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Bailing on Cash Bail: A Proposal to Restore Indigent Defendants' Right to Due Process and Innocence Until Proven Guilty

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Bailing on Cash Bail: A Proposal to Restore Indigent Defendants' Right to Due Process and Innocence Until Proven Guilty

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Abstract

The practice of cash bail in the United States is changing. For the past few decades, the cash bail system is abandoning pretrial release and shifting the burden to the defendant thereby abandoning innocence until proven guilty. Bail hearings are increasingly less individualized and discriminatory because of risk assessment tools and judicial discretion without requiring justification, leading to indigent defendants facing unprecedented detainment solely for not being able to afford bail, and thus, violating due process of law. This Note focuses on two 2021 decisions: the California Supreme Court's decision in In re Humphrey, ruling to partially maintain cash bail, and Illinois' Pretrial Fairness Act, eliminating cash bail by 2023. This Note argues each state must fully eliminate cash bail to restore indigent defendant's constitutional rights by highlighting the constitutional concerns which remain prevalent in California and how Illinois' decision works to correct cash bail's discrimination. In conclusion, this Note provides a proposal on how states can effectively eliminate the cash bail system using the Pretrial Fairness Act as a guide with District of Columbia's foreshadowed success since mostly eliminating cash bail in 1992.

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I. Introduction

Imagine being arrested and, despite having an alibi for the alleged offense, spending eighty-four days in jail solely because you could not afford bail.[1] This happened to an individual, pseudonym David, released after the court dismissed his case.[2] David lost his apartment, job, and 50-50 custody of his child while languishing in jail — consequences forced to endure because he could not afford a $5,000 bail and a judicial officer would not lower the monetary amount.[3] This is cash bail in America. A system designed as innocent until proven guilty systematically punishes indigent defendants who cannot afford bail by forcing individuals to wait in jail until their case is adjudicated.[4] Instead of upholding the presumption of innocence, approximately 400,000 individuals are locked behind bars in American jails as pretrial detainees.[5]

Over the past few decades there have been waves of reform to the cash bail system causing numerous states to make changes to their system.[6] Courts in some jurisdictions have determined cash bail violates the rights of indigent defendants, including their due process rights, but fail to fully eliminate the cash bail system.[7]

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1. *See* Emily Hamer & Shelia Cohen, *Poor Stay in Jail While Rich Go Free: Rethinking Cash Bail in Wisconsin*, NPR WIS. (Jan. 21, 2019, 6:00 AM) (reporting the events of an individual charged with a criminal offense and held in pretrial detention) [perma.cc/6BJ6-4TGM].

2. *See id.* ("David sat in jail for 84 days waiting for his trial.").

3. *See id.* (stating that David eventually got his job back but had to use retirement savings to pay off his car loan).

4. *See Bail and Bond, in* THE SOCIAL HISTORY OF CRIME AND PUNISHMENT IN AMERICA: AN ENCYCLOPEDIA 91, 91 (Wilbur R. Miller, ed., 2012) [*hereinafter* "Bail and Bond"] ("The idea of releasing a person on bail is based on the belief that people are innocent until proven guilty and should not be punished until they are convicted of a crime."); *see also* U.S. CONST. amend. VI (embedding the right to the presumption of innocence until proven guilty).

5. *See* Sam Rosen, *Bail Fund Co-Optation and the Purpose of Cash Bail*, 36 CRIM. JUST. MAG., no. 2, Summer 2021, at 28 (finding that two-thirds of individuals in America's jails at a given time have not yet had their cases adjudicated).

6. *See, e.g.*, *Pretrial Justice Reform*, ACLU N.J. (describing how New Jersey's 2017 Criminal Justice Reform Act reforms yet maintains their state's cash bail system) [perma.cc/3KCS-YT2V].

7. *See, e.g.*, *In re* Humphrey, 482 P.3d 1008, 1019–21 (Cal. 2021) (deciding that cash bail violates indigent defendant's rights but partially maintains their reliance on cash bail in particular circumstances).

Illinois is the first state making the necessary change of elimination; as this Note will explain, the system is embedded with constitutional violations and discrimination rising to the conclusion cash bail must be abolished. The District of Columbia's success, which largely eliminated cash bail, foreshadows Illinois' success and Illinois' legislation provides a guide for the remaining states to rely on to effectively end cash bail's discrimination and constitutional rights violations.[8]

Part II of this Note is an overview of the history and supposed purpose of the cash bail system.[9] Part III provides various bail reform challenges over time throughout the United States and provides the adverse impacts the system has on indigent defendants.[10] Part IV examines California's and Illinois' 2021 decisions regarding cash bail and the District of Columbia's success since largely ending cash bail in 1992.[11] That Part goes on to discuss the Illinois legislative decision to fully eliminate cash bail by 2023 while California's Supreme Court ruled cash bail violates indigent defendants' rights, but nonetheless deciding to partially maintain the system. Part V argues cash bail violates an individual's due process and furthers systematic discrimination.[12] Decades of systematic abuse and statistics prove the system leads to discrimination for indigent defendants, which state court judges and Supreme Court justices have noted but continue to maintain. This Note concludes by arguing that the final step in cash bail reform is for the entire United States to bail on cash bail to which Illinois' legislation provides a reliable guide for states to utilize.[13]

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8. *See* Lea Hunter, *What You Need to Know About Ending Cash Bail*, CTR. AM. PROGRESS (Mar. 16, 2020) (providing statistics to show that over ninety percent of defendants in D.C. attend their trials) [perma.cc/A2KX-MULC]; *see also* 725 Ill. Comp. Stat. Ann. 5/110-1.5–6 (2023) (codifying the Illinois Pretrial Fairness Act which eliminates cash bail and establishes pretrial release parameters and requirements).

9. *See infra* Part II.

10. *See infra* Part III.

11. *See infra* Part IV.

12. *See infra* Part V.

13. *See infra* Part VI.

II. History and Purpose of Cash Bail

The United States cash bail system traces back to English common law.[14] Prior to the American Revolution, the Massachusetts Body of Liberties established an individual's right to bail as "an unequivocal right to bail for non-capital offenses, regardless of the evidence or the accused character."[15] Despite these protections and presumptions, the United States Constitution ("Constitution") did not establish an unequivocal right to bail.[16] Instead, the Constitution codified pretrial detention safeguards within the Eighth Amendment's Excessive Bail Clause and within the Judiciary Act of 1789.[17] Through the seventeenth and eighteenth centuries, after passing the Judiciary Act of 1789, sureties for bail "were paid only upon default, so that wealth did not factor directly into release decisions."[18]

A. Bail Reform Act of 1966

The 1800s sparked change in bail practices as "personal sureties were no longer willing to take responsibility over

14. *See* Alexa Van Brunt & Locke Bowman, *Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next*, 108 J. CRIM. L. & CRIMINOLOGY 701, 710 (2018) (stating that bail law principles from English common law can be found within the Bill of Rights, the Petition of Right, and the Habeas Corpus Act).

15. *Id.* at 710 (citing June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 530 (1983)); *but see* Caleb Foote, *The Coming Constitutional Crisis in Bail: I (Bail I)*, 113 U. PA. L. REV. 959, 981 (1956) (believing the Massachusetts bail statute's theoretical liberality "should not be overdrawn, for the colony punished by death non-bailable offenses that included idolatry, witchcraft, blasphemy, bestiality, sodomy, adultery . . . [and] stubbornness or rebelliousness on the part of a son against his parents") (internal quotations omitted).

16. *See* Brunt & Bowman, *supra* note 14, at 711–12 (articulating the final expression of the United States' federal pretrial policy which lacked the notions found in state law prior to the Constitution's ratification).

17. *See* Muhammad Sardar, *Give Me Liberty or Give Me . . . Alternatives? Ending Cash Bail and its Impact on Pretrial Incarceration*, 84 BROOK. L. REV. 1421, 1427–28 (2019) (finding the original codified bail protections remained the same for almost two hundred years).

18. Brunt & Bowman, *supra* note 14, at 711.

defendants without payment," to which courts shifted the burden onto the defendants directly until Congress intervened and passed the Bail Reform Act of 1966 ("1966 Act"), creating a "presumption towards release for all non-capital defendants."[19] The 1966 Act worked to alleviate hardships indigent defendants endure by mandating judges to use "nonmonetary forms of assurance in cases of indigent defendants."[20] Under this Act, for noncapital offenses, the only standard for assessing an individual's bail was to deter risk of flight.[21] Additionally, a defendant's presence at hearings was assured by travel restrictions, personal assurances, placing the defendant in the custody of a third party, or using unsecured bonds.[22] If a judge determined "release on recognizance would be inadequate in assuring" appearance at trial, judges chose "the least restrictive alternative condition."[23] People should not face needless detainment pending their case's adjudication, shown by congressional intent as the 1966 Act established personal recognizance release as the default in federal courts to displace the cash bail trends which emerged prior to the 1966 Act's passage.[24] Additionally, personal recognizance release assists to ensure bail hearings are individualized, not based solely on charged allegations.[25]

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19. Sardar, *supra* note 17, at 1428–29.

20. Donald Verrilli, Jr., *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328, 362 n.13 (1982) (citing Bail Reform Act of 1966, 18 U.S.C. §§ 3141–50 (repealed 1984)).

21. *See* Sardar, *supra* note 17, at 1429–30 (explaining that neither community safety nor an individual's future dangerousness were expressly permitted considerations during under the Bail Reform Act of 1966).

22. *See* Bail Reform Act of 1966, 18 U.S.C. §§ 3141–50 (using other conditions rather than relying on cash bail) (repealed 1984).

23. Sardar, *supra* note 17, at 1429.

24. *See* Bail Reform Act of 1966, 18 U.S.C. §§ 3141–50 (revising bail practices to provide pretrial release, regardless of financial status) (repealed 1984).

25. *See* Jordan Gross, *Devil Take the Hindmost: Reform Considerations for States With a Constitutional Right to Bail*, 52 AKRON L. REV. 1043, 1059–60 (2018) (explaining how the Bail Reform Act of 1966 encouraged federal courts to consider a defendant's circumstances and conduct evaluations on a case-by-case basis).

B. Bail Reform Act of 1984

A wave of highly publicized violent crimes, committed by pretrial released defendants, led to public dissatisfaction in bail practices.[26] In response, Congress enacted the Comprehensive Crime Control Act of 1984, encompassing the Bail Reform Act of 1984 ("1984 Act").[27] The 1984 Act permits judges to utilize more discretion through creating a "danger to the community" factor, and creating a rebuttable presumption towards denying bail for individuals charged with certain offenses, such as drug crimes and crimes of violence.[28] Ultimately, the 1984 Act changed cash bail's practice to a presumption towards detainment.[29] Subsequently, the 1984 Act led to constitutional challenges culminating three years after its enactment when the Supreme Court granted certiorari.[30]

The Supreme Court granted the government's writ to resolve a split among the federal circuit courts by addressing two issues:

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26. *See Pre-Trial Reform*, PRE-TRIAL REFORM (last updated Sept. 2021) (containing a timeline for changes in bail law) [perma.cc/YL33-9TSF].

27. *See* Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended at 18 U.S.C. §§ 3141–50 (2012 & Supp. V 2018)) (enacting a new bail policy); *see also* Sardar, *supra* note 17, at 1430 ("The 1984 Act contained numerous provisions that helped lead to the current system.").

28. *See* Sardar, *supra* note 17, at 1430–31 (describing how judicial discretion leads to increased racial biases, whether explicitly or implicitly); *see also Bail Reform Act, in* THE SOCIAL HISTORY OF CRIME AND PUNISHMENT IN AMERICA: AN ENCYCLOPEDIA 96, 97 (Wilbur R. Miller, ed., 2012) [perma.cc/ZJP5-QEEQ].

> The Bail Reform Act of 1984 . . . specifically allows for pretrial detention of dangerous defendants . . . Defendants may be eligible for preventive detention if there is a serious risk that they will flee, obstruct justice, or threaten or harm a witness or juror. Additionally, they may be eligible for preventive detention if they are (1) charged for a crime that may result in the death penalty or life imprisonment, (2) charged with certain violent crimes . . . (3) charged with nonviolent crimes involving minors, firearms, or destructive devices, (4) charged with certain drug offenses . . . resulting in a sentence of 10 years or more, or (5) charged with a felony and have a history of convictions for the types of offenses listed above.

29. *See* MILLER, *supra* note 28, at 97 (describing the 1984 Act as a departure from the long-standing history of prioritizing pretrial release).

30. *See* Gross, *supra* note 25, at 1063 (explaining that a circuit split developed regarding whether the 1984 Act violated the Eighth Amendment and/or substantive due process within the Fifth Amendment).

whether the 1984 Act violated the Eighth Amendment or violated substantive due process.[31] In *United States v. Salerno*,[32] the Court determined the 1984 Act violated neither the Eighth Amendment nor the Fifth Amendment's Due Process Clause, as the Court found Congress has a legitimate and compelling interest to prevent danger to communities.[33] The Supreme Court established the following principles which still shape federal bail laws: 1) while the Eighth Amendment prohibits excessive bail, it does not contain any implicit right to bail; and 2) pretrial detention is not punitive, it is regulatory which does not violate an individual's due process.[34] As created within the 1984 Act, post *Salerno*,[35] states began adopting danger as an assessment and emphasizing judicial discretion in determining individuals' danger to the community as a factor to decline bail or factor into the monetary bail set.[36] In addition, pretrial incarceration increased influenced by the era's "tough on crime rhetoric."[37] After the 1984 Act's implementation, detainment without bail skyrocketed for federal defendants from

31. *See id.* (stating the issues within the cases where the Supreme Court ultimately disagreed with the lower court by finding the 1984 Act comports with constitutional requirements).

32. 481 U.S. 739 (1987).

33. *See* United States v. Salerno, 481 U.S. 739, 741 (1987) (ruling the Act serves as a form of regulation, not as a punishment to pretrial defendants). The *Salerno* ruling has drawn significant criticism from observers. *See, e.g.*, Sardar, *supra* note 17, at 1432–33 (citing James A. Allen, *"Making Bail": Limiting the Use of Bail Schedules and Defining the Elusive Meaning of "Excessive" Bail*, 25 J.L. & POL'Y 639, 652–53 (2017)) (asserting that the *Salerno* ruling has contributed to "the imprisonment of innumerable pretrial detainees"); *see also* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.").

34. *See* Gross, *supra* note 25, at 1063–64 (examining the *Salerno* majority's reasoning that lead them to affirm the constitutionality of the 1984 Act); *But see Salerno*, 481 U.S. at 759–60 (Marshall, J., dissenting) (rejecting the majority's finding that preventing danger to the community comports with due process requirements).

35. *See Salerno*, 481 U.S. at 741 (permitting the 1984 Act's dramatic overhaul of the cash bail system to proceed).

36. *See* Sardar, *supra* note 17, at 1433–34 (discussing states' incorporation of dangerousness and community safety into bail determinations).

37. *Id.* at 1433 (citing Wendy Calaway & Jennifer Kinsley, *Rethinking Bail Reform*, 52 U. RICH. L. REV. 795, 804 (2018); *see also* Ram Subramanian et al., *Incarceration's Front Door: The Misuse of Jails in America*, VERA INST. JUST. 1, 7 (2015) [perma.cc/59PD-LMST].

1.7% to 18.8% and those required "to post bail" for release rose from 50% to 63%.[38]

C. Factors Judicial Officers Utilize in Determining Bail

When determining bail, judicial officers consider the following four factors pursuant to the Bail Reform Act of 1984:

> (1) the nature and circumstances of the offense charged; (2) the weight of the evidence against the person; (3) the history and characteristics of the person, including the person's character, physical and mental condition, family ties, employment, *financial resources*, length of residence in the community, community ties, past conduct, criminal history, and *record concerning appearance at court proceedings*; and (4) the *nature and seriousness of the danger to any person or the community that would be posed by the person's release*.[39]

Bail hearings mostly revolve around judicial officers deciding to release or detain individuals regarding risk of flight and danger to the community.[40] The government must prove flight risk by a preponderance of the evidence; however, "there is a rebuttable presumption against release" when a defendant is charged with allegedly committing "certain types of offenses."[41] The government must prove danger "to the community by clear and convincing evidence."[42] To make the determination to order a higher monetary bail or detain an individual, judicial officers only need to find the individual is either a flight risk or a danger to the community, not both.[43]

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38. BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, PRETRIAL RELEASE AND DETENTION: THE BAIL REFORM ACT OF 1984, U.S. DEPT. OF JUST. 1–2 (Feb. 1988) [perma.cc/P77M-Y9NX].

39. 2 Crim. Const. L. § 7.02 (2021) (emphasis added).

40. *See id.* (describing the two risk assessments).

41. *Id.*

42. *Id.* (internal quotations omitted).

43. *See id.* (describing how the law allows judicial officers to detain individuals based off the two risk assessments).

D. Purpose Behind Bail

The cash bail system serves two purposes. First, bail's primary purpose is, supposedly, to ensure individuals appear for court hearings.[44] Eligibility for bail is determined by judges who set the conditions or financial amount which must be met before the defendant is released from pretrial detention.[45] Second, the system utilizes the community safety factor to justify arbitrarily confining individuals deemed as a future danger.[46] As laws are designed to reflect the will of the people, this safety provision assumes the people believe the individual is dangerous and need that protection.[47] However, the alleged justified purpose behind cash bail is disproven by the practical consequences within the criminal justice system, as explored in later parts of this Note, including Supreme Court justices' statements and community actions against full support of pretrial detention via cash bail.[48]

The cash bail system assumes there is a vested interest in keeping those who cannot pay the bail in pretrial detention by way of the will of the people, a notion which is practically erroneous.[49] Ideologically, Supreme Court justices, democrat and republican, have expressed their opinion concerning the need to balance cash bail and its constitutional implications. In *Carlson v. Landon*,[50] the Court decided, as it pertains to bail's purpose, that the Attorney General's discretion in granting or refusing bail to noncitizens did

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44. *See Bail and Bond*, *supra* note 4, at 91 (describing cash bail's purpose).

45. *See Bail and Bond*, *supra* note 4, at 91 ("If the [defendant] fails to appear, the amount is forfeited to the court [and] [i]f the accused does appear, the amount is reimbursed.").

46. *See* Matthew Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 960 (2013) (providing the current cash bail regime allows courts to deny bail if the judge determines the individual is a danger to the community).

47. *See id.* at 960 (asserting first that the Bail Reform Act allows, among other considerations, to assess dangerousness to the community as a valid reason to deny bail and secondly that Salerno found the act to not violate the Fifth or Eighth Amendment).

48. *See infra* Part II.

49. *See infra* Part II.

50. 342 U.S. 524 (1952).

not violate the Eighth Amendment's excessive bail prohibition.[51] In Justice Black's dissent, he stated:

> [t]he plain purpose of our bail Amendment was to make it impossible for any agency of Government, . . . to authorize keeping people imprisoned a moment longer than . . . necessary to assure their attendance to answer whatever legal burden or obligation might thereafter be validly imposed upon them.[52]

Furthermore, despite writing the majority opinion in *United States v. Salerno*,[53] Justice Rehnquist expressed that bail conditions must balance with "individual's interest in liberty."[54]

E. Risk Assessment Discrimination: Flight Risk and Risk of Danger to the Community

Jurisdictions consider a defendant's flight risk and danger to the community to generate a risk assessment score as part of an individual's bail determination.[55] Assessing danger to the community, as debated in the Bail Reform Act of 1984, emerged because risk of flight was determined, at the time, an inadequate ground upon which to solely base a higher monetary bail or pretrial detention, even though a judge must only find one ground to increase or deny bail.[56] Theoretically, these assessments are aimed

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51. *See* Carlson v. Landon, 342 U.S. 524, 542 (1952) ("The refusal of bail in these cases is not arbitrary or capricious or an abuse of power.").

52. *Id.* at 557–58 (Black, J., dissenting) (emphasis omitted).

53. 481 U.S. 739 (1987).

54. *Id.* at 750; *see also* Allen, *supra* note 33, at 681 (noting Rehnquist's statement).

55. *See* Jenny Carroll, *The Due Process of Bail*, 55 WAKE FOREST L. REV. 757, 770–71 (2020)

(explaining the criteria used for pretrial release) (citing Sandra Mayson, *Dangerous Defendants*, 127 YALE L. J. 490, 567 (2018)).

56. *See* Clara Kalhous & John Meringolo, *Bail Pending Trial: Changing Interpretations of the Bail Reform Act and the Importance of Bail from Defense Attorneys' Perspectives*, 32 PACE L. REV. 800, 813 (2012) (outlining the congressional acts, debates, and final decisions regarding risk assessments involved in bail decisions); *see also* Michael Edmund O'Neill, Note, *A Two-Pronged Standard of Appellate Review for Pretrial Bail Determinations*, 99 YALE

at reducing judicial discretion, thereby reducing bias; however, in practice, the assessment's goals fail.[57] The reality is that pretrial detention risk assessment tools "displayed the same bias as the system they sought to improve."[58] The system's design to utilize factors "from socioeconomic dependent data, like the stability of housing or employment, to criminal focused data, such as prior arrests — are subject to and the products of racial and economic disparity."[59]

Even with minimal bias, the data has limited value in assessing the actual risk an individual poses pretrial due to, for example, bias in policing.[60] Additionally, even without bias embedded into the system, "pretrial-risk score is subject to an individual judge's interpretation."[61] Many individuals arrested "represent the most marginalized people in the country in terms of health needs, education, . . . [and] poverty."[62] Despite the risk assessment's intention of making bail determinations less arbitrary, in practice, it leads to further inequalities for indigent defendants.[63] These assessments categorize individuals as low risk, medium risk, or high risk.[64] Middle risk individuals face various requirements in addition to monetary bail while individuals who score within high risk levels face pretrial

L.J. 885, 891 (1990) (noting that judicial officers' bail assessments are two-pronged, yet such officers only need to find one prong to deny pretrial release).

57. *See* Carroll, *supra* note 55, at 772 (stating, theoretically, that risk assessments should have shifted pretrial assessments to reduce bias within the pretrial detention process) (citing Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 678–84 (2018)).

58. *Id.* at 770.

59. *Id.* at 771–75.

60. *See id.* at 771–72 (explaining that potential bias is present in assessments which consider past offenses which could just be a signal of "racial, gender, or socioeconomic" police profiling or an individual living in a "highly policed neighborhood").

61. *Id.* at 772.

62. Cherise Fanno Burdeen & Wendy Shang, *The Case Against Pretrial Risk Assessment Instruments*, 36 CRIM. JUST. 21, 23 (2021).

63. *See* Carroll, *supra* note 55, at 772 ("Regardless of whether a decision to detain pretrial is based on machine-generated risk assessments.").

64. *See* Burdeen & Shang, *supra* note 62, at 24 (describing the risk assessment categories).

detention.[65] Examples of additional requirements include check-ins with pretrial officers, drug testing (even if the alleged crime is not drug related), and electric monitoring.[66] These additional pretrial release requirements lead to reincarceration prior to case adjudication as supervision violations are rising.[67] Moreover, these infringements on pretrial innocence and freedom have little empirical evidence as "court date reminders are the only pretrial support that has been shown to actually help improve rates of return to court."[68] All this shows that the current cash bail regime can and should change.

F. Use of Bail Schedules

In addition to the aforementioned risk assessment, many jurisdictions use bail schedules, a mechanism which sets bail at fixed amounts for specific offenses by either a judge at a formal hearing or judicial officers to predetermine in lieu of a formal hearing.[69] Assigning "a dollar amount to each criminal charge" replaces individualized hearings as it is not a case-by-case judicial determination.[70] Consequently, jurisdictions utilizing these schedules further create "a wealth-based detention system."[71]

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65. *See id.* (explaining the difference in the levels of risk assessment categories).

66. *See id.* (stating that the results of these requirements morph mass incarceration into mass supervision).

67. *See id.* ("The Council of State Governments estimates that one-quarter of the people in prison are incarcerated due to supervision violations.").

68. *Id.* (internal citations omitted) [perma.cc/CAY7-N9G4].

69. *See* Gross, *supra* note 25, at 1072 (explaining that bail schedules operate to list the amount of bail for defendants who have posted bail and avoid the requirement that the defendant must appear before a judicial officer); *see also* John Gross, *The Right to Counsel but Not the Presence of Counsel: A Survey of State Criminal Procedures for Pre-Trial Release*, 69 FLA. L. REV. 831, 857–59 (2017) (listing which jurisdictions utilize bail schedules and whether their use is by judges or judicial officers).

70. *See* Cynthia Jones, *Accused and Unconvicted: Fleeing from Wealth-Based Pretrial Detention*, 82 ALB. L. REV. 1063, 1067 (2019) (describing the mechanism which abandons judicial individualized hearings and determinations); *see also* Allen, *supra* note 33, at 641 (explaining these schedules can be mandatory or advisory).

71. Allen, *supra* note 33, at 642 (internal citations and quotations omitted).

These schedules contribute further discrepancy in the monetary value at which bail is set.[72] Schedules exacerbate wealth-based discrimination because the only difference between those imprisoned and those released hinges on whether the individual can afford the monetary amount.[73] Despite widespread use and reliance on these schedules, they can be determined per se unconstitutional, given the Supreme Court's construction of "the Eighth Amendment's prohibition of excessive bail as requiring that the amount of bail be fixed in each individual case, according to the circumstances of each individual defendant, in an amount no greater than is necessary to assure [their] appearance."[74]

III. Bail Reform: Challenges to the Cash Bail System and Adverse Impacts of Pretrial Detention

A. Challenges to the Cash Bail System

Calls for reform arise from administrative bodies, legislatures, and court rulings and are centered around the premise to end wealth-based discrimination.[75] Cash bail reform is either voluntary or involuntary.[76] Voluntary reform is enacted when a jurisdiction, on the state or municipality level, amends or repeals

72. *See id.* at 641 (stating that bail schedules are also referred to as bail schemes furthering discrepancies).

73. *See* Brunt & Bowman, *supra* note 14, at 749 ("Nothing supports the proposition that a person able to raise a few hundred dollars is more deserving of pretrial freedom than a person without those funds."); *but see* Gross, *supra* note 25, at 1096 (stating that "in some instances, money-based bail can . . . facilitate the routine pretrial release of persons charged with low-level offenses (assuming they can post bail) and relieve time pressures on the judicial system" especially in rural areas where detention centers are spread out far throughout a geographical area).

74. Stephen Pitcher, *Excessive Bail*, 18 AM. JUR. 2d *Proof of Facts* § 149 (1979) (citing Stack v. Boyle, 342 U.S. 1 (1951).

75. *See* John Logan Koepke & David Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 WASH. L. REV. 1725, 1746 (2018) (discussing current reform efforts generally referenced as "the third generation of bail reform") (citing Timothy Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*, U.S. DEP'T OF JUST., at 36 (2014)).

76. *See* Gross, *supra* note 25, at 1079 (transitioning to discuss jurisdiction reforms).

its court rules or laws by shifting to nonmonetary release conditions.[77] On the other hand, involuntary reform is derived from litigation.[78]

Other reform measures come from broader, ongoing movements. Civil rights organizations, such as the Civil Rights Corps, are initiating lawsuits to challenge jurisdictions' bail systems.[79] Civil Rights Corps, partnering with other civil liberty organizations and/or jurisdiction specific organizations, have shown success in challenging bail laws and practices by arguing that they violate the well-founded principles of equal protection and due process.[80] While many of their lawsuits are in litigation, they have already shown success through settlements or final adjudication opinions in Texas, California, Nevada, and Louisiana.[81] Moreover, Equal Justice Under Law, the first organization to file successful lawsuits, has similarly challenged cash bail practices through successful litigation.[82]

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77. *See id.* at 1079–80 (listing New Jersey, Maryland, New Mexico, Illinois, Colorado, New Orleans, Jackson, Philadelphia, and Atlanta as jurisdictions to voluntarily amend their bail laws and/or court rules) (citing State v. Robinson, 160 A.3d 1, 7 (2017); MD. Code Ann., CRIM. PROC. 4-216.1(c)(1) (West 2017); State v. Brown, 338 P.3d 1276 (N.M. 2016)); Anne Kim, *Time to Abolish Cash Bail*, WASH. MONTHLY (Jan. 3, 2017) [perma.cc/Y3XM-PUCG]; Teresa Mathew, *Bail Reform Takes Flight in Philly*, CITYLAB (Feb. 2, 2018, 2:23 PM) [perma.cc/U2NW-Y39Q].

78. *See* Gross, *supra* note 25, at 1080 (stating that other jurisdictions have seen changes to their bail practices due to lawsuits which challenge the constitutionality of their bail practices).

79. *See, e.g.*, *Challenging the Money Bail System*, CIV. RTS. CORPS [hereinafter CIVIL RIGHTS CORPS] (challenging detention based on assessments of wealth and outlining the alternative methods of bail systems found in relevant caselaw, including anti-carceral alternatives) [perma.cc/HQ79-4F4A]; *see also* Lori K. Shemka, *Pretrial Bond Presumptions, Measurements, and the Avoidable Consequences of Detaining Low-Risk Defendants*, 98 MICH. BAR J. 22, 23 (2019) ("Nonprofits such as . . . Civil Rights Corps are forcing change across the country by successfully litigating class-action suits against courts and judges for excessive bail practices."); Gross, *supra* note 25, at 1080–81 (explaining that lawsuits routinely argue the problem with detainment of indigent defendants on the basis that the defendant cannot afford the monetary conditions of their bail).

80. *See* CIVIL RIGHTS CORPS, *supra* note 79 (basing their lawsuits, in large part, on arguing equal protection and due process grounds).

81. *See id.* (providing links to relevant lawsuits).

82. *See Ending American Bail Money*, EQUAL JUST. UNDER L. (describing Equal Justice Under Law "[a]s the first organization to file successful cases in multiple states") [perma.cc/T6PL-SYLX]; *see also* Shemka, *supra* note 79, at 23

In addition to organizational litigation, another type of bail reform is community bail, also known as bail nullification.[83] Public defender offices and activist groups, like the Black Lives Matter movement, have taken action into their own hands by creating and utilizing community bail funds by grants from charities to post indigent defendants' bail on their behalf.[84] These community bail funds are analogized to the concept of jury nullification following the principle that individuals are inserting themselves into the criminal justice system to post indigent defendants' bail; thereby, nullifying bail determinations and supplying the notion that pretrial detention's hand in mass incarceration, wealth-based detention, and racial injustice will not be tolerated.[85] A fairly recent concept, community bail exists "in at least twenty-one states."[86] The general Bronx model works in the following way: after screening defendants, the bail is posted for the defendant's pretrial release, then someone calls the individual to remind the person of their court dates and ensure there are no logistical issues which would prevent the defendant's presence at the hearing, and after adjudication, the bail money is recycled and returned to the overall fund.[87]

(stating that civil rights organizations are challenging bail practices because people cannot remain detained solely because they cannot afford the set bail).

83. *See* Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 606 (2017) (explaining bail nullification).

84. *See id.* at 587–88 (noting the emergence of funds for community bail and listing public defender offices and social movements who have these funds); *see also* C. Chisolm Allenlundy, *Democratizing Bail: Can Bail Nullification Rehabilitate the Eighth Amendment?*, 71 ALA. L. REV. 575, 585 (2019) (explaining that community bail emerged from the Manhattan Bail Project which paved the way for the Bronx Freedom community bail fund, established in 2007 by the Bronx Defenders, serving as the model for other community bail funds).

85. *See* Simonson, *supra* note 83, at 606 (stating what bail nullification is and its impact on the criminal justice system); Allenlundy, *supra* note 84, at 587 (analogizing and explaining bail nullification to and within the context of jury nullification) (citing Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 681 (1995)).

86. Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 267 (2019).

87. *See* Allenlundy, *supra* note 84, at 585–86 (explaining the community bail fund model).

B. Effects of Pretrial Detention

In a matter of a few days, pretrial detention can affect a defendant's personal and professional life, such as losing a job and child custody.[88] This is a reality far too many people encounter, such as Miranda O'Donnell.[89] O'Donnell, a twenty-two-year-old, was arrested for allegedly driving without a valid license.[90] Additional facts pertinent to O'Donnell's circumstances are 1) she received public assistance; 2) she was responsible for caring for her young daughter; 3) she lived with a friend because she could not afford rent; and 4) she was living paycheck to paycheck as a waitress — a job she started only weeks before her arrest.[91] From O'Donnell's initial bail determination, she later received a mere sixty-second court hearing where the judge refused to lower the bail, all without being asked if she could afford the $2,500 bail, leaving O'Donnell worrying about her daughter and whether she would have a job upon her eventual release.[92]

Cash bail causes more individuals to face pretrial detention solely because they cannot afford their release, and in addition to imprisonment prior to a finding of guilt, individuals held in pretrial detention face worse case outcomes. A defendant placed in detainment has more difficulty gathering evidence, preparing a defense, or contacting witnesses than defendants not in

88. *See* Paul Heaton, Sandra Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713 (2017) ("A person detained for even a few days may lose her job, housing, or [child] custody.") (citing Curry v. Yachera, No. 15-1692, 2016 WL 4547188, at *3 (3d Cir. Sept. 1, 2016) ("While imprisoned [pretrial on a bail he could not afford], [Curry] missed the birth of his only child, lost his job, and feared losing his home and vehicle."); Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG. (Aug. 13, 2015) (chronicling the story of a woman who, "five months after her arrest, . . . was still fighting in family court to regain custody of her daughter") [perma.cc/CK4W-BBZ5].

89. *See generally,* First Amended Class Action Complaint, O'Donnell v. Harris Cnty. 251 F. Supp. 3d 1052 (S.D. Tex. 2016).

90. *See id.* at 1062 (charging O'Donnell, and setting a high bail, with a misdemeanor offense); *see also* Jones, *supra* note 70, at 1063 (referring to O'Donnell's complaint).

91. *See* First Amended Class Action Complaint, 251 F. Supp. 3d at 1063–64 (listing O'Donnell's livelihood, living conditions, and various daily responsibilities).

92. *See id.* (noting the brevity of O'Donnell's bail hearing).

detainment.[93] Due to these difficulties, pretrial detainment can lead to detainees pleading guilty to get out of jail in lieu of receiving a trial.[94] In addition to trial preparation difficulties, those denied bail "lose bargaining power with a prosecutor."[95] A loss of bargaining power leads to pretrial detainees receiving "longer sentences regardless of the crime they are charged with and the evidence against them."[96] Another effect of imprisonment while awaiting trial is that individuals denied bail go directly to jail leading to even more overcrowding and even poorer living conditions.[97]

Pretrial detainees also have little to no access to their attorneys leading to increased 1) conviction rates, 2) unemployment, and 3) recidivism for individuals.[98] First, pretrial detention increases a defendant's "likelihood of pleading guilty from 33% to 44%" and more than doubles sentence length.[99] Second, in terms of post-conviction livelihoods, about "three to four

93. *See* Heaton et al., *supra* note 88, at 714 (describing the difficulty those in pretrial detainment face throughout their case's adjudication) (quoting Baker v. Wingo, 407 U.S. 514, 533 (1972)); Shima Baughman, *The Bail Book: A Comprehensive Look at Bail in America's Criminal Justice System*, CAMBRIDGE UNI. PRESS 1, 6 (2017) (supplying that defendants who are detained lack the ability to investigate their case, line up witness, and other background work that attorneys often rely on clients to do); *see also* U.S. CONST. amend. VI

> [T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

94. *See* Heaton et al., *supra* note 88, at 714 (finding a possible "increase in the severity of . . . sanctions imposed" too).

95. Baughman, *supra* note 93*,* at 4.

96. *Id.* at 5.

97. *See id.* at 6 (highlighting poor jail conditions contribute "to a defendant's incentive to plead guilty to get out of jail").

98. *See id.* at 7 (stating that busy attorneys cannot visit their clients as often which resorts in less communication via email or phone).

99. Paul Heaton, *The Expansive Reach of Pretrial Detention*, 98 N.C. L. REV. 369, 371–73 (2020) (citing Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 212, 214, 224–25 (2018); *see also* Heaton et al., *supra* note 88, at 747.

years post adjudication, detention reduces" an individual's likelihood of employment from forty-seven percent to thirty-seven percent and decreases their "likelihood of accessing social safety net programs like the earned income tax credit."[100] Lastly, in terms of recidivism, "as of eighteen months post-hearing," pretrial detention also "increases felony offending by 30% and misdemeanor offending by 23%."[101] These statistics show those who are held in pretrial detention are neither afforded due process of the law nor receive a fair, if any trial, as required by the Constitution.[102]

IV. Examining California and Illinois 2021 Decisions and the District of Columbia's Success Since Removing Reliance on Cash Bail

A. California

California has experienced challenges to their cash bail system including 2020 when a referendum attempted to reform their case bail system. The California legislature proposed the California Proposition 25 which served as a veto referendum as a response to the Replace Cash Bail with Risk Assessments Referendum (SB 10) during the general election.[103] SB 10 would have ended the cash bail system and replace it with a risk assessment system "to determine whether a detained suspect should be granted pretrial release and [if so] under what conditions."[104] On election day, 56.41% of voters voted to repeal SB 10.[105] The following year, the California Supreme Court decided a case involving cash bail. An individual, Kenneth Humphrey, faced

100. Heaton, *supra* note 88, at 371 (internal citations omitted).

101. *Id.* at 373 (internal citations omitted).

102. *See* U.S. CONST. amend. V (requiring that individuals receive due process of law); U.S. CONST. amend. XIV, § 1 (requiring states not deprive one's due process of law); *see also* U.S. CONST. amend. VI (requiring individuals receive a fair and impartial trial by a jury of their peers).

103. *See California Proposition 25, Replace Cash Bail With Risk Assessments Referendum (2020)*, BALLOTPEDIA (discussing SB10 and its results post-election) [perma.cc/X95A-DYSX].

104. *Id.*

105. *Id.*

pretrial detention under a $350,000 bail, which he could not afford, and the trial court did not consider his ability to afford the bail or whether any "nonfinancial conditions of release could meaningfully address public safety concerns or flight risk."[106] Humphrey filed a writ of habeas corpus to which the Attorney General filed a return in agreement that Humphrey deserved another hearing.[107] On remand, Humphrey received a second bail hearing and afterwards the California Supreme Court granted review on its own motion "to address the constitutionality of money bail as currently used in California and the proper role of public and victim safety in making bail determinations."[108]

The court applied a due process analysis after determining that cash bail's pretrial detention, without considering the individual's ability to meet bail, is an infringement upon an indigent defendant's substantive due process rights.[109] After examining California's cash bail system, the court concluded pretrial detention via cash bail is subject to "state and federal constitutional constraints," which is only permissible if "no less restrictive conditions of release can adequately vindicate the state's compelling interest."[110] The court further set the following new requirements: judges shall sanction nonfinancial means of release or make cash bail an amount the individual can pay to protect a compelling governmental interest.[111] Despite largely eliminating the cash bail system, the court held that 1) state courts must set bail at an amount the individual can reasonably afford, unless there is a valid basis for detention; 2) solely conditioning pretrial release on ability to pay the bail is unconstitutional; and 3) individuals cannot be held in custody until trial unless a court has made that individualistic determination.[112] California

106. *In re* Humphrey, 482 P.3d 1008, 1014 (Cal. 2021).

107. *See id.* at 1014–15 (describing the case's procedural posture).

108. *Id.* at 1015.

109. *See id.* at 1018 (analyzing cash bail under due process and equal protection).

110. *Id.* at 1019.

111. *See id.* (citing to *Salerno* which discusses the court's new parameters around the limited exception of pretrial detention).

112. *See id.* at 1019–21 (allowing judges to maintain discretion as to who is deemed a risk and ineligible for personal recognizant release or release with nonmonetary conditions).

determined cash bail to be unconstitutional in how the state utilizes the system in its application to indigent defendants, yet decided to maintain the system with modifications. The court sketched a general bail determination hearing where courts must hold individual hearings to consider the following relevant factors: protection to the public and "victim," seriousness of the alleged, charged offense, "the arrestee's previous criminal record and history of compliance with court orders, and the likelihood that the arrestee will appear at future court proceedings."[113]

California made necessary changes to its cash bail system; however, it did not do enough. Overall, California did not change the underlying issues which are prevalent since the Bail Reform Act of 1984's implementation.[114] California maintains a reliance on the state's compelling interest, the same standard noted in *United States v. Salerno*,[115] the case upholding the Bail Reform Act and set in motion an abuse of judicial discretion and a tough on crime rhetoric within bail determinations.[116] As challenges to the cash bail system, statistical studies, and the District of Columbia have shown, states lack a compelling interest in cash bail to ensure the public's safety and the defendant's return to future hearings.[117] Relying on what should be regarded as a misguided and outdated principle to uphold a partial reliance of cash bail, indigent defendants in California will continue facing a loss of pretrial liberty which interferes with their right to due process of law.[118] The California Supreme Court had the chance to end pretrial, wealth-based discrimination; however, the court missed their

113. *See id.* at 1019 (applying the California Constitution's requirements regarding excessive bail).

114. *See* Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended at 18 U.S.C. §§ 3141–3150 (2012 & Supp. V 2018)) (establishing America's current bail laws and practices).

115. *See* 481 U.S. 739, 748 (1987) ("[W]e have found that sufficiently compelling governmental interests can justify detention of dangerous persons.").

116. *See In re Humphrey*, 482 P.3d 1008, 1019 (Cal. 2021) (maintaining the state's compelling interest for cash bail); *Salerno*, 481 U.S. at 741 (establishing bail to run with a state's compelling interest); *see also supra* Part II.

117. *See supra* Part II–III; *see also infra* Part IV.

118. *See* U.S. CONST. amend. V (articulating that no person is to be deprived of liberty without due process of the law); *see also Salerno*, 481 U.S. at 741 (establishing bail to run with a state's compelling interest and finding the Bail Act of 1984 to be constitutional).

mark. Requiring courts to hold individualistic hearings and consider a person's ability to pay are necessary changes, yet they do not fix the root problems of the cash bail system: requiring funds to obtain release, abusive judicial discretion, and problematic risk assessments.[119]

B. Illinois Pretrial Fairness Act

Bail reform measures in Illinois began in 2018 with the state's Bail Reform Act to counteract the system's discrimination against indigent defendants.[120] The law made "nonviolent misdemeanor or low-level felony" subject to a presumption of nonmonetary bail, like curfews, in-person reporting, electric home monitoring, etc.[121] If a judge sets a monetary bail which the person cannot afford, the court must set a rehearing within seven days.[122] This legislative change paved the way for a new legislation signed in 2020, making Illinois the first state to fully eliminate cash bail by 2023.[123] Illinois has created nonfinancial conditions of pretrial release and further stipulations on when pretrial release is revoked.[124] This act re-establishes the presumption that defendants are "entitled to release on personal recognizance."[125]

Furthermore, within their legislation, Illinois restricts judicial discretion without justification. Any additional nonmonetary conditions to release are only set when a judge determines they are "necessary to assure the defendant's appearance in court, assure

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119. *See supra* Parts II–III; *see also infra* Part V.

120. *See* Kim Geiger, *Rauner Signs Law to Change Rules for Paying Cash to Get Out of Jail*, CHI. TRIB. (June 9, 2017, 4:57 PM) (describing the legislative change and the purpose behind the change) [perma.cc/WG5N-X9P6]; Kiran Misra, *A History of Bail Reform*, S. SIDE WKLY. (Jan. 31, 2018) (same) [perma.cc/WB8Q-T4QP].

121. *See* Geiger, *supra* note 120 (describing what the law changed).

122. *See id.* (discussing requirements if a judge places monetary measures on an individual).

123. *See generally,* Illinois Pretrial Fairness Act § 110-5 (codified as amendment to H.B. 3653) (establishing other parameters and considerations in lieu of cash bail in pretrial release).

124. *See id.* at 334 (explaining the assessment for judges for revocation if a defendant fails to appear on pretrial release).

125. *Id.* at 335.

the defendant does not commit any criminal acts, and complies with all conditions of pretrial release."[126] If a judge orders GPS monitoring, electric monitoring, or home confinement as a pretrial release condition, the court must "determine every 60 days if no less restrictive condition of release or combination of less restrictive conditions of release would reasonably ensure the appearance, or continued appearance, of the defendant."[127] Pretrial release is only denied when a judge determines the defendant "poses a specific, real and present threat to a person, or has a high likelihood of willful flight" or the individual is "charged with an offense listed in Section 110-6.1 . . . after the court has held a hearing under Section 110-6.1."[128] If the judge places upon the defendant pretrial conditions or is denied release, the court must submit a written finding to explain why more restrictive conditions are necessary, and at each subsequent appearance before the court, "the judge must find that continued detention or the current set of conditions imposed are necessary to avoid the specific, real and present threat to any person or of willful flight from prosecution to continue detention of the defendant."[129] All decisions regarding pretrial release or its conditions must be individualized and "no single factor or standard should be used exclusively to make a condition or detention decision."[130] This eliminates virtually all judicial discretion unless their decision is justified based on the heightened requirements placed on judges and shifts the burden from the defendant back to the government.

Illinois is the first state to end cash bail, thereby making Illinois the first state to end the due process violations towards

126. *Id.* at 336.

127. *Id.* at 356.

128. *Compare id.* at 336–37; 340 (specifying the many factors for determining pretrial detention, including the nature of the charges, history of the defendant, and the age and physical condition of the defendant and complaining witnesses), *with* Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended at 18 U.S.C. §§ 3141–3150 (2012 & Supp. V 2018)) (noting the Bail Reform Act's language of requiring the court to determine whether the individual poses a risk of flight and/or risk of danger).

129. Illinois Pretrial Fairness Act at 337 (codified as amendment to H.B. 3653); *see also id.* at 383–84 (requiring that risk assessment tools not be the sole basis of pretrial detention and requiring that the defendant's attorney be provided the scoring system and information of the assessment).

130. *Id.* at 379.

indigent defendants regarding pretrial, wealth-based liberty.[131] Ending cash bail is necessary for an indigent defendant's due process rights because their pretrial detention is solely due to their socioeconomic status, further serving as a loss of their liberty when they possess a presumption of innocence.[132] Until final adjudication, individuals should neither face a loss of liberty nor have their presumption of innocence ignored, especially when the individuals suffering from the cash bail system are suffering because of factors such as their socioeconomic status and/or race.[133] Illinois is also addressing the issue without replacing cash bail with a risk assessment based system, as these assessments, including determining flight risk and community danger, are often built on systemic discrimination against America's most marginalized communities.[134] The state's abandonment of cash bail within the pretrial phases of adjudication can come with the foreshadowed success the District of Columbia has since their 1992 legislative change.[135] All other states should look to Illinois' legislation as a guide for how to end cash bail and to start addressing systematic discrimination against marginalized communities via wealth-based discrimination and racial discrimination within their jurisdiction.

C. District of Columbia

Although Illinois' decision cannot be supported by direct evidence for future success, the District of Columbia ("D.C.")

131. *See id.*

132. *See* U.S. CONST. amend. V (establishing that no person is to be deprived of liberty without due process of the law); U.S. CONST. amend. VI (establishing the principle of innocence until proven guilty).

133. *See* Carroll, *supra* note 55, at 771 (stating that the mechanisms which cash bail's pretrial detention are based upon stem from a person's socioeconomic status and race).

134. *See id.* at 771 (explaining that the risk assessment tool bases its data off of socioeconomic and criminal focused factors which are products of economic and racial disparity).

135. *See* Melissa Block, *What Changed After D.C. Ended Cash Bail*, NPR (Sept. 2, 2018, 7:43 AM) (discussing D.C.'s jurisdictional success after largely eliminating cash bail) [perma.cc/S7JQ-367W].

largely eliminated its use of cash bail in 1992.[136] Since 1992, D.C. has shown cash bail is obsolete as ninety to ninety-four percent of individuals are released each day without relying on money.[137] D.C. legislation begins with a presumption of personal recognizance or an "unsecured appearance bond."[138] If a judicial officer requires a bail bond, it must be an amount which is "reasonably necessary to assure the appearance of the person," and future dangerousness may not be imposed by means of a financial condition.[139] For individuals whom pretrial conditions for release are imposed if, "after 24 hours from the time of the release hearing, continues to be detained as a result of inability to meet the conditions," they are entitled review "by the judicial officer who imposed them."[140] The judicial officer must write the reasons for the condition(s) and/or their continuance.[141] Pursuant to data by the D.C. Pretrial Services Agency, within the past five years, approximately "90 percent of defendants released were not arrested again before their cases were fully adjudicated," and the majority of those arrested again were not arrested "for violent crimes."[142] As of 2020, "94 percent of defendants are released pretrial, and 91 percent of them appear in court for their trial."[143] This shows cash bail is not needed and that Illinois, as well as any other jurisdiction, can see the same success that D.C. has since their cash bail reform.

136. *See id.* (discussing cash bail reform with a concentration on D.C.'s success with the Honorable Truman Morrison who served on the Superior Court from 1979 to 2020).

137. *See* Ann Marimow, *When it Comes to Pretrial Release, few Other Jurisdictions do it D.C.'s Way*, WASH. POST (July 4, 2016) ("[T]here is no evidence you need money to get people back to court.") [perma.cc/EVZ4-RV9W].

138. D.C. CODE § 23–1321, Pub. L. 24–50 (current through Feb. 8, 2022).

139. *See id.* (providing judicial hearing requirements).

140. *Id.*

141. *See id.* (decreasing judicial discretion in granting or denying pretrial bail).

142. Marimow, *supra* note 137.

143. Hunter, *supra* note 8.

V. Proposal: Cash Bail Must be Abolished to Eliminate the System's Due Process Violations via Wealth-Based and Systematic Discrimination

A. Wealth-Based Release Decisions Violate Due Process

The Fifth Amendment, along with the Fourteenth Amendment, require individuals receive due process of the law by not being "deprived of life, liberty, or property."[144] Procedural due process prevents unfair and arbitrary processes by requiring the government to follow certain procedures.[145] On the other hand, substantive due process is concerned with how rights are created, defined, and regulated—the government cannot infringe upon these rights when it lacks a compelling reason, whether or not the process given.[146] For example, procedural due process is concerned and touches on provisions like the right to an attorney while substantive due process is concerned with issues like privacy.[147]

Pretrial detainment, exacerbated by cash bail, signals due process concerns as confinement is a significant deprivation of a person's liberty, encompassing the principle of having fundamental liberty from bodily restraint.[148] Furthermore, cash

144. U.S. CONST. amend. V; *see also* U.S. CONST. amend. XIV, § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

145. *See Due Process of Law: Substantive Due Process, Procedural Due Process, Further Readings*, L. LIBRARY—AM. L. & LEGAL INFO. (explaining procedural due process) [perma.cc/2U35-MLBN]; *see also* Nathan S. Chapman & Kenji Yoshino, *The Fourteenth Amendment Due Process Clause*, NAT'L CONST. CTR. (describing the government's burden within procedural due process) [perma.cc/Q3QX-QT69].

146. *See Due Process of Law: Substantive Due Process, Procedural Due Process, Further Readings*, *supra* note 145 (explaining substantive due process); *see also* Chapman & Yoshino, *supra* note 145 (highlighting the government's burden in substantive due process issues).

147. *See Due Process of Law: Substantive Due Process, Procedural Due Process, Further Readings*, *supra* note 145 (providing examples of what falls under procedural versus substantive due process).

148. *See, e.g.*, United States v. Salerno, 481 U.S. 739, 741 (1987) (examining the Bail Reform Act of 1984 under a due process analysis); *In re* Humphrey, 482 P.3d 1008, 1018;1021 (2021) (examining cash bail under a due process analysis); *see also* Addington v. Texas, 441 U.S. 418, 425 (1979) (describing commitment as

bail carries an additional due process violation concern, as the detainment runs contrary to "the well-established principle that an indigent criminal defendant may not be imprisoned solely because of [their] . . . indigence."[149] States, such as California, are ruling cash bail violates individuals' due process rights. Those states apply a substantive due process analysis, meaning the state holds cash bail violates due process in its application to indigent defendants.[150] Within a substantive due process constitutional challenge, the law or regulation must pass scrutiny. When the government is infringing upon an individual's fundamental right, they must show the law or regulation is necessary to fulfill their compelling objective.[151] If there is a necessary, compelling objective for the law or regulation, courts find individual's substantive due process rights are not violated.[152] If the law or regulation does not "invoke a suspect classification or infringe upon a fundamental right," then it will be reviewed under rational basis, requiring the government to have a legitimate interest in the law or regulation.[153]

In 1978, the Fifth Circuit stated "the incarceration of those who cannot [afford bail], without meaningful consideration of other possible alternatives, infringes on . . . due process . . . requirements."[154] The idea behind the Bail Reform Act

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a deprivation of liberty which requires protection under due process); Foucha v. Lousiana, 504 U.S. 71, 80 (1992) (stating that due process protects against arbitrary governmental action).

149. Caliste v. Cantrell, 329 F. Supp. 3d 296, 310 (E.D. La. 2018), aff'd, 937 F.3d 525 (5th Cir. 2019) (quoting Cain v. City of New Orleans, 281 F. Supp. 3d 624, 649 (E.D. La. 2017), aff'd sub nom. Cain v. White, 937 F.3d 446 (5th Cir. 2019)) (internal quotations omitted).

150. *See In re Humphrey*, 482 P.3d at 1018–19 (applying a substantive due process standard to determine whether the state has a compelling interest to regulate pretrial detention via cash bail).

151. *See* Liza Batkin, *Wealth-Based Equal Process and Cash Bail*, 96 N.Y.U. L. REV. 1549, 1555 (2021) (discussing which governmental infringements upon an individual's liberties fall under a strict scrutiny analysis).

152. *See Substantive Due Process—Fundamental Rights*, LAWSHELF (articulating what qualifies as a fundamental right of substantive due process under a strict scrutiny analysis) [perma.cc/6KPL-ZQZB].

153. *See* Batkin, *supra* note 151, at 1555 (explaining different levels of scrutiny and what the government must prove to justify the law or regulation).

154. *In re* Humphrey, 482 P.3d 1008, 1018 (2021) (quoting Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978)) (internal quotations omitted).

of 1984 and the decision by the Supreme Court in *United States v. Salerno*[155] is that "liberty is the norm," while pretrial detention is "the carefully limited exception."[156] However, affording pretrial release has become the exception rather than the norm for indigent defendants.[157] Pretrial detainees cannot be punished "prior to an adjudication of guilt in accordance with due process of law," especially when these individuals are also being punished for their indigency.[158] Within a due process analysis for pretrial detainment, the government must prove they have a compelling reason to overcome the loss of a right to a fundamental liberty.[159] Conforming with that standard, to keep an individual imprisoned, sentencing courts must determine that "alternatives to imprisonment are not adequate in a particular situation to meet the [s]tate's interest in punishment and deterrence."[160]

California, along with the other forty-eight states currently maintaining any part of cash bail, violates indigent defendant's rights based on a failure to establish a justifiable governmental compelling or legitimate interest in maintaining the system within a due process analysis. Due to the success D.C. maintains within the past thirty years and statistical studies, there is evidence that defendants do not need a monetary incentive to help assure court appearances.[161] Additionally, cash bail's purpose of increasing monetary funds for release to those who are a supposed risk of

155. *See generally,* United States v. Salerno, 481 U.S. 739 (1987).

156. *See* Baughman, *supra* note 93, at 3 (explaining that the Supreme Court's decision to assess future dangerousness in bail hearings is a constitutionally valid rationale in denying bail) (internal citations and quotations omitted).

157. *See id.* at 3 (concluding this new norm exists in the federal and state bail schemes).

158. *See* Bell v. Wolfish, 441 U.S. 520, 535 (1979) (evaluating pretrial detention within a due process analysis).

159. *See In re Humphrey*, 482 P.3d at 1019 (stating that, in accordance with due process constitutional constraints, "such detention is impermissible unless no less restrictive conditions of release can adequately vindicate the state's compelling interests.").

160. *Id.* (quoting Bearden v. Georgia, 461 U.S. 660, 672 (1983)) (internal quotations omitted).

161. *See* Hunter, *supra* note 8 (finding ninety-one percent of defendants appeared for their proceedings in D.C.); Burdeen & Shang, *supra* note 62, at 24 (stating that sending reminders for court date is the only pretrial support mechanism which has proven to be successful at improving appearance rates).

future danger to the public directly impacts indigent defendants.[162] By attaching that standard to cash bail's risk assessment to determine the monetary value of release, the system is stating the public needs protection against indigent defendants who commit offenses while those who commit the same or similar alleged offense(s), but have the monetary means to post the bail are not a risk to the public.[163] This is nothing more than direct wealth-based discrimination. Lastly, congressional intent behind adding danger to the community as a risk assessment lacks merit. That particular risk assessment exists, at least partially, because that session of Congress believed flight risk could not be the sole risk assessment tool that a judicial officer should consider.[164] The lack of valid congressional intent, challenges to the cash bail system, D.C.'s success, and statistical studies show cash bail is not needed, signaling the government lacks a compelling or legitimate interest in cash bail itself to justify individuals forced to sit in jail for an unspecified time while watching their lives vanish before their eyes through metal bars.[165] Removing pretrial liberty and dehumanizing indigent defendants, especially prior to an adjudicated determination of guilt, signals due process concerns and without a compelling or legitimate governmental interest any fragment of the cash bail system fails a substantive due process challenge.

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162. *The Civil Rights Implications of Cash Bail*, U.S. COMM'N C.R., 7 (Jan. 20, 2022) ("[H]igher-risk individuals in the money-bail system are sometimes released because they have access to the necessary monetary funds, regardless of the public safety risk they pose.").

163. *See* Rory Fleming, *The Cash Bail System is an Abusive Anachronism*, FILTER (Nov. 5, 2019) ("[T]here's no reason someone should be held in jail just because they have less money when compared with someone else who is charged with the same crime[,] [i]t is legalized discrimination against indigent people.") (internal quotations omitted) [perma.cc/AB7K-D8DG].

164. *See* Kalhous & Meringolo, *supra* note 56, at 813 (noting the congressional intent behind adding "danger to the community" as part of the bail risk assessment); *see also* United States v. Salerno, 481 U.S. 739, 768 (1987) (Sevens, J., dissenting) ("[A]llowing pretrial detention or requiring a higher bail on the basis of future dangerousness is unconstitutional.").

165. *See Substantive Due Process—Fundamental Rights*, *supra* note 152 (discussing how the government needs compelling reason in a due process analysis to justify the discriminatory law or regulation); *see, e.g.*, *In re* Humphrey, 482 P.3d 1008, 1019;1021 (2021) (stating that the state must have a compelling justification for keeping individuals in jail).

B. Even if Constitutional, Wealth-Based Release Decisions Exacerbate Economic and Racial Disparities and are Counter-Productive

Unless and/or until an individual is found guilty, individuals are afforded certain substantive due process rights which includes a presumption of innocence and places the burden on the prosecution to prove the defendant's guilt beyond a reasonable doubt.[166] However, instead of the presumption of innocence, pretrial freedom comes at a price.[167] Judges predict future danger and flight which in turn decides pretrial liberty contingent on meeting monetary (and/or other) conditions or pretrial detention without having to explain their rationale.[168] Additionally, current bail practices allow courts and the prosecution to predict guilt and weighs evidence against defendants prior to trial.[169] Many individuals held on bail are "often not convicted later and pose no danger to the public, but simply lack the funds to get out on bail."[170] Consequently, those who are indigent face the repercussions of this system, while others more privileged who commit the same or similar alleged offenses are awarded a get out of jail free card. Judge Truman summarizes this position by stating the requirement for an individual to pay money to receive pretrial release is "irrational, ineffective, unsafe, and profoundly unfair."[171]

Furthermore, cash bail directly fuels mass incarceration by forcing individuals into pretrial detention solely because they cannot afford their conditional monetary release. Approximately 400,000 individuals are imprisoned at any given time due to

166. *See In re* Windship, 397 U.S. 358, 364 (1970) (holding that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of "every fact necessary to constitute the crime with which [they are] charge"); *see also* Baughman, *supra* note 93, at 2 (concluding that individuals maintain their right to liberty until the fact finder determines guilt).

167. *See* Baughman, *supra* note 93, at 2 (explaining that the system results "in many individuals sitting in jail before they are found guilty of any crime").

168. *See id.* at 3–4 (providing that pretrial detention ultimately will result in "defendants being denied a real determination of guilt").

169. *See id.* at 4 (determining defendant's rights lack constitutional rooting).

170. *Id.* at 8.

171. *See* Marimow, *supra* note 137 (arguing against the use of bonds to release those accused of crimes before trial).

pretrial detention.[172] Of that, roughly ninety percent, who are the "poorest Americans with the fewest resources," are incarcerated solely because they cannot afford bail.[173] Past cash bail targeting individuals because of their indigency, racial discrimination is an additional layer of inequality in bail determinations.[174] Those facing pretrial detention are "disproportionally Black and Hispanic . . . Black and Hispanic Americans are more likely to be stopped by the police and experience police violence at the time of arrest; they also are more likely to be poor and unable to raise bail funds."[175] Cash bail serves as yet another example of the United States' long-standing history and policy of racial discrimination within society and the criminal justice system.[176] For decades of systematic discrimination to end, cash bail must end.

C. Proposal

It is not enough to eliminate cash bail for most cases. To end the discrimination and constitutional violation of the cash bail system, cash bail must be eliminated entirely.[177] California missed its opportunity to end cash bail's discrimination and constitutional violations. After stating that cash bail violates indigent defendant's due process rights, California maintains the premise

172. *See* Rosen, *supra* note 5, at 28 (discussing the number of individuals who are imprisoned prior to conviction); Arnav Shah & Shanoor Seervai, *How the Cash Bail System Endangers the Health of Black Americans*, THE COMMONWEALTH FUND (June 17, 2020) (same) [perma.cc/VH6C-LHQ9].

173. *See* Shah & Seervai, *supra* note 172 (noting the discrimination that occurs between wealthy and indigent incarcerated individuals).

174. *See* Baughman, *supra* note 93, at 9 (stating that commentators have acknowledged racial discrimination in bail determinations by comparing the cash bail amount of racial groups "charged with the same crimes").

175. *See* Shah & Seervai, *supra* note 172 (offering data to support the claim that law enforcement officers discriminate against men of color).

176. *See* Heather Thompson, *The Racial History of Criminal Justice in America*, 16 DU BOIS REV. SOC. SCI. RSCH. RACE 221, 232 (2019) (serving as an example of racism within the overall criminal justice system, the war on drugs lead to racialized drug laws which increased drug offense arrests by 126% in the 1980s).

177. *See* Illinois Pretrial Fairness Act § 110-5, 337, 356 (codified as amendment to H.B. 3653) (requiring judges to follow a presumption of release on recognizance ("OR") and write reports explaining why their decision must be affirmed at subsequent proceedings whenever an individual is not released OR).

that under certain circumstances cash bail is justified through the government's compelling interest.[178] Consequently, California's decision in continuing to utilize cash bail will still give way to discrimination within the criminal justice system as the cash bail system furthers systematic discrimination of marginalized groups within the United States.[179] The system's discrimination is inherent through aspects of the criminal justice system such as biased policing and the system's underlying statistical marginalization within risk assessment tools.[180]

Additionally, the costs of cash bail do not justify the means as individuals sit idly behind bars to bear witness, powerlessly, as their livelihoods and family members disappear before their eyes.[181] If a loss of liberty, livelihoods, and families is not enough to abolish the system, pretrial detainees face an increased risk of recidivism as the American prison system is meant to keep individuals locked up in lieu of providing resources and rehabilitation.[182] Additionally, indigent defendants who cannot afford their release also endure the social stigma associated with imprisonment and convictions.[183] Due to California maintaining even a part of their cash bail system, those chained to California's judicial system will continue to experience discrimination and oppression through 1) the violation of the due process right to pretrial liberty, 2) the loss of employment, housing, custody, etc.,

178. *See In re* Humphrey, 482 P.3d 1008, 1019–21 (2021) (maintaining that judges have ultimate discretion within bail hearings where the only parameters are that judicial decisions shall comport with due process and require pretrial release as the norm, unless the judge finds reason to detain the individual).

179. *See supra* Part II (addressing the history and purpose behind the cash bail system).

180. *See* Carroll, *supra* note 55, at 771–72 (finding discriminatory assessments which rely on an individual's past offenses could just be a signal of "racial, gender, or socioeconomic" police profiling).

181. *See supra* Part II (addressing the history and purpose behind the cash bail system).

182. *See* James Gilligan, *Punishment Fails. Rehabilitation Works.*, N.Y. TIMES (last updated Dec. 19, 2012, 11:43 AM) ("[I]f any other institutions in America were as unsuccessful in achieving their ostensible purpose as our prisons are, we would shut them down tomorrow.") [perma.cc/GBH4-D65E].

183. *See* McWilliams, E. R. & Hunter, B. A., *The Impact of Criminal Record Stigma on Quality of Life: A Test of Theoretical Pathways*, AM. J. CMTY. PSYCH. (2020) (providing the conclusion that individuals can feel stigmatized from the general public due to their criminal record) [perma.cc/G538-3KMS].

3) the overcrowding of jails and mass incarceration, and 4) the effects of subsequent convictions upon release.[184]

Ultimately, the only adequate way to stop the violations and discrimination caused by the cash bail system is to fully eliminate the system, such as Illinois' full implementation of the Illinois Pretrial Fairness Act.[185] In consequence to Illinois' state legislature, Illinois is the first state to make the meaningful change to stop the constitutional violations and wealth-based discrimination within the cash bail system.[186] Illinois' legislation, serving as a guide for other states, should assist in fixing the gaps and discrimination as discussed throughout this Note.

The cash bail system punishes individuals for being indigent. This punishment is discriminatory as an infringement on defendants' right to due process, which is further perpetrated by the system's abundance of judicial discretion, without justification, and reliance on risk assessment tools.[187] Each state must recognize the cash bail system is fueled by punitive and discriminatory rhetoric.[188] The first step in correcting direct wealth-based discrimination is to eliminate cash bail, and by doing so, eliminate the resulting mass incarceration.[189] Eliminating the cash bail system mitigates against the loss of one's job, housing, custody, recidivism, and worse case outcomes, as an individual would not be forced to try to find the means to afford their release pending case adjudication.[190] Next, states will need to take steps to reverse

184. *See supra* Part II.

185. *See generally*, Illinois Pretrial Fairness Act § 110-5 (codified as amendment to H.B. 3653).

186. *See, e.g.*, *Pretrial Justice Reform*, *supra* note 6 (changing their cash bail system in 2017 to make bail determinations via a point system to decide whether individuals should 1) be released on their own recognizance; 2) released with alternative procedures; or 3) held in pretrial detention); *but see supra* Part IV.

187. *See supra* Part II, IV.

188. *See Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125, 1132;1141 (2018) (noting "prosecutors can be overly punitive pretrial" and "[r]isk assessments [like flight and danger] depend upon criminal justice data" that is shaped by racial discrimination).

189. *See* Ill. Pretrial Fairness Act at 335 (abolishing cash bail before setting out the conditions and describing pretrial release); *see also* Shah & Seervai, *supra* note 172 (noting the number of defendants in jail at any given time in pretrial detention which fuels mass incarceration).

190. *See, e.g.*, Hamer & Cohen, *supra* note 1 (stating that David lost his job, 50-50 custody, and his housing); *see also* Baughman, *supra* note 93, at 6–7

the effects of the Bail Reform Act of 1984, which constructively abandoned the presumption of innocence.[191] After eliminating cash bail, states should create a presumption that individuals be released on their own recognizance and place the burden solely on the government in bail hearings, as Illinois plans to implement.[192] As an additional measure, states should implement court date reminders and day of travel logistics or assistance, as that is the only proven method to assist individuals' increased court appearance.[193] Further states should avoid replacing the cash bail system with another discriminatory mechanism as the root problems of the system need to be corrected, not just the title "cash bail." For example, pretrial conditional release requirements which come with supervision should be limited, if not eliminated, as supervision violations lead to a profoundly unfair incarceration rate.[194] Incarceration for violation of these conditions is unfair because an individual's inability to meet countless requirements does not mean they are engaging in criminal activity or that they pose a threat to public safety.[195] Additionally, jurisdictions should not replace cash bail with release programs focusing on other risk

(finding that individuals in pretrial detention have an increased risk of recidivism and face worse outcomes than those who receive pretrial release).

191. *See* Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended at 18 U.S.C. §§ 3141–3150 (2012 & Supp. V 2018)) (changing the entire United States system of cash bail).; *but see* United States v. Salerno, 481 U.S. 739, 762–63 (1987) (Marshall, J., dissenting) ("[T]he very pith and purpose of this statute is an abhorrent limitation of the presumption of innocence.").

192. *See* Ill. Pretrial Fairness Act at 341 (stating the "burden of proof . . . shall be upon the State"); *id.* at 356 (aiding in the release process, Illinois lessens judicial discretion by requiring repeat written reports as to why an individual cannot be released on their own recognizance or by the least required measurements possible); *see also* Sardar, *supra* note 17, at 1430–31 (describing how judicial discretion leads to increased racial biases); Bail Reform Act of 1984 (changing the presumption from pretrial release to the presumption of rebuttable detainment which first began in 1984 for judicial officers to determine which permits more judicial discretion than previously allowed).

193. *See* Burdeen & Shang, *supra* note 62, at 24 (finding reminders to be the only effective method to increase pretrial appearance).

194. *See id.* (reporting that one-quarter of individuals imprisoned are imprisoned because of supervision violations).

195. *See To Safely Cut Incarceration, States Rethink Responses to Supervision Violations*, PEW CHARITABLE TRUSTS 1, 2 (2019) (articulating how studies "have found that long periods of incarceration can make re-entry more difficult, causing people to lose their jobs, homes, and even custody of their children").

assessments to set pretrial release conditions, as risk assessments rely on the same discriminatory mechanisms as cash bail, including bail's flight and future danger assessment, which, in turn, nullifies the reasoning and principles behind ending the cash bail system.[196] For example, California's SB 10 aimed to implement a risk assessment system after eliminating cash bail.[197] On the other hand, Illinois counters reliance on bail's problematic risk assessments by calling on the Illinois Supreme Court to consider establishing its own non-discriminatory risk assessment, and requiring that the defendant and counsel receive the risk assessment's information and scoring mechanism to challenge its validity with evidence.[198]

Illinois as the only state effectively combating pretrial, wealth-based discrimination could cause concern regarding the success of abandoning one of the oldest principles of the criminal justice system; however, D.C.'s success serves as foreshadowed success for Illinois.[199] Illinois is moving towards ensuring the fundamental principles of the right to bodily autonomy through pretrial liberty and the right to be innocent until proven guilty; furthermore, the state is eliminating cash bail's responsibility

196. *See* Carroll, *supra* note 55, at 771 (finding risk assessment tools use factors which are products of economic and racial disparity); Pauline Kim, *Auditing Algorithms for Discrimination*, 166 U. PA. L. REV. 189, 189–90 (2017) (describing how automatic decision assessments can produce biased outcomes by relying on historic inequality and disadvantages among protected characteristics); *see also* Seth Prins, *Criminogenic or Criminalized? Testing an Assumption for Expanding Criminogenic Risk Assessment*, 43 L. & HUM. BEHAV. 477, 477 (2019) (concluding that "exposure to the criminal justice system itself increases some of the risk factors used to predict recidivism").

197. *See, e.g.*, Jon Schuppe, *California May Replace Cash Bail With Algorithms—but Some Worry That Will be Less Fair*, NBC NEWS (Oct. 17, 2020, 10:28 AM) (describing the fear that these assessments cause the same type of discrimination) [perma.cc/9D76-EZK7].

198. *See* Ill. Pretrial Fairness Act at 354, 383 (prohibiting risk assessments as the sole basis in denying pretrial release, requiring defense counsel to be provided with the tool's information and scoring mechanism, and calling on the Illinois Supreme Court to consider establishing a non-discriminatory risk assessment).

199. *See* Hunter, *supra* note 8 (providing numerical data that demonstrates D.C.'s success, including how in 2020, ninety-one percent of individuals appeared for their trial).

within pretrial mass incarceration.[200] Challenges to the cash bail system will continue to occur in every state, including California, until the fight against pretrial, wealth-based discrimination is over.[201] Illinois should be an example to the remaining states to show how the system can be effectively eliminated to fix the standards caused by the Bail Reform Act of 1984 and *United States v. Salerno*,[202] which will lead to a better criminal justice system and uphold the ideals set forward in the Constitution.[203]

VI. Conclusion

The origins of United States' pretrial detention begin with pretrial liberty as the norm; however, American systematic discrimination led to the rise of determining guilt prior to conviction through the cash bail system.[204] Justifying the system and forcing individuals to forego their constitutional right of freedom from bodily restraint, Congress established risk assessment factors which, in practice, frame defendants as presumably guilty criminals who are a danger to society and whom will flee from the given jurisdiction upon release to evade trial (unless they pay for their release).[205] Conversely to the basic notions of a constitutional right to due process and the

200. *See* U.S. CONST. amend. V (requiring the government to provide individuals with due process of law); U.S. Const. amend. XIV, § 1 (requiring states to uphold an individual's due process of law); U.S. CONST. amend. VI (rooting the presumption of innocence into American jurisprudence via the Bill of Rights); *see also* Shah & Seervai, *supra* note 172 (noting how cash bail fuels mass incarceration).

201. *See supra* Part III (addressing the cash bail system and the impacts of pretrial detention).

202. *See* United States v. Salerno, 481 U.S. 739, 741 (1987) (finding that the 1984 Bail Reform Act conforms with the Constitution).

203. *See* Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended at 18 U.S.C. §§ 3141–3150 (2012 & Supp. V 2018)) (setting the framework for the current cash bail system).

204. *Compare* Bail Reform Act of 1966, 18 U.S.C. §§ 3141–3150 (repealed) (establishing flight risk as an assessment tool while maintaining, through congressional intent, release via personal recognizance as the default), *with* Bail Reform Act of 1984 (creating the current cash bail system and risk assessment tools which establish certain presumptions towards detainment for judicial officers to decide).

205. *See supra* Part II (addressing the history and purpose of the cash bail system).

presumption of innocence until proven guilty, cash bail is a system that implements costs justifying the means by detaining those who cannot afford bail — the same marginalized groups the criminal justice system continuously oppresses.[206]

By maintaining any part of the cash bail system, individuals will have their constitutional rights violated and will be forced to watch, helplessly, as their lives vanish before their eyes as they sit locked in a jail cell.[207] Statistics show the vast majority of individuals do not evade hearings illuminating that the only measure, verifiably, needed is court date reminders and assistance getting to court.[208] Additionally, groups have spoken out against the cash bail system and its constitutional violations causing waves of reform through time.[209] These waves of reform culminate in Illinois' decision to be the only state ending the system which therefore eliminates the discrimination and due process violations caused by cash bail.[210] All other states will continue to face reform measures until the entire United States bails on cash bail.

206. *See* U.S. CONST. amend. V (requiring that individuals have due process of law); U.S. CONST. amend. VI (requiring that there be certain safeguards to maintain the presumption of innocence).

207. *See* Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended at 18 U.S.C. §§ 3141–3150 (2012 & Supp. V 2018)) (implementing an abundance of judicial discretion and changing the presumption to detainment with the burden of proof being placed upon the defendant); *see also* Sardar, *supra* note 17, at 1430 (stating that "the 1984 Act contains numerous provisions which shape the current system").

208. *See* Burdeen & Shang, *supra* note 62, at 24 (stating that court date reminders have been the only pretrial support to ensure future hearing and trial appearances) (internal citations omitted).

209. *See supra* Part III.

210. *See, e.g.*, *In re* Humphrey, 482 P.3d 1008, 1022 (2021) (maintaining cash bail in some cases and scenarios).