

Eliminating Cash Bail in Washington State—Amending Criminal Rule 3.2

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INTRODUCTION

At the young age of sixteen, police apprehended Kalief Browder for a robbery despite his unwavering insistence of innocence.¹ Browder, raised in the Bronx, was the youngest of seven siblings.² In 2010, police arrested Browder while he was walking home, based on the description given by a purported victim two weeks earlier, for allegedly having stolen

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1. Udi Ofer, *Kalief Browder's Tragic Death and the Criminal Injustice of Our Bail System*, ACLU (Mar. 15, 2017), <https://www.aclu.org/news/smart-justice/kalief-browders-tragic-death-and-criminal-injustice-our-bail-system> [https://perma.cc/3TT2-3TGV].

2. *Say Their Names*, SPOTLIGHT AT STAN., <https://exhibits.stanford.edu/saytheirnames/feature/kalief-browder> [https://perma.cc/5BA2-JH9Z].

a backpack.³ Unfortunately, Browder supposedly matched the description of the suspect reported to have stolen the backpack.⁴ Although the police had not found a backpack on Browder at the time of arrest, he was arrested and charged with robbery, grand larceny, and assault.⁵ The judge set a bail of \$3,000, an amount his family could not afford; thus, instead of being released to his family, Browder was subject to Rikers Island jail (Rikers) in New York.⁶

Throughout his time at Rikers, Browder maintained his innocence.⁷ Approximately seventy-four days after entering Rikers, Browder appeared before a judge and pleaded not guilty, refusing to confess to a crime he did not commit.⁸ However, at the time of his arrest, Browder was on probation from an earlier run-in with the law, making the new charges a violation of his probation.⁹ For this reason, the judge remanded Browder to jail without bail—meaning paying for his freedom was no longer an option even if his family could come up with the funds.¹⁰ Peter Goldberg, executive director for the Brooklyn Bail fund, explained, “Judges end up looking at folks who are in [jail] as more likely to be guilty”¹¹ Browder was offered several plea bargains but refused to admit guilt for a crime he had not committed.¹² The only remaining option for Browder was to remain at Rikers.¹³

Browder remained at Rikers for almost 1,100 days simply because he was unable to post bail and he had one prior conviction.¹⁴ Nearly 800 of his days at Riker were spent in solitary confinement.¹⁵ Although Browder was eventually released after three years, when his case was

3. *Id.*

4. *Id.*

5. *Id.*

6. Alysia Santo, *No Bail, Less Hope: The Death of Kalief Browder*, MARSHALL PROJECT (June 9, 2015), <https://www.themarshallproject.org/2015/06/09/no-bail-less-hope-the-death-of-kalief-browder> [<https://perma.cc/YSG5-7WJA>].

7. Ofer, *supra* note 1.

8. Santo, *supra* note 6.

9. Jennifer Gonnerman, *Kalief Browder, 1993–2015*, NEW YORKER (June 7, 2015), <https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015> [<https://perma.cc/PML8-R4VE>]. Browder had had a few prior run-ins with law enforcement. For example, eight months prior, an officer had reported seeing Browder take a delivery truck for a joyride and crash into a parked car, subsequently being charged with grand larceny. Yet, Browder admitted to Gonnerman that he had simply watched his friends drive the truck but be plead guilty to the charge thinking he had no defense. Browder was given probation and “youthful offender” status, ensuring that he was not subject to a criminal record.

10. Santo, *supra* note 6.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. Ofer, *supra* note 1.

dismissed for lack of evidence, the horrors he endured at Rikers left a permanent scar. Browder reported that he was repeatedly beaten by officers and inmates and attempted to take his own life more than once.¹⁶ Although Browder entered Rikers as a teenager, he left an adult, missing his last two years of high school and his high school graduation.¹⁷ Upon release, Browder tried to assume a normal life by surrounding himself with family and enrolling at the Bronx Community College, finishing the semester with a 3.5 GPA.¹⁸ Yet the malnourishment, fights amongst inmates, physical and mental abuse by guards (caught on video), and turmoil were now ingrained in him.¹⁹ As a result, Browder struggled to lead a normal life, “experienced deep bouts of depression, became increasingly paranoid[,] and made [several] attempts to take his life.”²⁰ In 2015, Browder succeeded in taking his own life.²¹

Among other issues, Browder’s case identifies the pervasive problem within the bail system, wherein individuals like Browder often find themselves unjustly detained in jail simply because they cannot afford the imposed bail.²² The difference is that Browder maintained his innocence and refused to plead guilty for a crime he did not commit.²³ Assistant Professor of Psychology at the University of Massachusetts Lowell, Miko Wilford, shared “that juveniles are more likely than adults to plead guilty to crimes they didn’t commit for many reasons, including that they are more susceptible to pressure from prosecutors and less aware of their rights and the consequences of a guilty plea.”²⁴

16. Colleen Shalby, *Kalief Browder, Teen Who Awaited Trial for 3 Years at Rikers, Kills Himself*, PBS NEWSHOUR (June 8, 2015), <https://www.pbs.org/newshour/nation/new-yorker-profiled-kalief-browder-kills-3-years-awaiting-trial-rikers-island> [<https://perma.cc/DSG5-KUHZ>].

17. Vanessa Romo, *New York City Reaches \$3.3 Million Settlement with Kalief Browder’s Family*, NPR (Jan. 25, 2019), <https://www.npr.org/2019/01/25/688501884/new-york-city-reaches-3-3-million-settlement-with-kalief-browders-family> [<https://perma.cc/Y5QJ-FUSM>].

18. Avianne Tan, *Kalief Browder: The Life and Death of the Man Who Spent 3 Years Without Trial on Rikers Island*, ABC NEWS (June 9, 2015), <https://abcnews.go.com/us/kalief-browder-life-death-man-spent-years-trial/story?id=31643296> [<https://perma.cc/PC2C-EGGJ>].

19. Madison J. Gray, *Bail Equals Inequality: The Kalief Browder Case & Why Freedom Costs Money*, NEWSONE (June 12, 2015), <https://newsone.com/3122034/bail-equals-inequality-the-kalief-browder-case-why-freedom-costs-money/> [<https://perma.cc/RE6K-9DZ6>].

20. Christopher Mathias, *The Death of Kalief Browder Is an ‘American Tragedy Almost Beyond Words’*, HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/kalief-browder-death_n_7535420 [<https://perma.cc/ZUT6-3P35>].

21. David K. Li, *Family of Kalief Browder, Young Man Who Killed Himself After Jail, Gets \$3.3M from New York*, NBC NEWS (Jan. 24, 2019), <https://www.nbcnews.com/news/us-news/family-kalief-browder-young-man-who-killed-himself-after-jail-n962466> [<https://perma.cc/7S5A-HF6A>].

22. See Gray, *supra* note 19.

23. Katherine Webster, *The Cost of Pleading Innocent: The Kalief Browder Case*, UMASS LOWELL (Feb. 27, 2019), https://www.uml.edu/News/stories/2019/CJ_Panel.aspx [<https://perma.cc/LNC8-2VGU>].

24. *Id.*

Frequently, freedom versus detention rests on the accused's ability to make bail.²⁵ Browder's story serves as a poignant example of how having the means to post bail can determine whether an accused remains in jail or is released.²⁶ Through the use of bail, our justice system criminalizes individuals based on race and poverty by unfairly imprisoning those who cannot make bail. One's ability to afford bail should not determine whether one is kept in detention. The bail industry presents one of the biggest sources of inequality because, for underprivileged individuals, the chances of being able to afford bail, thereby securing their release, are extremely slim.²⁷ Outside of bail, there are other ways to avoid potentially staying out of jail, such as pleading guilty for committing the alleged crime. Many will opt for this option and plead guilty to get out of jail sooner, even if they did not commit that crime.²⁸ What many do not realize is that by pleading guilty, they have just developed a criminal record, which will follow them and present obstacles when looking for work, housing, loans, licenses, etc.²⁹ Such practices also continue to keep the bail-bond industry alive, allowing them to profit through the incarceration of the accused.

This Note proposes that Washington state abolish the cash bail system, following the example of other states that have already done away with this discriminatory and inequitable practice.³⁰ Under Criminal Rule (CrR) 3.2 and Criminal Rule for Limited Jurisdictions (CrRLJ) 3.2, the current bail system allows the detention and penalization of individuals with lesser means by imposing cash bail in criminal cases instead of ensuring future appearance and reducing further crime.³¹ Specifically, the proposed amendment would remove the monetary bail provision in CrRLJ 3.2(O) (which requires that bail for a misdemeanor shall be \$500 and \$1,000 for a gross misdemeanor) and require that judges only consider non-financial conditions of release, which are already outlined in both CrR 3.2 to CrRLJ 3.2.³² This proposed change is necessary because although non-financial considerations for release are available, judges wield

25. *See id.*

26. *See id.*

27. *See id.*

28. Toni Messina, *Innocent People Who Plead Guilty*, ABOVE L. (July 23, 2018), <https://abovethelaw.com/2018/07/innocent-people-who-plead-guilty/> [<https://perma.cc/5BY9-F79R>].

29. *Id.*

30. *See* discussion *infra* note 34.

31. *See* Criminal Rule (CrR) 3.2 and Criminal Rule for Limited Jurisdictions (CrRLJ) 3.2. These rules are used in Washington state and govern the release of defendants before trial. By amending these rules, the court could put in place new procedures that eliminate relying on monetary bail for releasing individuals.

32. Wash. Super. Ct. Crim. R. 3.2; Wash. R. Ct. Lim. Jur. 3.2.

significant discretion to impose alternative measures, such as cash bail.³³ In practice, judges often fail to offer alternatives, resulting in the unnecessary detention of individuals who could have been safely released prior to trial.³⁴ This amendment would bring Washington in line with a growing number of jurisdictions across the country that have recognized the inequities and inefficiencies of the cash bail system.³⁵ This would also ensure that pretrial release decisions are based on individual risk assessments rather than a defendant's ability to post bail to secure release.

This Note discusses the following three parts. Part I provides an overview of the cash bail system, its history, and its contemporary use in Washington state. Part II presents the effects of bail on pretrial release, analyzing low-income and racial inequalities and the adverse impacts it can have on the accused. Part III focuses on solutions and alternatives to the cash bail system, using other states as case studies.

I. THE CASH BAIL SYSTEM

A. Understanding the Bail System

Although bail varies between jurisdictions, many adhere to similar methods.³⁶ Upon the filing of charges, the presiding judge will assess whether the accused should be held in jail without the possibility of release until the end of the case.³⁷ Judges will typically only proceed with this route if they find there is a significant risk of the individual failing to appear in court for a future hearing date, or if the individual is deemed to pose a threat to the community.³⁸ If the judge determines that the individual does not present a risk of failing to appear in court and does not pose a safety concern to the community, that judge then has discretion regarding which conditions of pretrial release they impose.³⁹ A judge may

33. See Laurie L. Levenson, *California's High Court Has the Chance to Fix Our 'Unsafe and Unfair' Money Bail System*, L.A. TIMES (June 14, 2019), <https://www.latimes.com/opinion/op-ed/la-oe-levenson-cash-bail-california-supreme-court-humphrey-20190614story.html#:~:text=Judges%20have%20broad%20authority%20to%20craft%20effective%20alternatives,who%20could%20be%20safely%20released%20prior%20to%20trial> [<https://perma.cc/4MCQ-7UHE>] (“Judges have broad authority to craft effective alternatives to money bail, such as ordering close supervision of the defendant during his release.”).

34. See *id.*

35. Allie Preston & Rachel Eisenberg, *Cash Bail Reform Is Not a Threat to Public Safety*, CTR. FOR AM. PROGRESS (Sept. 19, 2022), <https://www.americanprogress.org/article/cash-bail-reform-is-not-a-threat-to-public-safety/> [<https://perma.cc/4ASH-779L>].

36. *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125, 1126 (2018).

37. *Id.*

38. *Id.*

39. *Id.* at 1127.

proceed in one of three ways: 1) releasing the individual on their personal recognizance if they promise to return to court, 2) conditionally release the individual, or 3) release the individual on bail.⁴⁰

An individual may also secure pretrial release by means of a secured or unsecured bond.⁴¹ With a secured bond, a defendant may only be released after paying the set monetary amount.⁴² The monetary amount is the individual's "cash bail" or "money bail."⁴³ Under some circumstances, a defendant can secure their release by paying 10% of the set monetary amount directly to court.⁴⁴ With an unsecured bond, a defendant is not required to make an immediate payment but will owe the bond amount if they fail to appear in court.⁴⁵ In many situations, if the defendant does not have the necessary amount to pay the bail amount, a bail bond agent, otherwise known as a surety, can make the payment for them.⁴⁶ Many times, bail bondsmen charge a 10% fee, retaining this fee as profit when the bond is refunded by the court after the defendant's court appearance.⁴⁷ However, if a defendant cannot make payment personally or through the bail bond agent, they will remain incarcerated due to their inability to pay bail.⁴⁸

B. History of the Bail System

Monetary bail is deeply rooted in Anglo-Saxon history, the period of time in English history between the withdrawal of the Roman Empire in the early fifth century AD and the Norman Conquest of 1066 AD.⁴⁹ In medieval England, wrongs were considered private affairs, settled through blood feuds.⁵⁰ The Anglo-Saxon legal process developed an alternative, in

40. *Id.* Conditional release may involve pretrial services, drug testing, or electronic monitoring. *Id.*

41. CRIMINAL JUSTICE POLICY PROGRAM, HARV. L. SCH., MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 6 (2016), <https://www.prisonpolicy.org/scans/cjpp/FINAL-Primer-on-Bail-Reform.pdf> [<https://perma.cc/QTU9-GD49>] [hereinafter BAIL PRIMER].

42. *Id.*

43. *Id.*

44. *Id.* at 13.

45. *Id.* at 6.

46. *Id.*

47. Adam Liptak, *Illegal Globally, Bail for Profit Remains in U.S.*, N.Y. TIMES (Jan. 29, 2008), <https://www.nytimes.com/2008/01/29/us/29bail.html?smid=tw-share> [<https://perma.cc/XR5D-YZNM>].

48. BAIL PRIMER, *supra* note 41, at 6.

49. Kurt X. Metzmeier, *Preventive Detention: A Comparison of Bail Refusal Practices in the United States, England, Canada and Other Common Law Nations*, 8 PACE INT'L L. REV. 399, 399–402 (1996).

50. TIMOTHY R. SCHNACKE, MICHAEL R. JONES & CLAIRE M. B. BROOKER, PRETRIAL JUST. INST., THE HISTORY OF BAIL AND PRETRIAL RELEASE 1 (2010), https://cdpsdocs.state.co.us/ccjj/Committees/BailSub/Handouts/HistoryofBail-Pre-TrialRelease-PJI_2010.pdf [<https://perma.cc/B444-WPVR>].

which wrongs once settled by feuds were settled through payments designed to compensate grievances.⁵¹ The small number of individuals deemed to be a danger to society—those caught in the act of a crime or those caught in the process escaping—were mutilated or executed.⁵² The rest were considered “safe,” so the potential dangers that individuals posed to society if released were not a concern.⁵³ Nevertheless, there was still concern that the accused would flee upon release to avoid payment.⁵⁴ To ensure an accused appeared in court, the accused had to find a surety.⁵⁵ This surety would provide a pledge, or bail, guaranteeing that the accused would appear in court and payment to the grieved party upon conviction.⁵⁶ Because the purpose of the Anglo-Saxon bail system was to ensure that the debt owed to the victim was paid, having a surety ensured that if the accused fled, the grieved victim was compensated one way or another.⁵⁷

Following the Norman invasion (between 1066 and the late eleventh century), the criminal justice process gradually became a concern of the state.⁵⁸ Suspicions of a presentment jury⁵⁹—a form of grand jury—and the sworn statements of the aggrieved were enough to initiate a criminal process.⁶⁰ Capital and corporal punishment replaced monetary fines for all but the least serious crimes, such as minor property crimes or damage of small value.⁶¹ The change to capital and corporal punishment can be traced to changes in the economic and social structures of medieval Europe where lords and monarchs wanted to assert their authority to maintain social order by imposing harsher punishments that would deter others from committing crimes.⁶² Yet, this lengthened the delays between accusation and trial, especially considering the itinerant justices that traveled around to administer justice.⁶³ This required a new equation because an accused

51. June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 519–20 (1983).

52. *Id.* at 520–21.

53. SCHNACKE, JONES & BROOKER, *supra* note 50, at 2.

54. *Id.*

55. *Id.*

56. *Id.*

57. Carbone, *supra* note 51, at 521.

58. *Id.*

59. *Id.* A presentment jury is a form of grand jury that convenes to investigate and evaluate evidence relating to criminal activity or misconduct. Unlike a trial jury, which assembles to decide guilt or innocence after trial, a presentment jury examines evidence in secret proceedings to determine whether criminal charges should be filed against an individual. The purpose of a presentment jury is to deem whether sufficient probable cause exists to prove a crime was committed and that an individual should be indicted.

60. *Id.*

61. *Id.*

62. *Id.* at 522.

63. *Id.* at 521.

threatened with corporal punishment had a greater incentive to flee compared to an accused only threatened with monetary fines, complicating the determination of whom to release.⁶⁴ Delays caused many to remain in primitive jails, and the discretion given to judges and magistrates regarding which accused to release led to corruption and abuse.⁶⁵ Because itinerant justices rode a circuit from county to county to work on cases, sheriffs were responsible for holding accused individuals until the justices arrived.⁶⁶

The First Statute of Westminster of 1275 limited judicial discretion over the circumstances under which bail may be granted or denied.⁶⁷ However, if one was imprisoned without being charged, determining whether the crime charged was bailable never arose.⁶⁸ Similarly, where an accused individual was imprisoned without bail and the detainer failed to timely return his writ of habeas corpus, the right to bail became futile.⁶⁹ During the American colonial period, Parliament addressed each of these issues.⁷⁰ First, in the Petition of Right, Parliament prohibited pretrial imprisonment without a criminal charge and confirmed habeas corpus relief for those held without charge.⁷¹ Second, in the Habeas Corpus Act of 1679, a three-day return deadline on habeas writs was imposed, eliminating the use of delay in return to frustrate a pretrial prisoner's right to bail.⁷² Third, in the Bill of Rights of 1689, excessive bail was prohibited.⁷³ The Eighth Amendment of the U.S. Constitution also established that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."⁷⁴ As pretrial release is based on the presumption of innocence and protects the accused before any finding of guilt,⁷⁵ common law judges in the United States released those accused of anything other than capital offenses, unless they presented a serious flight risk.⁷⁶ The Judiciary Act of 1789 embodied this principle, stating that defendants in jail for non-capital offenses should have the right to some form of bail, while bail for capital offenses

64. *Id.* at 522.

65. SCHNACKE, JONES & BROOKER, *supra* note 50, at 2.

66. *Id.* at 3.

67. CHARLES DOYLE, CONG. RSCH. SERV., R40221, BAIL: AN OVERVIEW OF FEDERAL CRIMINAL LAW 1 (2017).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 1–2.

72. *Id.* at 2.

73. *Id.*

74. U.S. CONST. amend. VIII.

75. Coffin v. United States, 156 U.S. 432, 454 (1895) (claiming that presumption of innocence is the foundation of criminal law).

76. See Statute of Westminster I 1275, 3 Edw. ch. 15 (Eng.).

remained under the discretion of judges.⁷⁷ Over the next two centuries, the bail system followed this foundation.

In 1966, Congress passed the Bail Reform Act of 1966, seeking to protect an individual's right to pretrial release by creating a presumption of release without monetary payment, now known as "release on recognizance", unless determined that as insufficient to assure appearance at trial.⁷⁸ Release of recognizance marked the first significant change in the bail system since the adoption of the Eighth Amendment and passage of the Judiciary Act of 1789.⁷⁹ Shortly thereafter in 1984, Congress amended bail law to allow the use of preventative detention in limited circumstances in which the accused demonstrated a danger to the public.⁸⁰ However, this notion of preventative detention encountered significant criticism. In *United States v. Salerno*, the Supreme Court upheld the constitutionality of the 1984 Act, concluding that the legislation was proper according to the Eighth Amendment's Excessive Bail Clause and the Fifth Amendment's Due Process Clause.⁸¹ Although the foundation of the 1984 Bail Reform Act remains nearly the same, Congress has amended several aspects of the Act in relation to the rebuttable presumption of flight and dangerousness.⁸²

C. The Contemporary Bail System in Washington State

In the Washington Superior Court, Criminal Rule 3.2(a) supplies that individuals not charged with capital offenses are released on their personal recognizance pending trial unless the "court determines that such recognizance will not reasonably assure the accused's appearance, when required," or there is a danger that the individual will commit a violent

77. Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91.

78. Patricia M. Wald & Daniel J. Freed, *The Bail Reform Act of 1966: A Practitioner's Primer*, 52 A.B.A. J. 940 (1966).

79. *Id.* at 941.

80. The Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1976 (codified at 18 U.S.C. §§ 3141–56 (1982 ed., Supp. II)).

81. *United States v. Salerno*, 481 U.S. 739, 755 (1987). The Bail Reform Act, passed by Congress in 1984, allowed federal courts to detain individuals before their trial if there was clear and convincing evidence that their release would jeopardize the safety of others. *Id.* at 742. This was done through adversary hearing, during which the individual had the right to legal representation, the ability to present evidence and witnesses, and cross-examine the government's witnesses. *Id.* at 750. A judicial officer was then tasked to determine whether to detain the individual. *Id.* Anthony Salerno, who as charged with violating the Racketeer Influenced and Corrupt Organizations Act (RICO), was detained under this law after the government presented evidence that he was a leader of a criminal organization and had engaged in violent activities and murder conspiracies. *Id.* at 743. The district court granted the government's motion for detention, but the court of appeals later ruled that the Bail Reform Act was unconstitutional as a violation of due process. *Id.* at 743–44. The case was granted certiorari by the Supreme Court of the United States. *Id.* at 741.

82. 18 U.S.C. § 3142(e)(2)–(3).

crime, attempt to intimidate witnesses, or interfere with the administration of justice in another capacity.⁸³

If the court finds that an individual may not appear in court if released on personal recognizance, the court imposes the least restrictive of the listed conditions that provide reasonable assurance of the individual's future appearance in court, or a combination thereof if a single condition is deemed insufficient in ensuring appearance:

1. Place the accused in the custody of a designated person or organization agreeing to supervise the accused;
2. Place restrictions on the travel, association, or place of abode of the accused during the period of release;
3. Require the execution of an unsecured bond in a specified amount;
4. Require the execution of a bond in a specified amount and the deposit in the registry of the court in cash or other security as directed, of a sum not to exceed 10 percent of the amount of the bond, such deposit to be returned upon the performance of the conditions of release or forfeited for violation of any condition of release. If this requirement is imposed, the court must also authorize a surety bond under section (b)(5);
5. Require the execution of a bond with sufficient solvent sureties, or the deposit of cash in lieu thereof;
6. Require the accused to return to custody during specified hours or to be placed on electronic monitoring, if available; or
7. Impose any condition other than detention deemed reasonably necessary to assure appearance as required. If the court determines that the accused must post a secured or unsecured bond, the court shall consider, on the available information, the accused's financial resources for the purposes of setting a bond that will reasonably assure the accused's appearance.⁸⁴

In determining bail amounts, Washington has a "bail schedule" detailing the suggested base amounts for various offenses.⁸⁵ A bail schedule is an arbitrary list that recommends a bail amount determined by the crime committed. The listed bail amounts on the bail schedule are mere suggestions and judges have discretion to adjust the actual bail to be lower

83. Wash. Super. Ct. Crim. R. 3.2(a).

84. Wash. Super. Ct. Crim. R. 3.2(b)(1)–(7).

85. *Bail Amounts and Procedures*, ESERVICE CTR. & WASH. CTS. FAQs (Aug. 1, 2022), <https://info.courts.wa.gov/support/solutions/articles/72000568517-bail-amounts-and-procedures> [<https://perma.cc/JVA8-5LJV>].

or higher than the amount specified on the schedule.⁸⁶ The suggested bail amounts range anywhere from \$51 to over \$10,000.⁸⁷

In Washington Courts of Limited Jurisdictions, where low-level misdemeanor cases are heard, there is a presumption of release in noncapital cases and conditions of release if there is a showing of likely failure to appear, as discussed above.⁸⁸ Even when courts determine there is no likelihood that an accused will not appear, bail is still imposed in criminal offense cases to ensure mandatory appearance.⁸⁹ When there is a need to ensure the accused's appearance in court, the bail amount for an individual charged with a misdemeanor offense is set at \$500 and for a gross misdemeanor, it is set at \$1,000.⁹⁰ However, if the court finds there is good cause to adjust those amounts, a different bail amount may be set.⁹¹ To meet any financial conditions to secure release, individuals may opt between a bail bond or cash bail.⁹²

II. THE EFFECT OF BAIL FOR PRETRIAL RELEASE

In essence, although the historical purpose of bail was to ensure the appearance of the accused in court, the primary result of bail today is the disproportionate incarceration of indigent and inexperienced offenders.⁹³ Pretrial detention resulting from the inability to afford bail can single-handedly have irreparable negative consequences on individuals.⁹⁴ Imprisonment, even for only a few days, can result in loss of employment, housing, education, and public benefits, harm one's physical and mental health, and strain relationships and finances.⁹⁵ Further, bail bond requirements have been documented as penalizing the politically powerless poor.⁹⁶ Along with the bail system impacting individual lives, the system has also contributed to overcrowding jails, mass incarceration,

86. *Id.*

87. WASH. SUPER. CT., JIS LAW TABLE (2022) https://www.courts.wa.gov/newsinfo/content/pdf/Bail_Schedule.pdf#xml=http://206.194.185.202/texis/search/pdfhi.txt?query=bail&pr=www&prox=page&rorder=500&rprox=500&rdfreq=500&rwfreq=500&rlead=500&rdepth=0&sufs=0&order=r&ccq=&id=46b35d7c0 [https://perma.cc/CXM6-W9XY].

88. *See* Wash. R. Ct. Lim. Jur. 3.2.

89. Wash. R. Ct. Lim. Jur. 3.2(o).

90. Wash. R. Ct. Lim. Jur. 3.2(o)(1).

91. *Id.*

92. Wash. Super. Ct. Crim. R. 3.2(b)(4)–(5); *see* Wash. Super. Ct. Crim. R. 3.2(d)(6).

93. Robert T. Sigler & William A. Formby, *The Necessity of Bail Reform*, 3 CRIM. JUST. REV. 1, 1 (1978).

94. Paul Heaton, Sandra G. Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713 (2017).

95. ACLU WASH., NO MONEY, NO FREEDOM: THE NEED FOR BAIL REFORM 4 (2016), <https://www.aclu-wa.org/bail> [https://perma.cc/56PT-6FE7].

96. Demetria D. Frank, *Prisoner-to-Public Communication*, 84 BROOK. L. REV. 115, 117 (2018).

increase in racial disparities, societal bias, and the use of imprisonment as punishment.⁹⁷

A. Low-Income and Racial Inequalities

Pretrial detention saw dramatic increase between 1970 and 2015: in 2013, the jail population was five times what it was in 1970.⁹⁸ Unfortunately, the bail system has been used capriciously, leading to unjustified inequalities within the criminal justice system.⁹⁹ Minorities are most frequently faced with such inequalities because the bail “system perpetuates racism” as “people of color are more likely to be over-policed and arrested.”¹⁰⁰ Further, because people of color are treated more harshly than white individuals at every stage of the legal process, people of color experience incarceration at a higher rate.¹⁰¹ Judges also often have large caseloads and are forced to make certain determinations regarding the defendants in front of them within short periods of time: sometimes judges only have three to five minutes to conclude whether sufficient evidence exists to charge a defendant and to determine their conditions of release.¹⁰² If a judge imposes bail, he or she follows court rules and takes into account the defendants’ financial resources.¹⁰³ But a judge may lack the requisite information to fully and accurately consider an individual’s available financial resources before imposing bail.¹⁰⁴ Independent of the crime a defendant is charged with, those who cannot afford bail remain in jail awaiting their trial, while those who have the monetary means to afford bail are released.¹⁰⁵ This means that regardless of whether you committed the crime, your release depends on whether you can pay the bail amount.

97. *See generally id.*

98. U.S. COMM’N ON C.R., THE CIVIL RIGHTS IMPLICATIONS OF CASH BAIL 2 (2022), <https://www.usccr.gov/files/2022-01/USCCR-Bail-Reform-Report-01-20-22.pdf> [<https://perma.cc/W3N8-GH72>] [hereinafter CIVIL RIGHTS IMPLICATIONS OF CASH BAIL].

99. *See, e.g.*, Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time*, PRISON POL’Y INITIATIVE (May 10, 2016), <https://www.prisonpolicy.org/reports/incomejails.html> [<https://perma.cc/CT7C-4FR3>].

100. Susannah Frame, *Victims Say Seattle-Based Charity Bail Group Should Stop Freeing People Charged with Violent Crimes*, KING 5 (Mar. 30, 2022), <https://www.king5.com/article/news/local/seattle-charity-group-bail-victims/281-ea8e92a7-7ca2-44d9-8374-e2186e35b8b0> [<https://perma.cc/ZS4V-X3HZ>].

101. *King County*, VERA INCARCERATION TRENDS (June 20, 2023), https://trends.vera.org/stat/e/WA/county/king_county [<https://perma.cc/HH4G-2MJS>].

102. *See discussion infra* Section II.C.

103. *See id.*

104. *See id.*

105. *See id.*

As a result, there is a disproportionate number of low-income defendants in pretrial detention awaiting trial.¹⁰⁶

The important balance of protecting public safety while upholding an accused's individual rights is the subject of recent concerns regarding whether the release of certain offenders poses a safety concern to the public.¹⁰⁷ While many argue that bail is related to the risk of flight by the accused, this is a baseless assertion.¹⁰⁸ The U.S. Bureau of Justice Statistics data analyzed the seventy-five largest counties in the United States and found that 96% of felony defendants held in pretrial detention had a monetary bail set, and if they had a means to post that bail, they would be released.¹⁰⁹ Nine out of ten of those individuals were unable to post bail.¹¹⁰ People who are low-income and people of color are most frequently unable to pay bail and, thus, remain in jail.¹¹¹

Looking at those in pretrial detention, there is an obvious disparity concerning race. The Black and Latinx populations within the United States have higher rates of pretrial detention and financial obligations when compared to other demographics.¹¹² There are further disparities among those of differing socioeconomic status, with data showing that more than 60% of those in pretrial detention are detained due to their inability to afford to post bail.¹¹³ Research also shows that people of color are more likely to be viewed as posing a danger to the community at bail hearings and as a result have higher bond amounts imposed.¹¹⁴ In a 2018 study, researchers learned that there was a racial discrepancy between monetary bail amounts assigned, with Black defendants receiving higher bail amounts than their white counterparts.¹¹⁵ Also, when compared to

106. OFF. OF THE WASH. STATE AUDITOR, REFORMING BAIL PRACTICES IN WASHINGTON 7 (2019), https://sao.wa.gov/wp-content/uploads/Tabs/PerformanceAudit/PA_Reforming_Bail_Practices_ar1023411.pdf [<https://perma.cc/GWP7-FPD5>].

107. Sigler & Formby, *supra* note 93, at 3.

108. *Id.*

109. BRIAN REAVES, BUREAU OF JUST. STATISTICS, U.S. DEP'T. JUST., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009—STATISTICAL TABLES 15 (2013), <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf> [<https://perma.cc/EN32-8AM5>].

110. *Id.*

111. CIVIL RIGHTS IMPLICATIONS OF CASH BAIL, *supra* note 98, at 3.

112. *Id.* at 33–34.

113. *Id.* at ii.

114. See e.g., Stephan Demuth & Darrell Steffensmeier, *The Impact of Gender and Race-Ethnicity in the Pretrial Release Process*, 51 SOC. PROBS. 222, 226 (2004); Katherine Hood & Daniel Schneider, *Bail and Pretrial Detention: Contours and Causes of Temporal and County Variation*, 5 RUSSELL SAGE FOUND. J. SOC. SCI. 126, 129 (2019).

115. David Arnold, Will Dobbie & Crystal S. Yang, *Racial Bias in Bail Decisions*, 133 Q. J. ECON. 1885, 1932 (2018). The objective of this study was to create a new method for detecting racial bias in bail decisions, a situation in which there are significant discrepancies in the treatment of white and Black defendants. *Id.* at 1908. The study uses Becker's model of racial bias, which predicts that if bail judges are not racially biased, the rates of pretrial misconduct will be the same for marginal white

white defendants, Black defendants were more often denied bail and remained in pretrial detention due to the judge perceiving them as more “dangerous.”¹¹⁶

Over the course of the past few decades, bail amounts have increased dramatically.¹¹⁷ Between 1992 and 2006, the national average bail amount nearly doubled, from \$25,400 to \$55,500.¹¹⁸ In 2006, there was a median bail amount of \$10,000, meaning that about 50% of felony defendants were assigned a minimum of \$10,000 in bail.¹¹⁹ An increase in bail amount is bound to lead to an increase in the amount of individuals who cannot afford the bail amount and must remain in pretrial incarceration. As of 2020, in King County, Washington, 149 out of every 100,000 residents ages fifteen to sixty-four were in pretrial detention.¹²⁰ According to the United States Census Bureau, as of 2020, around 6.67% of the population in King County identified as Black or African American.¹²¹ However, they compose 33% of those incarcerated.¹²² Although unable to find statistics focusing on how many of those 33% are incarcerated, it is safe to assume that Black individuals are unjustifiably overrepresented in this aspect of the justice system in King County as well.

A recent study by the Justice Policy Institute found correlations between race and the various pretrial outcomes, revealing that “each correlation indicated harsher treatments for African Americans.”¹²³ The results concluded that “African Americans were less likely to be released

and marginal Black defendants. *Id.* at 1922. However, if bail judges are racially biased against Black defendants, marginal white defendants are more likely to engage in misconduct than marginal Black defendants. *Id.* at 1896. To test this model, the researchers developed a new estimator that utilizes the release tendencies of randomly assigned bail judges to identify the relevant rates of misconduct for each race. *Id.* at 1908. The study found that bail judges in Miami and Philadelphia are biased against Black defendants, with more bias from inexperienced and part-time judges. *Id.* at 1890. Further, both Black and white judges demonstrated bias against Black defendants. *Id.* at 1929. The researchers suggest that these results are due to racially biased prediction errors rather than direct racial prejudice. *Id.*

116. *Id.* at 1929.

117. COLOR OF CHANGE & ACLU’S CAMPAIGN FOR SMART JUST., SELLING OFF OUR FREEDOM: HOW INSURANCE CORPORATIONS HAVE TAKEN OVER OUR BAIL SYSTEM 6 (2017), <https://www.aclu.org/report/selling-our-freedom-how-insurance-corporations-have-taken-over-our-bail-system> [https://perma.cc/UJZ5-PZJE].

118. See MELISSA NEAL, JUST. POL’Y. INST., BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL 10 (2012), <http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf> [https://perma.cc/HRZ3-EZZ8] [hereinafter BAIL FAIL].

119. *Id.*

120. VERA INCARCERATION TRENDS, *supra* note 101.

121. *American Community Survey, King County, Washington*, U.S. CENSUS BUREAU (2020), https://data.census.gov/profile/King_County,_Washington?g=0500000US53033 [https://perma.cc/DD3H-7YYK].

122. See *id.*; *Quick Facts: King County, Washington*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/kingcountywashington> [https://perma.cc/M39E-E42F].

123. BAIL FAIL, *supra* note 118, at 15 (internal citation omitted).

on their own recognizance than white defendants,” and African Americans between the ages of eighteen and twenty-nine received significantly higher bail when compared to all other types of defendants.¹²⁴ Another study showed that people of color are more likely to have a higher bail imposed when compared to white defendants with the same charge and criminal history.¹²⁵ More specifically, compared to white men, Black men receive bail amounts about 35% higher and Latino men receive bail amounts 19% higher.¹²⁶ This explains the disparity in convictions as well because prosecutors are generally less likely to dismiss cases when a defendant remains in pretrial detention.¹²⁷ This study suggests systemic bias in the pretrial justice system, meaning there is a need for greater scrutiny of the pretrial system to ensure all defendants are treated fairly and impartially.

B. Impact of Pretrial Detention

Holding an accused in jail because of their inability to afford bail has an adverse impact, observable in several different areas. First, pretrial detention means that any dependents who rely on the accused for financial support are now without the support of that individual who, in many instances, may be the sole person bringing in money.¹²⁸ Such detention, even if for a short period of time, can set off a ripple effect, affecting housing, employment, transportation, and similar basic necessities for survival.¹²⁹ When an accused is held in pretrial detention, the stability of an entire family is threatened.¹³⁰

Second, pretrial detention has a cumulative effect on subsequent treatment of the case, disposition, and increases the likelihood of conviction and recidivism.¹³¹ For example, pretrial detention increases the probability of defendants opting for a guilty plea, thereby leading to consequent imprisonment with associated prison sentences that can be as much as twice the duration compared to individuals who were not

124. *Id.* (internal citations omitted).

125. JONAH B. GELBACH & SHAWN D. BUSHWAY, TESTING FOR RACIAL DISCRIMINATION IN BAIL SETTING USING NONPARAMETRIC ESTIMATION OF A PARAMETRIC MODEL 1 (2010).

126. KRYSTAL GIBSON, INDIANA UNIV. PUB. POL’Y INST., MARION COUNTY BAIL SYSTEM 3 (2022), <https://policyinstitute.iu.edu/doc/bail-bond-brief.pdf> [<https://perma.cc/XCK6-PKSF>].

127. Nick Petersen, *Do Detainees Plead Guilty Faster? A Survival Analysis of Pretrial Detention and the Timing of Guilty Pleas*, 37 CRIM. JUST. POL’Y. REV. 1015, 1017 (2020).

128. ARTHUR L. BEELEY, THE BAIL SYSTEM IN CHICAGO 60 (1927).

129. See Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1356–57 (2014); see also Laura Sullivan, *Inmates Who Can’t Make Bail Face Stark Options*, NPR (Jan. 22, 2010), <http://www.npr.org/templates/story/story.php?storyId=122725819> [<https://perma.cc/U3A9-TNUP>].

130. CIVIL RIGHTS IMPLICATIONS OF CASH BAIL, *supra* note 98, at 32.

131. *Id.* at 50.

subjected to pretrial detention.¹³² Pretrial detention has also been connected to wrongful convictions and excessively punitive prison sentences.¹³³ Research found that detained defendants are 25% more likely than those released to plead guilty, 43% more likely to be sentenced to jail, and be sentenced to jail for more than twice as long as the average person.¹³⁴ According to interviews with defendants and defense attorneys, it appears that the “material, psychological, and temporal pains of pretrial detention lead many detainees to plead guilty to escape jail.”¹³⁵ Coercion from prosecutors and defense attorneys alike can also lead defendants to accept a guilty plea.¹³⁶

Researchers investigated the relationship between pretrial detention and sentencing on 153,407 defendants booked into jail in Kentucky.¹³⁷ The study revealed that defendants detained for the entire pretrial period were more likely to be sentenced to jail and prison.¹³⁸ Low-risk defendants detained for the entire pretrial period were found to be 5.41 times more likely to be sentenced to jail and 3.76 times more likely to be sentenced to prison when compared to defendants released and not subjected to being detained for the entire pretrial period.¹³⁹ Moderate to high-risk defendants detained for the entire pretrial period are nearly 3 times more likely to be incarcerated compared to defendants released at some point before their trial.¹⁴⁰

C. Disparate Figures

There are many reasons that contribute to the disparate sentencing rate for pretrial detainees. First, pretrial detention makes it extremely difficult to meet and strategize with your lawyer; building a defense is much more feasible when a defendant has been released on their own personal recognizance, leading to more favorable sentencing outcomes.¹⁴¹

132. Evan M. Lowder, Carmen L. Diaz, Eric Grommon & Bradley R. Ray, *Effects of Pretrial Risk Assessments on Release Decisions and Misconduct Outcomes Relative to Practice as Usual*, 73 J. CRIM. JUST. 1, 2 (2020).

133. Matthew G. Rowland, *The Rising Federal Pretrial Detention Rate, in Context*, 82 FED. PROB. J. 13, 13 (2018).

134. Heaton, Mayson & Stevenson, *supra* note 94, at 711.

135. Petersen, *supra* note 127, at 1017.

136. *Id.*

137. CHRISTOPHER T. LOWENKAMP, MARIE VANNOSTRAND & ALEXANDER HOLSINGER, ARNOLD FOUND., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES 3 (2013), https://static.prisonpolicy.org/scans/ljaf/LJAF_Report_state-sentencing_FNL.pdf [<https://perma.cc/ER5J-X7YN>].

138. *Id.* at 4.

139. *Id.*

140. *Id.*

141. See Will Dobbie, Jacob Goldin & Crystal Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM.

Additionally, the defendant must ask their friends and family to engage potential witnesses and track down evidence on their behalf, due to the limited visiting hours which results in being unable to adequately communicate with their lawyer.¹⁴² There are also a great deal of logistics involved that pose additional problems for pretrial detainees.¹⁴³ Due to the trend of mass incarceration, many prisoners, including pretrial detainees, may be jailed in facilities further away than expected which constitutes yet another hurdle in facilitating proper communication with attorneys.¹⁴⁴ Further, jail conditions are often poor, encouraging one to secure their release as soon as possible through guilty pleas.¹⁴⁵

III. THE SOLUTION

The bail system in Washington state is in dire need of change. Imagine the following scenario: A single parent is raising their children and living in a rental home. They live paycheck-to-paycheck, barely making ends meet. The parent is arrested for a petty crime and because this is not their first run in with the justice system, they are handed a \$500 bail that they are unable to afford, meaning they cannot secure release. Because they could not make bail, they remain in jail although they pose no threat to the community. Since their children were alone at the apartment, they are taken away by child services. Further, since the parent is stuck in jail, they miss work and are let go. Lastly, among other possible adverse impacts, they miss paying rent, so the landlord begins an eviction process. Is this a fair response from the criminal justice system? Penalizing someone because they could not post bail?

Bail has the effect of keeping a certain category of individuals in jail, simply due to their inability to make bail. For some, \$500 may not seem like much, yet this can be an extravagant amount when considering that nearly half of the American population has less than \$400 on hand.¹⁴⁶ In Seattle, many who cycle through the Seattle Municipal Court are either

ECON. REV. 201, 234 (2018); Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 424 (1990).

142. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2493 (2004).

143. See Vincent L. Broderick, *Pretrial Detention in the Criminal Justice Process*, 57 FED. PROB. 4, 5–6 (1993) (discussing the complications of defense attorneys communicating with their detained clients who are either housed far away or moved).

144. Douglas J. Klein, *The Pretrial Detention "Crisis": The Causes and the Cure*, 52 WASH. U.J. URB. & CONTEMP. L. 281, 294 (1997).

145. See Dobbie, Goldin & Yang, *supra* note 141, at 234 (discussing how pretrial release decreases a defendant's incentive to plead guilty to obtain a faster release from jail).

146. Emmeline Clein, *Here's How to Help End Cash Bail*, NATION (Oct. 25, 2018), <https://www.thenation.com/article/archive/heres-how-to-help-end-cash-bail/> [<https://perma.cc/CSX5-XEJZ>].

homeless or experiencing housing instability.¹⁴⁷ Thus, the issue is not what the bail amount is, it is the fact that many individuals cannot afford to pay *any* amount.¹⁴⁸ This means that individuals who may pose a higher risk to the community may be released while those who pose far less risk but are unable to pay their bail amount remain detained. Through the use of cash bail, an individual with more financial stability will be able to make bail and secure their release, whereas an individual charged with the same crime but who is not financially stable will remain in jail.¹⁴⁹ The bail system is flawed in that it is a means of detaining and penalizing lower-income individuals rather than actually attempting to ensure future appearance and reduce further crime. Thus, Criminal Rule (CrR) 3.2 and Criminal Rule for Limited Jurisdictions (CrRLJ) 3.2 need to be amended to eliminate the use of bail in Washington state.

A. Case Studies

The elimination of bail is not new to the United States. In fact, many states have reformed their cash bail practices, while some have abolished bail for those awaiting trial.¹⁵⁰ New York, New Jersey, Washington D.C., and Santa Clara County, California, have all implemented some form of cash bail reform.¹⁵¹ Washington D.C. has put a complete end to cash bail, resulting in 80–95% of individuals arrested walking away with no financial condition imposed.¹⁵² Those considered “the most dangerous” remain in jail without the ability to buy their freedom.¹⁵³ Washington D.C. developed a scientifically-validated risk assessment instrument that measures a risk score.¹⁵⁴ The tool is used to give an arrested individual a score assessing their likelihood of appearing for their court date and their likelihood of getting into trouble again if released.¹⁵⁵ This ensures that whether you can make bail is not what is keeping you in jail. Further, it eliminates biases and discrimination when it comes to assigning bail,

147. Josh Kelety, *Locked up and Poor*, SEATTLE WKLY (Sept. 25, 2018), <https://www.seattleweekly.com/news/locked-up-and-poor/> [https://perma.cc/3PW3-WPUW].

148. *Id.*

149. *Id.*

150. Allie Preston & Rachel Eisenberg, *Cash Bail Reform Is Not a Threat to Public Safety*, CTR FOR AM. PROGRESS (Sept. 19, 2022), <https://www.americanprogress.org/article/cash-bail-reform-is-not-a-threat-to-public-safety/> [https://perma.cc/W7BE-U5S4].

151. *Id.*

152. Nick Wing, *New Mexico Votes to Reform Bail System that Jails People Just Because They're Poor*, HUFFPOST (Nov. 8, 2016), https://www.huffpost.com/entry/new-mexico-amendment-1_n_5817a3cfe4b0990edc32ed05 [https://perma.cc/F7FP-FHN9].

153. *Id.*

154. Sabri Ben-Achour, *Washington, D.C. Has Figured out a Way Around Money Bail*, MARKETPLACE (Oct. 21, 2016), <https://www.marketplace.org/2016/10/21/washington-dc-has-figured-out-way-around-money-bail/> [https://perma.cc/L4R9-WKXY].

155. *Id.*

which determines who is detained versus who is released. Nearly 90% of individuals released in Washington D.C. appeared for their court date, while 91% successfully made it through trial without being arrested again.¹⁵⁶

New Jersey is another example of a state that has changed the way pretrial release operates in their state. In 2017, New Jersey replaced its current practice of using bail as a mechanism for release by introducing the Bail Reform and Speedy Trial Act.¹⁵⁷ Upon arrest, court staff deliver a public safety assessment (PSA), which considers the arrestee's failure to appear at a future court date and risk of rearrests.¹⁵⁸ The act allows most defendants to be released pending trial and empowers judges to only keep detained those accused of a violent crime or determined to be a risk for not appearing in court.¹⁵⁹ To keep an individual detained, prosecutors must show "clear and convincing evidence" that the accused should be held while awaiting trial.¹⁶⁰ Since the adoption of this new system, New Jersey has seen a significant reduction in its jail population without risking public safety.¹⁶¹ Individuals living in society under the presumption of release continue to appear in court at similar rates, spend less time in jail, and New Jersey has not seen an increase in crime.¹⁶² This system is a major point of success in ensuring that an individual's release and freedom do not depend on the size of their bank account.

More and more states are moving towards eliminating cash bail. Illinois passed a sweeping overhaul of its current justice system by enacting the SAFE-T Act, which dramatically changes pretrial detainment protocols.¹⁶³ Beginning January 1, 2023, this legislation made the presumption of release the default, ceasing any financial considerations when making decisions regarding who remains in jail.¹⁶⁴ Judges will have

156. Wing, *supra* note 152.

157. Mark F. Bernstein, *How New Jersey Made a Bail Breakthrough*, PRINCETON ALUMNI WKLY. (Nov. 2020), <https://paw.princeton.edu/article/how-new-jersey-made-bail-breakthrough> [<https://perma.cc/XTV2-B276>].

158. Dillon Reisman, *How New Jersey Used an Algorithm to Drastically Reduce Its Jail Population—and Why It Might Not Be the Right Tool for the Job*, ACLU N.J. (Aug. 20, 2022), <https://www.aclu-nj.org/en/news/how-new-jersey-used-algorithm-dramatically-reduce-its-jail-population-and-why-it-might-not-be> [<https://perma.cc/83B9-B73M>].

159. Ryan, *supra* note 157.

160. Nikita Biryukov, *Changes for Bill Aimed at Tweaking Bail Reform for Suspects in Gun Crimes*, N.J. MONITOR (June 14, 2022), <https://newjerseymonitor.com/2022/06/14/changes-for-bill-aimed-at-tweaking-bail-reform-for-suspects-in-gun-crimes/> [<https://perma.cc/7FTP-ANWZ>].

161. Reisman, *supra* note 158.

162. *Id.*

163. Nicole Moeder, Devin Dwyer & Isabella Meneses, *Illinois Set to Become 1st State to Eliminate Cash Bail*, ABC NEWS (Dec. 19, 2022), <https://abcnews.go.com/Politics/illinois-set-become-1st-state-eliminate-cash-bail/story?id=95421342.zw> [<https://perma.cc/5RTW-H9P3>].

164. *Id.*

discretion in determining who should be detained and can only require detention if the state is able to prove that the accused presents a threat to another, has a high likelihood of flight, or shows a history of forcible felonies.¹⁶⁵

B. Community Concerns over Pretrial Release

Washington state should adopt the approach of other states that have eliminated the use of cash bail. Nonetheless, it is apparent that such reform has generated apprehension among some community members. For example, many critics argued that bail reform was to blame for the increase in crime in New York state in 2020.¹⁶⁶ However, there was no evidence linking bail reform to the increase in crime.¹⁶⁷ In fact, crime rose all throughout the country in 2020 regardless of whether the state used bail or not.¹⁶⁸ Yet, despite the plethora of contrary evidence, cash bail reform has become an easy target to point fingers towards.¹⁶⁹ In states that have abolished the use of cash bail, the release of individuals without financial conditions has not proven to lead to higher rates of crime.¹⁷⁰

Some contend that the absence of bail would allow “violent offenders” to freely “roam the streets.”¹⁷¹ Yet, the efficacy of bail in ensuring community safety has not been substantiated, and it may, in fact, have the opposite effect.¹⁷² There is also apprehension that the absence of bail may diminish the motivation for defendants to attend their court appearances, resulting in a considerable number of individuals who were released without monetary constraints to miss their assigned court dates.¹⁷³ However, this scenario is improbable as the failure to appear is deemed unlawful in forty-six states, thereby augmenting the consequences of the offenders’ initial punishment.¹⁷⁴ Further, it is important to consider that

165. *Id.*

166. Ames Grawert & Noah Kim, *The Facts on Bail Reform and Crime Rates in New York State*, BRENNAN CTR. FOR JUST. (Mar. 22, 2022), <https://www.brennancenter.org/our-work/research-reports/facts-bail-reform-and-crime-rates-new-york-state> [<https://perma.cc/RY8L-HTX8>].

167. *Id.*

168. *Id.*; see e.g., Preston & Eisenberg, *supra* note 150.

169. Preston & Eisenberg, *supra* note 150.

170. *Id.*

171. *Six Myths About Cash Bail Reform*, GIVING COMPASS (Mar. 11, 2020), <https://givingcompass.org/article/6-myths-about-cash-bail-reform> [<https://perma.cc/R2CW-WDL7>].

172. *Id.*

173. Puck Lo & Ethan Corey, *The ‘Failure to Appear’ Fallacy*, APPEAL (Jan. 9, 2019), <https://theappeal.org/the-failure-to-appear-fallacy/> [<https://perma.cc/6RJK-E5J2>]; see also *Why Do So Many Defendants Fail to Appear in Court?*, DOC’S BAIL BONDS (Oct. 10, 2019), <https://www.docsbailbonds.com/get-out-of-jail-texas/why-do-so-many-defendants-fail-to-appear-in-court> [<https://perma.cc/7LR6-U6FB>].

174. Lo & Corey, *supra* note 173.

some miss their court dates due to reasons beyond their control.¹⁷⁵ Although bail, theoretically, may discourage people from intentionally avoiding court, Traci Schlesinger, a sociologist at DePaul University, explains there is little evidence indicating that absconding is the issue.¹⁷⁶ Prosecutors often argue that individuals missing their court dates show behavior that indicates a disrespect for the legal system, yet many times, individuals are simply grappling with extenuating circumstances that prevent them from appearing in court.¹⁷⁷

CONCLUSION

The bail system was created as a means of ensuring those accused of a crime appeared for their court date.¹⁷⁸ It was not designed to hold individuals who have yet to be convicted of a crime.¹⁷⁹ Yet, countless innocent people remain in jail awaiting trial.¹⁸⁰ The bail system is a mechanism to keep a certain class of individuals detained while allowing wealthier individuals to secure release for the same crime committed. In determining who is detained under this wealth-based system, many continue to remain in prison simply because they cannot afford to buy their freedom like wealthier individuals can.¹⁸¹ Bail is a means to tie people to their poverty status, maintaining the systematic cycle of penalizing those most vulnerable in our society.¹⁸²

This Note proposes that Washington state implement bail reform by eliminating the use of bail entirely. Criminal Rule (CrR) 3.2 and Criminal Rule for Limited Jurisdictions (CrRLJ) 3.2 both impose the use of bail. Although Washington is more relaxed in subjecting a person to bail by first relying on the presumption of release and other conditions before turning to bail, the use of bail is still under the judge's discretion and may be imposed. Instead, Washington state should only detain those charged with violent felonies and where defendants are shown to be a danger to society. Because of the paramount importance we place on the presumption of innocence, all others awaiting trial should be released on their own recognizance. A defendant's ability to afford bail should not be the determinative factor that keeps them wrongfully imprisoned when they are not a danger to the community. Others may be released by imposing

175. *Id.*

176. *Id.*

177. *Why Do So Many Defendants Fail to Appear in Court?*, *supra* note 173.

178. Rachel Smith, *Condemned to Repeat History? Why the Last Movement for Bail Reform Failed, and How This One Can Succeed*, 25 *GEO. J. ON POVERTY L. & POL'Y* 451, 452 (2018).

179. *Id.*

180. *Id.*

181. *See Rabuy & Kopf*, *supra* note 99.

182. *Id.*

other listed conditions under Rule 3.2(b) that do not contain the use of bail or bonds, such as electronic monitoring. This way, the inability to pay bail is not the primary purpose for one's detention.