities is a logical objective for broader community health.

Due to their experience with such a high potential rate of transmission in these facilities, prisoners are currently seeking redress, primarily under claims that continued confinement is an imposition on their Eighth and Fourteenth Amendment rights or through habeas corpus petitions.¹⁹ However, in jurisdictions adhering to a bail system, indigent detainees may sit in jail cells for months simply due to an inability to pay for their bail and not because of a heightened risk they will abscond or a perceived risk to their communities. In Wisconsin, financial considerations are still used in determining the conditions of release of detainees. While individual counties like Milwaukee County and Dane County have made significant reforms to reduce the financial burdens on low-risk detainees,²⁰ there has not been state-level action to make these same reforms that will help curb the spread of COVID-19, reduce costs on taxpayers, and uphold the rights of the accused. Pursuant to Wis. Stat. § 969.035, judges are entitled to impose monetary conditions on release based on detainees' likelihood of appearing for trial. However, these monetary conditions are customarily applied based on the degree of the alleged offense with little regard to the actual threat of absconding.

With the continuing threat of a global pandemic spreading throughout the country, there is a growing impetus for states like Wisconsin to reduce their incarcerated populations by enacting sensible bail reforms that effectively consider a detainee's real threat to their communities or likelihood to abscond. This Comment will provide an overview of how pandemics have historically affected jails and prisons, undertake a review of the cash bail system and its roots in the American criminal justice system, discuss the current limitations of jurisdictions with cash bail systems, compare Wisconsin's statewide inaction to action taken by some of its own counties or other states, and identify

18. See *How COVID-19 Spreads*, *supra* note 9.

19. *Maney v. Brown*, 464 F. Supp. 3d 1191 (D. Or. 2020); *Money v. Pritzker*, 453 F. Supp. 3d 1103 (N.D. Ill. 2020); *Frazier v. Kelley*, 460 F. Supp. 3d 799 (E.D. Ark. 2020).

20. Abigail Becker, *Early Research Shows Fewer Inmates Flattened COVID-19 Curve at Dane County Jail*, THE CAP. TIMES, (Aug. 1, 2020), https://madison.com/ct/news/local/govt-and-politics/early-research-shows-fewer-inmates-flattened-covid-19-curve-at-dane-county-jail/article_7fd4ebb9-59fa-56c2-8952-3668f5d61ad2.html [https://perma.cc/4L35-RA4C]; Ann-Elise Henzl, *Milwaukee County's Use of Risk Assessment Tool Keeps Some People Out of Jail While Awaiting Trial*, MILWAUKEE PUB. MEDIA, (May 25, 2017, 1:00 AM), <https://www.wuwm.com/post/milwaukee-countys-use-risk-assessment-tool-keeps-some-people-out-jail-while-awaiting-trial#stream/0> [https://perma.cc/RU4K-XYD5].

rationales for enacting sensible cash bail reforms. Finally, this Comment will propose that Wisconsin adopts a statewide approach that identifies and applies specific parameters for assessing risk to communities in determining the financial considerations that must be met for release prior to trial.

II. THE AMERICAN BAIL SYSTEM

A. *What is Cash Bail?*

Bail is the most common mechanism employed by courts to allow arrestees to secure their pretrial release.²¹ Bail—also called cash bail or money bail—specifically refers to the monetary conditions required for release.²² Bond, on the other hand, may refer to the full set of conditions for release.²³ Holding a detainee on remand occurs when a judge does not permit release under any conditions, and the individual remains in custody until the court date;²⁴ this occurs most frequently in incidents involving serious felony matters such as murder, armed robbery, and rape, among other charges.²⁵ In addition to other non-financial considerations, courts routinely assess a monetary figure that must be paid in part or in full in order to be released upon arrest.²⁶ Depending on jurisdiction, this amount may be subject to a set, uniform schedule codified by the legislature or involve judicial discretion based on the surrounding circumstances of the arrest.²⁷ In most jurisdictions, arrestees have the option to either front the full amount of bail to the court, which is typically returned for appearing for trial, or obtain the services of a commercial bonding service.²⁸ The commercial bondsman pays the full amount of bail in exchange for a nonrefundable fee, typically 10% of the bail amount.²⁹ The allowance of a commercial bail system results in a host of issues, which will be discussed in further detail in Subsection C.³⁰ While more jurisdictions are moving away

21. PAUL BERNARD WICE, U.S. DEP'T. OF JUST., BAIL AND ITS REFORM: A NATIONAL SURVEY 10 (1973).

22. *Id.*

23. 7 LAWRENCE K. MARKS, ROBERT S. DEAN, MARK DWYER, ANTHONY GIRESE & JAMES A. YATES, NEW YORK PRETRIAL CRIMINAL PROCEDURE § 4:2 (2d ed.).

24. WICE, *supra* note 21, at 22.

25. *Id.*

26. *Id.* at 10.

27. *Id.* at 6, 13–14.

28. *Id.* at 10.

29. *Id.*

30. *See infra* Section II.C.

from the exclusive practice of cash bail,³¹ its use is still statutorily permitted in a majority of states.³²

The American bail system is based on an Anglo-Saxon foundation that dates back for centuries.³³ In medieval England, courts were created to resolve blood feuds between individual parties.³⁴ Because claims largely manifested between closely-related individuals to avoid war and further bloodshed, the courts were less concerned with the risk of harm that defendants could pose to the larger community.³⁵ As such, bail was imposed as an impediment to abscondence and manifested as an amount identical to the sentenced punishment.³⁶ If the defendant did flee or abscond, the bail amount would be granted to the plaintiff party and the matter would be resolved.³⁷ Since its adoption in the United States, few comprehensive changes have been made to the cash bail system.³⁸

B. The Inherent Flaws of Cash Bail

Across the nation, jurisdictions typically assess bail primarily on the number of charges and the degree of the offense alleged (i.e., misdemeanor versus felony) and not the overall risk of the accused to abscond or pose a threat to the community.³⁹ Increasingly, these excessively high bail amounts are actually detrimental to the pretrial success of having detainees appear in court.⁴⁰ Additionally, excessively high bail amounts are leaving presumptively innocent individuals detained and inducing an inflated number of guilty pleas.⁴¹ “Zombie predictions,” or bail assessments made without considering individual circumstances beyond the alleged charges, may render inadvertently stiffer

31. Jordan Gross, *Devil Take the Hindmost: Reform Considerations for States with a Constitutional Right to Bail*, 52 AKRON L. REV. 1043, 1065–68 (2018).

32. *Id.* at 1078–79.

33. TIMOTHY R. SCHNACKE, MICHAEL R. JONES & CLAIRE M. B. BROOKER, PRETRIAL JUST. INST., *THE HISTORY OF BAIL AND PRETRIAL RELEASE 1* (2010).

34. *Id.*

35. *Id.* at 2.

36. *Id.*

37. *Id.*

38. *See generally id.* Of note, the few most prevalent laws related to the cash bail system include the Judiciary Act of 1799, the Bail Reform Act of 1966, and the Bail Reform Act of 1984.

39. John Logan Koepke & David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 WASH. L. REV. 1725, 1775 (2018).

40. *Id.*

41. *Id.* at 1772.

punishments.⁴² For example, judges failing to consider whether individuals are single, working parents or a student may create a harsher imposition on these individuals due to their busier schedules.⁴³ By placing stiff bail considerations, without respect to an individual's own character and circumstance, the judicial system places a seemingly objective standard on all detainees, effectively marginalizing individuals who may truly achieve pretrial success.⁴⁴ While the alleged offenses or number of alleged charges may provide some indication of the level of risk that arrestees may have on their communities, imposing bail conditions for the level of alleged severity instead of a reasonable amount to guarantee appearance runs counter to our constitutional principles.⁴⁵

1. Disparate Effect on Poor People

The use of cash bail has a disproportionately harsher impact on indigent detainees compared to more affluent detainees. Over the past decade, it is estimated that the median bail amount for felony defendants is around \$12,000.⁴⁶ In 2015, the median annual pre-incarceration income for people in local jails unable to satisfy their monetary bail was \$15,598.⁴⁷ With the median bail amount representing such a high percentage of this large population's annual income, the ability to satisfy cash bail could require the expenditure of several months of income for these detainees.⁴⁸ In a practical sense, indigent detainees are stuck incarcerated for often minor offenses with "low" bail amounts despite not being considered a risk to society or threat to flee.⁴⁹ These bail amounts are relatively low in the sense that sums under \$1,000 likely

42. *Id.*

43. *Id.*

44. *Id.*

45. *Stack v. Boyle*, 342 U.S. 1, 8 (1951).

46. See PATRICK LIU, RYAN NUNN & JAY SHAMBAUGH, THE HAMILTON PROJECT, THE ECONOMICS OF BAIL AND PRETRIAL DETENTION 7 (2018), https://www.hamiltonproject.org/assets/files/BailFineReform_EA_121818_6PM.pdf [<https://perma.cc/P6BT-CPGD>]; BERNADETTE RABUY & DANIEL KOPF, PRISON POL'Y INST., DETAINING THE POOR: HOW MONEY BAIL PERPETUATES AN ENDLESS CYCLE OF POVERTY AND JAIL TIME 1–2 (2016), <https://www.prisonpolicy.org/reports/DetainingThePoor.pdf> [<https://perma.cc/6S8A-VAA4>].

47. BERNADETTE RABUY & DANIEL KOPF, PRISON POL'Y INST., PRISONS OF POVERTY: UNCOVERING THE PRE-INCARCERATION INCOMES OF THE IMPRISONED (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html> [<https://perma.cc/AL4P-7P49>].

48. RABUY & KOPF, *supra* note 46, at 2.

49. Nicholas P. Johnson, *Cash Rules Everything Around the Money Bail System: The Effect of Cash-Only Bail on Indigent Defendants in America's Money Bail System*, 36 BUFF. PUB. INT. L.J. 29, 30–31 (2017).

are not a severe imposition on many Americans; however, the same sums would place a high financial impediment on release for most detainees, as a majority of detainees are considered to be living below the poverty level.⁵⁰ In some cities across the country, like Baltimore, Maryland, detainees often remain incarcerated for failing to afford bail amounts as low as \$100.⁵¹ In the landmark case *Stack v. Boyle*, the Court held that “the function of bail is limited . . . [and] must be based upon standards relevant to the purpose of assuring the presence of that defendant.”⁵² This decision reaffirms the notion that bail is a mechanism for ensuring appearance for trial⁵³—and not a pretrial punishment for alleged offenses. Legal scholar Insha Rahman succinctly depicts the antithetical nature of cash bail as such:

The idea that money bail mitigates the risk of failure to appear has long been axiomatic within this country’s bail system. The logic is simple—a financial stake in a person’s case means they have an incentive to come back to court, otherwise they risk losing their or someone else’s money or property. If that were true, however, one would expect dramatically different rates of court appearance when people are released under financial conditions versus when they are released on their own recognizance or under non-financial conditions.⁵⁴

Nevertheless, courts routinely hold detainees solely based on an antiquated fear of abscondence.⁵⁵ In the case of low-income detainees, the incentive and resources to flee are much less than that of higher-income arrestees.⁵⁶ Due to the advent of modern technology and exponentially larger law enforcement departments, the fear of “low-cost” abscondence should be dramatically reduced.⁵⁷ With GPS technologies, more interconnected police forces, and improved tracking services, the ability to cross state lines or remain undetected

50. *Id.* at 30.

51. MELISSA NEAL, JUST. POL’Y INST., BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL 17–18 (2012), <http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf> [<https://perma.cc/7654-K9LV>].

52. *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

53. *Id.*

54. Insha Rahman, *Undoing the Bail Myth: Pretrial Reforms to End Mass Incarceration*, 46 *FORDHAM URB. L.J.* 845, 859 (2019).

55. Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 *YALE L.J.* 1344, 1352 (2014).

56. *Id.* at 1351–53.

57. *Id.* at 1352–53.

from police pursuit for a substantial amount of time is greatly diminished.⁵⁸ While abscondence is still possible, successfully fleeing would likely require far more financial resources than what is available to most detainees.⁵⁹ Detainees possessing greater financial resources may capitalize on their wealth to secure the tools to abscond, such as transportation, new phones, and access to new income in a different location.⁶⁰ For higher-income individuals capable of making bond, the likelihood of abscondence is far greater.⁶¹ This dichotomy represents one of the greatest shortcomings of the cash bail system: people with the greatest resources and risks to flee remain able to do so, whereas people with fewer resources are disproportionately disadvantaged based on their income.

The excessive use of cash bail perpetuates a recurring cycle of poverty among indigent detainees held on charges of poverty.⁶² Bail amounts are typically a result of bail schedules, which are legislatively or judicially predetermined amounts of financial consideration that may be required for certain offenses.⁶³ As referenced, in Maryland, bail amounts can be set as low as \$100.⁶⁴ However, these low bail amounts do not correlate to equitable access to release.⁶⁵ For crimes of poverty or low-level misdemeanor offenses, detainees may not be subject to a hefty bail amount yet still be unable to be released due to inability to pay their bail amount.⁶⁶ While not necessarily justified, persons committing crimes of poverty are likely doing so out of necessity and as a result of currently living in poverty. Furthermore, the financial impediments associated with bail potentially induce untrue confessions and lead to more frequent guilty pleas.⁶⁷ With more guilty pleas that are not truly indicative of guilty conduct, the effects of bail on low-income detainees are an increased rate of recidivism and lengthier sentences.⁶⁸ As such,

58. *Id.*

59. *Id.* at 1352.

60. *Id.* at 1361–62.

61. Muhammad B. Sardar, Note, *Give Me Liberty or Give Me . . . Alternatives?: Ending Cash Bail and Its Impact on Pretrial Incarceration*, 84 BROOK. L. REV. 1421, 1440–42 (2019).

62. RABUY & KOPF, *supra* note 46, at 4.

63. James A. Allen, Note, “Making Bail”: *Limiting the Use of Bail Schedules and Defining the Elusive Meaning of “Excessive” Bail*, 25 J.L. & POL’Y 637, 641 (2017).

64. NEAL, *supra* note 51, at 18.

65. *Id.*

66. Allen, *supra* note 63, at 651–52.

67. Sardar, *supra* note 61, at 1440.

68. *Id.* at 1435–38.

it follows that persons committing crimes of poverty will likely remain incarcerated for longer periods of time simply because of their inability to pay relatively high bail amounts.⁶⁹ Thus, the American bail system is inadvertently creating a judicially-imposed cycle of poverty.

Even without any conviction, arrest and detainment immediately impute an assumption of guilt for many individuals. As soon as a person is seated in the back seat of a police car, the social notions of guilt often manifest within communities.⁷⁰ Upon arrest, the detained individual begins what many legal scholars have coined “purgatory” as the criminal justice system is initiated.⁷¹ At this time, detainees typically undergo an arduous process in which they are stripped of their belongings, fingerprinted, photographed, and then returned to a large, open cell of other detained individuals.⁷² Upon the setting of any bail or bond, it can then be weeks or months before any further court proceedings.⁷³ Considering the financial restraints of many detainees, the imposition of bail is in consequence a sentencing of guilt, for their time spent in custody may exceed the eventual sentence if ever convicted.⁷⁴ As one legal scholar puts it, “[p]retrial detention sets the status quo at imprisonment.”⁷⁵

In addition to costs levied onto the detainee, bail places increased costs upon the family members and support systems of incarcerated individuals. As discussed earlier, bail can usually be a privately paid amount that is later returned for successfully appearing in court.⁷⁶ However, this amount paid is essentially suspended until the conclusion of an individual’s case.⁷⁷ If a percentage of the bail is paid to a commercial bondsman, then the fee is likely surrendered entirely.⁷⁸ As a result, indigent family members who gather to pay these amounts for bail are then left for weeks, months, or potentially years without those financial resources necessary for groceries, rent payments, and

69. See Allen, *supra* note 63, at 651–52.

70. DAVID RAY PAPKE, CONTAINMENT AND CONDEMNATION: LAW AND THE OPPRESSION OF THE URBAN POOR 25 (2019).

71. *Id.* at 33.

72. *Id.*

73. *Id.*

74. *Id.*

75. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2540 (2004).

76. See *supra* Section II.

77. See *supra* Section II.

78. See *supra* Section II.

other bills as the case continues to move through the criminal justice system.⁷⁹ Similarly, if a detained individual is the primary income generator for a low-income family or household, their detention imposes another financial hardship.⁸⁰ In this scenario, the time an indigent detainee remains incarcerated due to an inability to post bail represents unearned wages, lost employment, absence from education, and other departures from means that could later place the detained individual in a better position financially to post bail—and likely avoid committing the initial crime of poverty.⁸¹

2. Increased Cost to Taxpayers

Recognizing that there undoubtedly remains a need to detain dangerous individuals following arrest, the costs to the American people are still considerable. In 2011, U.S. Attorney General Eric Holder stated that housing the nearly two-thirds of the incarcerated population awaiting trial costed approximately nine billion dollars per year⁸²—accounting for close to 10% of the Department of Justice’s annual budget.⁸³ Thus, taxpayers are collectively paying billions of dollars each year for pretrial incarceration despite the practice not always leading to the most efficient or effective results for avoiding pretrial misconduct. Many scholars argue that municipalities should reallocate funds used for housing detainees towards alternative pretrial methods such as remote monitoring, displaced supervision, and house arrest.⁸⁴ Scholars have demonstrated that active supervision of arrestees exponentially decreases costs compared to pretrial detention.⁸⁵ Studies on the use of electronic monitoring devices estimated a daily cost reduction of one hundred dollars per person compared to incarceration.⁸⁶ Others have suggested that cellphone and social media use can be a much more cost efficient means of tracking detainees

79. NEAL, *supra* note 51, at 13.

80. *Id.* at 14.

81. *Id.*

82. Eric Holder, Att’y Gen., U.S. Dep’t of Just., Address at the National Symposium on Pretrial Justice (June 1, 2011) (transcript available at <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-symposium-pretrial-justice> [<https://perma.cc/KJN9-FJQT>]).

83. Aimee Picchi, *The High Price of Incarceration in America*, CBS NEWS (May 8, 2014, 5:53 AM), <http://www.cbsnews.com/news/the-high-price-of-americas-incarceration-80-billion/> [<https://perma.cc/U3WG-GEZL>].

84. See Gross, *supra* note 31, at 1103; Johnson, *supra* note 49, at 68–69; Sardar, *supra* note 61, at 1452–53; Allen, *supra* note 63, at 668–69.

85. Allen, *supra* note 63, at 658–59.

86. Johnson, *supra* note 49, at 90–91.

pretrial.⁸⁷ With some of these methods already in use by courts, specifically electronic monitoring devices, expansion of their use could be more readily available and more reliable. Additionally, they may serve as a more efficient and less invasive means of ensuring pretrial success. Moreover, a departure from incarceration towards modern supervision methods may reduce overall costs on taxpayers, allow arrestees to continue earning their own incomes, and potentially avoid the judicially imposed cycle of poverty.

3. No Statistically Significant Effect on Pretrial Success

The cash bail system has not always demonstrated success in ensuring a defendant's appearance for trial or reducing the risk of abscondence. From 1990 to 2004, between 21% and 24% of felony defendants released prior to their court date failed to appear.⁸⁸ When considering the other goals associated with setting bail, like reducing the potential to reoffend or pose further risk to the community, the percentage of "pretrial misconduct" increased to 33%.⁸⁹ Included in this figure is failing to appear, as well as being arrested for any crime, being arrested for a felony, or completely absconding, all of which are considered the primary dimensions of pretrial misconduct.⁹⁰ Among those whose release did result in pretrial misconduct, 83% had a prior arrest and 75% had a prior conviction.⁹¹ These figures underscore the importance of properly assessing risk in the determination of bail and not giving an arbitrary assignment of cash bail. In some states, courts have still found success when not relying solely on the imposition of cash bail for release.⁹² The Pretrial Services Agency for the District of Columbia reported a 91% court appearance rate in 2016, and this measure exceeded the 88% figure in the other four reported years (2014–2018).⁹³ Following the implementation of the Public Safety Assessment in New Jersey, courts reported much higher pretrial success

87. Lydia D. Johnson, *The Politics of the Bail System: What's the Price for Freedom?*, 17 SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. 171, 216 (2015).

88. THOMAS H. COHEN & BRIAN A. REAVES, U.S. DEP'T OF JUST., PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 8 (2007).

89. *Id.* at 7.

90. *Id.*

91. *Id.* at 5–6.

92. Rahman, *supra* note 54, at 859.

93. PRETRIAL SERVS. AGENCY FOR D.C., CONGRESSIONAL BUDGET JUSTIFICATION AND PERFORMANCE BUDGET REQUEST: FISCAL YEAR 2020, at 25 (2019), <https://www.csosa.gov/wp-content/uploads/bsk-pdf-manager/2019/03/PSA-FY-2020-CBJ-Performance-Budget-Request-3-18-19.pdf> [<https://perma.cc/5NXA-QF2D>].

vis-à-vis an 89% court appearance rate in 2017.⁹⁴ The specific measures employed by New Jersey and Washington D.C. are discussed further in Section III.⁹⁵ In some jurisdictions still relying largely on the use of cash bail, like New York, they have nevertheless found success when releasing defendants without monetary conditions.⁹⁶ In 2017, New York City reported that 86% of defendants released on their recognizance appeared in court for their trial.⁹⁷ Changes in legislative policy, however, have affected the state of cash bail in New York State. More discussion of the bail system in New York City and New York State is provided in Section V.⁹⁸

C. Commercial Bond

1. Background

Commercial bail is the practice in which private surety providers secure a defendant's funds necessary to make bail in exchange for a non-refundable fee.⁹⁹ The allowance of commercial bail may provide a false sense of relief for indigent defendants. While they may not be able to independently afford bail to be released, detainees may seek the services of a commercial bondsmen or bonding company to secure payment of the bail. However, this practice leads the commercial bail industry to not only serve as a second assessor of risk but also capitalize off innocent defendants, regardless of their trial outcome.¹⁰⁰ When detainees are granted bond with the condition of money bail, without the means to post this bail, their most available recourse is a commercial bondsman. Despite detainees being eligible to be released, the bonding company can also determine which detainees will be eligible for their services and assess their own risk standard.¹⁰¹ This determination places another imposition upon the release of those arrested. Additionally, bonding companies typically assess a

94. N.J. JUDICIARY, 2018 REPORT TO THE GOVERNOR AND THE LEGISLATURE 14 (2019), <https://njcourts.gov/courts/assets/criminal/2018cjrannual.pdf?c=dSE> [<https://perma.cc/MGT5-H7TQ>].

95. *See infra* Section III.

96. Rahman, *supra* note 54, at 859.

97. AUBREY FOX & STEPHEN KOPPEL, N.Y.C. CRIM. JUST. AGENCY, PRETRIAL RELEASE WITHOUT MONEY: NEW YORK CITY, 1987–2018, at 9 (2019), https://issuu.com/csdesignworks/docs/cja_rwm_final/2 [<https://perma.cc/BD47-N99Y>].

98. *See infra* Section V.D.

99. Gross, *supra* note 31, at 1070–71.

100. *Id.* at 1072.

101. *Id.*

fee of 10% of the full bail amount when rendering their services.¹⁰² This fee is not returned to the detainee regardless of their pretrial success.¹⁰³ For detainees able to pay their own bail amount, the bail amount is typically returned to them for appearing in court.¹⁰⁴

2. Status of Implementation

As of 2018, Wisconsin is one of four states in the country to have outlawed commercial bail.¹⁰⁵ Despite commercial bail being outlawed since 1979, the legislature has advanced few developments to the cash bail system, but it has revisited the notion of reviving the commercial bail system. Over the last two decades, state legislators and interest groups have continuously mounted attempts to restore the practice within the state.¹⁰⁶ Thus, the presumption that commercial bail will continuously be disallowed is not a foregone conclusion. Opposition from judges and local law enforcement officials has successfully stymied these movements for the time being,¹⁰⁷ but few affirmative changes have taken place to further distance the state from the practice of imposing any financial considerations related to release.¹⁰⁸ However, the state is not devoid of any progress. In place of complete cash bail reform, Wisconsin has undertaken steps to implement more evidence-based decision making by judges.¹⁰⁹ Specifically, the court system began evaluating and piloting the use

102. *Id.* at 1075.

103. *Id.* at 1070–71.

104. *Id.*

105. WIS. STAT. § 969.12 (2019–2020); Gross, *supra* note 31, at 1071.

106. See Sheila Terman Cohen, *Bail Bond Industry Fights Back Against Moves To Limit Or End Cash Bail*, WISCONSIN WATCH, (Jan. 20, 2019), <https://www.wisconsinwatch.org/2019/01/bail-bond-industry-fights-back-against-moves-to-limit-or-end-cash-bail/> [<https://perma.cc/2GBU-BJ3L>]; Jason Stein & Karen Herzog, *Scott Walker Issues 57 Vetoes, Signs \$68 Billion Wisconsin Budget*, MILWAUKEE J. SENTINEL, (June 30, 2013), <http://archive.jsonline.com/news/statepolitics/scott-walker-makes-57-vetoes-signs-68-billion-wisconsin-budget-b9944038z1-213757881.html> [<https://perma.cc/VMU8-6UQQ>]; Bruce Murphy, *Bail Bond Bill Will Create Debtor's Prisons*, URB. MILWAUKEE, (May 21, 2013, 12:45 PM), <https://urbanmilwaukee.com/2013/05/21/murphys-law-bail-bond-bill-will-create-debtors-prisons/> [<https://perma.cc/C84U-388L>].

107. COLIN DOYLE, CHIRAAG BAINS & BROOK HOPKINS, CRIM. JUST. POL'Y PROGRAM HARV. L. SCH., *BAIL REFORM: A GUIDE FOR STATE AND LOCAL POLICYMAKERS* 73 (2019), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=9a804d1d-f9be-e0f0-b7cd-cf487ec70339&forceDialog=0> [<https://perma.cc/JUQ7-E7K7>].

108. *Id.*

109. *Id.* at 74.

of drug courts and diversion programs.¹¹⁰ The Assess, Inform, and Measure Program was instituted in 2006 to track the evidence-based factors related to crime recidivism and effectuate change in sentencing.¹¹¹ While these programs and practices have come with their own successes for the convicted, they fail to remedy the liberty impositions on those detained before they are found guilty.

III. HISTORICAL RESPONSE TO PANDEMICS IN PRISONS

While novel in that its rapid transmission shuttered many of the world's largest economies for months, COVID-19 is not the first instance of widespread infection permeating throughout American incarceration facilities. In 1918, prisons served as a breeding ground for the influenza pandemic.¹¹² Several medical studies identified outbreaks within the San Quentin State Prison in San Quentin, California as an early hub for the viral infection's growth and transmission across the United States.¹¹³ Less than twenty years prior, in 1890, comparable influenza outbreaks were discovered in correctional facilities.¹¹⁴ Similarly, in the late nineteenth century, the detention of immigrants moving into New York City led to large outbreaks of typhus, which later resulted in quarantines and a high death rate for the newly immigrated population.¹¹⁵ In addition to the spread of typhus, poor jail infrastructures led to the spread of cholera throughout New York City and other areas where immigrants were entering and being detained.¹¹⁶ Tuberculosis is another infectious disease that has continuously wreaked havoc in American correctional facilities.¹¹⁷ Coupled with a growing HIV/AIDS epidemic, tuberculosis affected an immense number of incarcerated individuals from the 1970s into the 1990s.¹¹⁸

110. SUPREME COURT OF WISCONSIN, PLAN. AND POL'Y ADVISORY COMM., EFFECTIVE JUSTICE STRATEGIES SUBCOMMITTEE, PHASE II: PROGRESS AND ACCOMPLISHMENTS 5 (2013), <https://www.wicourts.gov/courts/committees/docs/finalreport.pdf> [<https://perma.cc/8MVJ-QGCF>].

111. *Id.* at 6.

112. Strassle & Berkman, *supra* note 16.

113. Thomas James Ronald Finnie, Ian M. Hall & Steve Leach, *Behaviour and Control of Influenza in Institutions and Small Societies*, 105 J. ROYAL SOC'Y MED. 66, 67–70 (2012); Niyi Awofeso, *Prisons Show Prophylaxis for Close Contacts May Indeed Help in Next Flu Pandemic*, 329 BRIT. MED. J. 173, 173 (2004).

114. Finnie, Hall & Leach, *supra* note 113, at 68.

115. Felice Batlan, *Law in the Time of Cholera: Disease, State Power, and Quarantines Past and Future*, 80 TEMP. L. REV. 53, 72–73 (2007).

116. *Id.* at 74.

117. Lawrence O. Gostin, *The Resurgent Tuberculosis Epidemic in The Era of AIDS: Reflections on Public Health, Law, And Society*, 54 MD. L. REV. 1, 51 (1995).

118. *Id.*

Between 1976 and 1978, over 90% of inmates in New York City infected with tuberculosis were also infected with HIV or AIDS.¹¹⁹ Despite a relatively large number of infections in the 1980s, cases of tuberculosis in correctional facilities rose to almost 1,200 in 1993; this marked a 400% increase from the 1980s.¹²⁰

From a practical standpoint, transmission of viral infections and deadly diseases within prisons is unsurprising.¹²¹ Among other inadequacies to curb transmission, correctional facilities place inmates in close confinement with one another, typically have scant medical resources, and are often comprised of already more susceptible and immunocompromised individuals.¹²² Additionally, there is a recent trend in the United States of a larger proportion of elderly individuals becoming incarcerated.¹²³ The CDC has stated that individuals over the age of sixty-five are more susceptible to the more harmful consequences of viruses like COVID-19 and other viral infections.¹²⁴ There are a variety of reasons why correctional facilities and the incarcerated population doubly presents a susceptible model for rapid infection, it is clear that viruses like COVID-19 could easily infect a large majority of a facility's population within days.¹²⁵

Moreover, containing the spread of a disease or virus within correctional facilities is typically not a government's main priority when tasked with curbing a large epidemic or pandemic level infection. In many events, pandemic level infection within correctional facilities is often discovered far too late or not at all.¹²⁶ Despite a readily available surplus of vaccines for the 2009 H1N1 Influenza virus, which manifested into its own pandemic, many facilities never received the doses to vaccinate their detainees and protect them from contracting the virus.¹²⁷ During the early months of COVID-19, over half of the largest clusters of cases in the United States emerged within jails or

119. *Id.*

120. *Id.*

121. Strassle & Berkman, *supra* note 16.

122. *Id.*

123. *Id.*

124. *COVID-19 Information for Specific Groups of People, supra* note 8.

125. *See How COVID-19 Spreads, supra* note 9.

126. Lee Kovarsky, *Pandemics, Risks, and Remedies*, 106 VA. L. REV. ONLINE 71, 73–75 (2020).

127. *Severe Influenza Among Children and Young Adults with Neurologic and Neurodevelopmental Conditions*, 60 MORBIDITY AND MORTALITY WKLY. REP. 1737, nos. 51 & 52, (Ctrs. for Disease Control and Prevention, Atlanta, GA) Jan. 6, 2012, at 1737–39.

prisons.¹²⁸ In some facilities, over 80% of detainees tested positive.¹²⁹ However, these figures represent only what is known from well-reported and regularly tested facilities.¹³⁰ An early lack of testing resources, coupled with low priority diversion for correctional facility use, has led to a severe result of undertesting within detention centers.¹³¹

In 2021, access to vaccinations has actually improved for incarcerated populations. In fact, in most states, the vaccination rate for detainees mirrors or exceeds the national vaccination rate.¹³² However, multiple factors leave this population still vulnerable to transmission. Notably, the vaccination rate of facility staff members is lower than the vaccination rate of the incarcerated population in an overwhelming majority of states.¹³³ In Alabama, at the end of 2021, the vaccination rate of staff members was 23%, compared to 66% of the incarcerated population. A 43% gap persists in Kansas, where 48% of the staff are vaccinated compared to 91% of incarcerated persons.¹³⁴ Considering the constant close contact between incarcerated persons and unvaccinated staff members, transmission will still occur among vaccinated detainees and continue to present serious health risks.

IV. INADEQUACY OF CURRENT REMEDIES

Across the criminal justice system, there are prosecutors, judges, and defense attorneys who can all agree to the deficiencies of the cash bail system in the United States.¹³⁵ Most notably, the issues of systemic racism within the criminal justice system are multifaceted and often well-articulated. The extent of racial biases in the criminal justice system exceeds the scope of this Comment. However, it is prudent to identify and briefly discuss some of the barriers to an equitable bail system.

128. *Coronavirus in the U.S.*, *supra* note 10.

129. Kovarsky, *supra* note 126, at 73.

130. *Id.*

131. Peter Eisler, Linda So, Ned Parker & Brad Heath, *Across U.S., COVID-19 Takes a Hidden Toll Behind Bars*, REUTERS (May 18, 2020, 11:00 AM), <https://www.reuters.com/investigates/special-report/health-coronavirus-usa-jails/> [<https://perma.cc/5MDG-JY5K>].

132. *Covid Behind Bars Data Project*, UCLA L., <https://uclacovidbehindbars.org> [<https://perma.cc/YWZ6-QJND>]; Josh Holder, *Tracking Coronavirus Vaccinations Around the World*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/world/covid-vaccinations-tracker.html> [<https://perma.cc/FS5Q-B2V8>].

133. *Covid Behind Bars Data Project*, *supra* note 132.

134. *Id.*

135. Sardar, *supra* note 61, at 1434.

Bail schedules have eliminated the positive use of judicial discretion in setting bail.¹³⁶ Instead of individualizing the assessment of release, judges and prosecutors instead defer to the set amounts typically codified by the state legislature.¹³⁷ Bail schedules—once a method of employing discretion to determine the level of risk abscondence—have transformed the discretionary method into a systematic one, requiring set financial requirements for release regardless of the threat of fleeing.¹³⁸ Judges are increasingly pressured to use or blindly adhere to bail schedules.¹³⁹ This occurs, in part, due to the steadfast need for judges to be “tough on crime”—a common election priority for judicial candidates to earn or retain their place on the bench.¹⁴⁰ Without said priority, judges are perceived as weak and ineffective at protecting their communities.¹⁴¹ Thus, bail schedules reinforce an important disconnect between effectively prioritizing the safety of a community and the liberties of a detainee.

Even in other parts of the country where bail schedules are not necessarily mandated, issues of systemic racism have permeated the independent tool of prosecutorial discretion.¹⁴² Charging decisions by prosecutors in a number of jurisdictions reveal that African-American and Latino individuals are more likely to be detained pretrial than White Americans.¹⁴³ In state prisons across the country, Black Americans are incarcerated at almost five times the rate of White Americans.¹⁴⁴ Despite comprising only 6% of the state’s population, Black Wisconsinites represent 42% of the state’s prison population.¹⁴⁵ Commentators point to “pervasive racial bias” to explain the state’s staggering imprisonment of Black Americans.¹⁴⁶ It would be wholly irresponsible and improper to label prosecutors as willfully misusing their discretion; instead, the

136. Johnson, *supra* note 49, at 51–53.

137. *Id.*

138. Sardar, *supra* note 61, at 1434.

139. Allen, *supra* note 63 at 653–56.

140. Wendy R. Calaway & Jennifer M. Kinsley, *Rethinking Bail Reform*, 52 U. RICH. L. REV. 795, 804 (2018).

141. *Id.*

142. Sardar, *supra* note 61, at 1438.

143. *Id.*

144. ASHLEY NELLIS, THE SENT’G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 4 (2021), <https://s3.documentcloud.org/documents/21084578/the-color-of-justice-racial-and-ethnic-disparity-in-state-prisons.pdf> [<https://perma.cc/3EEG-FXRT>].

145. *Id.* at 20.

146. Claire Amari, *Wisconsin Imprisons 1 in 36 Black Adults. No State Has a Higher Rate.*, WIS. PUB. RADIO (Oct. 16, 2021, 7:00 AM) <https://www.wpr.org/wisconsin-imprisons-1-36-black-adults-no-state-has-higher-rate> [<https://perma.cc/7SKB-7GCQ>].

wide latitude generally granted to prosecutors provides great variance across the nation.¹⁴⁷ For U.S. Attorneys, charging involves an “individualized assessment,” which does not need to conform to what the arresting officer has determined but what may further the purposes of federal law.¹⁴⁸ In plea bargaining, disparities in deals are attributed to the inexperience of prosecutorial staff, regional differences, and the frequently harsher treatment of Black, Latino, and immigrant detainees.¹⁴⁹ This is just a glimpse into some of the speculated inconsistencies and their underlying causes. Given the broad autonomy afforded in prosecutorial discretion, there should be more objective standards to assess the risk of the individual and not merely the alleged charge.

A detainee’s initial contact with the criminal justice system is perhaps the most crucial one, occurring before any plea deal or judicial sentencing. Police interaction is one of the most important components of the criminal justice system and, in some form, has precipitated the mass incarceration problem plaguing America. Flawed policing practices include, among others, stop and frisk detention,¹⁵⁰ broken windows policing,¹⁵¹ and zero tolerance policing.¹⁵² In many respects, these policing tactics have been widely criticized or condemned for allegedly racist underpinnings.¹⁵³ In *Floyd v. City of New York*, Judge Shira Scheindlin held that the New York City Police Department’s stop and frisk program ran afoul of the Equal Protection Clause, observing that “officers are directed, sometimes expressly, to target certain racially defined groups for stops.”¹⁵⁴ Beyond just direct policing activity, requests for law enforcement intervention disproportionately target Black Americans.¹⁵⁵ Here

147. Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1089–90 (2017).

148. *Id.* at 1090 n.99 (citing U.S. Dep’t of Just., U.S. Att’ys’ Manual § 9-27.300 (1997)).

149. Bibas, *supra* note 75, at 2475.

150. Darius Charney, Jesus Gonzalez, David Kennedy, Noel Leader & Robert Perry, *Suspect Fits Description: Responses to Racial Profiling in New York City*, 14 CUNY L. REV. 57, 71–72 (2010).

151. Mike Rowan, *The Illusion of Broken Windows Theory: An Ethnographic Engagement with the Theory That Was Not There*, 9 WM. & MARY POL’Y REV. 1, 1 (2017).

152. Udi Ofer, *Criminalizing the Classroom: The Rise of Aggressive Policing and Zero Tolerance Discipline in New York City Public Schools*, 56 N.Y. L. SCH. L. REV. 1373, 1401–03 (2012).

153. Renata M. O’Donnell, Note, *Challenging Racist Predictive Policing Algorithms Under the Equal Protection Clause*, 94 N.Y.U. L. REV. 544, 544 (2019).

154. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 660 (S.D.N.Y. 2013).

155. Kevin E. Jason, *Dismantling the Pillars of White Supremacy: Obstacles in Eliminating Disparities and Achieving Racial Justice*, 23 CUNY L. REV. 139, 144 (2020); Moriah Balingit, *Racial Disparities in School Discipline Are Growing, Federal Data Show*, WASH. POST (Apr. 24, 2018), <https://www.washingtonpost.com/local/education/racial-disparities-in-school-discipline-are-growing->

in Milwaukee County, county officials concede that the local governments have exasperated mass incarceration by allocating increasingly more funds towards policing instead of other resources which may also reduce crime.¹⁵⁶

Law enforcement officers, prosecutors, and judges represent three vitally important components of the criminal justice system. In some form, all three are restrained from propagating a flawed bail system. Collectively, these restraints perpetually oppress a vulnerable class of detainees.

V. THE PUBLIC SAFETY ASSESSMENT & CURRENT PROGRESS

A. Abolishment of Cash Bail in Illinois

On February 22, 2021, Illinois became the first state in the United States to wholly abolish the use of cash bail.¹⁵⁷ The cash bail provision is a part of the Illinois Pretrial Fairness Act, which arises out of a larger effort to reform law enforcement and pretrial practices within the state and makes changes that, among other things, require more detailed reporting in handling deaths in custody, mandate body camera use for law enforcement officers, and address issues within police unionization.¹⁵⁸ The legislation requires the use of cash bail to cease by 2023.¹⁵⁹ Furthermore, the law would instead prioritize increasing resources such as pretrial officers to efficiently reduce the

federal-data-shows/2018/04/24/67b5d2b8-47e4-11e8-827e-190efaf1f1ee_story.html [https://perma.cc/999B-DD3J]; see also Brandon Griggs, *Living While Black*, CNN (Dec. 28, 2018, 8:37 AM), <https://www.cnn.com/2018/12/20/us/living-while-black-police-calls-trnd/index.html> [https://perma.cc/S3L5-PGZC]; Erik Ortiz, *#WhileBlack: Calling Police on Black People Become Teachable Moments for Law Enforcement*, NBC NEWS (July 6, 2018, 2:23 PM), <https://www.nbcnews.com/news/nbcblk/whileblack-calling-police-black-people-becomes-teachable-moments-law-enforcement-n889276> [https://perma.cc/8ZXW-TEA8].

156. Amari, *supra* note 146.

157. Cheryl Corley, *Illinois Becomes 1st State to Eliminate Cash Bail*, NPR (Feb. 22, 2021, 9:35 PM), <https://www.npr.org/2021/02/22/970378490/illinois-becomes-first-state-to-eliminate-cash-bail> [https://perma.cc/J6EJ-A5S5].

158. Derek Cantu, *Illinois Lawmakers Vote to End Cash Bail*, NPR ILL., (Jan. 13, 2021, 6:28 PM), <https://www.nprillinois.org/post/illinois-lawmakers-vote-end-cash-bail-4#stream/0> [https://perma.cc/8XFQ-NHB4]; Dan Petrella, *Illinois General Assembly Approves Sweeping Criminal Justice Overhaul that Would End Cash Bail, Require Cops to Wear Body Cameras*, CHI. TRIB., (Jan. 13, 2021), <https://www.chicagotribune.com/politics/ct-illinois-legislature-criminal-justice-20210113-rr6bt2x6jndxff5tnwhz6qhay-story.html> [https://perma.cc/SL6W-46YB].

159. Marcia M. Meis, *Illinois Courts Prepare for the Pretrial Fairness Act*, ILL. CTS. (Mar. 30, 2021), <https://www.illinoiscourts.gov/News/935/Illinois-Courts-Prepare-for-the-Pretrial-Fairness-Act/news-detail/> [https://perma.cc/VR6V-2HDR].

incarcerated population.¹⁶⁰ Importantly, the law's departure from cash bail does not equate to a judge's inability to hold potentially dangerous individuals. For certain offenses such as violent felonies and domestic violence crimes, judges may still hold individuals on remand.¹⁶¹ While time will truly determine the success of this legislation, Illinois's actions undoubtedly create a new opening to sensible bail reform across the country. Because the state is home to the largest city in the Midwest and one of the highest crime rates in the country,¹⁶² lawmakers across the United States will certainly seek to understand where the state succeeds and fails regarding the end of cash bail.

B. Model Reform

Washington D.C. has also enacted and implemented innovative reforms to its systems of pretrial release. While Illinois has become the first state to completely abolish the use of cash bail, Washington D.C. has spearheaded the move towards more judicial discretion in determining other alternatives for pretrial release.¹⁶³ What began as the D.C. Bail Project in 1963, the Pretrial Services Agency for the District of Columbia operates as a judicial mechanism to expedite the information gathering necessary to make release decisions and carries out the release process for defendants within the District.¹⁶⁴ Here, law enforcement personnel work with detainees and assess the detainees' risk of pretrial misconduct.¹⁶⁵ By exploring the individual facts and circumstances of these cases, the judicial system is better equipped to impose bail when necessary and confidently release individuals back into their communities as they await their next court hearing. The adoption of the D.C. Bail Reform Act, which passed in 1992, allowed the jurisdiction to be seen as an innovator in the

160. Jason Asenso, *Pretrial Fairness Act Would Make Illinois the First State to Abolish Cash Bail*, INJUSTICE WATCH, (Nov. 12, 2020), <https://www.injusticewatch.org/news/2020/pretrial-fairness-act-bill-end-cash-bail-illinois/> [<https://perma.cc/KQ6R-6HZD>].

161. *Id.*

162. Samuel Stebbins, *The Midwest Is Home to Many of America's Most Dangerous Cities*, USA TODAY (Oct. 26, 2019, 10:30 AM), <https://www.usatoday.com/story/money/2019/10/26/crime-rate-higher-us-dangerous-cities/40406541/> [<https://perma.cc/A4WR-3NMC>]; *Midwestern United States*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/midwest-states> [<https://perma.cc/E6NR-UHD5>].

163. Rahman, *supra* note 54, at 857.

164. *PSA's History and Role in the Criminal Justice System*, PRETRIAL SERVS. AGENCY FOR D.C., <https://www.psa.gov/?q=about/role> [<https://perma.cc/A3W6-3PZK>].

165. *Id.*

nation, as it effectively disallowed the use of cash bail.¹⁶⁶ In 2017, 94% of defendants release was not contingent on any financial considerations.¹⁶⁷ Yet, 88% of defendants successfully appeared to all court dates.¹⁶⁸ Additionally, 98% of released defendants were not arrested for a violent crime prior to their trial.¹⁶⁹ The District touts the following progressive reforms for effectuating change: least-restrictive forms of bond; “cite and release,” which renders citations for low-risk misdemeanors as opposed to incarceration; efficient assignment of public counsel; twenty-four hour charging decisions; and a pretrial services agency that supervises and expedites the release process.¹⁷⁰ As a whole, these practices and strategies provide for less invasive detention and fewer incarcerations of individuals posing little or no risk of pretrial misconduct.

Despite the jurisdiction’s high crime rates, Washington D.C. officials remain confident in its bail reform efforts. Senior Judge on the D.C. Superior Court, Truman Morrison, defends the bail reform as a necessary process to properly safeguard the community.¹⁷¹ Specifically, Judge Morrison recognizes cash bail as a tax on the poor and not an effective preventor of recidivism.¹⁷² For many of the crimes that are continuing to be committed, most of them are bail eligible in other jurisdictions.¹⁷³ Thus, Morrison counters that the absence of bail does not further incentivize the commission of crimes.¹⁷⁴ In fact, many reports have failed to link bail reform efforts with increases in crime.¹⁷⁵ For

166. Clifford T. Keenan, *We Need More Bail Form*, PRETRIAL SERVS. AGENCY FOR D.C., <https://www.psa.gov/?q=node/390> [<https://perma.cc/JM56-4GEW>].

167. Beatrix Lockwood & Annaliese Griffin, *The State of Bail Reform*, THE MARSHALL PROJECT (Oct. 30, 2020), <https://www.themarshallproject.org/2020/10/30/the-state-of-bail-reform> [<https://perma.cc/P978-MRTX>].

168. *Id.*

169. PRETRIAL SERVS. AGENCY FOR D.C., RELEASE RATES FOR PRETRIAL DEFENDANTS WITHIN WASHINGTON, DC (2017), <https://www.psa.gov/sites/default/files/2016%20Release%20Rates%20for%20DC%20Pretrial%20Defendants.pdf> [<https://perma.cc/ZV8K-C339>]; *Performance Measures*, PRETRIAL SERVS. AGENCY FOR D.C., https://www.psa.gov/?q=data/performance_measures [<https://perma.cc/87JA-HZ3N>].

170. Keenan, *supra* note 166.

171. Interview by Melissa Block with Truman Morrison, Senior Judge, D.C. Sup. Ct. (Sept. 2, 2018).

172. *Id.*

173. *See id.*

174. *Id.*

175. Holmes Lybrand & Tara Subramaniam, *Fact-Checking Claims Bail Reform Is Driving Increase in Violent Crime*, CNN (July 7, 2021, 4:10 PM),

Washington D.C., bail reform efforts may have not achieved as much of the crime reduction it anticipated, but there is no indication it has increased crime, and it has not detained presumptively innocent individuals simply based on their inability to post bail.

C. Public Safety Assessment

1. Overview

Over the last several decades, private organizations and policy groups have conducted research and recommended mechanisms better equipped to balance respecting the liberty interest of detainees and the safety aspect of reducing pretrial risks.¹⁷⁶ One of the leading, and more widely implemented policy directives, is the Public Safety Assessment (PSA), which considers nine factors in determining the potential chance of pretrial success.¹⁷⁷ More specifically, the assessment uses a combination of these factors to determine the likelihood that a detainee will fail to appear for their court date, be rearrested for any criminal offense, or be arrested for a violent offense.¹⁷⁸ The PSA algorithm provides jurisdictions with a more judicious and less disparately impactful method of releasing detainees that is supported by nationwide data.¹⁷⁹ States such as Arizona, Alaska, California, and Kentucky have adopted the assessment.¹⁸⁰ New Jersey was one of the first to adopt it and was arguably the most successful state-wide jurisdiction to implement the PSA.¹⁸¹

<https://www.cnn.com/2021/07/07/politics/bail-reform-violent-crime-fact-check/index.html>
[<https://perma.cc/WA49-MXQD>].

176. See About the Public Safety Assessment: How the PSA Works, ADVANCING PRETRIAL POL'Y & RSCH., <https://advancingpretrial.org/psa/factors/> [<https://perma.cc/6LQF-CHNU>]; *Our Approach*, THE BAIL PROJECT, <https://bailproject.org/our-work/> [<https://perma.cc/PVJ9-CG7H>]; NAT'L JUV. DEF. CTR., A RIGHT TO LIBERTY: REFORMING JUVENILE MONEY BAIL 5 (2019), https://njdc.info/wp-content/uploads/2019/NJDC_Right_to_Liberty.pdf [<https://perma.cc/YFL3-8W64>].

177. *Public Safety Assessment: How It Works*, ADVANCING PRETRIAL POL'Y & RSCH. (May 2020), <https://advancingpretrial.org/psa/factors/> [<https://perma.cc/3D6B-DLUG>].

178. *Id.*

179. William M. Carlucci, Comment, *Death of A Bail Bondsman: The Implementation and Successes of Nonmonetary, Risk-Based Bail Systems*, 69 EMORY L.J. 1205, 1221–22, 1228 (2020).

180. *Id.* at 1228.

181. See N.J. STAT. ANN. § 2A:162-17 (West 2017).

2. New Jersey

In New Jersey, the manner in which the PSA is implemented requires judges to essentially exhaust all potential considerations before imposing a monetary bail on detainees.¹⁸² As a result, New Jersey has swiftly moved away from the use of money bail.¹⁸³ Following the state's implementation of the PSA, money bail was imposed on only forty-four detainees in 2017.¹⁸⁴ While it is not clear the number of times money bail was imposed on pretrial detainees before the implementation of the PSA, the shift away from money bail has led to reductions in at least several thousands of cases.¹⁸⁵ Prior to implementing the PSA, in 2013 alone, over 5,000 pretrial detainees remained incarcerated simply due to an inability to satisfy their money bail.¹⁸⁶ As a whole, this transition away from money bail has led to a 94% release rate for pretrial detainees and reduced the overall New Jersey jail population by 20%.¹⁸⁷ These legislative changes have been lauded by judges in New Jersey as they reaffirmed the important presumption of innocence until proven guilty.¹⁸⁸ Given the state's geographical proximity and connection to states such as New York and Pennsylvania, the pretrial efforts in New Jersey may lead to successful implementation across the region. Bail reform efforts have occurred in New York, but they have since been rolled back; this is discussed later in this section.¹⁸⁹

3. Milwaukee & Dane County

Responding to the relative inaction by the state legislature, individual Wisconsin counties have undertaken some of these cash bail reforms to mitigate the impact of financial bail on indigent arrestees. In 2016, Milwaukee County implemented the PSA to better determine the potential risk among arrestees,

182. Carlucci, *supra* note 179, at 1236–37; N.J. STAT. ANN. § 2A:162-17 (West 2017).

183. DOYLE, *supra* note 107, at 45.

184. *Id.* at 49.

185. See MARIE VANNOSTRAND, LUMINOSITY, NEW JERSEY JAIL POPULATION ANALYSIS 11–12 (2013).

186. *Id.*

187. DOYLE, *supra* note 107, at 49.

188. See Carlucci, *supra* note 179, at 1246; David J. Reimel III, Comment, *Algorithms & Instruments: The Effective Elimination of New Jersey's Cash Bail System and Its Replacement*, 124 PENN ST. L. REV. 193, 193–95 (2019).

189. See *infra* Section V.D.

and Dane County followed suit in 2017.¹⁹⁰ In Milwaukee, the progress associated with implementing the PSA has been lauded by judges and prosecutors for allowing low-risk arrestees to return to their communities.¹⁹¹ Over the last several months, the progress made by Dane County proved to be critical in lowering the transmission of the coronavirus within its facilities.¹⁹² Here, the reforms taken in counties like Dane County and Milwaukee County yield multiple positive advances; the reduction in the jail population led to fewer positive cases in their facilities and more low-risk individuals safely returning to their homes and contributing to their households, workplaces, and local economies.¹⁹³

Local efforts to reduce the disproportionate effect of bail are materializing in the absence of statewide bail reform. In March 2021, the Milwaukee Common Council established the Milwaukee Police Department Diversion Task Force.¹⁹⁴ The task force is designed to create “a plan for responding to calls for service that do not involve threats to public safety, particularly for those involving persons experiencing mental health, substance abuse or homelessness crises, with trained, unarmed first responders.”¹⁹⁵ Importantly, this process reorients the criminal justice system for many low-risk individuals who would otherwise have a different interaction with armed law enforcement officers. The plan further calls for the response staff to be civilians with special training in de-escalation and mental health issues.¹⁹⁶ Slated to begin in mid-2022, this effort demonstrates an indirect way to alleviate the effects of bail on indigent and low-risk individuals in Milwaukee.

190. *Supporting the Implementation of the PSA Tool*, JUST. SYS. PARTNERS, <https://justicesystempartners.org/projects/supporting-the-implementation-of-the-psa-tool/> [https://perma.cc/JY9N-D68G].

191. Kenechukwu Okocha, *Nationwide Trend: Rethinking the Money Bail System*, 90 WIS. LAW. 30, 30 (2017); Jeffrey A. Kremers, *Milwaukee Moves Away from Money Bail System*, 90 WIS. LAW. 38, 40–41 (2017); Henzl, *supra* note 20.

192. Becker, *supra* note 20.

193. *Id.*

194. Statement by Chantia Lewis, Alderwoman, City of Milwaukee, Council Passes Legislation Creating the MPD Diversion Task Force (Mar. 23, 2021), https://city.milwaukee.gov/ImageLibrary/Groups/ccCouncil/News/2021/District-09/3_23MPDDiversionTaskForceStatement.pdf [https://perma.cc/JR44-KPQX].

195. *Id.*

196. Frederica Freyberg, *First Responders for Mental Health Incidents*, PBS WIS. (July 9, 2021), <https://pbswisconsin.org/news-item/first-responders-for-mental-health-incidents/> [https://perma.cc/BQQ3-NY4Q].

The efforts to minimize the number of pretrial detainees remaining in custody serve oppressed populations, like African-Americans, who are disproportionately affected by the coronavirus and pretrial detention.¹⁹⁷ In Wisconsin, Black Americans comprise 6% of the state's population;¹⁹⁸ however, 90% of the state's Black population resides in six of the state's counties, including Milwaukee and Dane County.¹⁹⁹ The largest county in the state, Milwaukee County, also contains the largest proportion of African-Americans, who make up over 25% of the county's population.²⁰⁰ Thus, these sensible reforms may proactively combat systemic issues within cash bail that have negatively impacted minority communities.

D. Failures

Bail reform efforts have not fully matriculated into success in all jurisdictions undertaking recent efforts. In 2019, New York State passed substantive bail reform measures that significantly reduced the number and types of charges where a judge may hold a detainee on remand or without bail.²⁰¹ The law sharply reduced the percentage of cases eligible for remand or imposition of bail,²⁰² over 80% of the cases arraigned prior to the bill's passing in 2019 would have been ineligible for bail or remand.²⁰³ Prior to its repeal and eventual amendment,²⁰⁴ local political leaders—including then Governor Andrew Cuomo—praised the legislation.²⁰⁵ Governor Cuomo underscored the major impetus for enacting cash bail reform when he articulated this message,

197. Becker, *supra* note 20.

198. *African Americans in Wisconsin: Overview*, WIS. DEP'T OF HEALTH SERVS. (Sept. 10, 2018), <https://www.dhs.wisconsin.gov/minority-health/population/afriamer-pop.htm> [https://perma.cc/WXV6-RCED].

199. *Id.*

200. *Id.*

201. Julie McMahon, *New York Ends Cash Bail for Most: What It Means for People Charged With A Crime*, SYRACUSE.COM (Apr. 3, 2019, 1:29 PM), <https://www.syracuse.com/news/2019/04/new-york-ends-cash-bail-for-most-what-it-means-for-people-charged-with-a-crime.html> [https://perma.cc/M89Z-F8BW].

202. MICHAEL REMPEL & KRISTAL RODRIGUEZ, CTR. FOR CT. INNOVATION, BAIL REFORM REVISITED: THE IMPACT OF NEW YORK'S AMENDED BAIL LAW ON PRETRIAL DETENTION 1 (2020), https://www.courtinnovation.org/sites/default/files/media/document/2020/Bail_Reform_Revisited_050720.pdf [https://perma.cc/L7E9-Z97A].

203. *Id.*

204. Jamiles Lartey, *New York Rolled Back Bail Reform. What Will the Rest of The Country Do?*, THE MARSHALL PROJECT (Apr. 23, 2020), <https://www.themarshallproject.org/2020/04/23/in-new-york-s-bail-reform-backlash-a-cautionary-tale-for-other-states> [https://perma.cc/Z2YN-UUH3].

205. *Id.*

“The blunt ugly reality is that too often, if you can make bail, you are set free, . . . and if you are too poor to make bail, you are punished.”²⁰⁶ However, the efforts were deemed too broad-stroked and heavy-handed.²⁰⁷ Less than six months after the bill’s implementation, Cuomo and New York City Mayor Bill de Blasio endorsed a rollback of the bail reform efforts and later amended the law.²⁰⁸ While the bill did create a dramatic drop in pretrial detention, the law’s successes were instead engulfed in media attention surrounding high-profile crimes²⁰⁹ where the defendant was not held on remand or bail was not imposed.²¹⁰

In New York, the new system of bail reform measures was likely too broad in its approach but was not afforded an appropriate amount of time to truly test its efficacy. By rolling back the efforts in less than six months, amid a pandemic,²¹¹ the state cannot fully assess the lasting successes that may have arisen from the now amended law. In New York, the rollback of bail reform efforts may have been a reaction to the increased media attention surrounding certain egregious crimes. Understandably, these bail measures were easy targets upon realization that certain crimes were not bail or remand eligible.²¹² As such, it is imperative for states to engage in sensible reforms. New York’s efforts might have been too aggressive in its approach to eliminate cash bail. New York State provides an example of how bail reforms may fail yet still lend sensible solutions and markers of improvement.

E. Public Health Induced Efforts

Amid the ongoing pandemic, state governments and local facilities are proactively taking steps to mitigate the transmission of the novel coronavirus in jails and prisons. In Colorado, the state law enforcement agencies suspended

206. Gloria Pazmino, *Cash Bail Will Mostly End in 2020. Here’s What That Could Look Like.*, SPECTRUM NEWS NY1 (Sept. 9, 2019, 8:24 PM), <https://www.ny1.com/nyc/all-boroughs/politics/2019/09/10/cash-bail-ending-in-new-york-in-2020-what-could-it-look-like> [<https://perma.cc/6BG8-YPXC>].

207. Lartey, *supra* note 204.

208. *Id.*

209. Yael Halon, *New York Lawmaker Says Cuomo Will Have ‘Blood on His Hands’ If Bail Reform Law Isn’t Changed*, FOX NEWS (Jan. 13, 2020), <https://www.foxnews.com/media/nicole-malliotakis-new-york-bail-laws-cuomo-de-blasio> [<https://perma.cc/P2V5-TQW6>].

210. Roxanna Asgarian, *The Controversy over New York’s Bail Reform Law, Explained*, VOX (Jan. 17, 2020, 8:30 AM), <https://www.vox.com/identities/2020/1/17/21068807/new-york-bail-reform-law-explained> [<https://perma.cc/9QYM-SSCH>].

211. Lartey, *supra* note 204.

212. Asgarian, *supra* note 210.

arrests for low-level parole violations specifically to reduce incarceration numbers.²¹³ In Ohio, the Cuyahoga County Jail refused to admit additional detainees charged with misdemeanors—with the exception of domestic violence related charges—to combat the spread of COVID-19 within the facility.²¹⁴ In Maryland, Marilyn Mosby, the State’s Attorney for Baltimore City, announced her office would dismiss pending charges for drug offenses, trespassing, minor traffic offenses, and other nonviolent crimes to combat the spread of COVID-19 in local facilities.²¹⁵ These are just three of the many²¹⁶ temporary actions that have taken place to remedy the disruptive effects COVID-19 has inflicted on the incarcerated population. The COVID-19 public health crisis reveals that improvements in public health and public safety may actually be intertwined and simultaneously achieved.

VI. WHAT WISCONSIN SHOULD DO

In 2021, the State of Illinois led the charge by becoming the first state to wholly abolish the use of cash bail. More local municipalities have carried on these efforts for many years, including within the state of Wisconsin. In Wisconsin, state legislators should enact sensible reforms for statewide assessment of pretrial detention. The practices consistent with the PSA, which has been launched in both Milwaukee and Dane Counties, should receive more attention as to their effectiveness. Instead of arbitrarily adhering to bail schedules, judges and prosecutors are being, and should be, tasked with truly assessing the risk of release among detainees. In light of a continuing pandemic, it could be advantageous to offer bail-free release for low-level offenses to prevent rapid transmission within jails and promote the continuation of employment, education, and other means to avoid the commission of crime.

213. *The Most Significant Criminal Justice Policy Changes from the COVID-19 Pandemic*, PRISON POL’Y INITIATIVE (Dec. 23, 2021), <https://www.prisonpolicy.org/virus/virusresponse.html> [<https://perma.cc/M3F2-4QTE>].

214. Cory Shaffer, *Cuyahoga County Jail Stops Accepting New Inmates Charged with Most Misdemeanors to Prevent ‘Explosion’ of Coronavirus Cases Amid Historic Surge*, CLEVELAND.COM (Nov. 17, 2020, 4:59 PM), <https://www.cleveland.com/court-justice/2020/11/cuyahoga-county-jail-stops-accepting-new-inmates-charged-with-most-misdemeanors-to-prevent-explosion-of-coronavirus-cases-amid-historic-surge.html> [<https://perma.cc/C7VY-UNJQ>].

215. Tim Prudente & Phillip Jackson, *Baltimore State’s Attorney Mosby to Stop Prosecuting Drug Possession, Prostitution, Other Crimes Amid Coronavirus*, BALTIMORE SUN (Mar. 18, 2020, 8:33 PM), <https://www.baltimoresun.com/coronavirus/bs-md-ci-cr-mosby-prisoner-release-20200318-u7kneeb6o5gqvnqmtpejftavia-story.html> [<https://perma.cc/EY9P-8PTA>].

216. PRISON POL’Y INITIATIVE, *supra* note 213.

The PSA is not a comprehensive solution to combatting increasing incarceration numbers but should be one of many tools employed to improve Wisconsin's bail system. Risk assessment should be expanded and vetted to move towards more sustainable pretrial practices. These risk factors can be expanded to embrace more options than just bail or no bail for detainees. Wisconsin courts should embrace more modern technology such as electronic monitoring devices, which provide a less invasive and less expensive method of surveilling defendants than standard incarceration. For defendants with low potential risks of harmful contacts with other persons, these modern solutions may provide a vital step in mitigating the historically damaging effect of pretrial detention for presumably innocent individuals. Before imposing stiff conditions for release, judges and prosecutors should consider the collateral consequences of said detainment; public health inside correctional facilities should now enter the equation. Bail should not be the definitive requirement for all detainees but instead should serve as a backstop for the court's most dangerous and most likely to abscond, flee, or otherwise result in a pretrial failure. By putting resources towards the more accurate assessment of which detainees truly pose a risk to the community and which detainees do not, the people, courts, and communities of Wisconsin will benefit exponentially.

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