



PRETRIAL DETENTION, PRETRIAL RELEASE, & PUBLIC SAFETY

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This article is part of a series of papers that Arnold Ventures commissioned exploring the relationship between the justice system and public safety. Find the rest of the series at ArnoldVentures.org/PublicSafetySeries.



INTRODUCTION

In 2016, several defendants filed a class-action lawsuit against Harris County, Texas for unconstitutional bail practices against people arrested for misdemeanor offenses. Specifically, in *O'Donnell et al. v. Harris County*, the plaintiff class accused the County of setting bail amounts so high that many were detained pretrial for no other reason than that they could not afford bail.¹ To end litigation, the County agreed to reform its pretrial systems and practices to protect the due process and equal protection rights of individuals arrested for misdemeanor offenses.

Among other things, the [O'Donnell Consent Decree](#),² as the agreement is known, requires that most misdemeanor defendants be released immediately on their own recognizance (i.e., without secured bond);³ that those ineligible for immediate release be granted a hearing – and access to an attorney – within 48 hours of arrest; and that when secured money bail is imposed, not only should the amounts assessed be based on evidence of defendants' ability to pay but also that less restrictive conditions could not reasonably ensure their appearance for trial.⁴ The Decree also established a role for an independent monitor to evaluate compliance, track the effects of new practices on relevant pretrial outcomes, and promote transparency by publishing regular reports on the progress of the Decree.⁵

In March of 2021, two years after bail reforms were implemented, the Independent Monitor released its second of two reports. *Monitoring Pretrial Reform in Harris County: Second Report of the Court-Appointed Monitor*⁶ included results from analysis estimating the effect that bail reform measures have had on misdemeanor defendants' current and future penal system outcomes. Specifically, since bail reform, while the average daily misdemeanor jail population has declined significantly, there have been no observed increases in recidivism rates among those released pretrial that would suggest a public safety threat.⁷

The report also addressed speculations about the effect that bail reform has had on spikes in violence: "As murders have gone up in Harris County, with this year's totals the highest in years, members of the public and public officials have understandably sought explanations. We have noted some public statements linking homicides to 'bail reform.' However, we find no evidence that bail reform has led to an increase in homicides, and those who have asserted otherwise have not identified any data to support the assertion."⁸ Thus, the Monitor's core findings were in line with the Court's finding in *O'Donnell* that "money bail does not meaningfully promote public safety or appearance in court."

A formal response by Harris County District Attorney, Kim Ogg, was relatively swift and unequivocal. In *Bail, Crime, & Public Safety: A Report by the Harris County District Attorney's Office to the Harris County Commissioners Court*, she criticizes the Monitor's recidivism-related analysis and findings. Based on her own office's analysis of the same data, she reports not only that bail reform led to substantial increases in recidivism rates, but also that increases in violent crimes were directly attributable to reform-related pretrial release practices. Speaking for prosecutors, police, and crime victims, whose daily experiences were claimed to conflict with the Monitor's recidivism findings, DA Ogg wrote, "Bail



reform,’ as presently practiced in some Harris County courts, will continue to be a driving factor in the crime crisis gripping our community.” Her message was clear. Harris County’s bail reform experiment had failed; money bail *does* meaningfully promote public safety and should be reinstated to protect the public from further harm.

As a growing number of jurisdictions across the country have attempted to implement bail reforms, debates have intensified about the relationship between such reforms and crime, including and perhaps especially violent crime.⁹ Similar debates, for instance, have raged in New York, where the backlash against bail reform caused the state legislature to roll back key elements just three months after implementation. In recent weeks, New York Governor Kathy Hochul has proposed further rollbacks to the law to address continued concerns that bail reform has contributed to spikes in the state’s violent crime rate.¹⁰

Although largely driven by politics, these debates raise an important and timely set of empirical questions: *What role does pretrial detention/release play in producing, or threatening, public safety? Does pretrial release incentivize crime and drive-up crime rates, including violent crime, as many in law enforcement have claimed? Or, all things considered, is pretrial detention the greater risk to public safety?*

This discussion paper is an effort to synthesize the evidence on this question. Before doing so, however, I specify the conceptualizations of public safety that I deploy throughout. I then draw from academic and policy research on the costs and benefits to public safety of pretrial detention/release, distinguishing evidence from studies of the impacts of releases resulting from routine pretrial practices, from bail reform, and from responses to the Covid-19 pandemic. No matter the cause of pretrial release, the evidence seems clear: Overall, pretrial detention is a far greater threat to public safety than pretrial release. Not only does detention increase the risk that even low-risk individuals might reoffend (or be rearrested), but detention also initiates a series of collateral consequences downstream that are difficult for many to overcome.

DEFINING PUBLIC SAFETY

Barry Friedman’s “What is Public Safety?” is a timely and important addition to debates about how we might reimagine public safety. The NYU law professor suggests that in the U.S. we have historically privileged what he calls the “protection function,” i.e., we place urgency on “guarding people from violent injury to person or property caused by third parties, and perhaps by nature...”¹¹ And, indeed, research on how pretrial detention and release affect public safety has focused on a core set of outcomes related to the protection function – failure to appear (FTA), conviction on current charges, and measures of recidivism, including new criminal complaints or arrests, new prosecutions, and/or new convictions. The public is safer when these rates are low or trending downward, and through law enforcement, it is the government’s first duty to ensure these outcomes.

Friedman critiques this narrow conceptualization of public safety, however, arguing that by privileging protection from injury to the exclusion of other conceptualizations, we have likely made our communities *less* safe. He suggests instead that we should expand the notions of public safety that we privilege to include domains beyond the protection function.

Specifically, to be safe is to also have basic needs met: “Many people are not safe because of government neglect beyond the protection function: from hunger and malnutrition, from lack of housing, from subpar education, from no health care, and more. But people also are unsafe because of privileging the protection function in ways that renders it unaccountable.”¹²

Importantly, public-safety-as-basic-needs is important in its own right. It also has major implications for public-safety-as-protection, however, since deprivations in the former increase risks to the latter. Access to employment, for instance, and especially good jobs, allows individuals to care for themselves and their families, but lack of the same increases the risk to public safety as people engage in potentially harmful behaviors to get their needs met.¹³ The reverse is also true: Being deemed a threat to public safety diminishes one’s employment prospects as well as access to other valued societal resources and so threatens public safety when conceptualized in terms of meeting basic needs, a point borne out by recent research. Although it has rarely been described as such, prior research has also investigated the effect of pretrial detention and release on public-safety-as-basic-needs, including individuals’ psychological and physical health and well-being,¹⁴ employment prospects,¹⁵ housing stability,¹⁶ and social bonds.¹⁷ In the synthesis to follow, to assess the costs and benefits to public safety of incarcerating versus releasing people pretrial, I privilege both categories of public safety when drawing from growing bodies of research.

THE BENEFITS AND COSTS OF PRETRIAL DETENTION

Pretrial detention has two recognized functions – to ensure that defendants who are at risk of flight appear in court, and to protect the public and crime victims from (further) harm.¹⁸ People who are detained pretrial are there because they are denied bail, cannot afford bail, or cannot meet other conditions set in their case.¹⁹ Most, however, are held because they cannot make bail.²⁰ Pretrial detainees are often the poorest of the poor, arrested as much (if not more) for being offensive to the broader society than for having broken laws of any significance (Irwin 2013). And more people are detained pretrial than almost ever before. Since 1970, the pretrial population has increased by 433%. Since 1990, much of that increase has been attributable to our greater reliance on money bail systems. While the percentage of those who have been denied bail and who have been released without money bail has steadily declined, the percentage being held or who have been released on money bail has increased significantly.²¹ Indeed, an important part of the mass incarceration story is the story about pretrial detention.²²

Has mass detention made us safer? Whether public safety is defined in terms of protection or in terms of meeting basic needs, the bulk of the evidence makes clear that mass detention has done far more to erode public safety than to protect it. Still, there are circumstances under which pretrial detention fulfills the protection function, reducing the likelihood that injury will occur to persons and property.

THE GROSS (VS NET) BENEFITS OF PRETRIAL DETENTION

Two benefits are attributed to pretrial detention. The first is that it reduces the likelihood that defendants will fail to make court appearances (FTA).²³ The second is that it reduces the likelihood of new criminal legal system involvement. In this regard, two recent studies are worth noting. Leslie and Pope’s 2017 study of the impact of pretrial detention on case outcomes in New York City found positive effects of incapacitation. Specifically, being detained reduced the probability of being rearrested before disposition by 12.2 and 10.6 percentage points for felony and misdemeanor defendants, respectively. They state, “The reduction in pretrial rearrests highlights the meaningful incapacitation effect of keeping suspected potential criminals behind bars.”²⁴ Published one year later, Dobbin, Goldin, and Yang used the detention tendencies of quasi-randomly assigned bail judges in Philadelphia and Miami-Dade bail systems to estimate the causal effects of initial pretrial release on FTA and new crime. They found that releasing instead of detaining

the marginal defendant increased the probability of FTA by 15.6 percentage points (or 129% increase) and of rearrest prior to case disposition by 18.9 percentage points (or 122% increase).²⁵ In other words, pretrial detention can act as a preventative measure, particularly so for high-risk defendants.

Both sets of researchers, however, find that positive incapacitation effects are offset by detention's negative criminogenic effects. For Leslie and Pope, detention might have reduced the probability of rearrest before disposition, but after disposition, the probability of being rearrested within 2 years *increases* by 7.5 and 11.8 percentage points for the felony and misdemeanor subsamples, respectively. For Dobbie, Goldin, and Yang, although marginally released defendants are 18.9 percentage points more likely to be rearrested for a new crime, they are 12.1 percentage points less likely to be arrested after case disposition. In other words, pretrial detention might prevent detained individuals from participating in crime while they are detained, but detention *increases* the likelihood that formerly detained people will commit crime after case disposition.

Further, a growing body of research indicates that pretrial systems do not have to rely on detention to ensure court appearances. In multiple contexts, research has found that simply reminding defendants of approaching court dates with postcards, text messages, and/or phone calls increases appearance rates significantly²⁶ and without any of the short- and long-term harms associated with pretrial detention (see below).

RELEASING PEOPLE PRETRIAL DOES NOT THREATEN PUBLIC SAFETY

A growing body of research indicates that when penal systems reduce their reliance on cash bail, not only do rates of pretrial detention decline substantially, but they do so without significantly increasing rates of rearrests. Following state-level bail reforms, for instance, Kentucky, and New Jersey²⁷ saw increases in rearrest rates on the order of 1-2 percentage points and 2.7 percentage points, respectively. In both instances, however, the reports' authors cautioned readers not to make too much of differences, which were either too small to be meaningful or were the result of natural fluctuations. And in at least five contexts, among those released pretrial, bail reform had no statistically significant impact on rearrest rates. In Cook County, Illinois, not only was there no change in overall crime in the year following bail reform,²⁸ but there was also no significant change in the rate of new criminal charges filed against people released pretrial.²⁹ Similar results have been reported for New York City,³⁰ Philadelphia,³¹ Yakima County, Washington,³² and Jefferson County, Colorado.³³

Neither is there any compelling evidence that, following bail reform, pretrial release has led to increases in *violent* crime.³⁴ After bail reform in Cook County, researchers found no statistically significant increase in the rate of new charges for violent criminal offenses among people on pretrial release.³⁵ In New York City, researchers reported a 3-percentage point increase in the rate of new violent felony arrests among people released through the program (relative to comparison group); however, this increase was statistically insignificant.³⁶ In Kentucky, although there was a slight increase in the overall rearrest rate for people released following the state's bail reform, there was no increase in the rate of new arrests for violent felonies.³⁷ Combined, these studies offer compelling evidence that jurisdictions that have reduced their reliance on money bail have not threatened public safety. Importantly, widespread reports also indicated that declines in jail populations associated with the Covid-19 pandemic did little, if anything, to increase rates of crime; to the contrary, as arrests and jail admissions plummeted and as detained individuals were sent home to depopulate crowded jail facilities, in almost all categories of crime, rates also fell precipitously.³⁸ Homicides were the one exception, but as indicated above, this likely had little if anything to do with increases in pretrial release.

THE COSTS OF PRETRIAL DETENTION

Whether public safety is defined in terms of protection or in terms of meeting basic needs, the net costs to public safety for holding people pretrial are substantial. It is difficult to imagine how much damage just a few days in jail can do to the life of an individual and the communities to which they belong, but recent research indicates that spending any more than one day in pretrial detention can have devastating consequences.³⁹

Public Safety as Protection

Not only does pretrial detention increase the likelihood of conviction on current charges⁴⁰ and lead to more severe sentences with conviction,⁴¹ as indicated above, it has also been found to increase the likelihood of future penal system involvement significantly and substantially. Lowenkamp, VanNostrand, and Holsinger (2013) were arguably the first to report this.⁴² To investigate the impact of pretrial detention on FTAs, arrests for new criminal activity pretrial, and post-disposition recidivism, they used data on over 150,000 defendants booked into Kentucky jails between 2009 to 2010 and found that the longer they were detained, the more likely they were to FTA, to have new penal contact pending trial, and to recidivate 12- and 18-months post-disposition.⁴³ Importantly, their outcomes were most pronounced for low-risk defendants.

Despite deploying a whole host of controls, Lowenkamp, VanNostrand, and Holsinger's study design would not allow them to make causal claims. Several more recent studies have followed suit, however, most adopting rigorous methodologies enabling their authors to make compelling statements about the effect of pretrial detention on future penal system involvement.⁴⁴ For instance, in a 2016 study, Heaton, Mayson, and Stevenson used detailed data on hundreds of thousands of misdemeanor cases resolved in Harris County, Texas to measure the effects of pretrial detention on case outcomes and future crime. They found that detained defendants were more likely to later be accused of committing crimes. Specifically, detention increased the share of defendants charged with new misdemeanors by 9.7 percent at 18 months post-hearing; it also increased the likelihood of any future felony charges by 32.2 percent. With a quasi-experimental analysis, they confirmed that differences likely resulted specifically because of pretrial detention.⁴⁵ These findings are in line with those reported by the Harris County Monitor. Gupta, Hansman, and Frenchman used a large sample of criminal cases in Philadelphia and Pittsburgh to analyze the consequences of the money bail system, a proxy for pretrial detention. To isolate its causal effect, they exploited variation in bail-setting tendencies among randomly assigned bail judges. Their results suggest that the assignment of money bail not only leads to a 12-point increase in the likelihood of conviction, but it also leads to a 6–9 percent increase in recidivism.⁴⁶ And, as stated above, more recently, Leslie and Pope and also Dobbin, Goldin, and Yang found that because of its incapacitation effect, pretrial detention reduced the likelihood of new criminal legal system involvement, but because of detention's criminogenic effect, it also *increased* the likelihood of later being accused of crime.⁴⁷ Loeffler and Nagin's recent review of methodologically rigorous studies on this question confirms that pretrial detention threatens public safety at least in part by exacerbating postrelease recidivism.⁴⁸

There are three major take-aways from this small but growing body of research. First, being held in detention pretrial beyond one or two days increases a person's chances of being arrested and charged again pretrial (for those eventually released before case disposition) and post-disposition.⁴⁹ Second, all things considered, the longer one's stint in detention, the greater the odds of new penal contact.⁵⁰ And third, the effects of pretrial detention on future penal system involvement are especially pronounced for low-risk defendants,⁵¹ individuals who likely would not have had further criminal legal system involvement had they not been held in detention. Thus, a growing body of research indicates that pretrial detention is creating "recidivators" out of individuals who might not otherwise (re)offend.

But pretrial detention also threatens the safety of the individuals who are held. Incarcerated people routinely endure the pains of imprisonment.⁵² It is not only that individuals must be hypervigilant to reduce their chances of being victimized by other incarcerated people. They must also be wary of the intentions of correctional officers and other jail staff, who routinely engage with incarcerated people in ways that are dismissive, contemptuous, neglectful, and violent.⁵³ In jail, rates of predation are high, and predation comes from incarcerated people and correctional staff alike. Take sexual assault, for instance. In recent surveys, roughly three percent of individuals incarcerated in jails, prisons, and juvenile detention centers reported experiencing sexual assault in the past year; in half of those cases, the perpetrator was a staff member at the facility.⁵⁴ And reports of sexual victimization are on the rise – from 2,411 in 2012 to 8,651 in 2018.⁵⁵

Further, mortality rates, already high, are also on the rise. A significant minority of incarcerated people die from suicide, and homicides are also a major cause of death, but illness takes most.⁵⁶ Deaths from Covid-19 are the most recent example of this. According to the COVID Prison Project, which tracks data and policy across the country, since the pandemic began, there have been roughly 700,000 reported infections among people incarcerated and working

in prisons and over 3,000 reported deaths; these figures are almost certainly underestimates as many facilities do not officially track and systematically report. Jails are responsible for the health and well-being of their inhabitants, but many fail miserably at providing protection and safety to those in their charge. And in so failing, they not only increase the risk of harm to those who are being detained, they also indirectly increase the risk of injury to persons and property in communities beyond jail facilities. As is often stated, hurt people hurt people.

Public Safety as Meeting Basic Needs

If public safety is conceptualized in terms of meeting basic needs, a large and growing body of research also indicates that pretrial detention can injure individuals' physical and psychological well-being,⁵⁷ employment prospects,⁵⁸ housing stability,⁵⁹ and financial stability.⁶⁰ Injury occurs during detention, but pretrial detention also has downstream effects on individuals' social, economic, and psychological health and well-being.

In absolute and relative terms, jails are awful places. With poor and unstable funding, jails tend to employ staff who are underpaid and poorly trained. Staff manage incarcerated persons in facilities that are often unsafe, unsanitary, and lacking adequate space. Detention facilities offer limited, if any, programming to occupy and engage incarcerated people. They have rules and regulations that are inconsistently enforced but punitively sanctioned for noncompliance, making daily life unpredictable and volatile. As we have learned from the Covid-19 pandemic, jails are also breeding grounds for the spread of infectious disease and violence.⁶¹ But jails also provide meager health care and other essential social services. This is a distressing reality given that people incarcerated in jails are a heterogeneous population disproportionately beset with several often-untreated chronic health conditions, mental health illnesses, and substance abuse problems.^{62,63}

These combined hardships represent two related types of punishments^{64,65}— environmental (or physical) and private (or psychological). Environmental punishments reflect the material impositions that incarcerated individuals face. In some contexts, they must sleep on floors when, due to overcrowding, facilities lack enough beds. They must contend with excessive heat or cold, but their complaints about their discomfort are almost always ignored. Not only are infestations of rodents, mold, and mildew typical, these environmental conditions can worsen or help to create the chronic physical and mental health conditions with which many incarcerated people struggle. People who are incarcerated also lack adequate health care. They are poorly fed; food is inadequate in serving size and of questionable quality. They lack personal hygiene due to insufficient access to showers, toiletries, and laundry. And because jails often lack programming of any kind, boredom overwhelms detained people and contributes to their misery. People who have been incarcerated complain most about these inhumane conditions⁶⁶

But the injury suffered because of pretrial detention extends beyond facilities' walls to affect many domains of individuals' lives. It diminishes formerly detained individuals' employment prospects, for instance. Dobbie, Goldin, and Yang report that, compared to detained individuals, released defendants are 11.3 percentage points more likely to have an income two years after bail and 9.4 percentage points more likely to be employed 3-4 years after bail. In other words, detention reduces employment probabilities substantially relative to pretrial release. These authors argue that the primary mechanism for the reduction is having a criminal conviction, since detention increases the likelihood of conviction on current charges as detained people accept guilty pleas to resolve their cases.⁶⁷ But they point to three other possible mechanisms: 1) detained individuals cannot work in the formal sector of the labor market while detained;⁶⁸ 2) if detained individuals have a job when arrested and detained, they might lose it;⁶⁹ and 3) employers prefer not to hire individuals with records of arrest, even without conviction, and this stigma also makes finding and keeping work difficult.⁷⁰ Indeed, consistent with prior research about the detrimental effects of pretrial detention on employment prospects, new research shows that New Jersey's 2014 pretrial reforms were associated with a 6.8 percentage point increase in employment probability among Black people.⁷¹ Importantly, because reforms did not affect White people's employment,⁷² they might have also reduced Black-White racial disparities in employment overall.

Housing is also a serious concern for those who have been detained, especially so for people with longer detention spells.⁷³ For those who lose their homes while incarcerated, securing housing after release is one of the most serious barriers to reentry, disproportionately so for Black and Latino returning citizens. Geller and Curtis explain that for returning citizens, it is easier to apply for employment and access treatment and services if they have stable housing.



However, the stigma of incarceration, lack of financial resources, strained familial relations, and public housing restrictions for those with certain offenses all represent major barriers to housing security. Thus, even at equal levels of income, Geller and Curtis find that formerly incarcerated men experience considerably more housing insecurity⁷⁴ than those who were never incarcerated. Therefore, they conclude that the relationship between housing insecurity and incarceration is due in part to factors beyond the labor market. These results indicate that the carceral system itself plays a central role in generating residential instability. Other studies have shown that the uncertainty and instability associated with housing insecurity can also lead to further criminal legal involvement among reentry populations.⁷⁵

Finally, pretrial detention also increases the burden of fines and fees associated with criminal legal system contact. In a 2017 review, Martin, Smith, and Still outline the five types of legal financial obligations (LFOs) — fines, forfeiture of property, costs, fees, and restitution — and illuminate the ways these sanctions impede the reentry efforts of formerly incarcerated people.⁷⁶ Because courts rarely consider indigency when they set LFOs, low-income individuals and their families are saddled with legal debt that can last for decades. Importantly, however, although a growing body of empirical research has examined the imposition of LFOs and their implications for successful reentry,⁷⁷ studies about LFOs rarely include the debt that people carry after bailing out. Nor does this body of research typically include accumulated debt resulting from other collateral consequences associated with detention, like reclaiming one's car from impound. Writings on bail have largely and understandably focused on how the poor are penalized by such assessments; few studies focus on bail loans as part and parcel of LFOs, broadly defined.⁷⁸ Still, bailing out is a primary source of detention-related debt, and detention-related debt is a major part of the LFO story. Paying off all debt related to criminal legal system contact can significantly reduce take-home pay for families, and so they face challenges meeting other needs and obligations, such as finding stable housing, transportation, and employment; obtaining credit; and making child support payments. Furthermore, formerly detained people's efforts to achieve upward mobility through educational attainment, property acquisition, etc., can also be stalled for years.

To better understand the economic costs associated with pretrial detention, University of Utah law professor Shima Baradaran Baughman applied a cost-benefit analysis to this form of incarceration and determined that the public only benefits from pretrial detention when it detains *only* the most dangerous people — people detained for violent felonies. This is essentially what Washington, D.C. does. In estimating costs, Baughman appropriately took into consideration notions of public safety as protection and as fairly basic needs — for instance, freedom, income, housing, childcare costs, property, intimate relationships, and the possibility of violent or sexual assault, which, as indicated above, is pervasive in U.S. jails. By contrasting estimates of detention's costs to individuals and society with the cost of releasing all or most defendants pretrial, she determined that universal pretrial release would be far less costly, *but it would be even more cost-effective to release some and detain others*. Specifically, it would be more cost effective to release nonviolent detainees while detaining those who pose a violent crime risk. Her reasoning is as follows: The costs to the individual and society if released nonviolent defendants commit similar crimes while on bail are relatively low, but if individuals accused of violent crimes commit similar crimes while on bail, those costs to society would be very high. When compared to current policies, Baughman estimates that the public would save \$14 billion by moving to universal release and \$78 billion by releasing most and detaining only people arrested for violent felonies. Dobbie, Goldin, and Yang conduct a similar cost-benefit analysis and find that the net cost for three or more days in detention is between \$55K and \$99K per marginal defendant and that detention is perhaps even more costly for defendants with no prior criminal history — \$85K to \$162K. Given this, and consistent with Baughman, they also suggest that it would be preferable to use alternatives to detention than to detain as many people as we do, especially low-risk defendants without a prior criminal record.



SUMMARY AND CONCLUSION

Despite claims by members of the law enforcement community, pretrial release – whether the result of bail reforms, responses to the Covid-19 pandemic, or other policies – does not drive-up crime rates and is very unlikely to be the cause of the recent spikes of violence across the country, as evidence by the fact that violent crime has spiked as much if not more in jurisdictions where no bail reform has occurred. Instead, the bulk of the evidence suggests that pretrial detention is most beneficial to public safety when it is only used to incapacitate people at high risk of committing violent offenses. For the vast majority of arrests – nonviolent felony and misdemeanor offenses – pretrial detention appears to do far more harm than good, for individuals, their families, and the broader society. Not only does it significantly increase the likelihood of injury to persons and property, but it also substantially reduces the likelihood that people will be able to get their basic needs met, in the short- and long-term.

ENDNOTES

- 1 Maranda Lynn ODonnell, et al. v. Harris County, Texas, et al., No. 16-cv-01414 (United States District Court for the Southern District of Texas, Houston Division November 21, 2019).
- 2 <https://jad.harriscountytexas.gov/ODonnell-Consent-Decree>.
- 3 “Administrative Order Number 2019-01” (Harris County Criminal Courts at Law, January 17, 2019), https://hccla.org/wp-content/multiverso-files/829_56990d05d6719/AdminOrder-MISD.pdf.
- 4 “Administrative Order Number 2019-01,” 3.
- 5 “Administrative Order Number 2019-01.”
- 6 Garrett and Guerra Thompson, “Monitoring Pretrial Reform in Harris County, First Sixth Month Report of the Court-Appointed Monitor.”
- 7 Garrett and Guerra Thompson, “Monitoring Pretrial Reform in Harris County, Second Report of the Court-Appointed Monitor,” 41–42. The Monitor’s relevant findings include the following: 1) A gradual decline in repeat offending rates across the entire 2015-2019 period, based on numbers of repeat-offense cases. 2) Slightly declining rates of individual people arrested for misdemeanors who repeat-offend in each year from 2015 to 2019 (from 23.4% in 2015 to 20.5% in 2019). 3) A slight increase in the share of cases associated with a new felony case (from 10.7% in 2015 to 11.4% in 2019). 4) Only about 1% of those arrested for a misdemeanor offense in 2019 were re-arrested on four or more separate occasions within 365 days, a rate that has not substantially changed from 2015-2019.
- 8 Garrett and Guerra Thompson, 22.

- 9 Holmes Lybrand and Tara Subramaniam, "[Fact-checking claims bail reform is driving increase in crime](#)," CNN, July 7, 2021; "[https://news.wttw.com/2021/08/15/behind-police-leaders-claims-bail-reform-responsible-surge-violence](#)," WTTW CNN News, August 15, 2021; Joe Barrett, "[Some police push back on bail reform, citing wave of killings](#)," The Wall Street Journal, July 16, 2021; Ally Peters, "[Bail reform and increased violence](#)," ABC News10, July 9, 2021; Ally Peters, "[Is New York's bail reform actually behind an increase in violence in Rochester?](#)" RochesterFirst.com, July 8, 2021; Lindsay Beyerstein, "[Did bail reform really cause a crime wave?](#)" City&State New York, February 18, 2020.
- 10 Under current law, to preserve the presumption of innocence, when considering bail, judges cannot consider the extent to which they believe people pose a public safety risk. But, according to a recent Brennan Center report, Hochul proposes to "allow judges to set bail almost any time someone is rearrested after initially being released, even for a low-level misdemeanor." Ames Grawert and Noah Kim. 2022. The Facts on Bail Reform and Crime Rates in New York State. Brennan Center for Justice, March 22.
- 11 Barry Friedman, "[What is Public Safety?](#)" Law and Economic Research Paper Series, Working Paper No. 21-05; Public Law and Legal Theory Research Paper Series, Working Paper No. 21-14, 2021: 5.
- 12 Friedman, 7.
- 13 Crystal S. Yang, "Local Labor Markets and Criminal Recidivism," *Journal of Public Economics* 147: 16-29, 2016.
- 14 J.A. Bick, "Infection control in jails and prisons," *Clinical Infectious Diseases* 45(8), 1047–55, 2007; Beck, A. J., Berzofsky, M., Caspar, R. and Krebs, C., "Sexual victimization in prisons and jails reported by inmates, 2011-12-Update." NCJ 241399. Washington, D.C.: Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice, 2014; Noonan, M. E., "Mortality in Local Jails, 2000-2014 - Statistical Tables." NCJ 250169. Washington, D.C.: Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice, 2016a.
- 15 Dobbie, W., Goldin, J., & Yang, C. S., "The effects of pretrial detention on conviction, future crime, and employment: Evidence from randomly assigned judges," *American Economic Review*, 108(2), 201-40, 2018.
- 16 Geller, A., & Curtis, M.A. (2011). "A sort of homecoming: Incarceration and the housing security of urban men." *Social Science Research* 40(4), 1196–1213; Harding, D.J., Morenoff, J. D., & Herbert, C.W. (2013). "Home is hard to find: Neighborhoods, institutions, and the residential trajectories of returning prisoners." *The ANNALS of the American Academy of Political and Social Science* 647(1), 214–36.
- 17 Shover, N. (1996). *Great Pretenders: Pursuits and Careers of Persistent Thieves*. Boulder, CO: Westview Press; Irwin, J. (1985). *The Jail: Managing the Underclass in American Society*. Berkeley: University of California Press.
- 18 In *The Jail*, however, John Irwin (2013[1985]), described another purpose, unrecognized: to manage the rabble, the mostly detached and disreputable persons who are arrested more because they are offensive than because they have committed crimes.
- 19 St. Louis, 51.
- 20 Elydah Joyce, "[The path from arrest to pretrial detention](#)," Prison Policy Initiative, 2016.
- 21 Patrick Liu, Ryan Nunn, and Jay Shambaugh, "[The economics of bail and pretrial detention](#)," The Hamilton Project, December 2018.
- 22 It is by now well known that in the United States, the penal system supervises almost seven million people. This includes 4.5 million people in community corrections. It also includes 2.3 million incarcerated individuals. On any given day, of those incarcerated, approximately 29 percent, or 750,000, are being held in our nation's local jails. Roughly 10.6 million people are admitted to local jails every year. Importantly, most of jails' inhabitants, disproportionately Black and Latino, have not been convicted of crime.
- 23 This is often described as "flight risk," with the implication that people who do not appear in court are attempting to avoid prosecution. For the overwhelming majority of defendants, however, this is far from true. As noted in *The Case against Pretrial Risk Assessment Instruments*, "People who are poor face greater obstacles to appearing in court than those who have greater access to resources. Forgoing paid time, risking employment, finding childcare,

and accessing reliable transportation are just some of the barriers experienced by people with low-paying jobs and few resources. This issue is compounded by higher rates of poverty among Black, Latinx, and Indigenous people. Acknowledging and addressing these barriers could raise court appearance rates” (Pretrial Justice Institute, 2020: 2-3).

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Meanwhile, seven in ten prisoners have pre-prison substance use—drug or alcohol—consistent with substance abuse and dependence (Mallik-Kane & Visher 2008).

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- 68 As days in detention increase, employers might dismiss employees for their absences, regardless of the reason, although some report that even short stints of between one and three days can lead to dismissal (Kimbrell and Davis 2016).
- 69 The fact of having been arrested and detained might lead some employers to dismiss employees, the result of having lost trust in them (Boshier and Johnson 1974; Holzer et al. 2007; Ispa-Landa and Loeffler 2016; Pager 2003, 2007; Schwartz and Skolnick 1964; but see Atkin-Plunk and Armstrong 2013), a likelihood increased by being Black or Latino (Pager 2003). Dismissal might also result if employers believe they will become liable for negligent hiring if employees who have been arrested and detained act criminally on the job (Bushway 1998; Connerley, Arvey, and Bernardy 2001; Glynn 1998; Holzer, Raphael, and Stoll 2007).
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- 74 Here housing instability is measured by homelessness, eviction, being unable to pay full rent, and being forced to move in with friends or family.
- 75 Lutze et al (2013) conduct an outcome evaluation of a reentry housing pilot program in Washington State, which provides housing assistance for high risk and high need people without a viable place to live after leaving prison. They discover lower rates of recidivism among program participants than the comparison group across three outcome measures —new convictions (22% for those in the program compared to 35% in the comparison group), revocations (40% vs 47%), and readmissions to prison (37% vs 56%). Thus, securing stable housing immediately upon release adds to the stability people need to navigate the challenges of reentry.
- 76 Fines and fees are commonly assessed at each stage of criminal case processing (Bannon et al. 2010). At pre-conviction, defendants are often charged fees for booking, to apply to obtain a public defender, and for fees related to pretrial detention. Court costs are another source of fines, fees, and surcharges, whether individuals are convicted of crime. Additional charges, however, do apply to those who have been convicted and sentenced. These court fines and fees do not include restitution, which is a distinct bucket of fines, and they do not include reimbursements for the use of public defenders, which is charged in several jurisdictions. While incarcerated, for

pretrial or as formal punishment, individuals routinely pay for programs and services, including medical care, work release program participation, per diem, and telephone use. With probation and parole, individuals pay monthly fees for supervision, including electronic monitoring, and administration fees for the installment of monitoring devices, drug testing, mandatory treatment, therapy, and classes. Finally, individuals are responsible for penalties for interest, tardy payments, applications for payment plans, and collection services. These penalties add to and extend individuals' debts, creating overwhelming financial burdens for those who are already struggling mightily to make ends meet (Bannon et al. 2010).

- 77 Bannon, Nagrecha, and Diller (2010) examined the policies and practices surrounding LFOs in the 15 states with the highest prison populations. They found that fees average in the hundreds or thousands of dollars and can be compounded by additional penalties, such as late fees and interest. Reincarceration for failure to pay CJFOs is also common across these states. Focusing on Washington State, Harris, Evans, and Beckett (2010) analyzed national and state-level court data to assess the prevalence of monetary sanctions in the state and to identify the social and legal consequences of residents' legal debts. Comparing expected earnings to average legal debt, they find that formerly incarcerated white men have nearly equivalent levels of legal debt and earnings, Hispanic men's legal debt comprises 69 percent of their expected earnings, and Black men's legal debt reaches 222 percent of their expected earnings. In a separate paper, Harris, Evans, and Beckett (2011) showed that race and ethnicity played a major role in the amount of fines and fees that justice involved individuals were assessed, contingent on the types of crimes they were being charged with. Not surprisingly, Latinos and Blacks were assessed higher fines and fees, especially when they were arrested, charged, and convicted of certain crimes. Both Bannon (2010) and Harris, Evans, and Beckett (2010) explain that the consequences of such debt include heightened financial stress; limited access to housing, education, and economic markets; and legal sanctions, such as warrants, arrests, and reincarceration when people miss payments. They also both contend that this form of debt can create significant barriers to reentry— for example, having a driving license suspended and being unable to go to work; having to pay off debt before regaining voting rights; damaging credit; and impeding payment of other financial obligations, such as child support. Further, they do so in ways that magnify already large racial and ethnic gaps in outcomes related to criminal justice contact.
- 78 This is likely because, unlike court fines, fees, and restitution, court-ordered bail assessments, though required for some pretrial release cases, are not mandatory. One can “choose” to bond out and leave jail, or one can choose not to and remain behind bars; it is one's “choice.” Where court-ordered fines and fees are considered, however, one lacks these basic options. Failure to pay is to invite further sanction.