

## Introduction

Bail is the temporary release of a person awaiting trial for a crime. This simple decision – to detain or release a defendant – is made all over the United States in courtrooms every day. It is a decision that often takes less than five minutes, does not require evidence, and usually only involves one lawyer and a judge. But what happens during those five minutes tells a significant story about criminal justice in America.

The story of bail is one that most heavily impacts poor individuals. Consider these three bail scenarios. James, a teenager, was accused of stealing a bus pass. After police arrested him, the court set a \$1,500 bail that neither he nor his family could afford. He remained in jail until he could negotiate a plea with the prosecutor. Another teen, Kenny, was charged with receiving stolen property. The prosecution suggested her bail be set at \$150, but the court set bail at \$300. Kenny spent five days in jail awaiting trial since she did not have the money to be released.<sup>1</sup> A homeless man, Leslie Chew, who was living out of his car, was arrested after he walked into a convenience store and took four blankets to keep him warm on a cold night. Chew was arrested for theft and his bail was set at \$3,500. A bail bondsman offered to cover it for \$350, but Chew did not have enough even for that. Chew was in jail pending trial for eight months, costing Lubbock, Texas, taxpayers \$9,210. Chew took a plea deal and pled guilty to felony theft.<sup>2</sup>

In contrast to these bail scenarios, consider three other very different ones.<sup>3</sup> A prominent foreign diplomat is released relatively quickly on bail and remained on house arrest after allegedly violently sexually assaulting a hotel maid. A wealthy husband and wife charged with brutally assaulting – including starving, beating, and torturing – two young maids are allowed their freedom on bail because they secure private bail guards. And finally, a well-known mob boss is released on \$10 million bail, with an electronic bracelet, and remains in his extravagant mansion pending trial. These six real-world

examples demonstrate that the inequities of bail are real. Poor defendants, who have committed minor, nonviolent crimes, are held in jail before trial while rich defendants charged with serious and sometimes violent crimes are released pending trial. Bail is not just a matter of abstract criminal justice policy, but a practice with real effects on real people. Indeed, these accounts demonstrate that the story of bail is one of poverty, inequality, and haste. It is also a tale of important constitutional rights lost and judicial discretion misused. And importantly, bail is the single most preventable cause of mass incarceration in America.

America is one of only two countries in the world that requires individuals to pay money to be released on bail awaiting trial. In most countries in the world, it is a constitutional right for most defendants to be released on bail awaiting trial. And even in America, the right to bail historically and constitutionally was available not just for the wealthy.

Bail rights should not be sold to the highest bidder but instead available for all of the accused. But today, average Americans struggle to meet bail and feel the repercussions and inherent inequity of the current bail system. Kenny and James are only 2 of the 27,000 juveniles held on bail in detention centers every day who cannot afford to be released.<sup>4</sup> In some areas, less than 10 percent of defendants can pay bail of less than \$1,000. In New York, for instance, only 12 percent of defendants will make bail at their arraignment; the rest will remain incarcerated.<sup>5</sup> The cost of receiving freedom before trial results in many individuals sitting in jail before they are found guilty of any crime.

This volume provides a glimpse into the reality of bail and mass incarceration. It explores the inequities of bail for the poor, discusses racial and cost implications, and explains why bail is so important for a defendant's case. This book focuses on constitutional and empirical issues. In particular, it demonstrates that historically bail has been a constitutional right and that empirical evidence tells us judges could safely release up to 25 percent more defendants before trial. In short, this book shows how we can preserve bail as a constitutional right by releasing more defendants, without increasing crime rates.

From medieval times to the modern day, the concept of bail has been a mainstay of the law. Bail is the means through which accused criminals can obtain release from police or state custody before trial and after arrest. Traditionally, bail was some form of property (such as money) deposited or pledged to a court to persuade it to release the accused on the understanding that he will return for trial or forfeit the money. The principle of bail grounds itself in constitutional rights of liberty and due process. It also stems from the presumption of innocence that proclaims that all should be deemed innocent until proven guilty at trial. The presumption of innocence and the right to

due process guarantee that a person will not be punished or lose their liberty before they face a trial. Therefore, every individual maintains a right to be free until a jury determines their guilt. And the Sixth Amendment of the US Constitution guarantees that a jury determines a person's guilt after a fair trial with evidence. These constitutional principles are deeply rooted in English and American law and preserve the constitutional right to bail.

The US criminal justice system has long recognized the constitutional importance of providing bail. The First Congress applied this broad protection to all noncapital offenses and left discretion to the judiciary for capital offenses.<sup>6</sup> Through the twentieth century until the 1950s, the Supreme Court protected the right to bail, even for communists who were the biggest national security threat at the time. For instance, when the government tried to prevent release for high-profile communists by demanding high bail amounts in *Stack v. Boyle*, the Supreme Court intervened, claiming that the government could not use expensive bails to deny individuals the constitutional right to release.<sup>7</sup> However, bail law started to shift with the first bail "reforms" of the 1960s. The Bail Reform Act of 1966, which still presumed release in noncapital cases, opened the door to individuals not receiving release on bail if a judge concluded they were likely to be found guilty. Then, the Bail Reform Act of 1984 further diluted the right to bail by allowing, for the first time, a defendant to be denied bail based on the likelihood of future criminality.<sup>8</sup> At the time, this new authority to detain individuals who were "dangerous" before trial was seriously controversial given the constitutional right to bail.

However, the Supreme Court quickly upheld this new requirement – future dangerousness – as a constitutionally valid reason for denying bail. The Court in *United States v. Salerno* held that "liberty is the norm," and detention before trial is the "carefully limited exception."<sup>9</sup> According to federal statutes, the norm is that people charged with a crime should be released before trial<sup>10</sup> and the government bears the burden of proving that a defendant should be detained pretrial.<sup>11</sup> Despite the supposedly limited nature of the 1984 bail reform policies, in the years since the 1984 reform, pretrial detention has become the norm rather than the exception.<sup>12</sup> It has become the norm not only in the federal system, but also in most states that have copied this bail scheme.

These significant changes in the latter part of the twentieth century are at odds with the long-standing principle that bail is a constitutional right. An oft-repeated value of US criminal justice is that all are innocent until proven guilty at trial. But our system has evolved into one where judges are allowed to predict which defendants are guilty and dangerous, and then to detain those people long before trial; and that detention ultimately results

in the defendants being denied a real determination of guilt. Because most criminal cases involve a plea, if a person is denied bail before trial, they lose bargaining power with a prosecutor. The defendant feels pressure to plead guilty – even if they are innocent – and often receives a custodial sentence or time served. If a person is granted bail, they have more bargaining power and are much more likely to receive a noncustodial sentence. The denial of bail has led to a violation of formerly sacred constitutional rights for a defendant. Current bail practices allow predictions of guilt and weighing of evidence against defendants before trial since defendants' rights have lacked steady constitutional rooting. Without consistent protection of constitutional rights – including due process and Sixth Amendment rights – a defendant's constitutional rights have been watered down and applied inconsistently, resulting in unfairness for defendants. These protections are critical to preserving bail as a constitutional right.

Modern-day reductions in constitutional rights have had significant effects on incarceration in America. Prison statistics show that detention before trial increased after the 1984 reforms and has steadily increased since that time. Since the 1990s, pretrial detention rates have risen 72 percent,<sup>13</sup> with the number of unconvicted people in US jails having increased by 59 percent.<sup>14</sup> This contributes greatly to the astonishing incarceration rates in the United States and accounts for 99 percent of the total increase in the jail population.<sup>15</sup> To put this into the context of the broader incarceration problem, the United States has about 5 percent of the world's population, but incarcerates 25 percent of the world's prisoners – incarcerating a greater percentage of its population than any other country. In 2015, almost 11 million people were admitted into a jail in the United States.<sup>16</sup> And while the last seven years have seen a slight fall in incarceration rates, prison population rates increased in twenty-seven states in 2013,<sup>17</sup> twenty-one states saw a further increase in 2014,<sup>18</sup> and eighteen states had an additional increase in 2015.<sup>19</sup> But almost 700,000 of the 2.3 million American prisoners aren't convicts; rather, they are accused individuals awaiting trial.

According to recent data, over 60 percent of the nation's jail population consists of unconvicted detainees,<sup>20</sup> and like James and Kenny, 75 percent of those detainees have been charged with minor property crimes, drug offenses, or other nonviolent acts.<sup>21</sup> Since the 1980s, both federal and state detention rates have increased. Over the last two decades, local jails have housed more pretrial detainees than actual convicts.<sup>22</sup> In just a few short years, the United States has gone from releasing 56 percent of defendants to only 40 percent, without any complaint or even acknowledgment by scholars or policy advocates despite the serious impact on US incarceration rates. And according to

the U.S. Bureau of Justice Statistics, 95 percent of the jail growth since 2000 has resulted from an increase in inmates held without bail.<sup>23</sup>

Besides arrest, bail is the most important criminal justice decision made today. The decision to deny or allow bail means more for a defendant's fate than any other decision besides arrest. This simple ability to afford bail determines whether the defendant loses her job or keeps it. Most criminal cases (95 percent or more) do not go to trial. In these cases, the decision to release someone from jail or detain them means everything for a case. If a judge denies a person bail, that person is more likely to lose their case and be detained for a longer period of time, simply based on whether they can pay bail or not. Defendants detained before trial are more likely to be convicted if they go to trial, four times more likely to be sentenced to jail, and three times more likely to receive prison sentences than similar people released pretrial.<sup>24</sup> Additionally, given their weak bargaining power with prosecutors while locked up, when jail or prison time is imposed pretrial detainees receive longer sentences regardless of the crime they are charged with and the evidence against them. In addition, their jail sentences are nearly three times as long, and prison sentences are more than twice as long.<sup>25</sup>

Detention leads to more detention, even among those who claim innocence. Consider the case of Shadu Green, who was arrested for speeding.<sup>26</sup> Officers claim that Green was belligerent and resisted arrest, but Green insisted that officers attacked him and proclaimed his innocence. The judge posted bail at \$1,000, and a bondsman offered to cover it for a \$400 fee. Green didn't have the money to pay bail and was sent to jail. The prosecutor offered Green sixty days in jail if Green pled guilty. Green maintained his innocence, he didn't want the charge to show up on his record, and wanted to assert his right to a trial by a jury of his peers. Green spent over half of the sixty days in jail before his girlfriend was able to pay the \$400 fee for the bail bondsman.

When Green was interviewed after his experience in jail, he recognized that if his girlfriend had not been able to come up with the bail money he would have settled and pled guilty for a crime he did not commit. He had no leverage in negotiating a favorable agreement while he was detained. Because he made bail, he continued to assert his innocence, and he was eventually found not guilty at trial. This is not an uncommon scenario. Marty Horn, the commissioner of New York City's jails, reported that he had seen this kind of situation play out over and over: "Individuals who insist on their innocence and refuse to plead guilty get held . . . [b]ut the people who choose to plead guilty get out faster." Not only do defendants who cannot afford bail plead guilty to get out of jail faster, they also often receive and accept harsher punishments than those who are released before trial.

Poor jail conditions contribute greatly to a defendant's incentive to plead guilty to get out of jail. Jail conditions nationally are dreadful, unequivocally worse than prison conditions, and individuals denied bail go directly to jail. The jail environment is often "chaotic" because resources are scarce, staff often lack adequate training, classification of inmates is random, and turn-over is quick.<sup>27</sup> Despite some efforts at reform, there are countless stories of jail abuse, gang rapes, illness, overcrowding, and other unsafe and abusive conditions nationwide. Jails are often older structures and sometimes contain mold contamination, poor ventilation, lead pipes, and asbestos. Furthermore, although serious illness is common in local and county jails, these facilities often have only minimal health services.

Jurisdictions across the country have been unable to cope with the financial costs of such high pretrial detention rates. As pretrial detention has become routine, overcrowding is now a problem for many jails and prisons. The financial strain appears to have compounded the poor conditions in jails, leading to horrible treatment in certain locations. For instance, LA County Jail inmates sleep on dirty floors and are allowed only one opportunity to go outside in a week.<sup>28</sup> In Maricopa County, Arizona, inmates sleep outdoors in military tents without air conditioning in over 100° temperatures, and are fed 15-cent meals only twice a day to cut costs.

And while dire jail conditions are enough reason to question current bail practices, what is worse is that it is actually a tool used by the government. Detention before trial is one of the prosecution's favorite tools for getting rid of a case. A prosecutor knows that detention before trial increases the likelihood that a defendant will accept a plea bargain. Shadu Green's case illustrates the pressure felt by defendants who cannot make bail. A prolonged stay in jail nearly broke Green's resolve to maintain his innocence to the point where he almost accepted a plea deal.<sup>29</sup> This pressure is felt most acutely by defendants who are risk averse and who do not have the financial resources to mount a defense.<sup>30</sup> Not only are defendants more likely to plead guilty if detained, but the prosecution is also more likely to prevail if the case is against a detained defendant at trial than against a defendant who is released on bail. That is because an individual who is detained often faces practical difficulties in attempting to prepare her case.

Prosecutors certainly know that once bail is denied a defendant is much more likely to plead guilty to get out of jail, even if she did not commit the crime. And they likely know that defendants who opt for trial are less capable of preparing an effective defense. For instance, a defendant who is in jail does not have the ability to investigate her case, line up witnesses, or do other necessary background work that busy lawyers often rely on clients to do.

As a result, prosecutors have an incentive to ask for high bails to ensure that defendants will remain behind bars.

In addition to the difficulties of negotiating with prosecutors while detained, an important constitutional concern is that defendants have little to no access to their lawyers while held without bail. Indeed, recent news accounts demonstrate the difficulty of defendants in communicating with counsel while in jail before trial. Busy attorneys who cannot visit their clients often must resort to discussing case matters over the phone or email. Those modes of communication are not secure, resulting in prosecutors gaining access to these privileged exchanges. When a defendant in pretrial detention is unable to communicate openly with her attorney, she is also less able to assist in her own defense. This inability to assist in the preparation of trial deprives defendants of important constitutional rights of due process, access to counsel, and the right to a fair trial. Some jails who used to screen lawyer emails and letters as attorney–client privileged claim they no longer have resources for screening and end up reviewing them all and disclosing the attorney information to prosecutors. Defendants are at a severe disadvantage when prosecutors have a sneak peek into their case before they reach court. There have even been instances in Brooklyn, New York, where prosecutors have read communications between defense attorneys and the accused and presented them against defendants in court.<sup>31</sup>

Defendants often lack access to any lawyer during this key pretrial period. About half of the local jurisdictions in this country do not provide counsel for indigent defendants at pivotal bail hearings. Bail hearings take one of two different forms. In some of these jurisdictions, a judicial officer presides with neither a prosecutor nor defense counsel present. Others have a judicial officer presiding and prosecutor participation, but no defense counsel.<sup>32</sup> In these jurisdictions, the defendant has no one to speak on their behalf. A recent study found that defendants who were provided counsel at bail hearings fared significantly better than a similar group of defendants who were not provided with counsel. Additionally, defendants who had counsel reported greater satisfaction with the bail process, including a sense that they were treated respectfully by the judge, and that the judge considered a great deal of information when making the bail decision.<sup>33</sup> Since pretrial detention has such serious and negative consequences for people in terms of the criminal justice outcomes at sentencing, defendants should have access to an attorney to preserve their constitutional right to bail.

The costs of incarceration, in general, and bail, in particular, are also a great burden on society. Spending on incarceration has increased dramatically over the last several decades. Over the past three decades, between 1979–80

and 2012–13, state and local expenditures for corrections quadrupled from \$17 to \$71 billion<sup>34</sup> – and spent an estimated \$9 billion just on housing pretrial detainees.<sup>35</sup> According to William Stuntz, even when adjusted for inflation, spending on corrections from 1971 to 2002 rose 455 percent. Institutions of higher learning and prisons compete for state funds, and prisons are winning. This burden caused by pretrial detention has serious consequences in many states, like California, that spend more on prisons than schools. In California, for example, 10 percent of the state general fund went to higher education and 3 percent went to prisons thirty years ago. In 2010, 11 percent went to prisons and 7.5 percent to higher education.<sup>36</sup> Today, per-inmate spending in the state is \$70,836,<sup>37</sup> compared with per-student spending of \$18,050.<sup>38</sup> And other states are not too far behind with current statistics showing that even when population changes are factored in twenty-three states increased per capita spending on corrections at more than double the rate of increases in per-pupil educational spending.<sup>39</sup> In sum, the costs of incarceration for individuals not released on bail are a massive burden on many state and local economies.

The individual costs of not obtaining release on bail are also significant. Individuals who are held on bail are often not convicted later and pose no danger to the public, but simply lack the funds to get out on bail. Consider the case of Perchelle Richardson, a seventeen-year-old high school student who, after the devastating impact of Hurricane Katrina, was a year behind in school.<sup>40</sup> When Perchelle allegedly took an iPhone from her neighbor, she was arrested, charged with felony burglary, and sent to jail. At her arraignment, the Judge issued a \$5,000 personal surety, assuming Perchelle would be released from detention the following morning. However, New Orleans has a \$200 administrative fee for all personal sureties. Perchelle's family was not able to raise the \$200, and as a result this young high school student remained in jail pretrial for 51 days. Perchelle's family, who relied on Perchelle for childcare, had to find alternative living arrangements for the other children. Perchelle fell behind in her studies and spent her pretrial detention detached from family and friends and among individuals who were charged with serious crimes.

After fifteen days, the prosecutor simply dropped the charges. Perchelle was never convicted. She spent fifty-one days in pretrial detention, at immense personal costs and costs to her family, simply to have the case dropped. Perchelle is not alone, her case highlights an extremely common problem of individuals facing serious personal and financial consequences because they cannot afford bail. The city of New Orleans alone pays \$10 million each year to hold pretrial detainees. These individuals take up almost half of the jail beds and place a significant strain on the infrastructure. Between 2010 and 2011, in New Orleans, 95 percent of the people booked into jail were never sent



to prison, and 75 percent of felony defendants will be found innocent, given probation, or placed in rehabilitation facilities. New Orleans is certainly not an isolated example as many defendants detained pretrial never serve prison time and are eventually released. The overwhelming majority of the time individuals held on bail can safely be released pending trial, but are often not.

Inequality in bail is not just a problem of those who can afford bail and those who cannot afford to pay bail. Inequality exists among jurisdictions because judges often rely on their gut instinct in determining who and how many defendants to release. While some defendants are able to pay their bail and go free, most cannot. This is because many judges, lacking firm insight into what types of prisoners are too dangerous to release, set high bail amounts knowing the accused can't afford them. Though some of these defendants will eventually be found not guilty and go free, keeping individuals incarcerated before their trial creates a burden on the prison system. There is no national consistency on which defendants are held on bail and which are released. And in many jurisdictions, I discovered in my research that because there is no guidance on release before trial, and no reliance on evidence-based practices, judges detain more than 90 percent of defendants before trial.<sup>41</sup> But in other jurisdictions, there is less concern for public safety and judges release over 95 percent of defendants. There is also no consistency in the types of defendants that are held or released, even though it is clear from the empirical data that is revealed here that judges are primarily focused on preventing violent crime on release. Most judges and even attorneys are not aware of this stark disparity between jurisdictions and lack of consistency in the bail decision.

Another layer of inequity comes with the unfair burden bail creates for minorities. Commentators over the years have acknowledged race discrimination in the bail decision, evidenced by more blacks being detained pretrial compared to whites charged with the same crimes. The bail decision is an obvious source of potential bias as 41.6 percent of black defendants are detained pretrial while only 34.4 percent of white defendants are. Also, black and Hispanic defendants are more than twice as likely to be unable to make bail than white defendants. African-Americans are more likely to pay higher bail amounts when charged with the same crimes as white people. In addition, national criminal justice data from the Department of Justice concluded that African-Americans and Latinos were twice as likely as white defendants to be held in pretrial detention for failure to pay bond amounts.<sup>42</sup> And even when charged for the same crimes, black and Hispanic defendants often pay higher bail amounts than white defendants. Some have blamed the police and judges who make arrest and release decisions based on predictions of whether

defendants will commit future crimes. They claim that prediction leads to minorities being treated unfairly. Others complain that racism results from misused discretion. This book explores where racial bias enters the criminal justice system through an empirical analysis that considers the impact of race in the bail decision.

Bail is the hidden key to cutting mass incarceration in America. Individuals have the constitutional right to release but yet are caged like criminals before conviction, leading to mass incarceration in our jails. As Judge Kozinski points out, and we often forget, pretrial detainees “are ordinary people who have been accused of a crime but are presumed innocent.”<sup>43</sup> The decision of whether to release a person on bail has immense consequences for an individual as well as for society. This important decision calls for a more empirically rooted decision-making mechanism. And one that takes into account the evidence, costs – and more importantly the constitutional implications – of incarcerating millions of people who have not been convicted. With firm constitutional grounding and consideration of empirical methods, this book traces a path for future bail reform that explains how jurisdictions can take a few simple steps to reduce incarceration pretrial while cutting pretrial crime.

The chapters that follow discuss several important issues surrounding bail. They cover a brief history, explain the bail process and the constitutional rights surrounding bail – including due process, and the Sixth Amendment and Eighth Amendment rights in detail. In addition, this volume lays out empirical evidence about prediction in the pretrial context, racial bias in bail decisions, and the costs of detention to society and a defendant. Other chapters cover an international perspective on bail, consider how pretrial detention is handled for terrorism crimes, and explore the unique challenge of money bail. The final chapter concludes with the important principles for an optimal bail system and describes practical changes that jurisdictions can make to achieve it. A brief description of each of these chapters follows.

#### CHAPTER 1: HISTORY OF BAIL IN AMERICA

With firm constitutional grounding and consideration of empirical methods, this book traces a path for future bail reform that explains how jurisdictions can take a few small simple steps to reduce incarceration pretrial while cutting pretrial crime. Chapter 1 traces the history of American bail, beginning with its roots in the Magna Carta and continuing through to the British common law and finally US cases and statutes. Bail determinations historically served the purpose of ensuring that the defendant appeared at trial, not preventing additional crimes from being committed, as is the case today. And there were no