IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

ZACHARY ROBINSON, and MICHAEL LEWIS, *et al.* on behalf of themselves and a class and subclass of similarly situated persons,	)	
Plaintiffs,	)	No. 2016 CH 13587
v.	)	Hon. Celia G. Gamrath
LEROY MARTIN, JR., E. KENNETH WRIGHT, JR., PEGGY CHIAMPAS, SANDRA G. RAMOS, and ADAM D. BOURGEOIS, JR., on behalf of themselves and a class of similarly situated persons,	)	
Defendants.	)	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' SUPPLEMENTAL 2-619 MOTION TO DISMISS FOR MOOTNESS

The Defendants argue that Plaintiffs' Amended Complaint is moot because General Order No. 18.8A (the "General Order"), an order issued by Chief Judge Evans regarding bail hearings in Cook County, purportedly affords the relief Plaintiffs seek. The Defendants are incorrect, for two reasons. First, the Defendants have offered no proof, nor have they even claimed, that they and members of the Defendant Class are currently complying with the General Order. And even if the Defendants and members of the Defendant Class were all to follow the General Order now, or upon its effective dates, they would merely have voluntarily ceased their unconstitutional practices. Defendants cannot meet their "heavy burden" under settled law to show that they will not resume those practices. Second, the General Order exceeds the

scope of the Chief Judge's limited administrative authority under the Illinois Constitution, and thus lacks the force of law. In short, there is no assurance that Cook County judges are adhering or will adhere to the General Order, nor any assurance that they would continue to adhere to it in setting individual bonds.

To be clear, the Chief Judge is to be commended for his efforts to spearhead meaningful, long overdue, and constitutionally mandated bail reform in Cook County. If those efforts could produce a certain end to the violation of Plaintiffs' rights, Plaintiffs would happily dismiss this case. They cannot. There is every reason to believe that the relief that the General Order purports to offer will be fleeting at best. The General Order is an acknowledgment by the Chief Judge of the Circuit Court that the relief requested by Plaintiffs is proper and necessary under the law, but it is not a judicial mandate. It is not a ruling on the merits of Plaintiffs' claims. It ensures no guarantee of compliance by the Defendants. As such, it cannot moot the Plaintiffs' request for declaratory relief from this Court.

ARGUMENT

I. Defendants currently continue to conduct unconstitutional bail proceedings. Even if they will cease their wrongful conduct, Defendants cannot meet their "heavy burden" of establishing that unconstitutional bail proceedings will not recur, and, as such, any future voluntary cessation by Defendants cannot moot this case.

As an initial matter, the Defendants have not provided any evidence to this Court—or for that matter even claimed—that they and all members of the Defendant Class are currently complying with the General Order in advance of its effective

dates.[1] As such, they have no basis to argue that Plaintiffs' case is currently moot. *Cf. Johnson v. Bd. of Ed. of City of Chicago*, 664 F.2d 1069, 1072 (7th Cir. 1981), cert. granted, judgment vacated sub nom. 457 U.S. 52 (1982) ("The Board's adoption of allegedly non-discriminatory feeder patterns . . . cannot moot the controversy if they have not actually been *implemented* and do not irrevocably eradicate the effects of the alleged violation.") (emphasis added). In essence, Defendants are asking this Court to blindly conclude that they will follow the General Order later,[2] and dismiss Plaintiffs' case based on a presumption of future mootness. Of course, there is no legal doctrine to support finding a case moot based on a likelihood of *future* mootness.

Furthermore, even if the Defendants and members of the Defendant Class were all to follow the General Order upon its effective dates, their compliance would constitute a voluntary cessation of the wrongful conduct complained of by Plaintiffs, which cannot moot the present suit. "The mere voluntary cessation of allegedly wrongful conduct . . . cannot render a case moot, unless it becomes absolutely clear that such behavior could not reasonably be expected to recur." *Cohan v. Citicorp*, 266 Ill. App. 3d 626, 629 (1st Dist. 1993); *accord Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 719 (2007) (recognizing that "subsequent events [must] make it absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur") (internal quotations omitted); *Fryzel v. Chicago*

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[1] By its terms, the General Order does not become effective in felony cases until September 18, 2017, and in all cases until January 1, 2018.

[2] Notably, Defendants' Motion does not contain any statement that the Defendants will in fact conform their practices to those provided in the Order, perhaps because they are well aware (see *infra*) that Chief Judge Evans is without authority to issue the Order.

Title & Trust Co., 173 Ill. App. 3d 788, 794 (1st Dist. 1988) (recognizing that absent an "absolutely clear" indication that the wrongful behavior could not be expected to recur, a defendant "would then be free to resume the practices complained of").

In this context, Defendants bear a "heavy burden" of establishing mootness. *Parents Involved in Cmty Sch.*, 551 U.S. at 719; *see also United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (finding that a suit for injunctive relief may be moot if defendant can demonstrate that there is no reasonable expectation that wrong sought to be enjoined will be repeated, but "[t]he burden is a heavy one"); *Ciarpaglini v. Norwood*, 817 F.3d 541, 545 (7th Cir. 2016) ("The 'heavy burden' of persuading the court that the challenged conduct 'cannot reasonably be expected to start up again' lies with the party asserting mootness.") (citations omitted); *Edwards v. Illinois Bd. of Admissions to the Bar*, 261 F.3d 723, 728 (7th Cir. 2001); *Cohan*, 266 Ill. App. 3d at 629 (citing *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203, (1968)). The new General Order does not come close to meeting this heavy burden.

First, Defendants have never acknowledged that their current bail practices are unconstitutional and wrongful. To the contrary, the judicial Defendants continue to vigorously insist upon their perceived right to conduct bail proceedings in the manner complained of by Plaintiffs. *See* Ds' Mot. to Dismiss Pls.' Am. Compl. at p.3, n.1 (refusing to concede "that the [Plaintiffs'] constitutional claims are legally sufficient or meritorious."); *id.* at p.27 (asserting that Plaintiffs' Equal Protection claims fail because "Plaintiffs do not allege any . . . discriminatory intent or purpose

by the Defendants when setting bail[, but] . . . instead allege that setting bail at a certain dollar amount affects indigent persons differently than wealthy persons"). To be sure, Defendants' arguments defending the existing system on the merits against Plaintiffs' claims are erroneous and inconsistent with Supreme Court precedent, but it is the fact that they are being made that forecloses any attempt to argue that Defendants have met their heavy burden that their conduct will not recur.[3]

Where the defendant ceases the challenged conduct, but continues to claim the *right* to engage in that conduct, courts refuse to find that the defendant's voluntary cessation moots the plaintiff's case. *See Fryzel*, 173 Ill. App. 3d at 794 ("Continuing to claim such a right inescapably leaves open the possibility that [defendant] may refuse a similar examination in the future. [Defendant's] voluntary offer, therefore, does not moot this case."); *Cohen v. Citicorp.*, 266 Ill. App. 3d 626, 630 (1993) ("[Defendants] maintain the right to assess the very same charge in the event of a future stock split. . . . Maintaining the right to charge the per share fee, however, by its very nature indicates that the controversy over the fees is likely to occur again in the future."); *Parents Involved in Cmty. Sch.*, 551 U.S. at 719 ("But the district vigorously defends the constitutionality of its race-based program, and nowhere

[3] The fact that Defendants' position on the merits is erroneous is evidenced by, among other things, a lengthy memorandum issued by former United States Attorney General Eric Holder (following the filing of Plaintiffs' Amended Complaint), which sets forth his analysis that Cook County's wealth-based pretrial detention system violates the Fourteenth Amendment and the Eighth Amendment of the U.S. Constitution, and disproportionately harms racial minorities. (Ex. A, Jul. 12, 2017 Mem. from Eric H. Holder, Jr., et al. to Amy J. Campanelli, Cook County Public Defender). The arguments presented in the memorandum are unassailable and consistent with the overwhelming merits arguments Plaintiffs will present at the appropriate time.

suggests that if this litigation is resolved in its favor it will not resume using race to assign students."); *Knox v. Serv. Employees Int'l Union*, 132 S. Ct. 2277, 2287 (2012) (finding it unclear that in the future union defendant would refrain from collecting fees akin to the one challenged "since the union continues to defend the legality" of the fee); *compare Fisch v. Lowes Cineplax Theatres, Inc.*, 365 Ill. App. 3d 537, 540 (1st Dist. 2005) (finding defendants met their burden of showing mootness as they had not "asserted, insisted upon, or maintained the right to" to continue the unlawful activity). That is exactly the case here.

Second, while it is true that some lower courts have treated the cessation of allegedly illegal conduct by government officials with "more solicitude" where their act of self-correction "appears genuine," *see Ds' Suppl. Mot. to Dismiss* at 6-7; *see also Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988); *accord Hanna v. City of Chicago*, 382 Ill. App. 3d 672, 680 (1st Dist. 2008); *Wis. Right to Life, Inc. v. Schober*, 366 F.3d 485, 492 (7th Cir. 2004), that more friendly standard is not applied when, as here, Defendants do not acknowledge the illegality of their conduct. The obvious reason is that one cannot "appear genuine" in one's assertion that one will never return to disputed conduct while at the same time defending the right to engage in it. There is clearly no basis here to conclude that the judicial Defendants are genuine given that, to date, they have not actually ceased the complained of conduct.[4] And

[4] Defendants certainly have not provided this Court with any evidence to meet their heavy burden. For instance, Defendants have not offered transcripts of bond hearings showing their advanced compliance with the procedures set forth by the General Order, nor have Defendants even provided any sworn indication that they intend to comply with the terms of the General Order on the effective dates.

they have been engaging in it for many years. In sharp contrast to the Chief Judge's General Order, the only representation that the *Defendants* have made to this Court is that they contest the merits of Plaintiffs' claims. Thus, it is impossible to conclude that the Defendants' *potential* future compliance with the General Order would be "genuine," or, for that matter, to conclude that the Defendants will even comply at all—particularly since, as discussed in section II *infra*, the General Order lacks the force of law and could well be outright ignored.

Third, the General Order does not make it "absolutely clear" that Defendants' conduct will cease, given that it is inherently impermanent.[5] The General Order is the unilateral undertaking of a single individual. There is nothing to prevent its being undone by this Chief Judge or a future Chief Judge at any point for any reason. In this respect, the General Order is fundamentally different from a statute or statewide "regulation" that courts have found sufficient to completely eliminate a controversy. In *Burbank v. Twomey*, 520 F.2d 744 (7th Cir. 1975), relied upon by Defendants, the Seventh Circuit found that the adoption of a "formal, published regulation" by the Illinois Department of Corrections mooted a challenge to certain procedures employed by prison officials in the imposition of prison discipline. At the outset, unlike the judicial Defendants, the defendants in *Burbank* did not continue to insist on the propriety of the challenged action. Further, in *Burbank*, subsequent to the

[5] Defendants cite to the Bail Reform Act of 2017, Public Act 100-1, but do not suggest that the statute itself requires the relief sought by Plaintiffs in the present suit (and thus moots it). Plaintiffs therefore do not address the merits of such an argument in this brief. It is obvious, though, that the state law on its face falls well short of addressing the violations of the class members' fundamental rights to liberty and equal protection of the laws, and thus does not provide the remedy Plaintiffs seek through this litigation.

filing of the plaintiff's action, the Supreme Court had issued *Wolff v. McDonnell*, 418 U.S. 539 (1974), which "held that due process required that prison officials furnish a prisoner with just the type of statement which Burbank was seeking," and thus the Court's constitutional ruling preceded—and indeed mandated—the formal rule at issue. 520 F.2d at 747.

Furthermore, the General Order at issue here is not a formal Rule adopted by the Supreme Court pursuant to Ill. Sup. Ct. R. 3 ("Rulemaking Procedures") or even a Circuit Court Rule adopted under Ill. Sup. Ct. R. 21(a), and thus it is more akin to a policy that was "adopted after the commencement of this suit, is not implemented by statute or regulation and could be changed again . . . ." *Sefick v. Gardner*, 164 F.3d 370, 372 (7th Cir. 1998) (finding that such policy did not moot the case); *see also Watkins v. Blinzinger*, 789 F.2d 474, 483 (7th Cir. 1986) (finding claim of mootness to be "weak" in part "because the state has not pledged to retain the policy it adopted"). Thus, Defendants' purported future "voluntary cessation of the challenged conduct does not eliminate the controversy." *Sefick*, 164 F.3d at 372.

II. The Chief Circuit Judge's authority is limited by the Illinois Constitution, state statute, and the Illinois Supreme Court Rules to authority over purely administrative matters, and thus General Order 18.8A cannot moot this case because it lacks the force of law.

Plaintiffs applaud Chief Judge Evans for issuing an enlightened, principled General Order. They share the Chief Judge's hope that Defendants will follow it. It constitutes a strong acknowledgement by the Chief Judge that the relief sought by Plaintiffs is legally necessary. No other Chief Judge of any circuit has ever issued such an order. Unfortunately, that is indicative of a serious problem. Although the

Court need not reach this issue in light of the legal principles stated above, it is nonetheless an unavoidable and regrettable fact that for all its virtue, the General Order cannot moot the present suit because it exceeds the Chief Judge's rulemaking authority.

The authority of the Illinois Courts to issue rules and administrative orders derives from the Constitution, state statute, and Supreme Court Rules. Under the Illinois Constitution, "[s]ubject to the authority of the Supreme Court, the Chief Judge [of each circuit] shall have general *administrative authority* over his court, including authority to provide for divisions, general or specialized, and for appropriate times and places of holding court." Ill. Const. art. VI, § 7(c) (emphasis added). In following this constitutional provision, the Code of Civil Procedure states that "[s]ubject to the rules of the Supreme Court, the circuit and Appellate Courts may make rules regulating their *dockets, calendars, and business.*" 735 ILCS 5/1-104(b) (emphasis added). Likewise, Illinois Supreme Court Rule 21(c) provides that "[t]he chief judge of each circuit may enter general orders *in the exercise of his or her general administrative authority*, including orders providing for assignment of judges, general or specialized divisions, and times and places of holding court." Ill. Sup. Ct. R. 21(c) (emphasis added).

The General Order exceeds this authority. It does not address the "divisions" of the Circuit Court, the "appropriate times and places of holding court," or any similar administrative function permitted by the plain text of the Illinois Constitution. Ill. Const. art. VI, § 7(c). Similarly, it is not a "rule" of the Circuit Court

passed by a majority of the circuit court judges regulating the docket, calendar or business of the Court. 735 ILCS 5/1-104(b); *see also* Ill. Sup. Ct. R. 21(a) ("*A majority of the circuit judges* in each circuit may adopt *rules* governing civil and criminal cases which are consistent with these rules and the statutes of the State, and which, so far as practicable, shall be uniform throughout the State.") (emphasis added).

Even if the General Order had been properly issued by the Chief Judge pursuant to Ill. Sup. Ct. Rule 21(c), it is not an exercise of the Chief Judge's "*general administrative authority*, including orders providing for assignment of judges, general or specialized divisions, and times and places of holding court." Ill. Sup. Ct. R. 21(c) (emphasis added); *see People v. Alexander*, 369 Ill. App. 3d 955 (2007) (holding that administrative order of Chief Judge providing for imposition of a $10 fee for collection of a defendant's DNA "exceeds the powers granted to the chief judge under Rule 21" because the order "does not provide for the 'assignment of judges,' nor does it delineate 'the times and places of holding court'"); *cf. People ex. Rel. Kilquist v. Brown*, 203 Ill. App. 3d 957, 961 ("It is fundamental that administrative agencies cannot extend the substantive provisions of a legislative enactment or create substantive rights through exercise of their rulemaking powers.").

Instead, the General Order imposes significant obligations on Cook County Circuit Court judges governing how they must handle bail proceedings. It directs that Circuit Court judges "shall" make certain findings, together with sufficient supporting facts, regarding their determinations of whether bail is appropriate, and if appropriate, that the defendant has the present ability to pay the amount necessary

to secure his or her release on bail. General Order, ¶¶ 4, 7. Thus, the General Order, if followed, would bind the hands of Circuit Court judges to take specific actions in cases before them. However commendable its substance, the Chief Judge has no authority to impose such a rule upon his judicial colleagues.

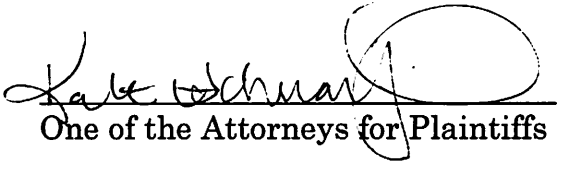
The changes sought by the General Order are essential and constitutionally-mandated. However, to have the force of law, the changes sought must be imposed by permanent and authoritative means, such as a declaration by this Court regarding the requirements of the Constitution in setting bail amounts, legislation that ensures that no arrestee is held in custody merely because of an inability to post a monetary condition of release, or a Supreme Court Rule passed pursuant to Ill. Sup. Ct. 3.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny the Defendants' Supplemental Motion to Dismiss for Mootness.

Dated: August 14, 2017

Respectfully submitted,



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COVINGTON & BURLING LLP

July 12, 2017

Memorandum

To: Amy J. Campanelli, Cook County Public Defender

From: Eric H. Holder, Jr.
Kevin B. Collins
Ryan O. Mowery
Kyle Haley

Re: Cook County's Wealth-Based Pretrial System

> "The defendant with means can afford to pay bail. He can afford to buy his freedom. But the poorer defendant cannot pay the price. He languishes in jail weeks, months, and perhaps even years before trial. He does not stay in jail because he is guilty. He does not stay in jail because any sentence has been passed. He does not stay in jail because he is any more likely to flee before trial. He stays in jail for one reason only – he stays in jail because he is poor."
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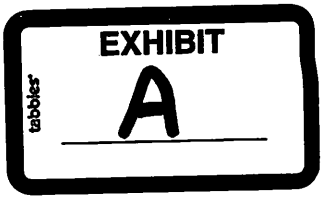
> – President Lyndon Johnson, 1966 –

At any given time, nearly half a million people in the United States who have not been convicted of any crime are imprisoned for one simple reason—they cannot afford to purchase their freedom.[1] The moral and economic effects of wealth-based pretrial detention schemes, in use in the great majority of U.S. states, are devastating. Incarcerated for weeks, months, or even years until trial, presumptively innocent individuals frequently lose their jobs, their homes, and even custody of their children. Numerous studies have shown that defendants who are detained before trial are less able to participate in their defense, have a greater likelihood of being convicted (and if convicted, are likely to receive longer sentences), and are also more likely to commit additional crimes upon release than defendants who were not imprisoned before trial. These consequences are vastly more likely to be visited upon persons of color, who are detained until trial at rates significantly higher than their white counterparts. The burden also falls on taxpayers in these states, who pay the high costs that result from an inflated prison population. And despite these costs, pretrial systems that rely heavily on secured money bail do not achieve

[1] Alec Karakatsanis, Remarks at Cook County Board of Commissioners Meeting (Nov. 17, 2016), *available at* http://cook-county.granicus.com/MediaPlayer.php?view_id=2&clip_id=1676.



more favorable outcomes when it comes to protecting public safety or ensuring the appearance of defendants at trial.

Across the country, momentum is building for reform of pretrial systems in which defendants, otherwise eligible for release, are incarcerated until trial simply because they cannot afford to pay bail. But despite growing critiques of these illogical and illegal schemes, Cook County has continued to operate an unconstitutional wealth-based pretrial system that is irrational, unjust, costly, and disproportionately affects minority communities.

This memorandum addresses Cook County's problematic pretrial practices. Part I reviews Cook County's troubling wealth-based pretrial detention practices. Part II explains why Cook County's current bail practices are illegal and vulnerable to challenge on both state law and federal constitutional grounds. Part III articulates why Cook County's wealth-based pretrial detention practices are not only illegal, but are also irrational, unjust, and inefficient as a matter of public policy. The memorandum closes by setting forth several commonsense reforms Cook County could initiate immediately to improve its pretrial detention practices.

Any scheme in which a defendant's liberty hinges primarily on his or her financial means, and which detains individuals solely because they cannot pay bond, is antithetical to the core principles of our nation's justice system. As the below analysis demonstrates, reform in Cook County is sorely needed.

I. COOK COUNTY'S WEALTH-BASED PRETRIAL DETENTION SCHEME

Pursuant to the Illinois Bail Statute, 725 ILCS 5/110-1 *et seq.*, Circuit Court judges in Cook County have several options for handling accused persons. For those defendants eligible for release on bond, two primary options are available: (1) Release on personal recognizance, meaning that the defendant is released without having to deposit funds (an "I-bond"); or (2) Release upon the deposit of cash bail, where the defendant deposits 10 percent of the total bond amount set by the judge (a "D-bond").[2] Some defendants are not eligible for release under any conditions—in the limited circumstances set forth in the statute, judges may deny bond to defendants who have been charged with serious felonies punishable by death, life imprisonment, or (under certain conditions) mandatory prison time. In these cases, the defendant is entitled to a hearing, at which the State must demonstrate by clear and convincing evidence that the defendant poses an immediate threat to the safety of other persons, and that no conditions of release would effectively protect the public.

In recent years, the Cook County pretrial system has garnered increasing attention for its overreliance on a middle option not contemplated by the statute—the pretrial confinement of defendants solely because they cannot afford to pay the bail required to secure their freedom. In these cases, a defendant is eligible for release under the statute, but bail is set at an amount that the defendant cannot afford to pay. As a result, the defendant remains in jail for weeks, months,

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[2] The Illinois Bail Statute also allows detainees to deposit stocks, bonds, or real estate valued at the amount of the total bond (or for real estate, double the amount of the total bond) in lieu of making a cash deposit of 10% of the bail amount to secure release. 725 ILCS 5/110-8.

or even years until trial, without the hearing, evidentiary showing, and written findings required to order pretrial detention under the statute. Multiple studies from the last five years have reported that more than 90 percent of individuals admitted to the Cook County Jail are pretrial detainees.[3]

Despite the Bail Statute's requirement that money bond be a last resort, and that when necessary, it be "not oppressive" and set in consideration of the financial resources of the accused, Cook County judges set financial conditions for numerous defendants as a matter of course. In 2007, one federal court described Cook County's bond process in this way:

> The holding pens for men are crowded well beyond their capacity. Prisoners are unable to sit, the sick and infirm are not isolated, noise levels are too high, and, at times, temperatures are uncomfortable. The great majority of people are represented by the public defender and have no chance to speak with a lawyer before their cases are called. Instead, each is briefly interviewed by a defense investigator who calls each one forward by name and records information about their residence, employment, family and military service. The information is given to the assistant public defender assigned to the bond court. The crowded conditions preclude private, confidential interviews. Moreover, the investigators, usually two or three, are allowed only 105 minutes to interview 100–150 prisoners. . . .
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> The usual hearings are short—30 seconds or less. The prosecutor states the charges, and the judge makes a finding of probable cause. The prosecutor asks for high bond, reciting, if possible, prior criminal history and prior failures to appear. The public defender uses the information in the chart to ask for a lower bond. The judge sets bond and continues the case for two to three weeks. As in most courts, including this one, bond hearings are very short. In Central Bond Court, they are sometimes so fast that "it is not uncommon for the proceedings to commence" before the next defendant gets to the podium.[4]

This account is corroborated by more than thirty years of government reports, academic articles, and media coverage exposing the alarming rate at which accused persons are continuously imprisoned until trial in Cook County. In 1987, supported by a grant from the

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[3] *See, e.g.*, DAVID E. OLSON & SEMA TAHERI, POPULATION DYNAMICS AND THE CHARACTERISTICS OF INMATES IN THE COOK COUNTY JAIL, COOK COUNTY SHERIFF'S REENTRY COUNCIL RESEARCH BULLETIN 5 (Feb. 2012); JUSTICE ADVISORY COUNCIL OF COOK COUNTY, EXAMINATION OF COOK COUNTY BOND COURT (July 12, 2012), *available at* https://www.slideshare.net/cookcountyblog/justice-advisory-council-bond-report-7122012 [hereinafter JAC REPORT].

[4] *Mason v. Cty. of Cook, Ill.*, 488 F. Supp. 2d 761, 762 (N.D. Ill. 2007).

Department of Justice, the Illinois Criminal Justice Information Authority published a report on the pretrial process in Cook County to help inform the creation of pretrial services agencies in Illinois.[5] Describing the pretrial process, the report observed that "the typical bond hearing does not last longer than two minutes (and is frequently shorter)," and added that "[t]he brevity of this procedure highlights the fact that the bond decision rests on one or two determining factors"—namely, criminal history and whether the charged offense is violent or non-violent.[6] The report's analysis of a sample of arrestees reflects the prevalence of money bond. Although only 22.9% of the arrests in the sample were for violent offenses, the report noted that D-bonds were "by far the most frequent bond type, applied in nearly 82 percent of the cases."[7] On the other hand, only 6% of arrestees in the sample received I-bonds, and were released without having to deposit funds.[8]

The report noted that "[i]n a bond system dominated by cash deposits as the means to secure pretrial release, as is the case in Cook County, the ability to secure pretrial release depends not only on the judge's assessment of the likelihood of the defendant's future appearance in court, but also on the defendant's financial resources."[9] In the sample studied for the report, less than half of the defendants assigned D-bonds were able to post the required bond deposit; the rest remained in custody following the bond hearing. Of those defendants unable to afford bail, 20% remained incarcerated because they could not afford a deposit of less than $500.[10]

Nearly 20 years later, in 2005, the Department of Justice (in partnership with American University) released a study reinforcing that the determining factor in the pretrial detention of numerous Cook County defendants is neither the danger they pose to society nor the risk that they will flee prior to their trial, but simply their inability to post bond.[11] The study described bond hearings as "a mass production operation," at which "judges receive no information from a disinterested interviewer as to the relevant facts about the defendant."[12] Once bond is set, judges "have made it clear to defense counsel that bond review applications are not favored and will rarely be granted."[13] Although the investigators noted that increases in statutory penalties

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[5] *See* CHRISTINE A. DEVITT & JOHN D. MARKOVIC, ILLINOIS CRIMINAL JUSTICE INFORMATION AUTHORITY, THE PRETRIAL PROCESS IN COOK COUNTY: AN ANALYSIS OF BOND DECISIONS MADE IN FELONY CASES DURING 1982–83 (1987).

[6] *Id.* at 16.

[7] *Id.* at 37, 45.

[8] *Id.* at 45.

[9] *Id.* at 55.

[10] *Id.* at 56.

[11] *See* BUREAU OF JUSTICE ASSISTANCE: CRIMINAL COURTS TECHNICAL ASSISTANCE PROJECT, AMERICAN UNIVERSITY, A REVIEW OF THE COOK COUNTY FELONY CASE PROCESS AND ITS IMPACT ON THE JAIL POPULATION (Sept. 26, 2005).

[12] *Id.* at 21.

[13] *Id.* at 22.

resulted in fewer defendants eligible for pretrial release, they "were told by prosecutors, defenders, and court staff that bonds tended to be set at a high level *even in those cases in which the defendants were eligible for release* on bond."[14] Specifically, 2004 data showed that almost half of defendants for whom a bond was set were required to deposit $10,000 or more in order to secure pretrial release. The researchers noted that "many whom the study team interviewed commented on what they perceived to be excessively high bonds frequently set," and given that 72% of the inmates sampled were unemployed, the study concluded that "high cash requirements for release guarantees that many are held in jail until disposition of their case because they cannot raise the money to get out."[15] Even for those defendants that are in the workforce, the high bond amounts set by Cook County judges would frequently require them to deposit a substantial portion of their annual income in order to secure their release—as of November 2016, the average monetary bond in Cook County was over $70,000, significantly more than the $54,648 median household income in the county.[16]

Reports from the last five years show that this disturbing trend has continued. A 2012 report on the bond system by the Justice Advisory Council of Cook County found that over two-thirds of pretrial detainees had a cash bond set at their bond hearing, and the "large majority . . . are unable to post the necessary bond to achieve release."[17] A 2012 research bulletin put out by the Cook County Sheriff's Office showed that rates of release on personal recognizance were strikingly similar to those in the 1987 study: only 8% of those who appeared in Cook County bond court in 2011 received an I-bond.[18] Perhaps even more alarming, the bulletin showed that of those defendants eligible for release on bond, approximately half were required to post $10,000 or more to secure their release.[19]

A 2014 operational review of Cook County's pretrial system undertaken by the Illinois Supreme Court and Administrative Office of the Illinois Courts found that despite the statute's direction "to set monetary bail only when no other conditions of release" are sufficient, money bond was often set as a matter of course, in a process that "generally takes 30 seconds or less per defendant—oftentimes less than 10 seconds."[20] The report noted that although there was at one time an initiative to review the "significant percentage" of cases in which defendants remained

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[14] *Id.* (emphasis added).

[15] *Id.* at 37–38.

[16] *See* Board of Commissioners of Cook County, Criminal Justice Committee, Public Hearing Notice and Agenda 3 (Nov. 17, 2016), *available at* http://cook-county.granicus.com/MediaPlayer.php?view_id=2&clip_id=1676.

[17] JAC REPORT, *supra* note 3, at 3.

[18] OLSON & TAHERI, *supra* note 3, at 5.

[19] *Id.* at 6.

[20] ILLINOIS SUPREME COURT & ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS, CIRCUIT COURT OF COOK COUNTY PRETRIAL OPERATIONAL REVIEW 15, 45 (Mar. 2014) [hereinafter PRETRIAL OPERATIONAL REVIEW].

in custody due to their inability to post a relatively low cash bond (and thus were detained "due to indigence"), that activity was "phased out."[21]

Although a 2016 review of Cook County's Central Bond Court showed modest improvement in the percentage of defendants released pretrial (largely due to the increased use of electronic monitoring as a condition of release), it also showed staggeringly high bond amounts for defendants for whom financial conditions were set.[22] The study showed that the average D-bond was $71,878, and of the 880 defendants who received D-bonds, less than 5% had a bond of less than $10,000.[23] It is therefore unsurprising that only 220 of those defendants (25%) were able to post bond and secure their release within 31 days.[24] Perhaps most discouragingly, the study revealed "a wide disparity in outcomes" depending on the presiding judge, finding that "[b]ond type and bond amount proved to be inconsistent even when controlling for defendants' backgrounds and charges."[25]

New risk assessment measures rolled out in 2015 and 2016 have led to some improvement in the proportion of Cook County defendants released without monetary conditions, and in 2016, Circuit Court Chief Judge Timothy Evans described Cook County as "in a transition period regarding pretrial detention."[26] But other reports from 2016, including the Central Bond Court review, have shown that Cook County judges are not following the recommendations of the pretrial services office.[27] This has prompted concern from Illinois Supreme Court Chief Justice Anne Burke about bond court judges' "unwillingness to apply the risk assessments," and her observation that Cook County judges continue to "refuse to allow eligible individuals to be released on their own recognizance and, instead, continue to require large cash bonds, even for relatively minor, nonviolent crimes."[28]

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[21] *Id.* at 50.

[22] SHERIFF'S JUSTICE INSTITUTE, CENTRAL BOND COURT REPORT 2 (Apr. 2016) [hereinafter 2016 BOND COURT REPORT].

[23] *Id.* at 1, 2.

[24] *Id.* at 1.

[25] *Id.*; *see also id.* at 13–16 (directly comparing bond outcomes for defendants with similar charges and backgrounds).

[26] Press Release, Statement from Chief Judge Timothy C. Evans (Oct. 24, 2016), *available at* http://www.cookcountycourt.org/MEDIA/ViewPressRelease/tabid/338/ArticleId/2485/Statement-from-Chief-Judge-Timothy-C-Evans.aspx.

[27] 2016 BOND COURT REPORT, *supra* note 22, at 9–10 (demonstrating the disparity between recommendations of pretrial services and bond decisions made by Cook County judges).

[28] Frank Main, *Cook County Judges Not Following Bail Recommendations: Study*, CHICAGO SUN TIMES, July 3, 2016, http://chicago.suntimes.com/news/cook-county-judges-not-following-bail-recommendations-study-find/.

Fortunately, momentum is growing in Cook County for meaningful reform of the pretrial process. In November 2016, the Cook County Board of Commissioners' Criminal Justice Committee held a public hearing focused on the prevalence of monetary bond, at which a number of reform advocates testified about the legal and policy shortcomings of Cook County's wealth-based pretrial system.[29] Major Cook County stakeholders have also publicly advocated for reform, including Cook County Sheriff Tom Dart, who has proposed abolishing cash bond in Cook County altogether.[30] Most recently, State's Attorney Kim Foxx and the Illinois Supreme Court each announced significant reforms in hopes of reducing the number of indigent defendants detained until trial.[31] Under the reform announced by State's Attorney Foxx in June, prosecutors would recommend I-bonds (i.e., release on personal recognizance) for defendants who do not present a risk of violence or flight.[32] And a bill introduced in the Illinois House in February 2017, HB3421, would abolish money bail in Illinois. However, despite these steps forward, significant work remains to be done to ensure that defendants in Cook County are no longer jailed solely because they are poor.

II. COOK COUNTY'S WEALTH-BASED PRETRIAL DETENTION SCHEME IS ILLEGAL

Discussing the well-publicized overcrowding of the Cook County Jail, a three-judge panel of one federal district court recently observed that "[m]any of the pretrial detainees in the Cook County Jail would . . . be bailed on their own recognizance, or on bonds small enough to be within their means to pay, were it not for the unexplained reluctance of state judges in Cook County to set affordable terms for bail."[33] Although the court found that the constitutionality of Cook County's bail practices was not before it, it appears highly likely that Cook County's wealth-based approach to pretrial release violates the U.S. and Illinois constitutions, as well as Illinois state law.

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[29] For a video of the full hearing, a list of speakers, and key documents presented at the meeting, see http://cook-county.granicus.com/MediaPlayer.php?view_id=2&clip_id=1676.

[30] Frank Main, *Get Out of Jail Free? Sheriff Proposes Scrapping Cash-Bond System*, CHICAGO SUN TIMES, Nov. 15, 2016, http://chicago.suntimes.com/news/sheriff-tom-dart-proposing-to-scrap-illinois-cash-bond-system/.

[31] *See* Steve Schmadeke, *Foxx Agrees to Release of Inmates Unable to Post Bonds of Up To $1,000 Cash*, CHICAGO TRIBUNE, Mar. 1, 2017, http://www.chicagotribune.com/news/local/breaking/ct-kim-foxx-bond-reform-met-20170301-story.html; Press Release, Illinois Supreme Court, Illinois Supreme Court Adopts Statewide Policy Statement for Pretrial Services (Apr. 28, 2017), *available at* http://www.19thcircuitcourt.state.il.us/ArchiveCenter/ViewFile/Item/1203.

[32] Press Release, State's Attorney Foxx Announces Major Bond Reform (June 12, 2017), *available at* https://www.cookcountystatesattorney.org/news/state-s-attorney-foxx-announces-major-bond-reform. Although this policy is undoubtedly a positive step, it applies only to a defined list of charges and may still result in the recommendation of unaffordable cash bail in some cases. And of course, the policy is not binding on Cook County judges, who may continue to set high cash bail notwithstanding the recommendations of the prosecutor in a given case.

[33] *United States v. Cook Cty., Ill.*, 761 F. Supp. 2d 794, 800 (N.D. Ill. 2011).

Both federal and state judicial and legislative bodies have abolished schemes that systematically discriminate against and imprison accused persons solely because they cannot afford bail. The federal government has endorsed these reforms, and in March 2016 issued guidance explicitly instructing judicial and executive officers nationwide that "*any* bail practices that result in incarceration based on poverty violate the Fourteenth Amendment."[34] Consequently, Cook County's current practices expose it to significant litigation risks. In fact, Cook County's bail practices are already the subject of at least one lawsuit—in October 2016, a putative class of pretrial detainees filed suit against county judges and the county sheriff, alleging that Cook County's practice of detaining release-eligible defendants solely because they cannot afford to post the required bail violates the federal and Illinois constitutions, as well as Illinois state law.[35]

Importantly, the legal infirmities of Cook County's pretrial system persist in spite of the fact that Illinois is one of several states to have eliminated commercial bail bonds. Under Illinois law, a defendant's bond may not be paid by a professional bail bondsman.[36] Instead, and as described in more detail below, defendants eligible for bail in Illinois are required in most cases to deposit ten percent of their total bail directly with the court to secure their release.[37] While this system may not suffer from all of the same legal infirmities as those in states with commercial bail bonds, the results are the same: indigent and low-income defendants who cannot afford to pay the required deposit are frequently detained for weeks or months pending trial, despite being otherwise eligible for pretrial release. This practice conflicts sharply with one of the primary purposes of the abolition of commercial bail bonds in Illinois—as the Illinois Supreme Court has explained, "the object of the statutes was to reduce the cost of liberty to arrested persons awaiting trial."[38]

Unsurprisingly, numerous criminal justice, municipal, and legal professional organizations have taken positions opposing wealth-based bail practices similar to those used in

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[34] U.S. Dep't of Justice, Civil Rights Division, Dear Colleague Letter (Mar. 14, 2016), at 7 (emphasis added), https://www.justice.gov/crt/file/832461/download.

[35] *See Robinson, et al. v. Martin, et al.*, Case No. 2016-CH-13587 (Cook Cty., Ill. Oct. 14, 2016). Sheriff Dart was subsequently dismissed from the case.

[36] *See* 725 ILCS 5/110-15 ("The provisions of Sections 110-7 and 110-8 of this Code are exclusive of other provisions of law for the giving, taking, or enforcement of bail."); 725 ILCS 5/110-13; 725 ILCS 5/103-9 (prohibiting the practice of "bounty hunting" in Illinois); *Schilb v. Kuebel*, 46 Ill. 2d 538, 544, aff'd, 404 U.S. 357 (1971) (explaining that "the central purpose of the legislature in enacting sections 110-7 and 110-8 was to severely restrict the activities of professional bail bondsmen").

[37] 725 ILCS 5/110-7(a) ("The person for whom bail has been set shall execute the bail bond and deposit with the clerk of the court before which the proceeding is pending a sum of money equal to 10% of the bail, but in no event shall such deposit be less than $25.").

[38] *Schilb*, 46 Ill. 2d at 544.

Cook County, including the American Bar Association,[39] National Association of Pretrial Services Agencies,[40] National Association of Counties,[41] American Jail Association,[42] International Association of Chiefs of Police,[43] American Council of Chief Defenders,[44] American Probation and Parole Association,[45] the Conference of State Court Administrators,[46] and the

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[39] AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE, Standard 10-1.4(e)–(f) (3d ed. 2007), at 44 (prohibiting "the imposition of financial conditions that the defendant cannot meet"), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf.

[40] NAT'L ASS'N OF PRETRIAL SERVICES AGENCIES, STANDARDS ON PRETRIAL RELEASE 4 (3d ed. 2004) (citing as a "key principle[]" the use of financial conditions "only when no other conditions will reasonably assure the defendant's appearance and at an amount that is within the ability of the defendant to post"), https://www.pretrial.org/download/performance-measures/napsa%20standards%202004.pdf.

[41] NAT'L ASS'N OF COUNTIES, THE AMERICAN COUNTY PLATFORM AND RESOLUTIONS 2011–2012: JUSTICE AND PUBLIC SAFETY 5 (2012) ("Counties should establish written policies that ensure . . . the least restrictive conditions during the pretrial stage," including release on recognizance, non-financial supervised release, and preventive detention.), http://www.naco.org/sites/default/files/documents/American%20County%20Platform%20and%20Resolutions%20cover%20page%2011-12.pdf.

[42] AM. JAIL ASS'N, RESOLUTION ON PRETRIAL JUSTICE (Oct. 24, 2010) (acknowledging the benefits of pretrial supervision as an alternative to incarceration), https://www.pretrial.org/download/policy-statements/AJA%20Resolution%20on%20Pretrial%20Justice%202011.pdf.

[43] INT'L ASS'N OF CHIEFS OF POLICE, LAW ENFORCEMENT'S LEADERSHIP ROLE IN THE PRETRIAL RELEASE AND DETENTION PROCESS 3, 6 (2011) (noting that "financial bail has little or no bearing on whether a defendant will return to court and remain crime-free"), http://www.pretrial.org/wp-content/uploads/2013/02/IACP-LE-Leadership-Role-in-Pretrial-20111.pdf.

[44] AM. COUNCIL OF CHIEF DEFENDERS, POLICY STATEMENT ON FAIR AND EFFECTIVE PRETRIAL JUSTICE PRACTICES 14 (2011) (noting that "when financial conditions are to be used, bail should be set at the lowest level necessary to ensure the individual's appearance and with regard to a person's financial ability to post bond"), https://www.pretrial.org/download/policy-statements/ACCD%20Pretrial%20Release%20Policy%20Statement%20June%202011.pdf.

[45] AM. PROBATION & PAROLE ASS'N, RESOLUTION, PRETRIAL SUPERVISION (June 2010) ("[P]retrial supervision has been proven a safe and cost effective alternative to jail for many individuals awaiting trial."), https://www.appa-net.org/eweb/Dynamicpage.aspx?site=APPA_2&webcode=IB_Resolution&wps_key=3fa8c704-5ebc-4163-9be8-ca48a106a259.

[46] *See generally* CONFERENCE OF STATE COURT ADMINISTRATORS, 2012–2013 POLICY PAPER: EVIDENCE-BASED PRETRIAL RELEASE (2013), http://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/Evidence%20Based%20Pre-Trial%20Release%20-Final.ashx.

Conference of Chief Justices.[47] As noted by Alec Karakatsanis, founder of the Civil Rights Corps and Co-Chair of the ABA Committee on Pretrial Justice, "[t]he absurdity, unfairness, and unconstitutionality of the cash bail system has been definitively condemned by the American Bar Association, the Department of Justice, leading scholars, police chiefs, public defenders, prosecutors, the Cook County Sheriff, the CATO Institute, and a long line of Presidents, Attorney Generals, distinguished judges."[48] Nevertheless, unjust and unconstitutional wealth-based pretrial systems persist across the United States, including in Cook County.

A. Cook County's Judicial Officers Routinely Violate the Illinois Bail Statute

Pretrial release and bail in Illinois are governed primarily by the Illinois Bail Statute, 725 ILCS 5/110-1 *et seq.* For all but a handful of specified—mostly violent—charges, the statute establishes a presumption of release. Thus, the law states that "[a]ll persons shall be bailable before conviction," *except* in the case of certain offenses, and even then, only "where the proof is evident or the presumption great that the defendant is guilty."[49] Those crimes include capital offenses, offenses for which life imprisonment may be imposed, and felony offenses carrying mandatory prison sentences where the court, after a hearing, determines that release of the defendant "would pose a real and present threat to the physical safety of any person or persons."[50] In determining whether a defendant charged with one of these offenses poses the "real and present threat" required for pretrial detention, the Bail Statute explicitly places the burden of proof on the State, which must demonstrate by clear and convincing evidence that "no condition or set of conditions . . . can reasonably assure the physical safety of any other person or persons."[51] If the court determines that pretrial detention is necessary, it must include in its order for detention a summary of the evidence of the defendant's culpability and its reasons for holding the defendant without bail.

For defendants whose offenses do not fall into the above categories, the court must determine the appropriate conditions of release (either financial or non-financial) by taking into account a list of 36 factors set out in Section 110-5(a) of the statute. The stated purpose of these factors is to aid the court in determining the conditions, if any, necessary to reasonably assure the appearance of the defendant and the safety of the community. In addition to a number of factors focused on the nature and circumstances of the charged offense, the statute requires that courts consider the characteristics and circumstances of the defendant, including the

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[47] CONFERENCE OF CHIEF JUSTICES, RESOLUTION 3 (Jan. 30, 2013) (endorsing the 2012–2013 COSCA policy paper), http://www.pretrial.org/wp-content/uploads/2013/05/CCJ-Resolution-on-Pretrial.pdf.

[48] Karakatsanis, *supra* note 1.

[49] 725 ILCS 5/110-4(a).

[50] *Id.* The statute also specifies three additional crimes that may be non-bailable: stalking, weapons charges taking place in or near a school under Ill. Crim. Code 24-1(a)(4), and making or attempting to make a terroristic threat under Ill. Crim. Code 29D-20.

[51] 725 ILCS 5/110-4(c); 725 ILCS 5/110-6.1(b)(3) & (c)(2); *see also* 725 ILCS 5/110-6.3 (setting forth a nearly identical procedure for defendants charged with stalking offenses).

defendant's financial resources and employment, and the source of any bail funds that the defendant might tender.[52] The court must also consider the sentence or fine that would be applicable if the defendant were convicted of the charged offense.[53]

Illinois courts have broad authority to release defendants on personal recognizance, without additional conditions. When the court determines "from all the circumstances" that the defendant "will appear as required . . . and the defendant will not pose a danger to any person or the community and that the defendant will comply with all conditions of bond," "the defendant may be released on his or her own recognizance."[54] Where the court finds that additional conditions of release are reasonably necessary "to assure the defendant's appearance in court, protect the public from the defendant, or prevent the defendant's unlawful interference with the orderly administration of justice," the court may impose additional, non-financial conditions of release set forth in the statute. Section 110-10(b) provides courts with a variety of options in this regard, from more minor conditions (curfews, work or study requirements, drug testing, or limitations on possession of weapons) to those that are more significant (medical or psychiatric treatment, electronic monitoring, remaining in the custody of a person or organization, restraining orders, or limitations on travel).

The statute specifically states that money bail is to be used as a last resort: "Monetary bail should be set *only* when it is determined that *no other conditions of release* will reasonably assure the defendant's appearance in court, that the defendant does not present a danger to any person or the community and that the defendant will comply with all conditions of bond."[55] In the event the court finds that financial conditions are necessary, the Bail Statute sets out explicitly in Section 110-5(b) the requirements for money bail. Those requirements make clear that money bail is not intended to be used in a manner that results in the pretrial detention of any defendant. First, the statute provides that the defendant's address be provided, kept up to date, and remain "a matter of public record with the clerk of the court." Second, the statute requires that any financial condition be "[n]ot oppressive." Third, financial conditions must be "[c]onsiderate of the financial ability of the accused." The statute provides that defendants for whom money bail is set "shall execute the bail bond and deposit with the clerk of the court . . . a sum of money equal to 10% of the bail."[56] After making this deposit, "the person shall be released from custody subject to the conditions of the bail bond."[57]

None of these provisions suggest that financial conditions may be set at a level that results in the pretrial incarceration of a person because he or she cannot afford to pay the required amount. To the contrary, the statute sets forth in great detail the procedures that must

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[52] 725 ILCS 5/110-5(a).

[53] *Id.*

[54] 725 ILCS 5/110-2.

[55] *Id.* (emphases added).

[56] 725 ILCS 5/110-7(a). The statute provides that the deposit must not be less than $25.

[57] 725 ILCS 5/110-7(b).

be undertaken to detain a defendant until trial. Namely, for the serious crimes identified in the statute as "non-bailable," the court may impose pretrial detention only where the State demonstrates at a hearing, by clear and convincing evidence, that the defendant poses a risk of dangerousness, and the court makes written findings to that effect. For all other "bailable" offenses, the court may release the defendant on his or her own recognizance or—where necessary to reasonably assure the appearance of the defendant, the safety of the community, and compliance with the conditions of bond—impose additional conditions of release. If "no other conditions of release" would suffice and the court determines that money bail is required, the statue contemplates that it will be set in an amount that is within the means of the defendant to post.[58] The statute does not provide for the protracted, pretrial incarceration of a defendant solely because that defendant cannot afford to pay the required bail deposit.

Courts in Cook County routinely fail to follow the Bail Statute's requirements in two primary ways. First, many courts have failed to observe the statute's requirement that monetary bail "be set *only* when it is determined that *no other conditions of release*" would sufficiently protect the public and assure the appearance of the defendant at trial. As explained above, Cook County judges set secured money bail in the vast majority of cases in which defendants are eligible for release, following bond hearings that last only a matter of seconds. Financial conditions are thus set reflexively, without meaningful consideration of alternative, non-financial conditions of release that would suffice to protect the public and ensure the appearance of the defendant.

Second, courts consistently set money bail in amounts beyond the ability of defendants to afford without consideration of the individual circumstances of each defendant. This practice runs afoul of Section 110-5(a)'s requirement that courts consider the financial resources of the accused before setting conditions of release, and also violates the statute's requirement that any monetary bail be set in an amount that is "[n]ot oppressive" and "[c]onsiderate of the financial ability of the accused."[59] As a result, arrestees in Cook County habitually face extended periods of pretrial detention not as a result of their dangerousness to the community or their risk of non-

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[58] Many other provisions of the statute reinforce this conclusion. Section 110-10, which sets out the conditions of *release* that a court may impose on a defendant, is titled "Conditions of bail bond." Other parts of the statute refer to "releas[ing] the person on bail," 725 ILCS 5/110-5.1(c), individuals being "free on bail," *see, e.g.*, 725 ILCS 5/110-6(e), and the possibility of an "offense committed on bail," 725 ILCS 5/110-6(b). Even when a defendant is charged with a crime while released on bail, the statute requires that the court hold a hearing on the bond violation "within 10 days from the date the defendant is taken into custody or the defendant may not be held any longer without bail." 725 ILCS 5/110-6(f)(1).

This interpretation is also supported by the Illinois Supreme Court Rules regarding bail, which prescribe limited preset bail schedules "to avoid undue delay *in freeing* certain persons accused of an offense when, because of the hour or the circumstances, it is not practicable to bring the accused before a judge." Ill. Sup. Ct. R. art. V, pt. B. (emphasis added). The Rules also specifically allow for defendants to whom bail schedules would apply to be released on unsecured "individual bonds" if they are "unable to secure release from custody" under the applicable bail schedule. *Id.* at art. V, pt. D, R. 553(d).

[59] 725 ILCS 5/110-5(b).

appearance, but solely because they are unable to pay bail. The extreme levels at which bail amounts are consistently set (and correspondingly high rates of pretrial detention) expose Cook County judicial officers to the claim that they are using unlawfully high bail amounts as a replacement for the hearing, clear and convincing evidence, and written findings required to order pretrial detention under the statute. Courts across the country have found such approaches illegal,[60] and indeed this is one of the specific practices the federal government sought to abolish when it reformed the federal bail system.[61]

The Illinois Supreme Court has held that using high bail as a tool to effect the pretrial detention of defendants violates state law. In *People ex rel. Sammons v. Snow*, the petitioner's bail was set at $50,000 for a charge of vagrancy, which carried a maximum punishment of up to six months' imprisonment and a $100 fine.[62] In setting the bail, the judge explicitly stated: "If I thought he would get out on that I would make it more." The court found that "[t]he amount of $50,000 could have no other purpose than to make it impossible for him to give the bail and to detain him in custody, and is unreasonable."[63] Because setting bail "for the purpose of keeping [the defendant] in jail" effectively "disregarded" the defendant's right to bail, the court vacated and reduced the petitioner's bail.[64] Other courts in Illinois have come to the same conclusion.[65]

The Illinois legislature has made clear that in implementing a pretrial bail system, the law "shall be liberally construed to effectuate the purpose of relying upon contempt of court proceedings or criminal sanctions *instead of financial loss*" to assure the appearance of the

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[60] *See, e.g., State v. Anderson*, 127 A.3d 100, 127 (Conn. 2015) (quoting *State v. Olds*, 370 A.2d 969 (Conn. 1976)) (noting that Connecticut's bail clause "prevents a court from fixing bail in an unreasonably high amount so as to accomplish indirectly what it could not accomplish directly, that is, denying the right to bail"); *Mendonza v. Commonwealth*, 673 N.E.2d 22, 25 (Mass. 1996) (noting that the similar Massachusetts rule "should end any tendency to require high bail as a device for effecting preventive detention because it directs that all decisions based on dangerousness be made under the procedures set forth for that specific purpose"); *State v. Brown*, 338 P.3d 1276, 1292 (N.M. 2014) ("Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether.").

[61] *See, e.g., United States v. Orta*, 760 F.2d 887, 890 (8th Cir. 1985) (noting that changes to federal law "eliminate the judicial practice of employing high bail to detain defendants considered dangerous and substitute a procedure allowing the judicial officer openly to consider the threat a defendant may pose"); *see also United States v. McConnell*, 842 F.2d 105, 109 (5th Cir. 1988) (explaining that the Bail Reform Act "proscrib[ed] the setting of a high bail as a de facto automatic detention practice").

[62] 340 Ill. 464 (1930).

[63] *Id.* at 469.

[64] *Id.*

[65] *See, e.g., People v. Ealy*, 49 Ill. App. 3d 922, 934 (1977) ("Believing defendant to be a danger to the community, Judge Wendt stated that he purposely set bond high enough to detain defendant until 'some medical people do something with the man.' Yet excessive bail should not be required for the purpose of preventing a prisoner from being admitted to bail.").

defendant and the safety of the community.[66] Cook County's pretrial bail practices routinely fail to follow these principles.

On June 9, 2017, Governor Bruce Rauner signed a bill into law reinforcing the Illinois Bail Statute's existing preference for non-monetary conditions of release.[67] While the bill bolsters existing requirements by stating a "presumption that any conditions of release imposed shall be non-monetary in nature" and requiring courts to "consider the defendant's socio-economic circumstance" [68] and "impose the least restrictive conditions or combination of conditions necessary," it falls short of setting clear limitations on the use of money bail.[69]

Unfortunately, while this law might appear to take a step toward reform, it places no limits on the imposition of unaffordable bail and is unlikely to curb the use of money bail as a means to detain individuals pretrial. Instead, the law will merely serve as another reminder that the existing provisions of Illinois' Bail Statute disfavor imposing money bail absent consideration of an individual's ability to pay—without forcing any tangible changes in the way bond courts actually function.

B. Cook County's Wealth-Based Pretrial Detention Scheme Violates the Fourteenth Amendment

It is evident from the reports and studies cited above, as well as the daily realities of courtrooms and jails in Cook County, that the county's approach to bond disproportionately and irrationally affects the poor. The Supreme Court has long held that such practices violate the Fourteenth Amendment of the U.S. Constitution. Specifically, the Court has found that in criminal proceedings, "a State can no more discriminate on account of poverty than on account of religion, race, or color."[70] These practices likely also violate Illinois' own constitution.[71]

In *Griffin v. Illinois*, the Supreme Court invalidated an Illinois law that prevented indigent defendants from obtaining a trial transcript to facilitate appellate review, explaining that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of

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[66] 725 ILCS 5/110-2 (emphasis added).

[67] Bail Reform Act of 2017, Ill. Legis. Serv. P.A. 100-1 (West).

[68] *Id.* § 110-5(a-5).

[69] *Id.*

[70] *Griffin v. Illinois*, 351 U.S. 12, 17–18 (1956).

[71] The Illinois Constitution contains a due process and equal protection clause, Ill. Const. 1970 art. I, § 2, and the Supreme Court of Illinois has made clear that because "[o]ur due process and equal protection clauses are nearly identical to their federal counterparts," they are interpreted coextensively unless there is a specific reason to depart from the federal interpretation. *Hope Clinic for Women, Ltd. v. Flores*, 2013 IL 112673, ¶ 49, 991 N.E.2d 745, 758 (Ill. 2013).

money he has."[72] Since *Griffin*, the Supreme Court has held in a long line of cases that individuals may not be incarcerated solely because of their inability to pay.

In *Williams v. Illinois*, the Court confirmed that a state may not subject a defendant to a prison sentence longer than the statutory maximum because he or she cannot afford to pay a fine.[73] The Court explained that "once the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency."[74] The Court extended its holding in *Williams* the following year, holding that a state may not impose a prison term solely because a defendant is indigent and cannot afford to pay a fine imposed under a fine-only statute.[75]

In *Bearden v. Georgia*, the Court further held that a defendant's probation may not be revoked for failure to pay a fine or restitution, absent evidence that the failure to pay was willful or that alternative forms of punishment would be inadequate.[76] The Court explained that "[t]o do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment."[77] As a result, the Court held that both the Equal Protection and Due Process Clauses of the Fourteenth Amendment prohibit "punishing a person for his poverty."[78]

The longstanding principle that the criminal justice system should not operate differently depending on the financial resources of the defendant applies with even greater force in the pretrial detention context. In *United States v. Salerno*, the court considered the constitutionality of the Bail Reform Act of 1984, which permits pretrial detention after an adversarial hearing in the face of "clear and convincing" evidence that no conditions of release would adequately assure the safety of the community.[79] Upholding the constitutionality of the statute, the Court made clear that individuals have a constitutionally recognizable "strong interest in liberty" when it comes to pretrial release.[80] The Court further confirmed that "[i]n

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[72] 351 U.S. at 19.

[73] 399 U.S. 235, 240–41 (1970).

[74] *Id.* at 241–42.

[75] *See Tate v. Short*, 401 U.S. 395, 398 (1971).

[76] 461 U.S. 660, 665 (1983).

[77] *Id.* at 672–73.

[78] *Id.* at 671.

[79] 481 U.S. 739 (1987).

[80] *Id.* at 750.

our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[81]

Courts across the country have invoked this line of cases to find that wealth-based pretrial detention schemes are unconstitutional.[82] Most recently, in April 2017, a federal district court in Texas ruled that Harris County's practice of detaining misdemeanor defendants until trial solely because they cannot afford cash bail violates the Fourteenth Amendment.[83] The court explained that its ruling did not amount to a "right to affordable bail." To the contrary, it acknowledged that Texas judges might in limited cases arrive at a high bail amount after weighing the required state law factors. But the court held that judges "cannot, consistent with the federal Constitution, set that bail on a secured basis requiring up-front payment from indigent misdemeanor defendants otherwise eligible for release, thereby converting the inability to pay into an automatic order of detention without due process and in violation of equal protection."[84] Finding that the plaintiffs had a clear likelihood of success at trial, the court issued an injunction prohibiting Harris County from continuing its "consistent and systematic policy and practice of imposing secured money bail as de facto orders of pretrial detention in misdemeanor cases."[85]

The United States Department of Justice has repeatedly taken a similar position, and has filed statements of interest and amicus briefs in support of the proposition that certain wealth-based bail practices violate the Fourteenth Amendment. For example, in *Walker v. City of Calhoun*, pretrial detainees challenged the City of Calhoun's bail system, which mandated payment of a fixed amount without consideration of other factors, including risk of flight, risk of dangerousness, and financial resources.[86] The trial court invoked the *Griffin* and *Bearden* line of cases, finding that the principle of those cases was especially applicable "where the individual being detained is a pretrial detainee who has not yet been found guilty of a crime."[87] The court found that the system violated the Equal Protection Clause since "incarceration of an individual

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[81] *Id.* at 755.

[82] *See, e.g., Pugh v. Rainwater*, 572 F.2d 1053, 1056–57 (5th Cir. 1978) (en banc) (recognizing that bail should serve the limited function "of assuring the presence of [the] defendant" at trial, and thus "imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible"); *see also Williams v. Farrior*, 626 F. Supp. 983, 985 (S.D. Miss. 1986) ("[I]t is clear that a bail system which allows only monetary bail and does not provide for any meaningful consideration of other possible alternatives for indigent pretrial detainees infringes on both equal protection and due process requirements."); *Alabama v. Blake*, 642 So. 2d 959, 968 (Ala. 1994) (also finding that a wealth-based pretrial bail scheme "violates an indigent defendant's equal protection rights guaranteed by the United States Constitution").

[83] *O'Donnell v. Harris County, Texas*, No. 16-cv-01414, 2017 WL 1735456 (S.D. Tex. Apr. 28, 2017).

[84] *Id.* at 89.

[85] *Id.* at 3.

[86] No. 4:15-cv-0170, Order Granting Preliminary Injunction, Dkt. No. 40 (N.D. Ga. Jan. 28, 2016), at 48–50.

[87] *Id.* at 51.

because of the individual's inability to pay a fine or fee is impermissible," and issued a preliminary injunction halting the city's unconstitutional bail practices.[88] The city appealed to the Eleventh Circuit Court of Appeals, where the Justice Department filed a brief taking the position that bail practices that result in the pretrial incarceration of defendants due to their indigence violate the Fourteenth Amendment.[89]

The Justice Department likewise filed a statement of interest in *Varden v. City of Clanton*.[90] There, the district court approved a settlement agreement creating a new bail scheme and confirmed that the previous scheme was unconstitutional because it allowed for secured bail "without an individualized hearing regarding the person's indigence and the need for bail or alternatives to bail."[91] In doing so, the court observed that "[c]riminal defendants, presumed innocent, must not be confined in jail merely because they are poor. Justice that is blind to poverty and indiscriminately forces defendants to pay for their physical liberty is no justice at all."[92]

As these cases make clear, Cook County's current pretrial scheme is ripe for constitutional challenge under the Fourteenth Amendment and such an attack could very well garner the support of the Justice Department. Indeed, and as noted above, an October 2016 class action lawsuit has raised precisely this claim, arguing that Cook County's pretrial practices violate the Due Process and Equal Protection clauses of the Fourteenth Amendment.[93] The suit also challenges Cook County's bail practices on Eighth Amendment grounds, and in light of Cook County's consistent imposition of extremely high bail amounts, it appears likely that the county's practices routinely violate the Eighth Amendment's right against excessive bail.

C. Cook County's Wealth-Based Pretrial Detention Scheme Violates the Eighth Amendment

In addition to the Fourteenth Amendment's Equal Protection and Due Process clauses, wealth-based pretrial detention schemes like the one used in Cook County contravene the

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[88] *Id.* at 49–50 (citing *Tate*, 401 U.S. at 397–98).

[89] *See* U.S. Amicus Br., *Walker v. Calhoun*, No. 16-1052 (11th Cir.) (filed Aug. 18, 2016), *available at* https://www.schr.org/files/post/files/2016.08.18%20USDOJ%20AMICUS%20BR.pdf. On March 9, 2017, the Eleventh Circuit remanded the case to the district court for further proceedings, finding that the language of the injunction did not comply with Federal Rule of Civil Procedure 65. *Walker v. City of Calhoun*, No. 16-10521, 2017 WL 929750 (Mar. 9, 2017). The Court of Appeals did not address the substantive propriety of the injunction. *Id.* at *2.

[90] U.S. Dep't of Justice, Statement of Interest of the United States, No. 2:15-cv-34, Dkt. No. 26 (M.D. Ala. Feb. 13, 2015), *available at* https://www.justice.gov/file/340461/download.

[91] No. 2:15-cv-34, Opinion, Dkt. No. 76 (M.D. Ala. Sept. 14, 2015), at 8.

[92] *Id.* at 11.

[93] *Robinson, et al. v. Martin, et al.*, Case No. 2016-CH-13587 (Cook Cty., Ill. Oct. 14, 2016).

Eighth Amendment's proscription of excessive bail.[94] Again, this practice likely violates Illinois' constitution as well.[95]

The seminal case interpreting the Excessive Bail Clause is *Stack v. Boyle*.[96] In *Stack*, the Supreme Court considered the meaning of "excessive" bail, and confirmed that bail has a single purpose: to assure the presence of the accused at trial.[97] Thus, "[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment."[98]

Under *Stack*, "the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant."[99] Other courts have thus held that bail amounts are excessive when they are not narrowly tailored to this purpose.[100] Available evidence suggests that this standard is not being met in Cook County. This reality is more than a legal technicality; it gets to the very heart of judicial fairness and integrity. As Justice Vinson wrote in *Stack*, "[t]o infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act. Such conduct would inject into our own system of government the very principles of totalitarianism which Congress was seeking to guard against."[101]

III. COOK COUNTY'S WEALTH-BASED PRETRIAL DETENTION SCHEME IS IRRATIONAL, INEFFECTIVE, UNNECESSARILY COSTLY, AND DISPROPORTIONATELY AFFECTS RACIAL MINORITIES

While the adoption of a validated risk assessment tool has led to modest improvements in Cook County's pretrial system, arrestees continue to face an arbitrary, expensive, and biased system in which their freedom depends more on the judge they appear before and their own financial means than on whether their release would threaten public safety or result in a failure

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[94] U.S. Const. amend. VIII. The Supreme Court has held that the Eighth Amendment's proscription of excessive bail applies to the States through the Fourteenth Amendment. *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971).

[95] Ill. Const. 1970, art. I, § 9 (providing that "[a]ll persons shall be bailable by sufficient sureties" with limited exceptions). Illinois courts have held that "[a] defendant has a constitutional right to reasonable bail," under both the Illinois and federal constitutions. *People v. Valentin*, 135 Ill. App. 3d 22, 46 (citing Section 9 of the Illinois Constitution and the Eighth Amendment of the U.S. Constitution).

[96] 342 U.S. 1 (1951).

[97] *Id.* at 5.

[98] *Id.*

[99] *Id.*

[100] *See, e.g., United States v. Arzberger*, 592 F. Supp. 2d 590, 605 (S.D.N.Y. 2008) ("[I]f the Excessive Bail Clause has any meaning, it must preclude bail conditions that are (1) more onerous than necessary to satisfy legitimate governmental purposes and (2) result in deprivation of the defendant's liberty.").

[101] 342 U.S. at 6.

to appear. As a 2016 review by the Cook County Sheriff's Office demonstrated, judges rarely follow the risk assessment-based release recommendations made by pretrial services, and frequently reach wildly different release decisions for similarly situated arrestees.[102] Without meaningful reforms, Cook County's pretrial detention scheme will continue to unnecessarily deprive individuals of their liberty, at great cost to taxpayers, while failing to advance the goals of reducing flight and protecting public safety.

A. Cook County's Wealth-Based Pretrial Detention Scheme is an Illegitimate, Ineffective, and Irrational Method of Protecting Public Safety

Cook County's pretrial bail scheme, as currently operated, is not properly or rationally related to the goal of protecting public safety for at least three reasons.

First and foremost, money bail is *never* an appropriate tool for protecting public safety. If the government believes that an arrestee poses a legitimate threat to the community, the proper course is to hold a hearing to determine whether pretrial detention is necessary. Using money bail as an end run around established pretrial detention procedures is inappropriate, both from a legal and a policy standpoint.[103]

Furthermore, when release outcomes hinge on a detainee's access to money, wealthy defendants are able to secure release regardless of the threat they may pose to public safety. As a result, Cook County's current wealth-based system can actually lead to the release of higher-risk detainees, thus compromising public safety.[104] For example, a recent analysis by the Chicago Tribune found that "gang members facing felony gun charges often had little problem coming up with the cash to get out of jail, while nonviolent thieves and others languished behind bars, unable to post much lower bonds."[105] The Superintendent of the Chicago Police Department, Eddie Johnson, has echoed this concern, noting: "[i]f you had an organization, and your enforcers were your best people to get done what you wanted to do, wouldn't you spend every resource you had to keep them out?"[106]

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[102] 2016 BOND COURT REPORT, *supra* note 22, at 8-10.

[103] *See supra* Part II.A (discussing, in part, the pretrial detention procedures outlined in the Illinois Bail Statute).

[104] *See* INT'L ASS'N OF CHIEFS OF POLICE, RESEARCH ADVISORY COMMITTEE RESOLUTION 005.T14, at 15 (2014) (noting that money-based pretrial release systems enable over 50% of defendants who are rated higher risk to be released pretrial).

[105] Todd Lighty & David Heinzmann, *How a Revolving Door Bond System Puts Violent Criminals Back On Chicago's Streets*, CHICAGO TRIBUNE, May 5, 2017, http://www.chicagotribune.com/news/local/ breaking/ct-bond-witness-murder-20170504-story.html.

[106] Bill Ruthhart, *Chicago Police Superintendent Supports Bond Reforms For Gun Crimes*, CHICAGO TRIBUNE, May 7, 2017, http://www.chicagotribune.com/news/ct-eddie-johnson-bond-reform-met-20170507-story.html; *see also* Eddie T. Johnson, Superintendent, Chicago Police Dep't., Remarks at the City Club of Chicago: A

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Second, bail amounts are often set without appropriate consideration of an individual's actual risk to the community. As a result, the majority of individuals held on bond were arrested for non-violent offenses,[107] and many detainees rated as low-risk by a pretrial services risk assessment nevertheless face significant bail amounts. For example, during a 2016 review of bond hearings, the Cook County Sheriff's Office observed that 40% of the detainees who were recommended for "release with no conditions" under the County's risk assessment metric instead received D or C bonds,[108] requiring them to post part or all of the bond amount to secure release.[109] In fact, only 11% of these lowest-risk detainees were actually released as recommended—on their own recognizance, with no conditions attached. Moreover, the Sheriff's Office found that judges, when deciding whether to impose bail, only follow the County's risk-based assessment recommendations 15% of the time.[110] As a result, judges often fail to adequately assess each detainee individually and frequently reach unjustifiably different release decisions for similarly situated individuals.[111] This arbitrary and irrational system inflicts considerable harm on individual detainees and their families without advancing the County's interest in ensuring community safety.

Finally, in addition to the profound consequences of depriving individuals of their fundamental right to liberty, pointlessly jailing low-risk individuals can actually deteriorate community safety by increasing the likelihood that they will commit new crimes once released. A 2013 study by the Laura and John Arnold Foundation revealed that, "when held 2-3 days, low-risk defendants were almost 40 percent more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours, [and] low-risk defendants who were detained for 31 days or more offended 74 percent more frequently than those who were released within 24 hours."[112]

Candid Conversation with Tom Dart and Eddie Johnson (Dec. 6, 2016) (explaining that no matter how high bail is set, gangs will pay to get their members out).

[107] *See Jail Roulette: Cook County's Arbitrary Bond Court System*, INJUSTICE WATCH (Nov. 29, 2016), http://injusticewatch.org/interactives/jail-roulette/ [hereinafter *Jail Roulette*] ("Thirty to 40 percent of the cases each judge set bonds for involved defendants charged with felony possession of drugs, and close to three-quarters of the cases per judge were for nonviolent crimes.").

[108] Unlike D-Bonds which require detainees to post 10% of the bond amount, C-Bonds require detainees to pay the full cash value of the bond to secure release pending resolution of their cases. COMMUNITY RENEWAL SOCIETY, COOK COUNTY BOND COURT WATCHING PROJECT: FINAL REPORT 15 (Feb. 2016).

[109] 2016 BOND COURT REPORT, *supra* note 22, at 9; *see also Jail Roulette*, *supra* note 107, at 14 (providing examples of low-risk detainees receiving substantial cash bonds).

[110] 2016 BOND COURT REPORT, *supra* note 22, at 8.

[111] *See id.* at 13–16, 25 (comparing release determinations).

[112] *Pretrial Criminal Justice Research*, LJAF RESEARCH SUMMARY (Laura & John Arnold Found.), Nov. 2013, at 4 [hereinafter *Pretrial Criminal Justice Research*], *available at* http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief_FNL.pdf.

The fact is that Cook County's current reliance on cash bonds frequently deprives individuals of their fundamental rights with no corresponding benefit to the community. At best, individuals are needlessly denied liberty with no resulting improvement in public safety. At worst, public safety is actually eroded by the perverse results of the indiscriminate imposition of money bail. There is simply no justification for continuing to operate a system that exacerbates one of the very concerns it was purportedly established to address.

B. Cook County's Wealth-Based Pretrial Detention Scheme is Not Rationally Related to the Goal of Reducing the Risk of Flight

An individual's wealth does not determine how likely he or she is to appear in court. Studies have repeatedly shown that alternatives to cash bond can be equally effective at ensuring appearance, without the negative consequences of forcing detainees to purchase their freedom or languish in pretrial detention. For example, a 2013 study by the Pretrial Justice Institute found that "unsecured bonds are as effective at achieving court appearances as are secured bonds."[113] Additional studies have reached similar conclusions and noted that alternative conditions of release such as pretrial supervision result in equally good, if not better, appearance rates by defendants.[114]

The lack of a connection between low failure-to-appear ("FTA") rates and secured bail can be seen in the FTA rates of jurisdictions that have already moved away from (or tested alternatives to) money bail systems. For example:

- In the District of Columbia, approximately 85% of arrestees are released pretrial under the District's long-established supervised release program. Of all arrestees, nearly 90% return to appear in court.[115]
- In Kentucky, the court system saw FTA rates remain constant or decrease when it moved away from reliance on traditional money bail and toward a risk assessment and pretrial services system.[116]

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[113] JUSTICE POLICY INST., UNSECURED BONDS: THE AS EFFECTIVE AND MOST EFFICIENT PRETRIAL RELEASE OPTION 3 (Oct. 2013).

[114] *See, e.g.*, CHRISTOPHER T. LOWENKAMP & MARIE VANNOSTRAND, EXPLORING THE IMPACT OF SUPERVISION ON PRETRIAL OUTCOMES 17 (Nov. 2013) (finding that supervised defendants were significantly more likely to appear for court than unsupervised defendants); *see also* TARA BOH KLUTE & MARK HEVERLY, REPORT ON IMPACT OF HOUSE BILL 463: OUTCOMES, CHALLENGES AND RECOMMENDATIONS 6 (2012) (finding legislation shifting Kentucky's system toward risk-based pretrial supervision, as opposed to reliance on money bail, resulted in lower FTA rates).

[115] Clifford T. Keenan, *We Need More Bail Reform*, THE ADVOCATE FOR PRETRIAL JUSTICE (Pretrial Servs. Agency, D.C.), Sept. 2013.

[116] Klute & Heverly, *supra* note 114, at 6.

- A Colorado study found that a simple reminder call to defendants reduced FTA rates from 21% to 12%.[117]

- A Nebraska study found that even postcard reminders noticeably reduced FTA rates.[118]

- In Multnomah County, Oregon, a significant decrease in FTA rates was achieved by using automated call reminders. This approach resulted in a 41% reduction in non-appearances among individuals who received an automated call.[119]

The use of money bail is not just an ineffective mechanism for improving FTA rates—it may actually *increase* FTA rates in some situations. According to the Laura and John Arnold Foundation, "[s]tudies show that those who remain in pretrial detention for longer than 24 hours and are then released are less likely to reappear as required than otherwise similar defendants who are detained for less than 24 hours."[120]

C. Cook County's Wealth-Based Pretrial Detention Scheme Imposes Significant and Unnecessary Costs on Illinois Taxpayers

Cook County's wealth-based pretrial detention scheme is not only illogical, it is also highly inefficient. These inefficiencies, which are not supported by any rational policy considerations or goals of the criminal justice system, come at a considerable cost to Illinois taxpayers. The estimated cost of housing the average pretrial detainee in Cook County is $143 per day.[121] While the jail population is in constant flux, on any given day around 8,000 individuals are detained in the Cook County Jail[122]—approximately 90% of whom are being held pretrial.[123] Based on these estimates, it costs roughly $1.1 million per day to detain pretrial

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[117] JEFFERSON COUNTY, COLORADO COURT DATE NOTIFICATION PROGRAM FTA PILOT PROJECT (2005).

[118] Mitchel Herian & Brian Bornstein, *Reducing Failure to Appear in Nebraska: A Field Study*, THE NEBRASKA LAWYER, Sept. 1, 2010, at 12.

[119] Matt O'Keefe, *Court Appearance Notification System: 2007 Analysis Highlights* (Local Pub. Safety Coordinating Council, Multnomah Cty., OR), June 2007, *available at* http://www.pretrial.org/download/research/Multnomah%20County%20Oregon%20-%20CANS%20Highlights%202007.pdf.

[120] *Pretrial Criminal Justice Research*, *supra* note 112, at 5 (finding that "[l]ow risk defendants held for 2-3 days were 22 percent more likely to fail to appear than similar defendants (in terms of criminal history, charge, background, and demographics) held for less than 24 hours.").

[121] Res. 16-6051, Crim. J. Comm., Bd. of Comm'rs of Cook Cty. (2016) [hereinafter Res. 16-6051].

[122] *See* Emily Hoerner & Jeanne Kuang, *Cook County Sheriff Proposes an End to Cash Bail*, INJUSTICE WATCH (Nov. 15, 2016), https://www.injusticewatch.org/news/2016/cook-county-sheriff-proposes-an-end-to-cash-bail/ ("This year, the daily jail population has hovered at just above 8,000"); *see also* Res. 16-6051, *supra* note 121 (noting that "8,248 individuals were being detained at Cook County Jail as of October 17, 2016").

[123] Res. 16-6051, *supra* note 121.

defendants in Cook County. Given that the majority of these individuals are non-violent offenders who pose little to no risk to the community,[124] Illinois taxpayers are left paying a hefty price for an ineffective, irrational, and deeply harmful pretrial system.

Pretrial supervision, on the other hand, is dramatically less expensive than the exorbitant costs of detaining individuals pretrial. For instance, an assessment by the United States Courts determined that "[p]retrial detention for a defendant was nearly *10 times more expensive* than the cost of supervision of a defendant by a pretrial services officer in the federal system."[125] Similar disparities in cost can be found in jurisdictions across the country. For example, in Washington, D.C. the cost of pretrial supervision is approximately $18 per person per day, compared to about $200 per day to detain an individual in jail. Likewise, a 2010 study revealed that Broward County, Florida spent an estimated $107.71 per day to detain each arrestee pretrial, while the cost of providing pretrial services was only $1.48 per person per day.[126]

It is not surprising that those charged with managing local detention facilities have made clear that any conversation about controlling costs must begin with a focus on reducing pretrial detention rates.[127] As one observer noted, "[t]he net result [of] a system that relies on money to determine pretrial release is that when defendants cannot pay, the costs shift to the jail."[128] Given that "[j]ails are becoming more and more facilities whose primary role is to hold persons while the charges against them are resolved," this observer concluded that the current practice "is an antiquated approach that our new economic realities can no longer sustain."[129]

Another costly consequence of Cook County's current money bail system can be found in the legal expenses and settlement payments the County has incurred due to overcrowding and unconstitutional jail conditions.[130] In 2011, a federal court found that overcrowding at the Cook

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[124] *See supra* Part III.A (arguing that Cook County's pretrial detention scheme, as operated, is not rationally related to the goal of protecting public safety).

[125] *Supervision Costs Significantly Less than Incarceration in Federal System*, United States Courts (July 18, 2013), http://news.uscourts.gov/supervision-costs-significantly-less-incarceration-federal-system (emphasis added).

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

[127] *See* NAT'L ASS'N OF COUNTIES, COUNTY JAILS AT A CROSSROADS: AN EXAMINATION OF THE JAIL POPULATION AND PRETRIAL RELEASE 10 (2015) ("The jail population, and especially the pretrial population, is growing, while county corrections costs are registering a steep upward trajectory . . . . County jails understand the need to reduce the jail population, including for particular groups within the jail population that drive up jail costs.").

[128] John Clark, *The Impact of Money Bail on Jail Bed Usage*, AMERICAN JAILS, July-Aug. 2010, at 47, 54.

[129] *Id.* at 48, 54.

[130] *See Change Difficult as Bail System's Powerful Hold Continues Punishing the Poor*, INJUSTICE WATCH (Oct. 14, 2016), https://www.injusticewatch.org/projects/2016/change-difficult-as-bail-systems-powerful-hold-

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County Jail was leading to conditions that violated inmates' constitutional rights.[131] The court made clear that the use of unaffordable money bail significantly contributes to the problem of overcrowding, noting that "the unexplained reluctance of state judges in Cook County to set affordable terms for bail" is a significant contributor to the overcrowding.[132]

In sum, wealth-based pretrial policies have an overwhelmingly negative impact on Cook County's finances—the County wastes substantial resources to detain presumptively innocent, low-risk individuals, which in turn increases the rate of recidivism (at great cost to the County) and exacerbates inmate overcrowding (leading to expensive litigation and settlement payments). From a purely financial perspective, Cook County's approach to pretrial justice is clearly unsound and irresponsible.

D. Cook County's Wealth-Based Pretrial Detention Scheme Disproportionately Harms Racial Minorities

Overwhelming evidence shows that Cook County's wealth-based pretrial detention scheme disproportionately affects persons of color. In secured bail schemes minorities are less likely to be released on their own recognizance,[133] and are assessed bail amounts that can often double the amounts imposed on white defendants, even when controlling for severity of offense, number of felony charges, and criminal history.[134] The result is that minorities are more likely to be detained. For example, one analysis determined that African-Americans are 66% more

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continues-punishing-the-poor/ [hereinafter *Punishing the Poor*] (noting that "Cook County is paying millions each year to settle lawsuits brought by current and former inmates. And so far this year, over 200 federal lawsuits are pending in Chicago, alleging some kind of trouble at the jail.").

[131] *United States v. Cook Cty., Ill.*, 761 F. Supp. 2d at 794.

[132] *Id.* at 800.

[133] JUSTICE POLICY INST., BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL 15 (2012) (citing John Wooldredge, *Distinguishing Race Effects on Pre-Trial Release and Sentencing Decisions*, JUSTICE QUARTERLY (2012)); Tina Freiburger, Catherine Marcum, & Mari Pierce, *The Impact of Race on the Pretrial Decision*, 35 AM. J. CRIM. JUSTICE 76 (2010) (finding that race has a strong impact on the probability that a defendant will be released on personal recognizance, with African-Americans being less likely to be released on that basis).

[134] Cynthia Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. OF LEGIS. & PUB. POL'Y 919, 950 (2013) (citing ROBERT R. WEIDNER, RACIAL JUSTICE IMPROVEMENT PROJECT, PRETRIAL DETENTION AND RELEASE DECISIONS IN SAINT LOUIS COUNTY, MINNESOTA IN 2009 & 2010 (2011)) (finding that median bail for minority defendants was twice the amount set for white defendants); *see also* ISAMI ARIFUKU & JUDY WALLEN, RACIAL DISPARITIES AT PRETRIAL AND SENTENCING AND THE EFFECT OF PRETRIAL SERVICES PROGRAMS 7 (2013) (finding that among defendants charged with a felony, Hispanics had an average bail amount of $67,000, African Americans had an average bail amount of $46,000 and Whites had an average bail amount of $37,000); K.B. Turner & James Johnson, *A Comparison of Bail Amounts for Hispanics, Whites, and African Americans: A Single County Analysis*, 30 AM. J. CRIM. JUSTICE 35, 36 (2005) (finding that the average bail for Hispanic defendants was 2.5 times greater than for the average white defendant).

likely to be detained than their white counterparts, and Hispanic defendants are 91% more likely to be detained than white defendants.[135] Other studies have found that racial minorities are more likely than white defendants to be detained because they are unable to post bail, and that the inability to "make bail" is the primary explanation for African-American and Latino defendants' greater likelihood of pretrial detention.[136]

These trends appear to have taken hold in Cook County. As Chicago Appleseed recently reported, "[s]eventy-three percent of the people incarcerated in the Cook County Jail are African American despite the fact that African Americans make up only 25% of Cook County's population."[137] Contributing to this disparity in jail population is a significant shortfall in the number of African American defendants released on bond compared to individuals of other races. Data from 2011 to 2013 analyzed by the MacArthur Justice Center demonstrated that "only 15.8 percent of African Americans charged with Class 4 felonies were released on bond before their trials, as compared to 32.4% of non-African American defendants."[138] Furthermore, studies have shown that minorities represent the vast majority—93%—of individuals who have been detained pretrial for more than *two years* at the Cook County Jail.[139]

Making this disproportionate detainment of minorities even more insidious is the fact that pretrial detention has a ripple effect on a defendant's case. Multiple studies have shown that defendants detained through their pretrial period are more likely to be convicted and more likely to be sentenced to longer periods of incarceration than their released counterparts.[140]

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[135] Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees*, 41 CRIMINOLOGY 873, 895 (2003); *see also* Cassia Spohn, *Race, Sex and Pretrial Detention in Federal Court: Indirect Effects and Cumulative Disadvantage*, 57 KAN. L. REV. 879, 888–89 (2009) (finding that detention rates were higher among African-American defendants than white defendants).

[136] Demuth, *supra* note 135, at 899.

[137] Sharlyn Grace, *Principles of Bail Reform in Cook County*, CHICAGO APPLESEED (Apr. 25, 2017), http://www.chicagoappleseed.org/introducing-principles-for-bail-reform-in-cook-county.

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

[139] Spencer Woodman, *No-Show Cops and Dysfunctional Courts Keep Cook County Jail Inmates Waiting Years for a Trial*, CHICAGO READER, Nov. 16, 2016, http://www.chicagoreader.com/chicago/cook-county-jail-pre-trial-detention-investigation/Content?oid=24346477 (noting that "[m]ore than 1,000 Cook County inmates have been awaiting trial for more than two years").

[140] Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* 3 (Univ. of Pa. Sch. of Law 2016), https://ssrn.com/abstract=2777615 (pretrial detention leads to a 6.6% increase in the likelihood that a defendant will be convicted); Will Dobbie, Jacob Goldin, & Crystal Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges* 26 (NBER Working Paper No. 22511), http://www.nber.org/papers/w22511 (finding that "pre-trial release significantly decreases the probability of conviction, primarily through a decrease in guilty pleas");
(continued...)

This disparity of outcomes stems from a number of factors, including defendants' limited access to defense counsel and inability to participate in the preparation of their defenses. A more troubling but equally prevalent explanation for this disparity is that defendants facing the economic hardship of pretrial detention are more likely to enter guilty pleas regardless of actual guilt or innocence. This is especially true for those charged with lower level crimes.[141]

To understand the pressure a detainee may feel to plead guilty—regardless of his or her actual guilt—one need only look at the number of detainees in Cook County whose length of pretrial incarceration eclipses the sentence they would likely face if convicted. According to Cook County Sheriff Tom Dart, in 2016, approximately 1,203 detainees were entitled to immediate release following their convictions because they had already served their full sentences while awaiting trial.[142] In fact, many of these individuals served time well *in excess* of their sentences, resulting in what Sheriff Dart has referred to as "dead days." In 2015 alone, defendants being held in the Cook County Jail served nearly 80,000 days (218 years) in excess of their eventual sentences, with some defendants serving hundreds of excessive days.[143] In 2016, this number increased to a total of 251 years of excessive time served, costing taxpayers around $14.7 million.[144] Given the choice between immediate release upon entry of a guilty plea or indefinite pretrial detention, is it any wonder that individuals would choose to plead guilty to secure their release?

Apart from the moral impetus for reforming Cook County's pretrial system, the County should also be concerned about significant legal liability for its continued operation of a wealth-based bail scheme that disproportionately harms racial minorities. According to a class action lawsuit filed last year, Cook County's bail practices violate not only the federal constitution but also the Illinois Civil Rights Act of 2003, 740 ILCS 23, "because the monetary criterion used to determine whether [detainees] will be released prior to the disposition of their case results in the disproportionate pretrial incarceration of African Americans."[145] In addition to the

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CHRISTOPHER LOWENKAMP, MARIE VANNOSTRAND, & ALEXANDER HOLSINGER, INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES 11 (2013) (low-risk defendants detained pretrial received sentences that were 2.8 times as long as released defendants).

[141] *See, e.g.*, Vanessa Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (Winter 2013); *see also* Nick Pinto, *The Bail Trap*, THE N.Y. TIMES MAGAZINE, Aug. 13, 2015 (noting that data from the New York Criminal Justice Agency indicate that detention itself creates enough pressure to increase guilty pleas).

[142] *Cook County Jail Population Down About 700 People*, DAILY HERALD, Jan. 3, 2017, http://www.dailyherald.com/article/20170103/news/170109830/ [hereinafter *Cook County Jail Population*].

[143] Justin Glawe, *Chicago's Jail Kept Inmates Locked Up for 218 Years Too Long*, THE DAILY BEAST, June 8, 2016, http://www.thedailybeast.com/chicagos-jail-kept-inmates-locked-up-for-218-years-too-long.

[144] *See Cook County Jail Population*, supra note 142.

[145] Class Action Complaint at 31, *Robinson, et al. v. Martin, et al.*, Case No. 2016-CH-13587 (Cook Cty., Ill. Oct. 14, 2016).

constitutional and statutory violations discussed earlier in this paper,[146] violations of the Illinois Civil Rights Act—as alleged in this recent class action complaint—may expose the County to costly litigation and liability absent serious reforms.

E. Cook County's Wealth-Based Pretrial Detention Scheme Increases Recidivism

The empirical evidence shows that pretrial bail schemes further harm communities by increasing recidivism. According to one study, defendants who are detained pretrial are 30% more likely to recidivate when compared to defendants released sometime before trial.[147] Even defendants who are released prior to trial but were detained for several days while securing enough money for bail are 39% more likely to commit a new crime prior to trial than defendants who were never incarcerated.[148] As the authors of this study explained, "[d]etaining low- and moderate-risk defendants, even just for a few days, is strongly correlated with higher rates of new criminal activity both during the pretrial period and years after case disposition; as length of pretrial detention increases up to 30 days, recidivism rates for low and moderate-risk defendants also increases significantly."[149]

The correlation between pretrial detention and recidivism is supported by a recent Texas study on the consequences of pretrial detention for misdemeanor offenses. Based on the results of this study, the researchers estimated that:

> [A] representative group of 10,000 misdemeanor offenders who are released pretrial would accumulate an additional 2,800 misdemeanor charges in Harris County over the next 18 months, and roughly 1,300 new felony charges. If this same group were instead detained they would accumulate 3,400 new misdemeanors and 1,700 felonies, an increase of 600 misdemeanors and 400 felonies. While pretrial detention clearly exerts a protective effect in the short run, for misdemeanor defendants it may ultimately serve to compromise public safety.[150]

Inmate release statistics show that over 50% of detainees released from the Cook County Jail following conviction and sentencing returned to jail within three years.[151] Because these

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[146] *See supra* Part II (assessing the legality of Cook County's wealth-based pretrial detention scheme).

[147] CHRISTOPHER LOWENKAMP, MARIE VANNOSTRAND, & ALEXANDER HOLSINGER, THE HIDDEN COSTS OF PRETRIAL DETENTION 19 (2013).

[148] *Id.* at 4.

[149] *Id.* at 3.

[150] Paul Heaton, Sandra G. Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 768 (2016).

[151] DAVID E. OLSON, CHARACTERISTICS OF INMATES IN THE COOK COUNTY JAIL, COOK COUNTY SHERIFF'S REENTRY COUNCIL RESEARCH BULLETIN 7 (Mar. 2011).

statistics do not include individuals who were released because they were acquitted, posted bail, or had the charges against them dropped, the actual recidivism rate is, in fact, higher.[152] This high rate of recidivism comes at a great cost. For example, a 2015 study by the Illinois Sentencing Policy Advisory Council found that, over the next five years, recidivism will cost Illinois more than $16.7 billion.[153] As Cook County and other jurisdictions struggle to reduce recidivism rates, continuing to operate a pretrial system that increases the likelihood that detainees will reoffend upon release is clearly illogical.

F. Cook County's Wealth-Based Pretrial Detention Scheme Creates Harmful Externalities

Cook County's money bail scheme not only unnecessarily and irrationally increases pretrial incarceration and long-term recidivism rates, it also wreaks havoc on the social networks of the accused.

A recent article in the Chicago Tribune provides an example of the all too common consequences of Cook County's pretrial system. The article describes the 2015 arrest of a Chicago man who was detained, pretrial, for over a year because he could not come up with $1,000 to buy his way out of jail. During his year behind bars, the man lost his job and his car, missed the birth of his son, and his sister passed away. All of this for the charge of selling $40 worth of cocaine.[154] Unfortunately, this story is far from unique.

The Cook County Sheriff's Office estimates that as many as 300 individuals are detained pretrial because they are unable to scrape together $100 to purchase their release.[155] These individuals, and numerous others who are unable to pay varying amounts in excess of $100, have their lives upended. Detaining a defendant until trial often means a loss of income for the defendant's family, and can lead to much more serious consequences like the loss of a car or home, lost custody over a child, and a host of other negative consequences.

For example, at the opening of the Department of Justice's 2011 National Symposium on Pretrial Justice, it was noted that pretrial detention also impacts health and healthcare costs:

> This link between financial means and jail time is troubling in its own right. But it's compounded by the fact that many inmates

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[152] *Id.*

[153] *The High Cost of Recidivism*, ILL. RESULTS FIRST (State of Ill. Sentencing Policy Advisory Council), Summer 2015, at 2, *available at* https://www.macfound.org/media/files/Illinois_Results_First.pdf.

[154] Steve Schmadeke, *Cash Bail Under Fire as Discriminatory While Poor Inmates Languish in Jail*, CHICAGO TRIBUNE, Nov. 15, 2016, http://www.chicagotribune.com/news/local/breaking/ct-cook-county-cash-bail-met-20161114-story.html.

[155] *Id.* (citing Sheriff's Office officials); *cf.* BERNADETTE RABUY AND DANIEL KOPF, PRISON POLICY INITIATIVE, DETAINING THE POOR (May 10, 2016) (finding that "most people who are unable to meet bail fall within the poorest third of society").

> become ineligible for health benefits while they're in jail – imposing an additional burden on taxpayers when they're released, and often are forced to rely on emergency rooms for even the most routine medical treatments.[156]

Furthermore, in addition to healthcare concerns, detainees in Cook County may face serious other threats related to the conditions of their confinement. Over the years, Cook County has been subjected to numerous lawsuits alleging poor or unsafe conditions as a result of overcrowding.[157] In fact, a federal investigation into conditions at the Cook County Jail "found that when the [jail] was overcrowded, there was a corresponding increase in fights, uses of force, and weapons, exposing inmates to harm and depriving them of their constitutional rights to safe and humane conditions of confinement."[158]

Frequently, the only way defendants can hope to mitigate these harsh realities is by relying on family and friends to carry the financial burden, often in amounts that are a significant portion of their annual incomes.[159] Our system of justice is predicated on the notion that punishment should not precede a finding of guilt. Imposing on presumptively innocent individuals and their networks unnecessary debt, joblessness, homelessness, and further financial duress prior to trial when the result neither protects communities nor meaningfully impacts trial appearance rates is unconscionable.

IV. REFORMS FOR IMPROVEMENT OF COOK COUNTY'S PRETRIAL DETENTION SCHEME

As detailed above, Cook County's wealth-based pretrial detention scheme, as currently operated, is illegal, harmful, and fails to adequately advance any legitimate policy goals. However, unlike some other jurisdictions around the country in which inadequate statutory schemes and the powerful influence of the bail bond industry have served as obstacles to change, Cook County is well-positioned for meaningful reform today. The deficiencies identified are not inherent in the Illinois Bail Statute, but in how its terms are applied at bond court. Money bond is not currently viewed as a last resort, nor is ability to pay considered on any regular basis. Meaningful reforms to the current system will require the stakeholders in Cook County to accept that money bail is not a guarantee for public safety or appearance in court. Such recognition will lead to significant strides in the application of a bond structure that avoids the negatives of the current wealth-based system. The Illinois Bail Statute—if properly implemented—contains the necessary elements for an effective and equitable pretrial system, and the majority of key stakeholders in Cook County appear to agree that change is necessary. In this context, there are several reforms Cook County should consider to dramatically improve its pretrial system and

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[156] Eric Holder, Remarks at the National Symposium on Pretrial Justice (June 1, 2011).

[157] *Punishing the Poor*, *supra* note 130, at 8 (discussing various legal actions against the County).

[158] *United States v. Cook Cty., Ill.*, 761 F. Supp. 2d at 798.

[159] *See supra* note 16 and accompanying text (discussing bond amounts relative to the median income in Cook County).

end the practice of needlessly punishing presumptively innocent defendants because they are poor.

A. Judicial Rules

As previously noted, the Illinois Bail Statute includes a provision requiring that any financial conditions of release must be "[c]onsiderate of the financial ability of the accused."[160] Notwithstanding this provision, Cook County judges frequently set bail in amounts that exceed the financial capacity of detainees, resulting in the continued pretrial detention of these individuals based on their inability to pay. The Illinois Supreme Court and the Circuit Court of Cook County should each consider adding provisions to their rules to address this disconnect between what the statute requires and what actually takes place in the courtrooms of Cook County.[161] For example, the following two provisions would help ensure compliance with the law by requiring judges to meaningfully assess the financial capacity of individuals when imposing financial conditions of release:

- *In any case in which a judicial officer imposes a financial condition of pretrial release, the judicial officer shall conduct an inquiry into the accused person's financial resources and ability to pay.*

- *A judicial officer shall not impose a financial condition of release unless the record indicates and the judicial officer finds, in writing on the record, that the accused has the present ability to pay the financial condition without hardship.*

The purpose of these rules is to make clear that judges may not impose a financial condition of release that results in the pretrial incarceration of a person. In combination with effective judicial education, these provisions are designed to shift the focus of pretrial release determinations away from the financial means of the accused, and toward alternatives that are more effective, efficient, just, and consistent with the law.

B. Judicial Education

Educating Cook County judges is critical to the effectiveness of any effort to reform Cook County's pretrial detention scheme. Numerous studies, media reports, and court-watching initiatives have concluded that, despite the increasing availability of risk assessments and other information about defendants, Cook County judges have continued to reflexively impose money bond on defendants without consideration of their ability to pay, and in violation of the Illinois

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[160] 725 ILCS 5/110-5(b); *see supra* text accompanying note 58 (discussing the statutory requirement to consider the financial ability of detainees when setting financial conditions of release).

[161] The Illinois Supreme Court has the authority to adopt rules and amend its rules pursuant to the procedures outlined in Illinois Supreme Court Rule 3. The Circuit Court of Cook County may make rules "regulating their dockets, calendars, and business" and "governing civil and criminal cases consistent with rules and statutes." Cook Cty. Cir. Ct. R. 0.1(a); *see also* Ill. Sup. Ct. R. 21(a) (requiring agreement of a majority of the circuit judges to adopt a rule).

Bail Statute. Perhaps even more disturbingly, these same sources have revealed dramatic inconsistencies in outcomes among Cook County judges, even when controlling for criminal history and other factors. To create meaningful change, the Circuit Court should educate its members on the efficacy and availability of alternatives to D-bonds, including I-bonds, pretrial supervision or monitoring, drug treatment, and other alternatives set forth in the statute. Judicial education on this topic should incorporate data from all Cook County judges to increase awareness of disparities in bail setting practices and to encourage uniform best practices that are consistent with the goals of an effective and fair pretrial scheme.

C. Data Monitoring

The Circuit Court of Cook County is the largest judicial circuit in Illinois, and one of the largest unified court systems in the world. Although many media outlets, academic researchers, and reform advocates have collected data related to the imposition of money bail in Cook County, the size of the court system makes accessing reliable information about pretrial release outcomes difficult. In order to ensure compliance with the requirements of the Bail Statute, and to avoid the substantial inconsistencies that currently plague the system, the court should track and publically disclose data on pretrial detention and release. Specifically, the court should aim to identify disparities in pretrial release outcomes for similarly situated defendants, including significant differences in the amount of money bail imposed and racial disparities in pretrial release outcomes. The court should also track pretrial release outcomes to determine whether the current system is working effectively to release low-risk defendants while detaining the most dangerous defendants. Enhanced data monitoring will facilitate judicial education and improvements to pretrial services by allowing Cook County officials to identify where the pretrial system is falling short, and effectively focus available resources in those areas.

D. Reforms to Pretrial Services

In addition to the above reforms, the pretrial system in Cook County could benefit enormously from commonsense reforms to Cook County's existing Pretrial Services Division. Cook County's shortcomings in this area are not novel. Three years ago, a report by the Illinois Supreme Court raised concerns about pretrial services in Cook County, explaining that the Pretrial Services Act had "become largely aspirational, rather than a model for everyday procedure."[162] Inadequacies in pretrial services are part of a vicious cycle that undermines pretrial justice in Cook County: "because of a lack of confidence in the credibility of risk assessment and community living information," "reliance upon the work of pretrial services is generally dismissed or minimized" by Cook County judges, which in turn leads to less investment in pretrial services.[163]

Although some changes have already been implemented, effective reform will require a well-funded, independent, social service-oriented pretrial services program. While the details of

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[162] PRETRIAL OPERATIONAL REVIEW, *supra* note 20, at 5.

[163] *Id.*

pretrial services reform are beyond the scope of this paper, a number of stakeholders have advocated for the following changes:

- Increased training, funding, and organizational structure to enhance the ability of pretrial services to conduct effective pretrial supervision of released individuals;
- Improving conditions for bail hearings, including alleviating overcrowding and providing more private settings for initial interviews;
- Continuing investment in risk assessment and other methods for maximizing the information available to the court at bail hearings; and
- Implementing text message or telephone reminders of upcoming court dates, which have proven to be a low cost method of reducing failures to appear.

These and other possible changes are detailed in the Illinois Supreme Court's 2014 Pretrial Operational Review of Cook County. In response to the Supreme Court's 2014 Review, Cook County Chief Judge Timothy Evans expressed his hope that the report "will serve as a blueprint for the Circuit Court and all of the stakeholders in the system to move forward."[164] But despite the agreement of most Cook County stakeholders that these reforms are essential, many of the same problems continue to plague pretrial services years later. In combination with the other reforms advocated above, enhancing Cook County's pretrial services capabilities will provide meaningful and necessary support to ensure the safety of the community and the appearance of defendants while reducing the pretrial incarceration of individuals who cannot afford their bail.

V. CONCLUSION

During testimony before the Senate Judiciary Committee in 1964, Attorney General Robert F. Kennedy noted that bail practices in the federal system had "become a vehicle of systemic injustice," under which "the rich man and the poor man do not receive equal justice in our courts."[165] Sadly, those comments apply with full force to Cook County's bail practices, under which pretrial detention outcomes have long been detached from valid criminal justice concerns, and have instead been based primarily on the financial means of the accused. Over fifty years after Attorney General Kennedy's words, the time to correct this injustice in Cook County is long overdue.

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[164] Press Release, Chief Judge Evans Responds to Illinois Supreme Court Report (Mar. 21, 2014), *available at* http://www.cookcountycourt.org/MEDIA/ViewPressRelease/tabid/338/ArticleId/2278/Chief-Judge-Evans-responds-to-Illinois-Supreme-Court-Report.aspx.

[165] *Hearing on S. 2838, S. 2839, and S. 2840 Before the Subcomm. on Constitutional Rights and Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 88th Cong. (1964) (statement of Robert F. Kennedy, Attorney General).