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Assessing Dangerousness Amidst Racial Stereotypes: An Analysis of the Role of Racial Bias in Bond Decisions and Ideas for Reform

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ASSESSING DANGEROUSNESS AMIDST RACIAL STEREOTYPES: AN ANALYSIS OF THE ROLE OF RACIAL BIAS IN BOND DECISIONS AND IDEAS FOR REFORM

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The problems of mass incarceration in the United States and its burdens on the economic and social well-being of local communities, counties, and states have received increased attention and have spurred conversations on prison and jail reform. More recently, reform efforts have appropriately focused on the bond system and the role of pretrial detention in fueling jail and prison overcrowding. The bond process presents a unique opportunity for reform because defendants at this stage are presumed innocent and, as the Supreme Court has affirmed, these defendants possess fundamental rights to liberty and a presumption towards pretrial release. Yet jurisdictions, such as Cook County, Illinois, overwhelmingly rely on monetary bonds and other restrictive measures to condition or deny a defendant's release, causing many defendants to remain behind bars for months and even years awaiting trial.

As recent research reveals, the use of pretrial detention disproportionately affects black defendants who are more likely to receive higher bond amounts and more restrictive conditions than white defendants facing similar charges. Meaningful bond reform, therefore, must address the role of racial bias in contributing to disparate detention outcomes for black defendants. Bond decisions are particularly susceptible to implicit bias because they often require judges to make quick, on-the-spot, complex, and predictive decisions about a defendant's threat to the community and

*B.A., Goshen College, 2009; J.D., Northwestern University Pritzker School of Law, 2018. I want to thank Professor Destiny Peery for her thoughtful discussions on implicit bias and racial disparities in the law that inspired this article. Thank you to the many editors of the *Journal of Criminal Law and Criminology* for their dedication to reviewing this piece. Finally, my deepest thanks to my beloved husband, Tyler Falk, for his love, support, and sacrifice.

likelihood to reappear in court. These decisions occur when judges have very limited information about the individual defendant, leading to a misguided reliance on racial stereotypes.

Effective bond reform should include the increased use of unsecured bonds instead of monetary bail as a more reliable and less restrictive means to ensure the defendant's return to court and community safety. Jurisdictions should also demand more accountability and transparency from bond judges by requiring publicly available data on bond court practices and jail admissions. Reform efforts should further require judges to undergo training on implicit bias and the proper use of risk-assessment instruments to more fairly and accurately evaluate the risks a defendant poses if released to avoid relying on inaccurate racial stereotypes.

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INTRODUCTION

In the past couple of decades, the United States has imprisoned more people, both in real numbers and as a percentage of the total population, than any other country.¹ As of 2008, the U.S. has 2.3 million people,² nearly 1 % of the U.S. adult population, behind bars.³ Despite the 50% decrease in national crime rates since the 1990s, the rate of incarceration has grown at approximately 3% each year from the early 1990s through the early 2000s,⁴ though in recent years the incarceration rate nationally has

¹ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 6 (2010).

² Peter Wagner & Wendy Sawyer, *Mass Incarceration: The Whole Pie 2018*, PRISON POLICY INITIATIVE (March 14, 2018), <https://www.prisonpolicy.org/reports/pie2018.html> [https://perma.cc/VE23-LEGG].

³ Mark A.R. Kleinman & Angela Hawken, *Fixing the Parole System*, 24 *ISSUES IN SCI. & TECH.* 45, 45 (2008), <http://issues.org/24-4/kleinman/> [https://perma.cc/CNT7-B4B7].

⁴ *Id.*

shown early signs of slowing down.⁵ These persistently high incarceration rates strain correctional facilities and stretch state budgets to accommodate the enlarging population.⁶ In a 2012 nationwide study of county jails, 15% of responding jails reported that confined jail populations were at or above the facility's capacity at the beginning of the year, and over 40% of the jails were operating at over 80% capacity.⁷

The impact of mass incarceration on prison and jail facilities is exceptionally evident in Illinois and Cook County, in particular.⁸ Situated on ninety-six acres of Chicago's southwest side, the Cook County Jail is one of the largest, single-site jail facilities in the country and as recently as 2012 has routinely operated at approximately 90% capacity at all times.⁹ The issue of severe overcrowding and its attendant impact on jail conditions for inmates and the strain on county resources has been documented as early as the 1920s¹⁰ and has been the subject of decades of litigation in federal courts.¹¹ In Cook County, the jail population rose considerably from around 8,700 in early 2011 to more than 10,000 at its peak in August 2013.¹² In addition to the human costs of mass incarceration on the social and economic welfare of the community, the costs to operate crowded jails and prisons are exorbitant. As of 2017, the estimated cost to taxpayers to operate the Cook County Jail was \$550 million annually, an average of

⁵ DANIELLE KAEBLE & LAUREN GLAZE, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2015 2 (2016), <https://www.bjs.gov/content/pub/pdf/cpus15.pdf> [<https://perma.cc/VUG6-QNT4>]. Bureau of Justice researchers note a recent downward trend in the incarcerated population since 2008.

⁶ NATALIE R. ORTIZ, NAT'L ASS'N OF CTYS., COUNTY JAILS AT A CROSSROADS: AN EXAMINATION OF THE JAIL POPULATION AND PRETRIAL RELEASE 8 (2015), <http://www.naco.org/resources/county-jails-crossroads> [<https://perma.cc/5DFZ-JJVA>].

⁷ *Id.* at 8–9.

⁸ DAVID E. OLSON & SEMA TAHERI, COOK CTY. SHERIFF'S REENTRY COUNCIL RESEARCH BULLETIN, POPULATION DYNAMICS AND THE CHARACTERISTICS OF INMATES IN THE COOK COUNTY JAIL 2 (2012), https://ecommons.luc.edu/cgi/viewcontent.cgi?article=1000&context=criminaljustice_facpubs [<https://perma.cc/V7TE-R6QL>].

⁹ *Id.* at 1–3.

¹⁰ *Id.* at 1.

¹¹ JOHN P. WALSH, THE CULTURE OF URBAN CONTROL: JAIL OVERCROWDING IN THE CRIME CONTROL ERA 9–13 (2013).

¹² After this unprecedented spike in the jail population, Cook County officials began reform efforts and recently released data suggests that these efforts may have had some impact in diminishing the prison population, which this paper will discuss in more detail in later sections. THE CIVIC FEDERATION, THE IMPACT OF COOK COUNTY BOND COURT ON THE JAIL POPULATION: A CALL FOR INCREASED PUBLIC DATA AND ANALYSIS 38 (2017), https://www.civicfed.org/sites/default/files/report_publicsafety2017.pdf [<https://perma.cc/TWW5-SB7Y>].

more than \$61,000 a year per detainee.¹³ Greater attention to a defendant's access to release from jail and prison can alleviate the ballooning burdens of the carceral state.

The rate at which defendants are eligible for pretrial release contributes to this rise in incarceration. The bond process represents the beginning of a defendant's contact with the criminal court system and pretrial detainees make up nearly two-thirds of the total defendants confined in jails nationwide.¹⁴ As overall incarceration rates increased, the share of confined pretrial detainees in jails also rose from 56% of the total jail population in 2000 to 63% of the total jail population in 2014.¹⁵ Bond determinations involve assessments of a defendant's risk pretrial when the defendant is presumed innocent.¹⁶ Unlike a judge's sentencing decision in the aftermath of a guilty verdict, bond decisions are unique moments in the criminal system in which there is a presumption towards release, sometimes explicitly written in the state statute.¹⁷ The bond process provides a special opportunity to alleviate the problems with overcrowding and mass incarceration by reexamining the decision makers' assessments of the defendant's risks and their decisions about release versus detention.

A detailed examination of bond decisions across the country is important not only to address the burdens of mass incarceration, but to address the way that bond decisions fuel racial disparities already evident in other areas of the criminal legal system. Racial inequalities exist at every phase of the U.S. criminal legal system.¹⁸ Compared to similarly situated white defendants, black defendants are more likely to be searched for contraband,¹⁹ more likely to experience police force,²⁰ more likely to be

¹³ *Id.* at 4 (citing Illinois Sentencing Policy Advisory Council, *Quantifying the County Adult Criminal Justice Costs in Illinois*, December 6, 2016, p. 5, http://www.icjia.state.il.us/spac/pdf/Quantifying_County_Adult_Criminal_Justice_Costs_in_Illinois_120616.pdf [<https://perma.cc/7GV8-WRZW>]).

¹⁴ ORTIZ, *supra* note 6, at 5.

¹⁵ TODD D. MINTON & ZHEN ZENG, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *JAIL INMATES AT MIDYEAR 2014* 4 (2015). The exact percentage is 62.8%.

¹⁶ *See generally id.* at 2–3.

¹⁷ *Id.* at 2; *see also* Illinois Bail Statute, 725 Ill. Comp. Stat. Ann. 5/110-4 (West 2013) (“All persons shall be bailable before conviction . . .”).

¹⁸ *See, e.g.,* Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 *YALE L.J.* 2 (2013).

¹⁹ Kate L. Antonovics & Brian G. Knight, *A New Look at Racial Profiling: Evidence from the Boston Police Department*, 91 *REV. ECON & STAT.* 163, 164 (2009).

²⁰ Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force* at 3 (Nat'l Bureau of Econ. Research, Working Paper No. 22399, 2016).

charged with a serious offense,²¹ more likely to be convicted of serious crimes,²² more likely to be incarcerated,²³ more likely to receive longer sentences,²⁴ and more likely to be sentenced to death.²⁵ Black male defendants, in particular, are more likely to receive upward departures from the sentencing guidelines and less likely to receive downward departures than any other group.²⁶

As this Article will later demonstrate, these racial disparities exist in equal force in the bond system.²⁷ Moreover, the nature of the bond process itself is particularly susceptible to racial bias because the type of assessments made of a defendant's dangerousness implicate established stereotypes of blackness and criminality.²⁸ In bond decisions, judges must quickly consider the risk a defendant poses to the safety of persons in the community if released and the likelihood that the defendant will appear for future court dates.²⁹ Constrained by an avalanche of cases,³⁰ judges make rapid, but complex, predictive decisions about a defendant's threat to the

²¹ Starr & Rehavi, *supra* note 18, at 7.

²² EMILY OWENS ET AL., EXAMINING RACIAL DISPARITIES: CRIMINAL CASE OUTCOMES AMONG INDIGENT DEFENDANTS IN SAN FRANCISCO, 18 (May 2017), <https://www.law.upenn.edu/live/files/6792-examining-racial-disparities-may-2017-summary> [<https://perma.cc/NAZ7-RUW6>].

²³ David S. Abrams et al., *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347–83, 347 (2012).

²⁴ David B. Mustard, *Racial, Ethnic and Gender Disparities in Sentencing: Evidence from the US Federal Courts*, 44(1) J.L. & ECON 285, 300 (2001).

²⁵ Scott Phillips, *Continued Racial Disparities in the Capital of Capital Punishment: The Rosenthal Era*, 45 HOUSTON L. REV. 131 (2008).

²⁶ Mustard, *supra* note 24, at 302, 312. The Sentencing Guidelines and Policy Statements of the Sentencing Reform Act of 1984 was designed to eliminate sentencing disparities and stated explicitly that race, gender, ethnicity, and income should not affect the length of an individual's sentence. *Id.* at 285–86. A federal sentencing commission established guidelines and rules that proscribed a sentencing range that was deemed appropriate for each defendant based on his or her offense category. *Id.* at 289. Yet researchers have demonstrated that judges are more likely to depart upward from the sentencing guidelines to order longer sentences to black defendants than the maximum amount included in the sentencing range and are less likely to order reduced sentences for black defendants that go lower than the sentencing range. *Id.* at 312.

²⁷ David Arnold et al., *Racial Bias in Bail Decisions*, Q. J. ECON., 3 (Oct. 2017), <https://www.princeton.edu/~wdobbie/files/racialbias.pdf> [<https://perma.cc/DA7Q-AMGY>].

²⁸ *Id.* at 26.

²⁹ *Id.* at 5.

³⁰ DANIEL T. COYNE, A REPORT ON CHICAGO'S FELONY COURTS, CHICAGO APPLESEED FUND FOR CRIMINAL JUSTICE PROJECT, 30 (2007), https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=1188&context=fac_schol [<https://perma.cc/E36C-SSG3>]. This source notes that Chicago would need to double the total number of criminal court judges to adequately process all the felony cases in the city's criminal courts.

community and his or her reliability to return to court based on very limited information using amorphous criteria.³¹ In many jurisdictions, judges have no training to make accurate predictions and have wide discretion in their decision-making with little accountability.³² The considerable time pressures, limited information available to judges, lack of training or oversight, and the nuanced analysis required present potent ingredients for racial bias, specifically implicit bias.³³

Research in cognitive psychology demonstrates that implicit biases are hidden attitudes and stereotypes that are “not consciously accessible through introspection” and can therefore impact a person’s behavior and decision-making without the person’s awareness.³⁴ Implicit bias often occurs when people are asked to resolve a complex issue with limited time and must resort to stereotypes, mental shortcuts, or other rules of thumb to quickly solve the issue.³⁵ This cognitive process that relies on mental shortcuts or existing schemas is rapid, intuitive, automatic, and error-prone.³⁶ Researchers have long demonstrated the persistent stereotypes of black people as criminal or threatening, as well as the association of black men, in particular, with danger and criminality.³⁷ Violent crimes, but not nonviolent crimes, are associated more frequently with black people than white people.³⁸ In the bond context, where judges make on-the-spot decisions about a defendant’s dangerousness with little to no interaction with the defendant and minimal accountability, judges subconsciously resort to established stereotypes and existing schemas of black people as dangerous.³⁹ This subconscious process may contribute to more restrictive bond conditions for black defendants.

This Article will analyze bond practices around the country, with a particular focus on Cook County, in order to identify specific reform ideas to lessen the burdens of mass incarceration and decrease the racial disparities present in bond decisions. Part I will outline the general

³¹ Arnold et al., *supra* note 27, at 3.

³² *Id.*

³³ *Id.* at 2.

³⁴ Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1129 (2012).

³⁵ See, e.g., Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 975 (2006); Kang et al., *supra* note 34, at 1138.

³⁶ Jolls & Sunstein, *supra* note 35, at 974.

³⁷ Mary B. Oliver, *African American Men as “Criminal and Dangerous”*: Implications of Media Portrayals of Crime on the “Criminalization” of African American Men, 7 J. AFR. AM. STUD. 3, 4 (2003).

³⁸ *Id.* at 6.

³⁹ Arnold et al., *supra* note 27, at 2.

background, purpose, and practices of bond nationally and within Cook County. This section will further discuss the importance and relevance of pretrial detention within the criminal legal system and explore the impact of race on bond decisions. Finally, Part II will identify solutions for reforming bond by revisiting how judges assess a defendant's risk and addressing the conditions that contribute to implicit bias in bond decisions.

I. THE PURPOSES, PRACTICES, AND IMPLICATIONS OF BOND

A. BACKGROUND OF THE BOND SYSTEM

The bond court judge establishes the conditions of a defendant's pretrial release by setting bail.⁴⁰ The judge determines the type of bail to issue by assessing the potential risks that arise from the release of that particular defendant.⁴¹ The three primary objectives of bail are to release all but the most dangerous criminal defendants before trial, ensure that defendants appear at all required court proceedings, and protect the public by preventing future crime.⁴² This emphasis on promoting safety and ensuring future appearances highlights that the judge's inquiry of the defendant's eligibility for release is forward-focused, reflecting the judge's assessment of the defendant's potential future actions not a judgment on the defendant's guilt or past conduct. This prospective inquiry requires a multifaceted analysis that, without proper direction and oversight, provides fertile ground for implicit bias.

Courts have commonly recognized a general presumption towards release in the absence of contrary findings of the defendant's risk.⁴³ The federal bail statute requires judges to determine the "*least restrictive further condition*" to reasonably assure the appearance of the defendant and the safety of the community.⁴⁴ When upholding the constitutionality of the bail statute, the U.S. Supreme Court recognized "the fundamental nature" of the defendant's strong interest in liberty.⁴⁵ This interest ensures that, consistent with the Eighth Amendment, "[e]xcessive bail shall not be required," and therefore, a detainee may not be "capriciously held" without an "informed

⁴⁰ ORTIZ, *supra* note 6, at 2.

⁴¹ *Id.*

⁴² Will Dobbie, Jacob Goldin & Crystal Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges* 1–57, 1 (Nat'l. Bureau of Econ. Research, Working Paper No. 22511, 2016).

⁴³ *See, e.g.*, 18 U.S.C.A. § 3142 (West 2012); 725 Ill. Comp. Stat. Ann. 5/110-4 (West 2013).

⁴⁴ 18 U.S.C.A. § 3142 (c)(1)(B) (emphasis added).

⁴⁵ *United States v. Salerno*, 481 U.S. 739, 750 (1987).

reason for the detention.”⁴⁶ In the seminal case on the rights of indigent defendants, the Supreme Court concluded that discrimination based on a defendant’s poverty is unconstitutional.⁴⁷ Therefore, a defendant’s access to bail, and subsequent pretrial release, cannot be conditioned on the amount of money the defendant has to post.

The general presumption towards release is also reflected in the Illinois bail statute.⁴⁸ Like the federal bail statute, the Illinois statute directs judges to impose conditions on the defendant’s release if the additional conditions are reasonably necessary to ensure the defendant’s appearance in court, to protect the public, or prevent the defendant’s unlawful interference with the administration of justice.⁴⁹ Without evidence of a real and present threat to the safety of others, the statute states that “all persons shall be *bailable* before conviction.”⁵⁰ The statute instructs judges to liberally construe the section on nonmonetary release to rely upon contempt of court proceedings or other criminal sanctions instead of financial loss to assure the future appearance of the defendant.⁵¹

Despite these presumptions towards release, the majority of pretrial detainees supervised by county jails nationwide are confined in physical custody—and not supervised in the community—while awaiting trial.⁵² In a 2015 nationwide survey of county jails, 79% of the defendant population supervised by county jails was confined at the time of the survey, whereas only 21% of defendants were released and supervised in the community.⁵³ Yet the vast majority of these pretrial detainees were deemed low risk.⁵⁴ In this survey, 40% of responding county jails reported using a risk-assessment tool at the time of the defendants’ booking prior to their bond hearing to better understand the public safety risks posed by certain defendants.⁵⁵ Of those jails using the assessment tool, 69% of them

⁴⁶ *Carlisle v. Landon*, 73 S. Ct. 1179, 1182 (1953).

⁴⁷ *Griffin v. Illinois*, 351 U.S. 12, 17–19 (1956) (invalidating an Illinois law that prevented indigent defendants from obtaining trial transcripts to facilitate appellate review, stating that, “In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color”).

⁴⁸ 725 Ill. Comp. Stat. Ann. 5/110-4.

⁴⁹ 725 Ill. Comp. Stat. Ann. 5/110-10 (West 2016).

⁵⁰ 725 Ill. Comp. Stat. Ann. 5/110-4 (emphasis added).

⁵¹ 725 Ill. Comp. Stat. Ann. 5/110-2 (West 2013).

⁵² ORTIZ, *supra* note 6, at 5.

⁵³ *Id.* Jurisdictions use a variety of pretrial supervision measures within the community including electronic monitoring, day reporting, treatment programs, and mandatory drug testing. *Id.* at 11.

⁵⁴ *Id.* at 6.

⁵⁵ *Id.*

reported that half of their jail's pretrial detainees were assessed low risk at booking.⁵⁶

These risk-assessment tools consider a variety of factors including the severity and nature of the alleged crime, the defendant's pending charges and prior criminal history, and any record of the defendant's failure to appear at past court dates.⁵⁷ The risk-assessment score is made available by members of the court's pretrial services department during the bond hearing to aid the judge in determining the defendant's release.⁵⁸ The many factors included in the risk-assessment tool underscore the complexity and nuance involved in the judge's predictive decision-making. This complexity highlights the potential for implicit, racial bias because without clear direction and accountability, judges are tempted to use stereotypes or intuition to short-circuit the complexity required in bond decisions.

In most jurisdictions, judges determine the defendant's potential risks in a brief and presumptive manner with limited information or oversight.⁵⁹ Pretrial release decisions are first made by an assigned bond judge within 24 to 48 hours after the defendant is arrested and charged.⁶⁰ Given this time frame, the information available to the judge on the defendant's dangerousness is often limited to the arresting officer's police report and the defendant's prior convictions or pending charges, if any.⁶¹ Additionally, bond hearings last an average of five minutes.⁶² Among the factors judges consider for pretrial release are "the nature of the alleged offense, the weight of evidence against the defendant," potential safety risks posed, "any record of prior flight or bail violations, and the financial ability of the defendant to pay bail."⁶³

In setting the appropriate bail conditions, judges have broad discretion and little accountability for their decision-making.⁶⁴ In some jurisdictions, judges can consider more than two dozen factors about the defendant's alleged offense and criminal background, in addition to the screening tool, to arrive at their bond decisions.⁶⁵ Given the many factors and the lack of

⁵⁶ *Id.*

⁵⁷ CHRISTOPHER T. LOWENKAMP ET AL., LAURA & JOHN ARNOLD FOUND., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES 8 (2013).

⁵⁸ *See, e.g.,* Dobbie et al., *supra* note 42, at 7.

⁵⁹ *See, e.g., id.* at 6.

⁶⁰ *Id.* at 5.

⁶¹ THE CIVIC FEDERATION, *supra* note 12, at 12.

⁶² Dobbie et al., *supra* note 42, at 6.

⁶³ *Id.*

⁶⁴ Arnold et al., *supra* note 27, at 5.

⁶⁵ THE CIVIC FEDERATION, *supra* note 12, at 13.

clarity in how judges weigh each factor, this judicial decision-making process lacks transparency, making it difficult to review. This multi-layered analysis, truncated by the considerable time pressures and coupled with the judge's broad discretion and minimal accountability, creates a powerful cocktail for racial bias.

As in many other jurisdictions, bond decisions in Cook County are made very quickly using a risk-assessment tool.⁶⁶ Decisions that determine a defendant's pretrial freedom are made in 100 seconds on average.⁶⁷ On July 1, 2015, the Pretrial Services Division of the Chief Judge's Office implemented a risk-assessment tool to guide the bond judge's determination.⁶⁸ The goal of the Public Safety Assessment (PSA) is to evaluate the defendant's threat to the community and likelihood to appear at the next court date.⁶⁹ The PSA consists of three components: new criminal activity, failure to appear, and new violent criminal activity.⁷⁰

The Pretrial Services staff interview the defendant and prepare the report of the PSA numbers before the defendant's bond hearing. When requested by the judge at the hearing, the staff call out the defendant's PSA numbers and whether there is a violence flag indicated.⁷¹ The PSA includes a Decision Making Framework Matrix that uses the defendant's combined scores for new criminal activity and failure to appear to recommend the appropriate level of monitoring.⁷² The different types of monitoring include release with no conditions, release with pretrial monitoring, like court date reminders, release with required meetings with pretrial services staff weekly or biweekly, release with the sheriff's electronic monitoring, or no release recommended. Based on information from the Chief Judge's Office, 16.7% of felony defendants who were released missed court appearances after nine months of using the PSA and 17.9% had at least one new felony or misdemeanor charge while awaiting trial during this period.⁷³

⁶⁶ SHERIFF'S JUSTICE INST., CENTRAL BOND COURT REPORT 2, 6 (Apr. 2016), https://www.chicagoreader.com/pdf/20161026/Sheriff_s-Justice-Institute-Central-Bond-Court-Study-070616.pdf [<https://perma.cc/Y42P-A5TM>].

⁶⁷ *Id.* Since September 18, 2017, bond hearings have slowed down somewhat due to the Chief Judge's judicial order on money bail that requires judges to explain why cash bail is needed. THE CIVIC FEDERATION, *supra* note 12, at 12.

⁶⁸ SHERIFF'S JUSTICE INST., *supra* note 66, at 12.

⁶⁹ *Id.* at 6.

⁷⁰ *Id.*

⁷¹ Personal observations by the author at Cook County Central Bond Court on September 21, 2017.

⁷² SHERIFF'S JUSTICE INST., *supra* note 66, at 6.

⁷³ THE CIVIC FEDERATION, *supra* note 12, at 5.

In many jurisdictions, the types of bonds issued comprise three categories: release on personal recognizance, nonfinancial, and financial conditions of bond.⁷⁴ Release on personal recognizance releases the defendant with no conditions after the judge determines the defendant presents minimal flight risk and does not pose a real or present threat to persons in the community.⁷⁵ A more restrictive release is the use of nonfinancial conditions of bond like court date reminders, electronic monitoring, and mandatory drug treatment.⁷⁶ Financial conditions present even greater restrictions on the defendant's release by requiring a bail payment if the judge determines that there is an increased risk that the defendant will not reappear in court.⁷⁷ The defendant is typically required to pay 10% of the bail amount to secure release, with most of the money refunded after the defendant appears for court, and a portion of the money retained by the court clerk as a court fee.⁷⁸

For a minority of defendants, judges order no bail based on the severity of the crime and the risk the defendant poses to public safety.⁷⁹ In some jurisdictions, there are statutory requirements for the denial of a bail bond for defendants charged with first or second-degree murder or other violent crimes.⁸⁰ In these situations, the judge determines that “no set of conditions for release will guarantee” either the defendant's appearance or will ensure the safety of the community.⁸¹ The number of bond conditions available to judges, and the lack of review of the judge's pretrial monitoring decision, give judges considerable discretion. This discretion makes them more susceptible to implicit bias by permitting them to subconsciously apply their own conclusions about the defendant's risks to the community.

Under the Illinois bail statute, for the defendants designated as release-eligible—those who do not pose a danger to the public—the statute creates two alternatives for pretrial release.⁸² Judges can order the defendant's release on personal recognizance (I-bond).⁸³ The second alternative is monetary bail, where defendants are eligible for release after posting a

⁷⁴ ORTIZ, *supra* note 6, at 7.

⁷⁵ 725 Ill. Comp. Stat. Ann. 5/110-4; Dobbie et al., *supra* note 42, at 5.

⁷⁶ Dobbie et al., *supra* note 42, at 5.

⁷⁷ *Id.*

⁷⁸ *Id.* at 5–6.

⁷⁹ *Id.* at 6.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² 725 Ill. Comp. Stat. Ann. 5/110-2.

⁸³ *Id.*

percentage or the entire bail amount as a surety of their return to court.⁸⁴ In these instances, the judge determines that the defendants are not a threat to the community and are entitled to release.⁸⁵

Despite the statute's requirement of the least restrictive conditions and the variety of nonmonetary release options, traditionally the most prevalent form of bond issued in Cook County is financial, deposit bonds. Cook County bond court reports from 1987,⁸⁶ 2005,⁸⁷ 2012,⁸⁸ and 2017⁸⁹ document the system's reliance on deposit bonds for pretrial release, requiring defendants to purchase their freedom in the vast majority of cases. In the 1987 study, 82% of defendants were required to make upfront payments to avoid jail even though only about 23% were charged with violent crimes; I-bonds made up only 6% of the cases.⁹⁰ By 2011, I-bonds were ordered in just 8% of the cases.⁹¹ That same year, a three-judge district court panel in Chicago found that many individuals awaiting trial would have been released with small or no cash bail amounts "were it not for the unexplained reluctance of state judges in Cook County to set affordable terms for bail."⁹² The court further found that "overcrowding is a primary cause of unconstitutional conditions at the jail" and ordered prisoners released to decrease the jail population.⁹³

⁸⁴ 725 Ill. Comp. Stat. Ann. 5/110-7(a); 725 Ill. Comp. Stat. Ann. 5/110-8(a).

⁸⁵ 725 Ill. Comp. Stat. Ann. 5/110-7.

⁸⁶ CHRISTINE A. DEVITT ET AL., ILL. CRIMINAL JUSTICE INFO. AUTH., THE PRETRIAL PROCESS IN COOK COUNTY: AN ANALYSIS OF BOND DECISIONS MADE IN FELONY CASES DURING 1982-83 37, 45 (1987), <https://www.bjs.gov/content/pub/pdf/ppcc-abdmfcd8283.pdf> [<http://perma.cc/7YBZ-RP6W>].

⁸⁷ Bureau of Justice Assistance: Criminal Courts Technical Assistance Project, American University, *A Review of the Cook County Felony Case Process and its Impact on the Jail Population*, 7 (Sept. 26, 2005).

⁸⁸ JUSTICE ADVISORY COUNCIL, COOK CTY., ILL., EXAMINATION OF COOK COUNTY BOND COURT 3 (2012), <https://www.slideshare.net/cookcountyblog/justice-advisory-council-bond-report-7122012> [<http://perma.cc/F2J9-FDRE>] (finding monetary bonds comprised two-thirds of the detainees in Cook County Jail in 2012).

⁸⁹ SHERIFF'S JUSTICE INST., CENTRAL BOND COURT REPORT 1, 4 (2018), <https://www.cookcountysheriff.org/wp-content/uploads/2018/02/Central-Bond-Court-Report.pdf> [<https://perma.cc/PC9Y-5LHP>]. Prior to recent changes in the bond process implemented in September 2017, judges in Cook County's Central Bond Court issued deposit bonds over half of the time. *Id.* at 4. Following the recent changes to the bond process, deposit bonds decreased in frequency to less than a quarter of all cases, however, the denial of bonds altogether increased in this period over tenfold from 0.6% of cases to 7.8% of all cases. *Id.*

⁹⁰ DEVITT ET AL., *supra* note 86, at 37, 44-45.

⁹¹ OLSON & TAHERI, *supra* note 8, at 5.

⁹² *United States v. Cook County*, 761 F. Supp. 2d 794, 800 (N.D. Ill. 2011).

⁹³ *Id.* at 796-97.

A 2012 study additionally found that two-thirds of pretrial detainees were assigned a monetary bond and the majority remained detained because the amount was above what they could afford.⁹⁴ Deposit bonds continued to remain the most common form of bond in Cook County as recently as 2016.⁹⁵ In court observations of 1,574 cases in Cook County's Central Bond Court in the spring of 2016, deposit bonds accounted for 56% of all bonds issued, followed by 23% of the bonds that required electronic monitoring, and 19% were I-bonds.⁹⁶ During this period, the average deposit bond amount was \$71,878, and only a quarter of all defendants who were issued a deposit bond posted bond within thirty-one days of being booked in the Cook County Jail.⁹⁷ Cook County judges' long-standing reliance on unaffordable deposit bonds to bar pretrial release, even for a low-risk defendant, highlights the lack of an individualized inquiry into the defendant's dangerousness and flight risk before setting bail. A judge's failure or inability to apply a complex analysis in bond decisions invites the judge to substitute his or her own abridged analysis or simplistic stereotypes to resolve the bond issue.

B. RECENT CHANGES TO BOND IN COOK COUNTY

In light of the incongruence between the bail statute's presumption of release and the court's reliance on unaffordable deposit bonds, the Chief Judge of the Cook County Criminal Court issued a judicial order in July 2017 that reiterates the statute's emphasis on nonmonetary bonds and pretrial release.⁹⁸ The order aims to ensure that "no defendant is held in custody prior to trial solely because the defendant cannot afford to post bail."⁹⁹ When judges are setting bail, "there shall be a presumption that any conditions of release imposed shall be *non-monetary* in nature and the *court shall impose the least restrictive conditions necessary* to reasonably assure the appearance of the defendant."¹⁰⁰ These guidelines became effective on

⁹⁴ Justice Advisory Council, *supra* note 88, at 3.

⁹⁵ SHERIFF'S JUSTICE INST., *supra* note 66, at 2.

⁹⁶ *Id.* at 1–2.

⁹⁷ *Id.* at 1.

⁹⁸ Chief Judge Evans, Circuit Court of Cook County, *General Order No. 18.8A — Procedures for Bail Hearings and Pretrial Release*, July 17, 2017, <http://www.cookcountycourt.org/Manage/DivisionOrders/ViewDivisionOrder/tabid/298/ArticleId/2562/GENERAL-ORDER-NO-18-8A-Procedures-for-Bail-Hearings-and-Pretrial-Release.aspx> [<https://perma.cc/TF2Y-WGFL>] (last visited on Sept. 13, 2018).

⁹⁹ *Id.*

¹⁰⁰ *Id.* (emphasis added).

September 18, 2017, in all felony cases and January 1, 2018, in all other cases.¹⁰¹

The order primarily mirrors the statutory language but requires judges to take additional steps before ordering restrictive bond conditions. Judges must state on the record, along with “sufficient supporting facts,” why no other conditions of release besides monetary bail will reasonably assure the defendant’s appearance in court and affirm that the amount of bail is not oppressive.¹⁰² They must also inquire into the amount the defendant can afford to pay before determining the monetary bail.¹⁰³ The order gives all defendants a rehearing within seven days to reconsider the bail amount if they cannot afford to pay the required amount.¹⁰⁴ Prior to this order, rehearing was available only to defendants charged with lower-level offenses.¹⁰⁵ As part of this new policy, the chief judge cleaned house, replacing all of the judges in the Cook County Central Bond Court.¹⁰⁶ The chief judge also created a new Pretrial Division with its own presiding judge to oversee the bond court, maintaining its separation from the Circuit Court’s criminal division where defendants are tried.¹⁰⁷

These recent changes may have contributed to initial decreases in the jail population. Cook County Sheriff Tom Dart announced a 900 inmate decrease in the jail population within the first month and a half of the order’s implementation.¹⁰⁸ As of November 1, 2017, Dart revealed that the general jail population had decreased by 39% since August 2013, dropping to 6,200 inmates, the jail’s lowest level since 1988.¹⁰⁹ While these announcements are positive news, recent data on jail population and bond practices in Cook County has been tightly controlled by the chief judge and the Cook County Sheriff who have not responded to various research requests to publicly review and verify the results.¹¹⁰ Without a complete picture of the data it is difficult to determine whether these decreases are attributable to other causes, such as changes in arrest or crime rates or the prosecutors’ charging decisions. Furthermore, the reticence of Cook

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at ¶ 11.

¹⁰⁵ THE CIVIC FEDERATION, *supra* note 12, at 14.

¹⁰⁶ *Id.* at 23.

¹⁰⁷ *Id.*

¹⁰⁸ THE CIVIC FEDERATION, *supra* note 12, at 3 (citing Cook County Sheriff Tom Dart on *Chicago Tonight* (WTTW 11 television broadcast Nov. 2, 2017)).

¹⁰⁹ THE CIVIC FEDERATION, *supra* note 12, at 4.

¹¹⁰ *Id.* at 3.

County officials to disclose the raw data raises concerns that it is being used selectively and not to measure the policy's effectiveness. The lack of transparency by Cook County officials to disclose this data contributes to the problems of implicit bias by failing to provide the accountability and judicial oversight needed to combat implicit bias.

C. THE CONSEQUENCES OF PRETRIAL DETENTION

The persistence of the current pretrial detention system in county jails and prisons has profound consequences for the administration of justice, public safety, and the reduction of recidivism. Pretrial detention has a devastating impact on a defendant's access to justice. Defendants detained pretrial are more likely to be convicted and receive longer sentences than defendants released pretrial.¹¹¹ Federal courts as early as the 1970s have routinely documented that defendants who are free pending trial "stand[] a better chance of not being convicted, or, if convicted, of not receiving a prison sentence."¹¹² Nationwide, detained defendants are 15% more likely to be incarcerated compared to released defendants and have prison sentences that are 264.6 days longer on average.¹¹³ The heightened risk of conviction is even more pronounced for defendants deemed low risk who are detained pretrial. Low-risk defendants detained for the entire pretrial period are 5.41 times more likely to be sentenced to jail and 3.76 times more likely to be sentenced to prison when compared to low-risk defendants released pretrial.¹¹⁴

Studies have additionally found that a defendant's success at trial correlates with the amount of time the defendant is detained before release. Defendants detained for the entire pretrial period were 4.44 times more likely to be sentenced to jail or prison compared to defendants who were

¹¹¹ Alissa Ackerman & Meghan Sacks, *Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment?*, 25 CRIM. JUST. POL'Y. REV. 59, 62–63 (2014); Dobbie et al., *supra* note 42, at 26 (finding that "pretrial release significantly decreases the probability of conviction, primarily through a decrease in guilty pleas"); Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* 3 (J. L. ECON. & ORG., Forthcoming 2018), <https://ssrn.com/abstract=2777615> [<https://perma.cc/V88R-2GJQ>] (finding pretrial detention leads to a 6.2% increase in the likelihood that a defendant will be convicted).

¹¹² *Campbell v. McGruder*, 580 F.2d 521, 531 (D.C. Cir. 1978); *see also Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 781 (9th Cir. 2014) (citing the ABA Standards for Criminal Justice: Pretrial Release at 29 (Am. Bar. Ass'n 3d ed. 2007) which found "considerable evidence that pretrial custody status is associated with the ultimate outcomes of cases, with released defendants consistently faring better than defendants in detention").

¹¹³ Dobbie et al., *supra* note 42, at 12.

¹¹⁴ LOWENKAMP ET AL., *supra* note 57, at 4.

released at some point pending trial, even when other relevant statistical controls are considered.¹¹⁵ In light of the hasty manner in which judges often make detention decisions and the decisions' susceptibility to racial bias, this link between pretrial detention and higher conviction rates is particularly alarming.

There are various explanations for the disparities in conviction rates for pretrial-detained and pretrial-released defendants. However, several courts and research studies agree that pretrial detention overwhelmingly disrupts a defendant's ability to prepare his or her own defense.¹¹⁶ Detained defendants are at a considerable disadvantage in identifying exculpatory evidence, accessing their defense counsel, and even understanding the nature and consequences of the charges before them.¹¹⁷ Prolonged pretrial detention additionally impacts the defendant's bargaining position to negotiate an advantageous resolution of the case with the prosecution.¹¹⁸

Another disturbing factor that contributes to the disparate conviction rates for pretrial detainees is the impact of prolonged detention on inducing guilty pleas. Defendants detained pretrial are more likely to enter guilty pleas regardless of actual guilt because of the coercive effects of long detentions.¹¹⁹ In fact, detained defendants plead guilty twice as much as released defendants in order to secure their release.¹²⁰ Released defendants also have access to more favorable plea deals than those detained.¹²¹ As a result, released defendants are substantially more likely to be convicted of a lesser charge and are convicted of fewer total offenses than detained defendants.¹²²

The particularly excessive periods of pretrial detention in Cook County not only exert a noxious effect on the defendant's willingness to accept an unjust guilty plea, but also result in incarceration beyond the defendant's sentence.¹²³ In Cook County, the extreme periods of time

¹¹⁵ *Id.* at 12.

¹¹⁶ *Gerstein v. Pugh*, 420 U.S. 103, 123 (1975); *Lopez-Valenzuela*, 770 F.3d at 781; *OLSON & TAHERI*, *supra* note 8, at 7.

¹¹⁷ *Lopez-Valenzuela*, 770 F.3d at 781; *see also* *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (stating the "traditional right to freedom before conviction permits the unhampered preparation of a defense").

¹¹⁸ *Dobbie et al.*, *supra* note 42, at 25.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 31.

¹²¹ *Id.* at 25.

¹²² *Id.*

¹²³ Daily Herald Report, *Cook County Jail Population Down About 700 People*, DAILY HERALD (Jan. 3, 2017, 9:13 AM), <http://www.dailyherald.com/article/20170103/news/170109830/> [<https://perma.cc/B9CR-WXXB>].

pretrial detainees remain in custody often surpass the sentence the defendant would have received if convicted.¹²⁴ According to Sheriff Dart, in 2016, approximately 1,203 pretrial detainees were eligible for automatic release after their convictions because they had already served their entire sentence waiting for trial.¹²⁵ Moreover, a number of these defendants remained behind bars for periods longer than the term of their sentence, causing what Dart calls “dead days.”¹²⁶ In 2015 alone, these “dead days” totaled nearly 80,000 days or 218 years that defendants served in excess of their eventual sentences while awaiting trial.¹²⁷ In 2016, the number of dead days rose to a total of 251 years of excess time served.¹²⁸ As a result, the use of pretrial detention strips the defendants of their liberty not merely for the period of time they are presumed innocent, but for months and years beyond the terms of their punishment. The temptation for judges to resort to racial stereotypes to quickly resolve complex bond decisions is exceptionally distressing given the excessive and disproportionate periods of pretrial incarceration and rates of conviction.

A further consequence of a monetary bail system that conditions pretrial release on a defendant’s access to funds is an increase in recidivism. Researchers have found a strong correlation between pretrial detention, even for a few days, and higher rates of crime committed by those defendants during the pretrial period and for years after the resolution of their criminal cases, particularly for low and moderate-risk defendants.¹²⁹ Low-risk defendants detained for the entire pretrial period are 1.3 times more likely to commit new crimes in the years following case disposition than defendants released at any point before trial.¹³⁰ Defendants detained, even for a few days while gathering funds to post bail, are 1.39 times more likely to recidivate in the pretrial period than defendants released within a day.¹³¹ Researchers find that recidivism rates for low and moderate-risk defendants increase considerably as the length of pretrial detention for a defendant increases up to 30 days.¹³² In Cook County, the rate of

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Justin Glawe, *Chicago’s Jail Kept Inmates Locked Up for 218 Years Too Long*, THE DAILY BEAST (June 8, 2016, 10:00 PM), <http://www.thedailybeast.com/chicagos-jail-kept-inmates-locked-up-for-218-years-too-long> [<https://perma.cc/NHF3-M8LX>].

¹²⁸ Daily Herald Report, *supra* note 123.

¹²⁹ CHRISTOPHER T. LOWENKAMP ET AL., THE HIDDEN COSTS OF PRETRIAL DETENTION 19 (2013).

¹³⁰ *Id.*

¹³¹ *Id.* at 4.

¹³² *Id.* at 3.

recidivism is alarmingly high for defendants detained pretrial.¹³³ Half of the defendants detained until their conviction and sentencing returned to jail within three years.¹³⁴

The causes of recidivism are multifaceted and complex, but researchers have studied the destructive effects of pretrial detention in lost employment, strained family relationships, economic hardship for the defendant and his or her dependents, and the loss of access to health care and social services.¹³⁵ Pretrial detention further destabilizes the lives of already vulnerable defendants unable to post bail and alienates them from family, friends, and other resources of support.¹³⁶ Resource deprivation and alienation from their communities can make defendants more susceptible to illicit activity. Pretrial detention additionally disrupts an individual's access to health care and social services which are often not adequately provided in county jails, and reconnecting defendants to community services can be difficult after their release.¹³⁷

Pretrial detention also lowers a defendant's ties to the formal labor market.¹³⁸ A defendant's release pretrial increases the probability of employment in the formal labor market by nearly 30% for three to four years after the bond hearing, and the probability of any formal sector income increases by 8.5 percentage points over this time period.¹³⁹ Indeed, detained defendants suffer an average of \$30,000 in lost earnings and government benefits alone because of their detention.¹⁴⁰ The use of pretrial detention exacts a considerable and disproportionate financial toll on racial minorities and economically at-risk defendants, many of whom already lack the necessary funds to purchase their freedom in the first place.

¹³³ David E. Olson & Sema Taheri, *Characteristics of Inmates in the Cook County Jail*, COOK COUNTY SHERIFF'S REENTRY COUNCIL RESEARCH BULLETIN, at 6 (Mar. 2011), https://ecommons.luc.edu/cgi/viewcontent.cgi?article=1003&context=criminaljustice_facpubs [<https://perma.cc/3WAD-D5RX>].

¹³⁴ *Id.* These release statistics do not include those defendants released before they were acquitted, posted bail, or had the charges against them dropped.

¹³⁵ ORTIZ, *supra* note 6, at 2.

¹³⁶ Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (finding that "[t]he consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships").

¹³⁷ Dobbie et al., *supra* note 42, at 4.

¹³⁸ *Id.*

¹³⁹ *Id.* The actual percentage is 26.9%.

¹⁴⁰ Arnold et al., *supra* note 27, at 2.

D. RACIAL BIAS IN BOND DECISIONS

The use of pretrial detention does not impact all defendants equally, and the disparate impact of pretrial detention suggests the existence of racial bias in bond decisions. Black defendants are 3.6 percentage points more likely to be assigned monetary bail than white defendants, even after controlling for the severity of the offense, the number of felony charges, and the defendant's criminal history.¹⁴¹ When assigned monetary bail, black defendants receive bail amounts that are nearly \$10,000 greater than white defendants with similar offense characteristics on average.¹⁴² Additionally, black defendants are 2.0 percentage points less likely to be released on their own recognizance and 1.6 percentage points less likely to receive non-monetary bail with conditions than white defendants.¹⁴³ Consequently, black defendants are 2.4 percentage points more likely to be detained pretrial compared to white defendants with the same type of offense.¹⁴⁴

Black defendants are detained pretrial at higher rates, yet research has found that white defendants are more likely to be rearrested for new crimes committed during the pretrial period, providing convincing evidence of racial bias against black defendants in bond decisions. Marginally released white defendants are 22.2 percentage points more likely to be rearrested prior to case disposition than marginally released black defendants.¹⁴⁵ The higher arrest rates for white defendants transcend all crime types.¹⁴⁶ Marginally released white defendants are 8 percentage points more likely to be rearrested for a violent crime, 4.7 percentage points more likely to be rearrested for a drug crime, and 16.3 percentage points more likely to be rearrested for a property crime prior to case disposition than marginally released black defendants.¹⁴⁷ The significant incongruity between release rates and rearrest rates for black and white defendants suggests that judges are likely racially biased against black defendants and highlights the

¹⁴¹ *Id.* at 18.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 23. "Marginally released" in this study refers to an outcome test to measure racial bias where researchers compare the success or failure of a judge's release decisions across racial groups at the margin of release. *Id.* at 1. The outcome test is based on the theory that rates of pretrial misconduct will be identical for marginal white and black defendants if bail judges are completely unbiased in their release decisions and any discrepancies in the judges' bail determinations are solely a result of statistical discrimination. *Id.*

¹⁴⁶ *Id.* at 23.

¹⁴⁷ *Id.*

inaccuracies in the current risk-assessment system at the expense of black defendants.

Racial disparities in pretrial detention also persist in Cook County. Like in other areas of the criminal legal system, black people are significantly overrepresented in the Cook County Jail population. As of April 2017, 73% of the people incarcerated in the Cook County Jail were black, yet black people make up only 25% of Cook County's population.¹⁴⁸ Within the context of pretrial detention, black defendants are released at substantially lower rates than non-black defendants charged with the same crimes—only 15.8% of black defendants in Chicago charged with Class 4 felonies were released on bond compared to 32.4% of non-black defendants with Class 4 felonies.¹⁴⁹ Along with the greater difficulties minority defendants experience procuring their freedom before trial, they are also more likely to face longer periods behind bars awaiting trial and disproportionately represent the defendants detained the longest at Cook County Jail.¹⁵⁰ Of the individuals detained for more than two years in Cook County Jail awaiting trial, 93% are racial minorities.¹⁵¹ Consequently, black and other minority defendants in Cook County disproportionately experience greater barriers to pretrial release in the first instance and greater incarceration periods as they await trial than their white counterparts.

II. IDEAS FOR REFORM

In light of the racial disparities, the bloated incarcerated population, and the grave consequences of pretrial detention on equal access to justice, it is essential to explore ideas for effective bond reform. While Cook County still relies on monetary bail for defendants deemed release eligible, other jurisdictions have rejected monetary bail for more reliable and less restrictive means to ensure defendants' return to court.¹⁵² Studies

¹⁴⁸ Sharlyn Grace, *Principles of Bail Reform in Cook County*, CHICAGO APPLESEED (Apr. 25, 2017), <http://www.chicagoappleseed.org/introducing-principles-for-bail-reform-in-cook-county> [<https://perma.cc/R35M-RZ8S>].

¹⁴⁹ Sarah Lazare, *Hundreds of Thousands Are Languishing in Jails Because They Can't Afford Bail Bonds: A National Movement Is Building to End This*, JUSTICE POLICY INSTITUTE (Dec. 22, 2016), <http://www.justicepolicy.org/news/11103> [<https://perma.cc/FN5V-2B6D>].

¹⁵⁰ Spencer Woodman, *No-Show Cops and Dysfunctional Courts Keep Cook County Jail Inmates Waiting Years for a Trial*, CHICAGO READER 3 (November 16, 2016), <http://www.chicagoreader.com/chicago/cook-county-jailpre-trial-detention-investigation/Content?oid=24346477> [<https://perma.cc/EA2C-98CH>] (noting that “[m]ore than 1,000 Cook County prisoners have been awaiting trial for more than two years”).

¹⁵¹ *Id.*

¹⁵² Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option*, PRETRIAL JUSTICE INSTITUTE 3 (Oct. 2013), <http://www.pretrial.org>

demonstrate that unsecured bonds are equally as effective as secured bonds to achieve court appearances.¹⁵³ The District of Columbia is a model bond court system because it has virtually eliminated monetary bail.¹⁵⁴ The District employs a comprehensive and long-established supervised release system, releasing approximately 85% of arrestees pretrial.¹⁵⁵ Of all arrestees, nearly 90% return to court for subsequent hearings.¹⁵⁶ In the first nine months of fiscal year 2015, only 9% of released defendants in D.C. were rearrested for new crimes.¹⁵⁷ In Kentucky, failure to appear rates remained constant or decreased when the court system stopped relying on money bail and adopted a more rigorous risk assessment and pretrial services system.¹⁵⁸ A Colorado study demonstrated that a simple reminder call to defendants reduced failure to appear rates from 21% to 12%.¹⁵⁹ A Nebraska study revealed that even postcard reminders noticeably reduced failure to appear rates.¹⁶⁰ Multnomah County, Oregon experienced a 41% decrease in the court system's failure to appear rates by using automated call reminders.¹⁶¹

These alternatives to monetary bail not only encourage more pretrial release, decrease the incarcerated population, and minimize the significant disruptions of pretrial detention for defendants and their families, but these alternatives are also considerably more cost-effective. In Washington, D.C., the cost of pretrial supervision is approximately \$18 per person per day,

/download/research/Unsecured+Bonds,+The+As+Effective+and+Most+Efficient+Pretrial+Release+Option+-+Jones+2013.pdf [https://perma.cc/Y8YZ-86KZ].

¹⁵³ *Id.*

¹⁵⁴ THE CIVIC FEDERATION, *supra* note 12, at 35.

¹⁵⁵ Clifford T. Keenan, *We Need More Bail Reform*, PRETRIAL SERVS. AGENCY, D.C. (Sept. 2013), <https://www.psa.gov/?q=node/390> [https://perma.cc/L6SS-AHEV].

¹⁵⁶ *Id.*

¹⁵⁷ THE CIVIC FEDERATION, *supra* note 12, at 35.

¹⁵⁸ Tara Boh Klute & Mark Heyerly, *Report on Impact Of House Bill 463: Outcomes, Challenges And Recommendations* 6 (2012), [https://perma.cc/PSP7-F4UL] (finding legislation shifting Kentucky's system toward risk-based pretrial supervision, as opposed to reliance on money bail, resulted in lower failure-to-appear rates).

¹⁵⁹ JEFFERSON COUNTY, COLORADO COURT DATE NOTIFICATION PROGRAM FTA PILOT PROJECT SUMMARY (2005).

¹⁶⁰ Mitchel N. Herian & Brian H. Bornstein, *Reducing Failure to Appear in Nebraska: A Field Study*, THE NEBRASKA LAWYER, Sept. 2010, at 12. <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1008&context=publicpolicyfacpub> [https://perma.cc/HXA9-QYHM].

¹⁶¹ Matt O'Keefe, *Court Appearance Notification System: 2007 Analysis Highlights*, LOCAL PUB. SAFETY COORDINATING COUNCIL, MULTNOMAH CTY., OR (June 2007) (source on file with author).

compared to about \$200 per day to detain that individual in jail.¹⁶² Similarly, a 2010 study found that Broward County, Florida spent an estimated \$107 per day to detain each individual pretrial whereas the cost of providing pretrial services was only \$1.48 per person per day.¹⁶³

Along with alternatives to monetary bail, another needed reform is ongoing judicial oversight and accountability of bond judge decisions. As research on cognitive psychology demonstrates, implicit bias often occurs when decision-making happens with significant discretion and no accountability.¹⁶⁴ Within Cook County, there is evidence that some judicial oversight improves bond outcomes. Following the record spike in the Cook County Jail population in September 2013, the Cook County Board President Toni Preckwinkle wrote a letter to the Illinois Supreme Court justices requesting help with the county's criminal case processing times, pretrial services, and the use of probation.¹⁶⁵ The letter referenced other jurisdictions, including Pennsylvania and New York City, where state high courts have intervened to address court system problems.¹⁶⁶ In response, the state supreme court convened an unprecedented meeting with its seven members and Cook County criminal justice leaders, including the chief judge, sheriff, state's attorney, public defender, and the circuit court clerk.¹⁶⁷

Available data suggests that the supreme court's intervention had an immediate positive impact on bond court orders, though the link cannot be conclusively proven.¹⁶⁸ From September 2013 through May 2017, the number of I-bonds and electronic monitoring orders increased from approximately 13% to 47%.¹⁶⁹ This meeting also prompted regular meetings of what is now called the Stakeholders Committee, comprised of key staff members at each of the aforementioned agencies, to address criminal court issues on an ongoing basis.¹⁷⁰ These developments underscore the important role of judicial oversight and leadership to improve the bond process.

¹⁶² Adrienne Hurst & Camille Darko, *Reforming Cook County Bail System May Have Side Benefit: Lower Cost*, INJUSTICE WATCH (Nov. 16, 2016), <https://www.injusticewatch.org/news/2016/reforming-cook-county-bail-system-may-have-side-benefit-lower-cost/> [<https://perma.cc/N2QV-N5W9>].

¹⁶³ *Id.*

¹⁶⁴ Arnold et al., *supra* note 27, at 2.

¹⁶⁵ THE CIVIC FEDERATION, *supra* note 12, at 18.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 19.

¹⁶⁸ *Id.* at 20.

¹⁶⁹ *Id.* at 5.

¹⁷⁰ *Id.* at 19.

To ensure this accountability on an ongoing basis, bond courts in each jurisdiction should update and publicly share information on bond court practices and jail admissions disaggregated by race. Implicit bias thrives without accountability and oversight. Taxpayers and county residents should know how the court system administers its bond decisions in the name of public safety, and meaningful reform is not possible without a comprehensive picture of the bond process. The Office of the Chief Judge of the criminal court should maintain a dashboard on the court's website with regularly updated information on bond court orders, release results, failures to appear, and rearrest rates disaggregated by race, age, gender, and offense type, and anonymously linked to each judge.¹⁷¹

Regular reports from the sheriff's office are also critical to system accountability. The sheriff's office should post daily reports on its website, tracking the demographic and offense characteristics of detainees, their bond, and their length of stay in jail.¹⁷² In addition to daily reports, the sheriff's office should release regular dashboard reports on trends in the jail population over time such as the number of defendants on electronic home monitoring, the percentage of defendants with monetary bonds, the average bond amount for the defendants who cannot post, and the defendants denied bond—with each number disaggregated by race, gender, age, and offense type.¹⁷³ Beginning in 2009, the Cook County Sheriff's Office released regular reports analyzing jail demographics and trends. However, these reports ended in 2013 at a time when the jail's population peaked.¹⁷⁴ The Sheriff's Office published the Central Bond Court Report that compares data from a four-month snapshot in 2016 and 2017.¹⁷⁵ This data tracks the overall offense type and bond type for all defendants and anonymously compares bond decisions of different judges based on the bond orders issued.¹⁷⁶ However, this report fails to disaggregate the data by race and

¹⁷¹ *Id.* at 44. Beginning in the final quarter of 2017, Chief Judge Evans of the Circuit Court of Cook County released the Model Bond Court Dashboard, a three-page summary of data for each quarter of the year to track benchmarks such as the general jail population separated by offense type, the type of bonds issued, and the average bond amount needed to release detained defendants, among other measures. *See* Court Statistics and Reports, State of Illinois Circuit Court of Cook County, <http://www.cookcountycourt.org/ABOUTTHECOURT/OfficeoftheChiefJudge/CourtStatisticsandReports.aspx> [https://perma.cc/GQ3J-KX9F]. Absent, however, is data disaggregated by race, gender, age, and offense type in order to examine the effects of racial bias and other demographic biases in bond decisions.

¹⁷² THE CIVIC FEDERATION, *supra* note 12, at 47.

¹⁷³ *Id.* at 46–47.

¹⁷⁴ *Id.* at 5.

¹⁷⁵ SHERIFF'S JUSTICE INST., *supra* note 89.

¹⁷⁶ *Id.*

other demographics to detect bias. Cook County data cited in this Article has come largely from organized court watching by advocates.¹⁷⁷

Along with publicly available data and alternatives to monetary bail, comprehensive bond reform should include more training and on-the-job feedback for bond judges to decrease racial disparities and improve accuracy in risk assessments. Recent studies on racial bias demonstrate that inexperienced judges have consistently higher rates of racially biased prediction errors in pretrial risk assessments compared to more experienced judges.¹⁷⁸ Bail judges make racially biased prediction errors by improperly relying on anti-black stereotypes and representative-based thinking which leads to the overdetection of black defendants at the margins of release.¹⁷⁹ Prediction errors in favor of excessive detention often occur when judges make upward departures from the risk-assessment recommendations to impose more restrictive conditions, a process that mirrors the upward departures judges make when sentencing black defendants after conviction.¹⁸⁰

Given the higher pretrial release rates for white defendants despite their higher probability for rearrest, judicial training on the role of implicit bias and the correct use of risk assessments and other pretrial information is critical. Most jurisdictions lack judges trained to use risk-assessment instruments.¹⁸¹ A proper training should include instruction on how to appropriately incorporate a risk-assessment instrument into the judge's decision-making and an opportunity for the judges to review the trends and statistical analysis of their own release decisions broken down, at the minimum, by race, gender, age, and offense type. The availability of this data for judges to review could help reinforce judges' awareness of implicit bias, and the understanding of demographic trends in their release decisions could empower them to think more critically about their decision-making processes.

A corollary of additional training is the requirement that all bond judges be full-time bond court specialists, not part-time generalists. Racial bias against black defendants is greater for part-time, less experienced bond judges compared to full-time judges.¹⁸² In Philadelphia, judges are full-time specialists who are able to set bail 24-hours a day, seven days a week,

¹⁷⁷ *Id.* at 41–42, (detailing difficulties obtaining Cook County bond court data).

¹⁷⁸ Arnold et al., *supra* note 27, at 28–29.

¹⁷⁹ *Id.* at 29–30.

¹⁸⁰ *Id.* at 28–29.

¹⁸¹ *Id.* at 30.

¹⁸² *Id.* at 15.

and hear an average of 5,253 cases a year.¹⁸³ In contrast, Miami bail judges are part-time generalists who serve as trial court judges on weekdays and assist the bond court on weekends; these judges hear only 179 bail cases each year on average.¹⁸⁴ Reflecting the research findings on racially biased error rates, the part-time bail judges in Miami with less bond court experience have much higher rates of racial bias.¹⁸⁵ Part-time, inexperienced judges are more likely to rely on mental shortcuts or established stereotypes to assist them in their decision-making.¹⁸⁶ In Cook County, the chief judge's decision to create a separate Pretrial Division with a new group of judges is a step in the right direction to improve bond outcomes. However, this staffing change should also include judicial training.

Before judges receive training to properly administer risk assessments, jurisdictions should conduct a comprehensive evaluation of the use and effectiveness of the risk-assessment instrument and report their findings. These tools prescribe the release conditions for defendants but have largely been unstudied. Since the PSA was introduced in Cook County in July 2015, there have been no comprehensive reports examining the tool's effectiveness.¹⁸⁷ The Administrative Office of the Illinois Supreme Court has announced its plans to evaluate the PSA tool and study its use in Cook, McClean, and Kane counties but has not determined whether the findings will be made public.¹⁸⁸ The high court's involvement and supervision in bond court reform is critically important but should be transparent. A publicly available report on the effectiveness of risk-assessment tools lends greater transparency and integrity to the bond process and can inspire improvements to the tools to ensure their objectivity and mediate the effects of implicit bias.

CONCLUSION

In an era of mass incarceration and the growing burden of jails and prisons on state and local resources, analysis of a defendant's access to pretrial release is an essential component to comprehensive criminal justice reform and a means to alleviate jail overcrowding. Numerous state and federal statutes presume pretrial release for all but the most dangerous criminal defendants, and the U.S. Constitution requires a presumption of

¹⁸³ *Id.* at 29.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 3.

¹⁸⁷ THE CIVIC FEDERATION, *supra* note 12, at 5.

¹⁸⁸ *Id.*

innocence for defendants held pretrial; yet most jurisdictions, including Cook County, overwhelmingly rely on monetary and other restrictive conditions to detain defendants pretrial.

A deeper analysis of pretrial detention practices reveals significant racial disparities. Black defendants are more likely to be detained pretrial despite having lower rates of rearrest compared to white defendants with similar criminal backgrounds and offense characteristics. Bond decisions are particularly ripe for implicit racial bias because judges often make highly technical and nuanced predictive decisions about a defendant's future risk to the community and likelihood to appear in court with very limited information about the defendant, little time to make the decision, minimal accountability, and broad discretion. Given this dynamic, judges are susceptible to mental shortcuts to quickly determine a defendant's bond. These mental shortcuts or rules of thumb subconsciously rely on racial stereotypes, leading to more restrictive conditions for black defendants. The disproportionate pretrial detention of black defendants has devastating effects on their ability to adequately defend against their criminal charges causing higher conviction rates for detained defendants and greater disruptions to formal sector employment, medical care, social services, and their ability to care for their dependents and other family members.

The bond process is a critical phase in the criminal justice system yet the tools and methods employed to ensure public safety and the defendants' return to court are inaccurate, counterproductive, and racially biased. Strategic and comprehensive bond reform that includes transparency, objectivity, and judicial training and supervision can help reduce recidivism, depopulate jails and prisons, mitigate implicit bias, and ensure equal access to justice for all defendants.