

## For the Record

# Justice Denied: The Harmful and Lasting Effects of Pretrial Detention

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## Summary

Approximately two thirds of the more than 740,000 people held in locally run jails across the United States have not been convicted of a crime—they are presumed innocent and simply waiting for their day in court.<sup>a</sup> This “pretrial population” has grown significantly over time—increasing 433 percent between 1970 and 2015, from 82,922 people to 441,790.<sup>b</sup> People held in pretrial detention accounted for an increasing proportion of the total jail population over the same time period: 53 percent in 1970 and 64 percent in 2015.<sup>c</sup>

This growth is in large part due to the increased use of monetary bail. Historically, the purpose of bail was to facilitate the release of people from jail pending trial, with conditions set to ensure their appearance in court. Over time, however, those conditions have shifted away from no requirement that money be paid—or a requirement that money be paid only when people failed to appear in court—to upfront payment of cash bail and bail bonds issued by for-profit companies.

Pretrial detention has far-reaching negative consequences. This brief presents information on the way that pretrial detention is currently used and summarizes research on its impacts. These studies

- › call into question whether pretrial detention improves court appearance rates;
- › suggest that people who are detained are more likely to be convicted and to receive harsher sentences—due largely to missing dismissal, diversion, and plea bargaining opportunities that pretrial release provides; and
- › indicate that even short periods of detention may make people more likely to become involved with the criminal justice system again in the future.

As the use of financial conditions of pretrial release has increased, many local jurisdictions have failed to put in place measures to ensure that monetary bail does not result in unnecessary pretrial detention simply because people cannot afford it. Such measures include

- › assessment of people’s ability to pay bail;
- › early assignment of defense counsel; and
- › adversarial hearings to determine appropriate conditions of pretrial release that would provide reasonable assurance that people will appear for court and avoid new charges.

Without these protective measures, people who cannot afford to post bail—in particular, people from poor communities—remain in jail, often until their cases are resolved, while those who have access to financial resources are able to secure their liberty. Bail practices may perpetuate racial disparities too: a number of studies have found that people of color who are charged with the same offenses and who have similar histories of criminal justice involvement as white people are more likely to be detained pretrial and have bail set in higher amounts.

The evidence linking pretrial detention to harmful consequences for the people held—consequences rooted in economic and racial disparities—demands further research. It also demonstrates the urgent need for alternative approaches. This brief concludes by highlighting strategies that some jurisdictions have employed to reduce the influence of wealth in decisions about whether to release someone pretrial. Efforts such as these hold the potential to minimize pretrial detention and its cascading harmful effects for people and communities.\*

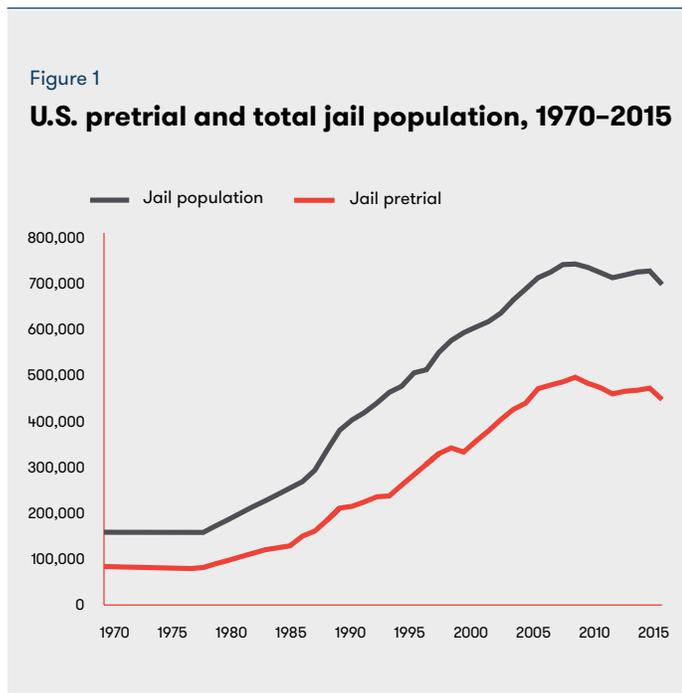
\* Box notes located at end of report.

## About these briefs

Public policy—including decisions related to criminal justice and immigration—has far-reaching consequences that are too often swayed by political rhetoric and unfounded assumptions. The Vera Institute of Justice has created a series of briefing papers to provide an accessible summary of the latest evidence concerning justice-related topics. By summarizing and synthesizing existing research, identifying landmark studies and key resources and, in some cases, providing original analysis of data, these briefs offer a balanced and nuanced examination of some of the significant justice issues of our time.

## The growth of pretrial detention

Since 1970, the number of people who are detained while awaiting trial—the “pretrial population”—has increased more than fivefold: from 82,922 people in 1970 to 441,790 in 2015.<sup>1</sup> (See Figure 1, below.) While the pretrial population comprised about half of people in jail prior to the early 1990s, it now accounts for approximately two-thirds of people in jail nationwide.<sup>2</sup>



The stunning growth of the pretrial population has occurred despite U.S. Supreme Court case law declaring that detaining people in jail before trial—known as “pretrial detention”—should be the “carefully limited exception” and liberty “the norm.”<sup>3</sup> This growth occurred even while both violent and property crime rates steadily declined—a 50 percent decrease for violent crime and a 47 percent decrease for property crime between 1991 and 2013.<sup>4</sup> Arrest rates decreased too, from 5,807 per 100,000 people in 1995 to 3,691 in 2013.<sup>5</sup>

A significant driver of the growing number of people in jail awaiting trial has been a paradigm shift toward financial conditions of pretrial release. (See “The price of freedom” at page 3.) Between 1990 and 2009, for example, the percentage of pretrial releases in felony cases in the largest urban counties that involved financial conditions increased from 37 percent to 61 percent.<sup>6</sup> Nearly all of that increase was due to greater use of commercial surety bonds, which are posted by a for-profit bail bond company after the person pays a

nonrefundable 10 percent fee.<sup>7</sup> If people do not have the financial resources to pay bail or bond fees, they remain in custody. As a result, members of the poorest communities are harmed most profoundly, despite constitutional prohibitions on punishing people for their poverty.<sup>8</sup>

Moreover, there is little evidence to support the efficacy of monetary bail in achieving the intended goals of reducing harm to the community and increasing court appearances.<sup>9</sup> An evaluation of arrests that resulted in pretrial release in New York City found that monetary bail increased appearance rates for people assessed to be at high risk for failure to appear, but made no difference, as compared to release on recognizance, for people who presented a low risk.<sup>10</sup> Citing positive results of a supervised release program, the author concluded that such a program could have the same deterrent effect as monetary bail for people who pose higher risk.<sup>11</sup> A study of nearly 2,000 cases in Colorado found no difference in court-appearance rates or public safety outcomes between people who were required to pay money to secure their release and similarly situated people who were not.<sup>12</sup> Further, financial conditions for purposes of public safety are particularly irrational because, in nearly every jurisdiction across the country, when people are rearrested while released on monetary bail they do not forfeit the money they posted, meaning bail does not provide any incentive for people to remain arrest free as it might to appear for court.<sup>13</sup>

The application of monetary bail—and subsequent pretrial release rates—is also inconsistent, varying greatly both between jurisdictions and judges.<sup>14</sup> For example, an analysis in New York City found that in misdemeanor cases, there was between a 2 and 26 percent chance that the judge would set monetary bail, depending on which judge was randomly assigned to arraignment court on that day.<sup>15</sup> For felony cases, the chance ranged between 30 and 69 percent.<sup>16</sup>

## Pretrial detention leads to worse outcomes for those held

A growing body of evidence suggests pretrial detention leads to worse outcomes for the people who are held in jail—both in their court cases and in their lives—as compared with similarly situated people who are able to secure pretrial release. Indeed, research dating back to the 1950s and 1960s has established a connection between pretrial detention and the likelihood of being convicted and sentenced to incarceration.<sup>17</sup> As described below, it is becoming increasingly

## The price of freedom: Monetary bail and pretrial detention

After people are arrested, a judicial officer decides whether to release them from custody while their cases are pending and, if release is granted, whether to set conditions of release to provide assurance of their appearance in court and public safety. Depending on local practice, people who are arrested and initially detained in jail or another holding facility may appear before a judicial officer—in some cases, this is a judge; in others, it is a commissioner or magistrate—for a bail hearing.<sup>a</sup> In other situations, law enforcement officers or jail or court staff may release the person even before a hearing occurs with a summons to appear in court or at the prosecutor's office, or they may use a bail schedule—which assigns specific bail amounts to certain charges—to set financial conditions of release.<sup>b</sup>

A judicial officer can set conditions of pretrial release in several ways.<sup>c</sup> People can be released “on recognizance”—meaning that they simply agree to return for future court

appearances.<sup>d</sup> Courts may also decide to set more stringent conditions to reduce the risk of flight or risk of arrest on a new charge. Those conditions may include prohibitions on certain activities, such as substance use or possession of weapons, and requirements like reporting periodically for pretrial supervision or monitoring. Alternatively, conditions may be financial—cash or a monetary bond, collectively referred to as “monetary bail.”<sup>e</sup>

As originally designed centuries ago, the primary form of bail was release to a “personal surety”—someone who agreed to take responsibility of the detained person and pay a set amount if that person failed to return to court for trial.<sup>f</sup> Today, however, bail typically operates to deny release as the system has come to rely primarily on secured financial conditions, meaning people must pay money before they can be released.<sup>g</sup>

apparent that pretrial detention, even for a relatively small number of days, may have negative implications for court appearance, conviction, sentencing, and future involvement with the justice system. (See “Challenges in researching the impact of pretrial detention” at page 4.)

### Pretrial detention and failure to appear for future court events

Although a core purpose of pretrial detention and monetary bail is to prevent failure to appear (FTA) for subsequent court hearings, research findings on their efficacy in achieving this have been mixed.

An often-cited 2013 study found FTA rates actually increased the longer a person was detained pretrial. The study, which followed all people arrested and booked into jails in Kentucky in a one-year period (153,407 records), controlled for various factors such as people's assessed risk level, offense type, and demographics.<sup>18</sup> The researchers found that people detained in jail two to three days pretrial and then released prior to the outcomes of their cases were slightly more likely (1.09 times) to fail to appear than people detained for up to one day.<sup>19</sup> The impact of longer stays in pretrial detention was greatest for people otherwise considered “low risk” for FTA or a new arrest while awaiting trial, as determined by a pretrial risk assessment tool. (See “The promise and perils of risk assessment” at page

9.) People assessed as low risk and detained between two days and one week were 1.22 times more likely to fail to appear than people who were assessed as low risk but detained for one day or less.<sup>20</sup> Those who were detained 15 to 30 days were 1.41 times more likely to fail to appear.<sup>21</sup>

Other studies have failed to replicate these results. For example, research conducted in Philadelphia looking at cases charged between 2007 and 2014 (328,492 cases from 172,407 unique people) suggests that pretrial detention reduces FTA.<sup>22</sup> Almost 18 percent of people initially released failed to appear, compared to approximately 12 percent of people detained beyond three days, but ultimately released pretrial.<sup>23</sup>

### Pretrial detention and conviction

Numerous studies have demonstrated that, compared to people who are released from jail within a few days of their bail hearings, people who are detained for longer periods are more likely to be convicted. In Philadelphia, a natural experiment that exploited the random assignment of cases to judges and differences in the judges' severity and leniency found that more than three days of pretrial detention increased the likelihood of conviction by 13 percent.<sup>24</sup>

Similarly, a 2018 study of administrative court records for more than 420,000 people in two large urban counties found that pretrial detention of more than three days increased the likelihood of being found guilty by 24 percent among people

## Challenges in researching the impact of pretrial detention

Studies on pretrial detention have found that even a small number of days in custody awaiting trial can have many negative effects, increasing the likelihood that people will be found guilty, harming their housing stability and employment status and, ultimately, increasing the chances that they will be convicted on new charges in the future. (See “Pretrial detention leads to worse outcomes for those held” at page 2.)

But researchers studying the ways in which pretrial detention may impact people’s lives face a variety of obstacles. Disentangling the possible effects of pretrial detention from the many other conditions that could influence outcomes is difficult. Two key methods have been used. Many studies have relied on *regression analyses*, which look for correlations between detention and outcomes, while controlling for other factors that could influence both—such as a person’s age, criminal history, or socioeconomic status.<sup>a</sup> Correlation does not, however, necessarily mean causation. Conducting a true experiment to determine the impact of pretrial detention would not be ethical, as it would require researchers to randomly incarcerate some people and release others and then measure and compare their outcomes.

As a close proxy to this, some researchers have conducted *quasi- or natural experiments*, taking advantage of conditions that approximate a randomly controlled experiment. To do so,

researchers have exploited the random assignment of judges to bail hearings and the fact that some judges are more likely to release people than others.<sup>b</sup> With enough data, researchers can compare similarly situated people who were released or held pretrial simply as a function of the judge to whom they were assigned. Other researchers have taken advantage of the variation in the likelihood that someone will be released on bail that is associated with the day of the week on which they have their hearing.<sup>c</sup> People whose cases are heard closer to the weekend are slightly more likely to be released pretrial as it is often easier for friends or family to access money and pay their bail over the weekend, as they are less likely to have work obligations that would make it difficult to do so.<sup>d</sup> Again, this provides an opportunity for researchers to compare the outcomes of similar people who were either detained or released pretrial for reasons that were unrelated to their demographics, charges, or life circumstances.

Research that has employed both regression analyses and natural experiments has found enough similarity in the results of the two approaches to conclude that with sufficient access to data to control for a variety of variables, regression analysis provides a meaningful way to estimate the impacts of pretrial detention on case and personal outcomes.<sup>e</sup>

who would likely have been released had they been assigned a more lenient judge.<sup>25</sup> The effects of pretrial detention on conviction were largest for people who did not have prior system involvement within the past year. The study’s authors attributed these larger effects to a strengthening of bargaining positions before trial for people who are released—they are both less likely to plead guilty, and thus less likely to be convicted, and more likely to receive favorable deals when they do plead, as compared with people who are detained. People who do not have prior criminal justice involvement and are therefore more likely to be eligible for dismissal or reduction of charges benefit most by this.<sup>26</sup>

In a 2012 analysis of data from New York City using regression analyses to control for multiple case and defendant characteristics, pretrial detention increased the likelihood of conviction in both nonfelony and felony cases.<sup>27</sup> For felony cases, in addition to increasing the likelihood of conviction, spending more time in pretrial detention lessened the chance that the charge would be reduced to a misdemeanor.<sup>28</sup>

A 2016 quasi-experimental study of nearly one million felony and misdemeanor cases in New York City also found pretrial detention increased the probability that people would be convicted—by at least 13 percentage points in felony cases and more than seven percentage points in misdemeanor cases.<sup>29</sup> While 34 percent of cases in which the person was released were dismissed, the dismissal rate was just 19 percent for people who were detained.

In each of these studies, researchers hypothesize that at least part of the effect of pretrial detention on conviction is due to a greater likelihood that those who are detained will plead guilty—regardless of the strength of their defense, or even if they did not commit the alleged offense. For example, in a 2016 study of almost 381,000 misdemeanor cases filed in Harris County, Texas—which found that people who were unable to pay bail within seven days of their bail hearings were 25 percent more likely to be convicted than similarly situated people who paid bail and were released—further analysis demonstrated higher guilty plea rates (25 percent more likely)

among those detained than similarly situated people who could secure their release by paying bail.<sup>30</sup>

A 2017 study found that in New York City, the effects of pretrial detention on conviction rates were particularly pronounced for people facing minor charges, who could expect to receive credit for the time spent in jail pretrial in exchange for a guilty plea—known as a sentence to “time served”—and avoid additional jail time.<sup>31</sup> Women facing less serious charges were more likely than men to plead guilty, an outcome the study’s authors attributed to a greater likelihood that women were single parents who needed to gain release to care for their children.<sup>32</sup>

Researchers point out that, particularly for people facing misdemeanor charges, a guilty plea in exchange for a sentence to time served or to probation can be the fastest means to release from jail. A quick plea would be especially enticing for people at risk of losing employment, housing, or custody of their children while detained.<sup>33</sup>

Other explanations for the increased likelihood of conviction include the impact of detention in limiting people’s ability to meet with their defense counsel and to assist in preparing a defense case.<sup>34</sup> Time in jail may also limit a person’s financial resources to dedicate to the defense, particularly when detention has resulted in lost income.<sup>35</sup> Lastly, pretrial detention prevents people from engaging in “prophylactic measures” that increase the likelihood of acquittal, dismissal, or diversion, such as paying restitution, seeking treatment or other services, and pursuing education and employment opportunities.<sup>36</sup>

## Pretrial detention and sentencing

Research demonstrates that people who spend time in pretrial detention receive harsher sentences—sentences that are more likely to include incarceration and for a longer amount of time—than those who spend the pretrial period at liberty. For example, a 2013 study of cases in Kentucky found that—even when controlling for other factors such as charge type, demographics, and criminal history—people detained for the entire pretrial period were 4.44 times more likely to receive a jail sentence and 3.32 times more likely to receive a prison sentence than those released at some point prior to case resolution.<sup>37</sup> Those sentences were also longer: jail sentences were 2.78 times longer for people who were detained for the pretrial period and prison sentences were 2.36 times longer.<sup>38</sup> In Harris County, Texas, researchers found that people charged with misdemeanors who were detained for more than seven days after their initial bail hearing were 43 percent more likely to receive jail sentences

than probation as compared to similarly situated people who were released pretrial, and their sentences were nine days longer on average—or more than double.<sup>39</sup>

These studies, and others, suggest that the impact of pretrial detention on sentencing severity is greatest for people who are classified as low risk, held on the smallest amounts of bail, or charged with misdemeanors rather than felonies.<sup>40</sup> The larger effect of pretrial detention on sentencing for people with these lower level cases may, at least in part, be because they are more likely to be sentenced to the time already served in jail pretrial than people facing more serious charges.<sup>41</sup> While a time-served sentence typically results in release from jail, people may have spent more time in jail pretrial than they would have had they been released pretrial and then sentenced to a term of incarceration.<sup>42</sup> Even when the effect of time-served sentences is discounted, however, pretrial detention has been shown to increase sentence lengths in misdemeanor cases. In Philadelphia, for example, when excluding time spent in pretrial detention from incarceration sentences for misdemeanor charges, pretrial detention still led to a 38-day increase in the maximum sentence days.<sup>43</sup>

Although the effects of pretrial detention are greatest for people with lower-level cases, the effects are also substantial for people charged with felonies: the 2016 quasi-experimental New York City study found that pretrial detention extended the minimum sentence length for people convicted of felonies by more than 150 days.<sup>44</sup> An earlier 2012 study found that in cases with a felony conviction, for people released during the pretrial period, 20 percent of sentences included incarceration; but for people who remained jailed for the entire pretrial period, 87 percent of sentences included incarceration.<sup>45</sup> Regression analysis showed that, although many factors appeared to predict incarceration, being detained pretrial was the “strongest *single* factor influencing a convicted defendant’s likelihood of being sentenced to jail or prison.”<sup>46</sup> The median sentence for cases with less than one day in pretrial detention was 120 days, compared to 730 days for those detained for more than two months pretrial—and this relationship was not a result of time-served sentences.<sup>47</sup> The researcher noted that pretrial release offers the opportunity for people to demonstrate their ability to “behave responsibly”—to work and support their families, for example—which can result in more lenient outcomes, while detained people essentially earn credit toward a jail sentence.<sup>48</sup> Additionally, cases tend to move more slowly when people are released pretrial, which can result in diminished evidence and availability of witnesses.<sup>49</sup>

The consequences of pretrial detention may go beyond sentence length. A study in Philadelphia found pretrial

detention led to an overall average increase of \$129 in court fees, costs that are assessed on conviction and are unrelated to monetary bail. Many people were able to pay just a portion of those fees and remained in debt.<sup>50</sup>

## Pretrial detention and future justice system involvement

Researchers have found that being held in custody while awaiting case disposition may increase the likelihood that people are charged with a new crime in the future. Some research has demonstrated that even a short time in pretrial detention can significantly increase the likelihood that a person will be charged with a new offense. Other studies have suggested that the effect is greater for people who pose a lower risk of recidivism.

In Kentucky, researchers controlled for demographics and other pertinent factors, such as people's assessed risk levels, charge type, and incarceration history, and found that people held for the entire pretrial period were 1.3 times more likely to be arrested on new charges following disposition of the original case than people who were released at some point pending trial.<sup>51</sup> While as little as two days in detention was associated with an increased likelihood of rearrest, the longer people were held, the more likely they were to be rearrested. The researchers found the relationship between pretrial detention and rearrest was strongest for people assessed as low risk, less pronounced for people assessed as medium risk, and insignificant for people assessed as high risk.<sup>52</sup>

Other studies have found that although people who are detained pretrial are less likely than released people to be rearrested in the short-term—due to the incapacitation effect of incarceration—they are more likely to be rearrested in the future due to a criminogenic effect of time in custody.<sup>53</sup> Although a study of cases in Philadelphia suggested that these two effects may cancel each other out (at least during the two-year time frame of the study), other research has suggested that the implications of pretrial detention for future justice system involvement may be substantial.<sup>54</sup> In Harris County, Texas, people detained pretrial were significantly less likely to be rearrested during the first 13 days after their bail hearings than similarly situated people who posted bail and were released, but significantly more likely to be rearrested by day 30.<sup>55</sup> This increased level of risk remained significant through the end of the 18-month follow-up period. Based on their findings, the researchers estimated that the pretrial detention of 10,000 people charged with

misdemeanors could be expected to result in 400 additional felonies and 600 more misdemeanors than if they had been released pretrial.<sup>56</sup>

As to why pretrial detention might be associated with increased risk for future arrest, researchers have hypothesized that disruption to interpersonal relationships and community ties—both of which help protect against future crimes—may be involved.<sup>57</sup> One study suggests the relationship between detention and new crime can be explained in part by the job loss that incarceration can cause and the increased challenge of finding employment with a criminal record.<sup>58</sup> The relationship may also be partly explained by the finding that people held in detention are more likely to plead guilty regardless of their innocence or guilt and therefore to receive a criminal conviction.<sup>59</sup> Having a recorded criminal history may change the likelihood that prosecutors choose to pursue offenses that, for someone without a criminal record, might have been dismissed.<sup>60</sup>

## Pretrial detention perpetuates inequities in the criminal justice system

The massive growth in the use of pretrial detention has affected some populations more than others. Research described below suggests that people who lack economic resources—as well as people of color—may be particularly likely to be held in custody while awaiting the resolution of their cases—irrespective of the merits of their cases or their likelihood of pretrial success.

### Pretrial detention, poverty, and gender

Monetary bail is typically assigned without any assessment of a person's ability to pay. For example, a 2018 study found that although monetary bail was set in approximately two-thirds of cases in Philadelphia, there was no evidence that judges took into account people's ability to pay.<sup>61</sup> As might be predicted, studies demonstrate that when facing equivalent bail amounts, people from low-income ZIP codes are less able to afford bail than people from wealthier neighborhoods and, therefore, are more likely to be detained.<sup>62</sup>

Furthermore, people who are unable to afford bail often remain in jail for the entire time their cases are pending, even when bail is set relatively low. In New York City, a 2016 analysis found that in 45 percent of felony cases and 43 percent of misdemeanor cases, people could not make bail before the end

of their cases and therefore remained in jail.<sup>63</sup> Even when bail was set at low amounts—\$500 or less—40 percent of people remained in jail until their cases were over.<sup>64</sup> A Vera Institute of Justice analysis of cases in New Orleans found that in the district court, where monetary bail was a condition of release in 85 percent of felony cases studied, nearly one-third of people charged with felonies remained in jail until their cases were resolved because they could not afford bail.<sup>65</sup> They spent an average of 114 days in jail pretrial.<sup>66</sup>

Monetary bail also disparately impacts women. Although judicial officers release women on recognizance at higher rates, deny them release less often, and set lower bail amounts for them, women are less likely to be able to afford bail when it is set.<sup>67</sup> Women are also more likely than men to have lacked employment prior to arrest and generally earn less than men when employed.<sup>68</sup> It is often women, however, who absorb the financial costs, including bail, attorney fees, and court fines and fees, when family members are incarcerated, which, in many cases, deepens their financial insecurity.<sup>69</sup>

## Pretrial detention and race

Research into the relationship between pretrial detention and race has produced mixed results, though several studies have found that people of color are treated more harshly than white people during the pretrial release decision-making process.<sup>70</sup> For example, two studies that analyzed state court data collected from 75 large jurisdictions in the 1990s—controlling for a number of different factors—found that black and Latino people were more likely than white people to be detained without bail.<sup>71</sup> When bail was granted, it was set at significantly higher rates for people of color.<sup>72</sup> These effects were most notable for Latino people with drug charges.<sup>73</sup> A 2010 study of drug cases in a midsized county in Pennsylvania found that black people were approximately 80 percent less likely to be granted release on recognizance than white people.<sup>74</sup> The study controlled for factors such as offense severity, criminal history, age, and the person's employment status. Other studies, however, have not shown evidence of disparate treatment, suggesting instead that racial differences disappear when controlling for factors such as economic status or likelihood of rearrest.<sup>75</sup>

Inconsistencies in the research findings may be due to the complexity of the issue and the methodological challenges that result from this complexity.<sup>76</sup> Researchers sometimes aggregate data across jurisdictions and offense type, and rarely measure the evidentiary strength of the cases in their sample.<sup>77</sup> Studies often treat pretrial release as one individual

decision point, rather than the sequence and culmination of multiple decisions by various actors it actually is; for example, whether to set monetary bail (and what amount to set), whether to require bail be paid in full or only partially in order to secure release, whether to set conditions of release or require supervision for a released person, whether to offer a plea bargain, or whether to dismiss or reduce charges.<sup>78</sup> Racial bias may be evident in some but not all of these decisions, limiting the power of research that aggregates and analyzes them as one binary decision—to release or not to release. Moreover, many studies use an overly simplistic consideration of racial discrimination and the ways in which it manifests, failing to consider the ways in which race intersects with other diverse factors such as income, crime type, and the race of the harmed party.<sup>79</sup>

A study of 2000 and 2002 court data from five counties in four states used more sophisticated economic modeling techniques to avoid these problems.<sup>80</sup> The researchers found evidence of significant bias against black people in bail setting and concluded that “judges value freedom less for blacks than whites” in four of the five counties they studied.<sup>81</sup> Similarly, a more recent quasi-experimental study of pretrial release decisions found that white people who were granted release were up to 23 percentage points more likely to be rearrested before disposition than black people—suggesting that judges have different perceptions of, or tolerance for, people's risk levels in ways that are related to their race.<sup>82</sup> The same study found that black people, when assigned monetary bail, received significantly greater bail amounts than white people.<sup>83</sup>

Researchers have noted how the nature of court hearings at which various pretrial decisions are made, such as whether to grant release on bail and the amount of bail to set, creates an opportunity for judges—knowingly or not—to be influenced by racial stereotypes.<sup>84</sup> Judicial officials have a great deal of discretion, minimal constraints, and often little information on which to base their decisions.<sup>85</sup> In these conditions, they may employ racialized assumptions—for example, by considering people of color to pose a higher risk, be more culpable or less reliable, or be better able to bear the pains of incarceration than white people—in order to make up for missing case information and to guide their decisions.<sup>86</sup> As a result, in many jurisdictions, people of color are unduly burdened by pretrial detention and the imposition of monetary bail.

# Better approaches to pretrial justice

The mounting evidence linking pretrial detention to harmful consequences for people who are held in jail demands that jurisdictions adopt new approaches. Strategies that move local justice systems away from their reliance on monetary bail and toward greater use of pretrial release already exist and, if used to the fullest extent possible, hold promise for reducing the overuse of jails. This shift may benefit not only the people who are otherwise held in pretrial detention and the communities from which they come, but may also bring substantial cost savings for local jurisdictions. As the pretrial population has grown, so have county corrections costs—increasing 74 percent between 2000 and 2012.<sup>87</sup> One study found the average cost of detaining people pretrial is approximately double that of releasing them while they await resolution of their cases: on average, pretrial detention results in \$40,300 in direct costs, while the cost of pretrial release is \$19,500.<sup>88</sup>

Studies have concluded that by better supporting people who are released pretrial through initiatives such as court date reminders, jurisdictions could achieve improved pretrial outcomes without resorting to pretrial detention.<sup>89</sup> Other simple changes could be made to the current bail system to yield big results.

- › **Meaningful bail hearings.** Despite the Supreme Court's mandate that bail setting be an individualized decision-making process that considers a person's financial ability to make bail, among other factors, bail hearings are often perfunctory, just minutes long, and occur without defense representation.<sup>90</sup> A meaningful bail hearing provides people the opportunity to present their individual circumstances and factors in support of their release with the assistance of defense counsel.<sup>91</sup>
- › **Pretrial supervision.** People who are deemed to be at higher risk of incurring new charges or failing to appear for future court dates if released pretrial may need additional supervision in order to achieve pretrial success. Although research on the efficacy of pretrial risk assessment instruments is limited and their potential to entrench or increase racial bias is controversial, jurisdictions are increasingly using them to assess the level of risk an individual poses for new charges or FTA during the pretrial period and ordering conditions of release to reduce those risks—such as periodic in-person or phone check-ins and court date reminders.<sup>92</sup> (See “The promise and perils of risk assessment tools” at page 9.) While there are very few studies on the

effectiveness of pretrial supervision and much greater analysis is needed, the studies that do exist suggest generally that supervision results in lower FTA and new charge rates.<sup>93</sup> But pretrial supervision is not without potential drawbacks. These same studies tend to show that more intensive interventions should be reserved for people who pose moderate to high risk for failure: although intensive supervision can decrease their risk of failure, it can actually *increase* the likelihood of failure for people otherwise identified as low risk.<sup>94</sup>

- › **Court date reminders.** Some counties send court date reminders to people ahead of their next hearings—increasingly by phone or text message—and many have seen significant reductions in FTA rates. In a pilot program in Jefferson County, Colorado, for example, when court staff contacted people scheduled for upcoming court appearances, there was a 43 percent reduction in the FTA rate.<sup>95</sup> When a live caller left a message or was able to speak with the person directly, the FTA rate fell from 21 percent to 13 percent and 8 percent, respectively.<sup>96</sup> When court staff also began notifying people one day after an FTA that the court had issued a warrant, the percentage of people who returned to court on their own initiative within five business days increased from 10 to 50 percent.<sup>97</sup> Similar results were found in Multnomah County, Oregon, and New York City.<sup>98</sup> In New York, the most effective messaging provided information about the consequences of not appearing for court, what to expect at court, and help with making plans for appearing.<sup>99</sup> Because some people fail to appear for court due to work or childcare responsibilities, lack of transportation, physical disabilities, or illness, taking proactive steps to assist people in addressing these barriers could facilitate increased use of release on recognizance without an accompanying increase in FTA.<sup>100</sup>
- › **Unsecured bonds.** Courts could increase their use of “unsecured bonds,” which allow people to be released from pretrial detention without paying any money upfront: they are only expected to pay the set bail amount if they fail to appear for their court dates.<sup>101</sup> Courts could also make greater use of “partially secured bonds” or “deposit bonds,” which require upfront payment of just a fraction of the set bail amount in order to gain release—again, with the understanding that people will pay the remaining amount only if they miss a court hearing.<sup>102</sup> For this practice to be most effective, courts should return the full amount deposited when people make their court appearances rather than retaining a portion as an administrative fee, as many courts currently do.<sup>103</sup>

## The promise and perils of risk assessment tools

Pretrial risk assessments are tools used to predict the likelihood that a person will be rearrested or fail to appear in court if released to the community while awaiting trial. The instruments vary in their design, but measure factors that, through statistical analysis, have been found to relate to pretrial behavior. These factors commonly include elements such as criminal history, community ties, employment, and age.<sup>a</sup> The tools produce a score that places a person's likelihood of pretrial failure on a scale from low to high risk. The assigned risk score is then used to guide judicial officers' decisions about pretrial release.<sup>b</sup>

Although some in the criminal justice system have called for the widespread adoption of rigorously evaluated pretrial risk assessments in order to decrease unnecessary detention, there has been limited analysis as to whether risk assessment achieves this goal and the results have been mixed.<sup>c</sup> For example, jurisdictions that have adopted one popular tool—the Public Safety Assessment (PSA)—have variously seen decreases in pretrial detention, increases in pretrial detention, or no discernable effect.<sup>d</sup>

Although more research is needed, the uncertain impact of risk assessment tools may be a result of variation in how they are implemented. Jurisdictions have discretion in how they define high and low risk and how they use that information to inform release decisions.<sup>e</sup> When risk assessments have been introduced at other stages of the criminal justice system, judges have been cynical about their value, disregarding the results in favor of their own judgment.<sup>f</sup>

If implemented correctly, some advocates believe risk assessment may be a powerful corrective to judicial officer biases and a productive force in ending racial inequity in pretrial release decisions.<sup>g</sup> A coalition of more than 100 organizations, however, has cautioned that risk assessment tools may in fact entrench, or even exacerbate, racial bias in the system, as the data used to produce the score is, itself, racially biased.<sup>h</sup> Measuring people's criminal histories is particularly troublesome, critics have argued, given that people of color have been—and continue to be—overpoliced in many jurisdictions, making them more likely to have a recorded criminal history than white people, purely as a result

of their race.<sup>i</sup> Other factors, such as education and employment, may similarly reflect racial biases and systemic racism inherent in American society—which are reproduced when used as a basis for pretrial release decisions.<sup>j</sup>

Two commonly used tools—the PSA and the Virginia Pretrial Risk Assessment Instrument (VPRAI)—have been promoted as being “race neutral,” meaning the results of the tool should not be affected by the subject's race.<sup>k</sup> The reality appears to be a little more complex.<sup>l</sup> A 2018 study found, for example, that the PSA has weaker predictive value for black people than white people in its assessment of the risk of failing to appear in court, and that black people were arrested for new crimes during their pretrial period of release at a lower rate than white people in the same risk category.<sup>m</sup> The same study suggested, however, that despite these statistical differences, use of the PSA does not increase race or gender disparities in incarceration.<sup>n</sup> Similarly, analysis of the VPRAI and the VPRAI-Revised suggests that the tools have slightly higher predictive power for white people than people of color, though the researchers conclude that these differences do not translate into significant bias when used to assign people to different risk categories.<sup>o</sup>

Researchers have recently developed more statistically sophisticated instruments that rely on “machine learning”—algorithms that can adapt to improve their accuracy based on new data—to predict risk. Researchers claim that the algorithms can be adjusted to guard against racial bias.<sup>p</sup> Such instruments have been criticized, though, for their lack of transparency. Unlike standard risk assessment tools, they operate as a “black box,” meaning that the end user may not know why they place a person in a specific risk category.<sup>q</sup>

Some believe the use of risk assessment tools in making pretrial release decisions holds promise in reducing both jail populations and racial inequity in the system, but their practical value has yet to be proven definitively.<sup>r</sup> In order for them to achieve these goals, it has been argued, robust procedures for their use—and safeguards against their misuse—will need to be in place.<sup>s</sup> Still others contend that pretrial detention can, and should, be drastically cut without the use of such instruments.<sup>t</sup>

## Conclusion

As court systems increasingly rely on monetary bail to determine whether people will remain in jail or at liberty while their cases are pending, the number of people in jail awaiting trial has grown precipitously, even with crime rates at historic lows.<sup>104</sup> And people who lack the means to post bail—largely those from poor communities and communities of color—have been impacted most profoundly.

While pretrial detention is supposed to increase the likelihood that people will appear for court hearings and reduce the risk of harm to the community, a mounting body of research indicates that it is not achieving those goals. In fact, studies

suggest that pretrial detention results in worse outcomes: more and longer sentences to incarceration and increased recidivism. Some research also indicates that pretrial detention may actually increase rates of failure to appear. While more rigorous research is needed to unpack the connection between pretrial detention and these outcomes, studies demonstrate that the current model of pretrial justice, which centers on the ability to pay monetary bail, is failing to deliver its anticipated results. Moreover, pretrial risk assessment instruments may not be the panacea they were once believed to be. Given this evidence, it is urgent that communities adopt more effective and just methods to guarantee pretrial success and rigorously assess whether those methods are achieving their intended impact.

### Resources

**Dobbie, Will, Jacob Goldin, and Crystal S. Yang.** “The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges.” *American Economic Review* 108, no. 2 (2018), 201-40. <https://perma.cc/7NAN-S7HB>.

**Harcourt, Bernard E.** “Risk as a Proxy for Race.” *Federal Sentencing Reporter* 27, no. 4 (2015), 237-43.

**Heaton, Paul, Sandra G. Mayson, and Megan Stevenson.** “The Downstream Consequences of Misdemeanor Pretrial Detention.” *Stanford Law Review* 69, no. 3 (2017), 711-94. <https://perma.cc/B7MF-9RLV>.

**Incarceration Trends.** Database. New York: Vera Institute of Justice. [trends.vera.org](https://trends.vera.org).

**Lowenkamp, Christopher, Marie VanNostrand, and Alexander Holsinger.** *The Hidden Costs of Pretrial Detention*. Houston, TX: Laura and John Arnold Foundation, 2013. <https://perma.cc/PX7G-N6BC>.

**Pretrial Justice Institute.** <https://perma.cc/5M54-Q63M>.

**Schnacke, Timothy R.** *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*. Washington, DC: U.S. Department of Justice, National Institute of Corrections, 2014. <https://perma.cc/EV8F-3YVY>.

**Stevenson, Megan.** “Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes.” *Journal of Law, Economics, and Organization* 34, no. 4 (2018), 511-42.

### About this report

This report is one of a series that the Vera Institute of Justice (Vera) is releasing with the Safety and Justice Challenge—the John D. and Catherine T. MacArthur Foundation’s initiative to reduce overincarceration by changing the way America thinks about and uses jails. The initiative is supporting a network of competitively selected local jurisdictions committed to finding ways to safely reduce jail incarceration. Through the Safety and Justice Challenge, our own office in New Orleans, and direct partnerships with jurisdictions nationwide, Vera is providing expert information and technical assistance to support local efforts to stem the flow of people into jail, including using alternatives to arrest and prosecution for minor offenses, recalibrating the use of bail, and addressing fines and fees that also trap people in jail. For more information about Vera’s work to reduce the use of jails, contact Nancy Fishman, project director at Vera’s Center on Sentencing and Corrections, at [nfishman@vera.org](mailto:nfishman@vera.org). For more information about the Safety and Justice Challenge, visit [www.safetyandjusticechallenge.org](http://www.safetyandjusticechallenge.org).

## Endnotes

- 1 Data from the Vera's *Incarceration Trends* tool, available at [trends.vera.org](https://trends.vera.org). Pretrial population counts represent snapshots from June 30 of each year.
- 2 Jacob Kang-Brown and Ram Subramanian, *Out of Sight: The Growth of Jails in Rural America* (New York: Vera Institute of Justice, 2017), 9-10, <https://perma.cc/J9DW-4WK5>.
- 3 *United States v. Salerno*, 481 U.S. 739, 755 (1987), <https://perma.cc/RZ35-RW49>.
- 4 See Federal Bureau of Investigation (FBI), Uniform Crime Reporting (UCR) Program, *UCR Data Online*, <https://perma.cc/95KR-QD6L>. The violent crime rate decreased from 758 to 379 per 100,000 people, and the property crime rate decreased from 5,140 to 2,733 per 100,000 people.
- 5 For the 1995 arrest rate, see FBI, "Crime in the United States 1995," 209 & table 30, <https://perma.cc/4KS7-77RQ>. For the 2013 arrest rate, see FBI, "Uniform Crime Reports: 2013 Crime in the United States," table 30, <https://perma.cc/H77R-YYSF>.
- 6 Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009 - Statistical Tables* (Washington, DC: Bureau of Justice Statistics, 2013), 15, <https://perma.cc/QNC4-ZQV3>.
- 7 *Ibid.*, 15 & 35.
- 8 See *Bearden v. Georgia*, 461 U.S. 660, 671 (1983), <https://perma.cc/A7CM-YCGC>.
- 9 Kristin Bechtel, John Clark, Michael R. Jones, and David J. Levin, *Dispelling the Myths: What Policy Makers Need to Know About Pretrial Research* (Rockville, MD: Pretrial Justice Institute, 2012), <https://pdfs.semanticscholar.org/199c/ed3713d5dbe7b5ffd3b3db121c184274e316.pdf>; and Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* (Washington, DC: U.S. Department of Justice, National Institute of Corrections, 2014), 12, <https://perma.cc/9E9B-RWVB>.
- 10 Mary T. Phillips, *A Decade of Bail Research in New York City* (New York City: Criminal Justice Agency, 2012), 97, <https://perma.cc/H8JE-E8P4>. The author found the majority of people in the sample who missed a scheduled court event did return within 30 days. Adjusting for failure to return within 30 days reduced the FTA rate by more than half. As the author explains, an adjusted FTA rate is "a better measure of what is sometimes called 'willful FTA' because many [people] who miss a court date do so merely because of forgetfulness, illness, inability to find child care or transportation, or some other reason related to a disordered life rather than a willful attempt to evade justice." The people described often return to court within a few days of the missed court event. *Ibid.*, 96.
- 11 *Ibid.*, 129. In New York City's supervised release program, clients undergo an assessment and are assigned a social worker or counselor who works with them to ensure they attend all court dates and follow court-ordered conditions. Voluntary referrals are made for services such as housing, job training, and community-based mental health or substance use treatment. See The New York City Criminal Justice Agency, "Services: Supervised Release," <https://perma.cc/D48J-689C>.
- 12 Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* (Rockville, MD: Pretrial Justice Institute, 2013), 3, <https://perma.cc/US5H-MUFF>.
- 13 *Ibid.*, 10.
- 14 *Ibid.*, 3.
- 15 Anna Maria Barry-Jester, "You've Been Arrested. Will You Get Bail? Can You Pay It? It May All Depend on Your Judge," *FiveThirtyEight*, June 19, 2019, <https://fivethirtyeight.com/features/youve-been-arrested-will-you-get-bail-can-you-pay-it-it-may-all-depend-on-your-judge/>.
- 16 *Ibid.*
- 17 American Bar Association (ABA), *ABA Standards for Criminal Justice—Third Edition: Pretrial Release* (Washington, DC: ABA, 2007), 29, <https://perma.cc/Q2FG-5VJE>.
- 18 Christopher Lowenkamp, Marie VanNostrand, and Alexander Holsinger, *The Hidden Costs of Pretrial Detention* (Houston, TX: Laura and John Arnold Foundation, 2013), 4, <https://perma.cc/498S-LM6P>.
- 19 *Ibid.*, 10.
- 20 *Ibid.*
- 21 *Ibid.*
- 22 Will Dobbie, Jacob Goldin, and Crystal S. Yang, "The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges," *American Economic Review* 108, no. 2 (2018), 201-40, <https://perma.cc/7NAN-S7HB>.
- 23 *Ibid.*, 214.
- 24 Megan Stevenson, "Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes," *Journal of Law, Economics, and Organization* 34, no. 4 (2018), 511-42, 516 & 532.
- 25 Dobbie, Goldin, and Yang, "The Effects of Pretrial Detention," 2018, 225.
- 26 *Ibid.*, 203.
- 27 Phillips, *A Decade of Bail Research*, 2012, 116.

- 28 Ibid. For felony cases, conviction on a felony charge increased from 22 percent among people who were released without spending any nights in jail to 72 percent among those who spent more than two months in pretrial detention.
- 29 Emily Leslie and Nolan Pope, “The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from NYC Arraignments,” *Journal of Law and Economics* 60, no. 3 (2017), 529-57, 530 & 547.
- 30 Paul Heaton, Sandra G. Mayson, and Megan Stevenson, “The Downstream Consequences of Misdemeanor Pretrial Detention,” *Stanford Law Review* 69, no. 3 (2017), 711-94, 717, <https://perma.cc/8BB3-8BPY>. The authors controlled for charges, demographic characteristics, ZIP code of residence, prior criminal history, claim of indigence, and bail amount. Ibid., 745.
- 31 Leslie and Pope, “The Unintended Impact of Pretrial Detention,” 2017, 530.
- 32 Ibid., 554.
- 33 See generally Heaton, Mayson, and Stevenson, “Downstream Consequences,” 2017.
- 34 Ibid., 722.
- 35 Ibid.
- 36 Ibid., 747.
- 37 Lowenkamp, VanNostrand, and Holsinger, “Investigating the Impact of Pretrial Detention on Sentencing Outcomes,” 2013, 10.
- 38 Ibid.
- 39 Heaton, Mayson, and Stevenson, “Downstream Consequences,” 2017, 747.
- 40 See for example Lowenkamp, VanNostrand, and Holsinger, “Investigating the Impact of Pretrial Detention, 2013, which found the impact of pretrial detention to be greatest for people assessed to be low risk; Heaton, Mayson, and Stevenson, “Downstream Consequences,” 2017, 750, which found the greatest impact on people held on lower bail amounts; and Stevenson, “Distortion of Justice,” 2018, 536, which found the strongest effect for people facing misdemeanor charges.
- 41 Stevenson, “Distortion of Justice,” 2018, 536.
- 42 A conviction often comes with collateral consequences that serve as barriers to employment, housing, education, and certain occupational licenses, impeding successful reentry. See National Reentry Resource Center, National Inventory of Collateral Consequences of Conviction (NICCC), “Welcome to the NICCC,” <https://perma.cc/NRN9-GCWK>.
- 43 Stevenson, “Distortion of Justice,” 2018, 536.
- 44 Leslie and Pope, “The Unintended Impact of Pretrial Detention” 2017, 536.
- 45 Phillips, *A Decade of Bail Research*, 2012, 118-19 & figure 44.
- 46 Ibid., 118 (emphasis in original).
- 47 Ibid., 120.
- 48 Ibid., 118-20.
- 49 Heaton, Mayson, and Stevenson, “Downstream Consequences, 2017, 722.
- 50 Stevenson, “Distortion of Justice,” 2018, 534.
- 51 Lowenkamp, VanNostrand, and Holsinger, *The Hidden Costs of Pretrial Detention*, 2013, 20.
- 52 Ibid., 24.
- 53 Dobbie, Goldin, and Yang, “The Effects of Pretrial Detention,” 2018; and Heaton, Mayson, and Stevenson, “Downstream Consequences,” 2017.
- 54 For the Philadelphia study, see Dobbie, Goldin, and Yang, “The Effects of Pretrial Detention,” 2018, 226.
- 55 Heaton, Mayson, and Stevenson, “Downstream Consequences,” 2017, 762.
- 56 Ibid., 768.
- 57 Ibid., 760.
- 58 Dobbie, Goldin, and Yang, “The Effects of Pretrial Detention,” 2018, 235.
- 59 Heaton, Mayson, and Stevenson, “Downstream Consequences,” 2017, 771.
- 60 Ibid., 760.
- 61 Megan Stevenson, “Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes,” *Journal of Law, Economics, and Organization* 34, no. 4 (2018), 511-42, 521. Stevenson gives further detail on judge’s failure to consider people’s ability to pay in setting bail amounts in an earlier draft of this paper. See Megan Stevenson, “Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes” (working draft November 8, 2016), 4, <https://perma.cc/62QP-RMYH>.
- 62 Stevenson, “Distortion of Justice,” 2016, 4.
- 63 New York City Criminal Justice Agency (CJA), *Annual Report 2015* (New York: CJA, 2016), 30, <https://perma.cc/K5NC-QHFR>.

- 64 Ibid.
- 65 Mathilde Laisne, Jon Wool, and Christian Henrichson, *Past Due: Examining the Costs and Consequences of Charging for Justice in New Orleans* (New York: Vera Institute of Justice, 2017), 7, <https://perma.cc/AL2V-MHEG>.
- 66 Ibid., 8 & figure 1.
- 67 Elizabeth Swavola, Kristine Riley, and Ram Subramanian, *Overlooked: Women and Jails in an Era of Reform* (New York: Vera Institute of Justice, 2016), 29, <https://perma.cc/EN98-E2HY>.
- 68 Stephanie S. Covington and Barbara E. Bloom, “Gendered Justice: Women in the Criminal Justice System” in *Gendered Justice: Addressing Female Offenders*, edited by Barbara E. Bloom (Durham, NC: Carolina Academic Press, 2003), 5, <https://perma.cc/3GY7-GNRA>. Sixty percent of women in jail did not have fulltime employment prior to their arrest, compared to 40 percent of men in jail. See Doris J. James, *Profile of Jail Inmates, 2002* (Washington, DC: Bureau of Justice Statistics, 2004), 9, <https://perma.cc/VK6U-A58K>. One study found women who could not post bail had an annual median income of just \$11,071, compared to \$15,598 for men who could not make bail. See Bernadette Rabuy and Daniel Kopf, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time* (Northampton, MA: Prison Policy Initiative, 2016), 2, <https://perma.cc/D8G4-VU5P>.
- 69 One study found 83 percent of family members responsible for a loved one’s court-related costs were women. See Saneta deVuono-powell, Chris Schweidler, Alicia Walters, and Azadeh Zohrabi, *Who Pays? The True Cost of Incarceration on Families* (Oakland, CA: Ella Baker Center, Forward Together, and Research Action Design, 2015), 9, <https://perma.cc/UFE4-WMUV>. Another study found 48 percent of women who ever owed money to a bail bonds agency faced housing insecurity. See Gina Clayton, Endria Richardson, Lily Mandlin, and Brittany Farr, *Because She’s Powerful: The Political Isolation and Resistance of Women with Incarcerated Loved Ones* (Oakland, CA: Essie Justice Group, 2018), 62, <https://perma.cc/UW8D-G2GG>.
- 70 Traci Schlessinger, “Racial and Ethnic Disparity in Pretrial Criminal Processing,” *Justice Quarterly* 22, no. 2 (2005), 170-92; and Stephen Demuth, “Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees,” *Criminology* 41, no. 3 (2003), 873-908, note that researchers have too often studied racial disparities in pretrial outcomes—that is, whether a person was released or held in custody—rather than decisions made by judges in granting release or setting bail. Doing so, they argue, confuses the picture, as the outcome may be determined by a person’s socioeconomic status in ways that obscure disparities in treatment.
- 71 Schlessinger, “Racial and Ethnic Disparity,” 2005; and Demuth, “Racial and Ethnic Differences,” 2003. Both studies incorporated extra-legal and legal variables into their regression models, including race, ethnicity, age, offense seriousness, offense type, and criminal justice history.
- 72 Schlessinger, “Racial and Ethnic Disparity,” 2005; and Demuth, “Racial and Ethnic Differences,” 2003.
- 73 Schlessinger, “Racial and Ethnic Disparity,” 2005; and Demuth, “Racial and Ethnic Differences,” 2003.
- 74 Tina L. Freiburger, Catherine D. Marcum, and Mari Pierce, “The Impact of Race on the Pretrial Decision,” *American Journal of Criminal Justice* 35, no. 1 (2010), 76-86, <https://perma.cc/8HAT-BDYW>.
- 75 See for example Tina L. Freiburger and Carly M. Hilinski, “The Impact of Race, Gender, and Age on the Pretrial Decision,” *Criminal Justice Review* 35, no. 3 (2010), 318-34, <https://perma.cc/63ZM-SFDS>. Freiburger and Hilinski controlled for markers of socioeconomic status, including whether the arrested person had an income of more than \$75 a month and assets over \$1,500. Race was not found to be a significant predictor of detention once these measures were introduced to the model. Also see Frank McIntyre and Shima Bardaran, “Race, Prediction, and Pretrial Detention,” *Journal of Empirical Legal Studies* 10, no. 4 (2013), 741-70. McIntyre and Bardaran, in their study, considered the likelihood that defendants would be rearrested and found that the inclusion of this factor in their regression models accounted for the apparent racial bias in the assignment of bail. It should be noted, however, that the risk of rearrest may itself be influenced by a person’s race, given differential policing practices in communities of color.
- 76 Demuth, “Racial and Ethnic Differences,” 2003, 878-79.
- 77 Marvin D. Free Jr., “Racial Bias and the American Criminal Justice System: Race and Presentencing Revisited,” *Critical Criminology* 10, no. 3 (2001), 195-223, 198-99.
- 78 Ibid., 219.
- 79 Ibid., 197-99.
- 80 Shawn D. Bushway and Jonah B. Gelbach, *Testing for Racial Discrimination in Bail Setting Using Nonparametric Estimation of a Parametric Model* (August 11, 2010), <https://perma.cc/D9AB-EK23>.
- 81 Ibid., 37. The four counties were Broward County, Florida; Cook County, Illinois; Dallas County, Texas; and Harris County, Texas. Los Angeles County, California, was the only jurisdiction studied that did not demonstrate significant racial bias in bail setting.

- 82 David Arnold, Will Dobbie, and Crystal S. Yang, "Racial Bias in Bail Decisions," *Quarterly Journal of Economics* 133, no. 4 (2018), 1885-1932, <https://perma.cc/Y529-8JV6>. For a description of quasi-experimental approaches to researching pretrial detention, see "Challenges in researching the impact of pretrial detention" at page 4.
- 83 Arnold, Dobbie, and Yang, "Racial Bias in Bail Decisions," 2018, 1906.
- 84 Cynthia Jones, "'Give Us Free': Addressing Racial Disparities in Bail Determinations," *N.Y.U. Journal of Legislation and Public Policy* 16, no. 4 (2013), 919-61, 943, <https://perma.cc/VN97-WUU2>.
- 85 Schlesinger, "Racial and Ethnic Disparity," 2005, 171-72.
- 86 Freiberger, Marcum, and Pierce, "The Impact of Race on the Pretrial Decision," 2010, 84; Jones, "'Give Us Free,'" 2013, 943; and Schlesinger, "Racial and Ethnic Disparity," 2005, 171-72.
- 87 Natalie R. Ortiz, *County Jails at a Crossroads: An Examination of the Jail Population and Pretrial Release* (Washington, DC: National Association of Counties, 2015), 8, <https://perma.cc/2SYC-6D2S>.
- 88 Shima Baradaran Baughman, "Costs of Pretrial Detention," *Boston University Law Review* 97 no. 1 (2017), 1-30, 18, <https://perma.cc/Q92U-FD3U>.
- 89 See for example Megan T. Stevenson, "Assessing Risk Assessment in Action," *Minnesota Law Review* 103, no. 1 (2018), 303-84, 370, <https://perma.cc/5XC5-BJCT>.
- 90 For bail hearing standards, see *Stack v. Boyle*, 342 U.S. 1, 5 & note 3 (1951), <https://perma.cc/L869-9CQC>. For the nature of modern bail hearings, see Heaton, Mayson, and Stevenson, "Downstream Consequences," 2017, 720.
- 91 See Alexander Bunin, "The Constitutional Right to Counsel at Bail Hearings," *Criminal Justice* 31, no. 1 (2016), 23-26, 47, <https://perma.cc/S9W5-85AT>.
- 92 Megan Stevenson and Sandra G. Mayson, "Bail Reform: New Directions for Pretrial Detention and Release" (March 13, 2017), 11, 17 & 20, <https://perma.cc/QR84-44VX>.
- 93 See for example Cindy Redcross, Melanie Skemer, Dannia Guzman, Insha Rahman, and Jessi LaChance, *New York City's Pretrial Supervised Release Program: An Alternative to Bail* (New York: MDRC and Vera Institute of Justice, 2017), <https://perma.cc/3SZZ-YKV7>; and Christopher T. Lowenkamp and Marie VanNostrand, *Exploring the Impact of Supervision on Pretrial Outcomes* (Houston, TX: Laura and John Arnold Foundation, 2013), <https://perma.cc/4N4J-9G2M>.
- 94 Marie VanNostrand, Kenneth J. Rose, and Kimberly Weibrecht, *State of the Science of Pretrial Release Recommendations and Supervision* (Rockville, MD: Pretrial Justice Institute, 2011), 28, <https://perma.cc/3DMM-S92S>.
- 95 Timothy R. Schnacke, Michael R. Jones, and Dorian M. Wilderman, "Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Pilot Project and Court Date Notification Program," *Court Review: The Journal of American Judges Association* 48, no. 3 (2012), 86-95, 89, <https://perma.cc/JXR4-FJVM>.
- 96 *Ibid.*
- 97 *Ibid.*, 89-90.
- 98 Matt Nice, *Court Appearance Notification System: Process and Outcome Evaluation* (Portland, OR: Multnomah County, 2006), <https://perma.cc/R2WY-YUR3>; and Brice Cooke, Binta Zahra Diop, Alissa Fishbane, et al., *Using Behavioral Science to Improve Criminal Justice Outcomes: Preventing Failures to Appear in Court* (Chicago: UChicago Urban Labs Crime Lab and ideas42, 2018), <https://perma.cc/5Q8Q-CW7S>.
- 99 Cooke, Diop, Fishbane, et al., "Using Behavioral Science," 2018, 16.
- 100 American Civil Liberties Union (ACLU), *A Pound of Flesh: The Criminalization of Private Debt* (New York, ACLU, 2018), 13, <https://perma.cc/MZJ3-KN4P>; and Stevenson, "Assessing Risk Assessment in Action," 2018, 370.
- 101 Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* (Washington, DC: Pretrial Justice Institute, 2013), 5, <https://perma.cc/76JT-LXNV>.
- 102 Insha Rahman, *Against the Odds: Experimenting with Alternative Forms of Bail in New York City's Criminal Courts* (New York: Vera Institute of Justice, 2017), 8, <https://perma.cc/E8XS-ZSE3>; and Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009 - Statistical Tables* (Washington, DC: Bureau of Justice Statistics, 2013), 35, <https://perma.cc/B3DN-6DK4>.
- 103 Reaves, *Felony Defendants in Large Urban Counties*, 2013, 35. Philadelphia recently discontinued its policy of retaining a portion of cash bail deposits even when people were fully compliant with their bail conditions. See Max Mitchell, "Phila. Courts Revoke Policy Allowing It to Retain 30 Percent of Cash Bail Deposit," *Legal Intelligencer*, October 10, 2018, <https://perma.cc/6EZC-GHG9>.
- 104 See generally Bruce Frederick, *Measuring Public Safety: Responsibly Interpreting Statistics on Violent Crime* (New York: Vera Institute of Justice, 2017), <https://perma.cc/NBR8-NXTU>.

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## Call out box endnotes

### Summary page 1

- a Zhen Zeng, *Jail Inmates in 2016* (Washington, DC: Bureau of Justice Statistics, 2018), 1 & 9, <https://perma.cc/5A4W-XCS5>. Zeng estimates the total jail population for June 30, 2016, as 740,700.
- b Data from the Vera Institute of Justice's *Incarceration Trends* tool, available at <https://perma.cc/HL5B-KQ34>.
- c Ibid. *Incarceration Trends* estimates the average daily total jail population for 2015 as 689,057—a figure that excludes people held in local jails for federal agencies such as U.S. Immigration and Customs Enforcement.

### The price of freedom: Monetary bail and pretrial detention page 3

- a Alexander Bunin, "The Constitutional Right to Counsel at Bail Hearings," *Criminal Justice* 31, no. 1 (2016), 23-26, 23, <https://perma.cc/KH4M-TWGC>.
- b Michael R. Jones, Claire M.B. Brooker, and Timothy R. Schnacke, *A Proposal to Improve the Administration of Bail and the Pretrial Process in Colorado's First Judicial District* (Golden, CO: Jefferson County Criminal Justice Planning Unit, 2009), 64, <https://perma.cc/KH4M-TWGC>; and John Clark and D. Alan Henry, *Pretrial Services Programming at the Start of the 21st Century: A Survey of Pretrial Services Programs* (Washington, DC: Bureau of Justice Statistics, 2003), 8, <https://perma.cc/5K5B-RQPH>.
- c For a description of pretrial release conditions in Philadelphia, for example, see John Clark, Daniel Peterca, and Stuart Cameron, *Assessment of Pretrial Services in Philadelphia* (Rockville, MD: Pretrial Justice Institute, 2011), 8-9, <https://perma.cc/64SH-7V8Y>. Alternatively, if authorized by state law, judicial officers may invoke "preventive detention" to detain people facing a specified set of the highest-level charges after a finding of clear and convincing evidence that no conditions of release could provide reasonable assurance of public safety. See Susan Keilitz and Sara Sapia, *Preventive Detention* (Williamsburg, VA: National Center for State Courts, Pretrial Justice Center for Courts, 2017), <https://perma.cc/S9UW-XSBJ>.
- d Clark and Henry, *Pretrial Services Programming*, 2003, 89.
- e For more on which pretrial release conditions can be imposed and when in each state, see National Conference of State Legislatures, "Pretrial Release Conditions," <https://perma.cc/VJ7A-8E8Z>.
- f Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for*

*Pretrial Practitioners and a Framework for American Pretrial Reform* (Washington, DC: U.S. Department of Justice, National Institute of Correction, 2014), 2, <https://perma.cc/9E9B-RWVB>.

- g Ibid.

### Challenges in researching the impact of pretrial detention page 4

- a See for example Christopher Lowenkamp, Marie VanNostrand, and Alexander Holsinger, *The Hidden Costs of Pretrial Detention* (Houston, TX: Laura and John Arnold Foundation, 2013), 6, <https://perma.cc/498S-LM6P>; Will Dobbie, Jacob Goldin, and Crystal S. Yang, "The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges," *American Economic Review* 108, no. 2 (2018), 201-40, <https://perma.cc/7NAN-S7HB>; Arpit Gupta, Christopher Hansman, and Ethan Frenchman, "The Heavy Costs of High Bail: Evidence from Judge Randomization," *Journal of Legal Studies* 45, no. 2 (2016), 471-505, <https://perma.cc/GH7Y-MM4U>; Megan Stevenson, "Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes," *Journal of Law, Economics, and Organization* 34, no. 4 (2018), 511-42; and Paul Heaton, Sandra G. Mayson, and Megan Stevenson, "The Downstream Consequences of Misdemeanor Pretrial Detention," *Stanford Law Review* 69, no. 3 (2017), 711-94, <https://perma.cc/8BB3-8BPY>.
- b See for example Dobbie, Goldin, and Yang, "The Effects of Pretrial Detention," 2018; Gupta, Hansman, and Frenchman, "The Heavy Costs of High Bail," 2016; Stevenson, "Distortion of Justice," 2018; and David Arnold, Will Dobbie, and Crystal S. Yang, "Racial Bias in Bail Decisions," *Quarterly Journal of Economics* 133, no. 4 (2018), 1885-1932, <https://perma.cc/Y529-8JV6>. These studies employed regression analyses in conjunction with an "instrumental variable" (IV) framework. The IV in these instances was the severity/leniency of the randomly assigned bail judge. The IV is associated with changes in the explanatory variable (pretrial detention) but does not have an independent effect on the outcome variable (new offenses). This helps researchers to identify and quantify any causal effects of the explanatory variable.
- c Heaton, Mayson, and Stevenson, "Downstream Consequences," 2017, 752-53. Heaton et al. similarly use an IV framework. Here, however, the IV relates to the days of the week on which the bail hearing was held.
- d Ibid., 753-54.
- e Ibid., 758.

## The promise and perils of risk assessment tools page 10

- a Matthew DeMichele, Peter Baumgartner, Michael Wenger, et al., *The Public Safety Assessment: A Re-Validation and Assessment of Predictive Utility and Differential Prediction by Race and Gender in Kentucky* (2018), 9-10, <https://perma.cc/EF9Y-C8J9>.
- b Pretrial Justice Institute (PJI), *Pretrial Risk Assessment 101: Science Provides Guidance on Managing Defendants* (Rockville, MD: PJI, 2012), 2, <https://perma.cc/FW5G-M7XA>.
- c Steering Committee, National Association for Public Defense, “Joint Statement in Support of the Use of Pretrial Risk Assessment Instruments,” May 10, 2017; and Megan T. Stevenson, “Assessing Risk Assessment in Action,” *Minnesota Law Review* 103, no. 1 (2018), 303-84, <https://perma.cc/5XC5-BJCT>.
- d Megan Stevenson, “Risk Assessment: The Devil’s in the Details,” *The Crime Report*, August 31, 2017, <https://perma.cc/A8PD-EB9E>.
- e Ibid.
- f Jordan M. Hyatt and Steven L. Chanenson, *The Use of Risk Assessment at Sentencing: Implications for Research and Policy* (Villanova, PA: Villanova University School of Law, 2016), 8, <https://perma.cc/VU4G-94EP>; and Stevenson, “Risk Assessment: The Devil’s in the Details,” 2017.
- g National Association for Public Defense, “Joint Statement,” 2017.
- h Leadership Conference on Civil and Human Rights, *The Use of Pretrial ‘Risk Assessment’ Instruments: A Shared Statement of Civil Rights Concerns* (Washington, DC: Leadership Conference on Civil and Human Rights, 2018), 1-2, <https://perma.cc/G7E6-4JBY>.
- i Bernard E. Harcourt, “Risk as a Proxy for Race,” *Federal Sentencing Reporter* 27, no. 4 (2015), 237-43, 237.
- j Megan Stevenson, “Assessing Risk Assessment in Action,” *Minnesota Law Review* 103, (2018), 303-84, 328. <https://perma.cc/YX8G-EV8A>.
- k Pretrial Justice Institute, *Pretrial Risk Assessment Can Produce Race-Neutral Results* (Rockville, MD: PJI, 2017), 4-6, <https://perma.cc/9ETP-J3TJ>.
- l Research into the existence of racial bias in risk assessment tools can itself be problematic, as many researchers have relied on the use of regression analysis. While regression analysis may demonstrate that a tool has equal predictive power for white and black people, it does not distinguish whether, for those cases in which the tool miscategorizes people, it is systematically over- or under-estimating the risk they pose—an important distinction. See Kevin W. Whiteacre, “Testing the Level of Service Inventory-Revised (LSI-R) for Racial/Ethnic Bias,” *Criminal Justice Policy Review* 17, no. 3 (2006), 330-42, 332.
- m DeMichele, Baumgartner, Wenger, et al., *The Public Safety Assessment*, 2018, 51.
- n Ibid., 7.
- o Mona J.E. Danner, Marie VanNostrand, and Lisa M. Spruance, *Race and Gender Neutral Pretrial Risk Assessment, Release Recommendations, and Supervision: VPRAI and Praxis Revised* (St Petersburg, FL: Luminosity 2016), 25, <https://perma.cc/8AQV-Q2AJ>.
- p See generally Jon Kleinberg, Himabindu Lakkaraju, Jure Leskovec, et al., *Human Decisions and Machine Predictions* (Cambridge, MA: National Bureau of Economic Research, 2017), <https://perma.cc/6DWV-RA76>.
- q See PJI, *Pretrial Risk Assessment Can Produce Race-Neutral Results*, 2017, 3 (“The factors and formula that influence risk scores must be publicly available and understandable. No ‘hidden algorithms’ or proprietary calculations.”).
- r Stevenson, “Assessing Risk Assessment in Action,” 2018, 341.
- s Note, “Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing,” *Harvard Law Review* 131, no. 4 (2018), 1125-46, 1132.
- t Leadership Conference on Civil and Human Rights, *The Use of Pretrial ‘Risk Assessment’ Instruments*, 2018.

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