

Spring 2017

The Bail Book: A Comprehensive Look at Bail in America's Criminal Justice System - Introduction

Shima Baughman

S.J. Quinney College of Law, University of Utah, shima.baughman@law.utah.edu

Follow this and additional works at: <https://dc.law.utah.edu/scholarship>



Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

Recommended Citation

Baughman, Shima B., *The Bail Book: A Comprehensive Look at Bail in America's Criminal Justice System - Introduction*, Cambridge University Press (2017)

This Book Chapter is brought to you for free and open access by the Utah Law Scholarship at Utah Law Digital Commons. It has been accepted for inclusion in Utah Law Faculty Scholarship by an authorized administrator of Utah Law Digital Commons. For more information, please contact valeri.craigle@law.utah.edu.

The Bail Book: A Comprehensive Look at Bail in America's Criminal Justice System

Introduction

Shima Baradaran Baughman

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.¹ 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.²

In contrast to these bail scenarios, consider three other very different ones.³ 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.⁴ 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.⁵ 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.⁶ 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.⁷ 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.⁸ 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."⁹ According to federal statutes, the norm is that people charged with a crime should be released before trial¹⁰ and the government bears the burden of proving that a defendant should be detained pretrial.¹¹ 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.¹² 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,¹³ with the number of unconvicted people in US jails having increased by 59 percent.¹⁴ 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.¹⁵ 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.¹⁶ And while the last seven years have seen a slight fall in incarceration rates, prison population rates increased in twenty-seven states in 2013,¹⁷ twenty-one states saw a further increase in 2014,¹⁸ and eighteen states had an additional increase in 2015.¹⁹ 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,²⁰ and like James and Kenny, 75 percent of those detainees have been charged with minor property crimes, drug offenses, or other nonviolent acts.²¹ 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.²² 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.²³

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.²⁴ 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.²⁵

Detention leads to more detention, even among those who claim innocence. Consider the case of Shadu Green, who was arrested for speeding.²⁶ 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 turnover is quick.²⁷ 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.²⁸ 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.²⁹ This pressure is felt most acutely by defendants who are risk averse and who do not have the financial resources to mount a defense.³⁰ 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.³¹

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.³² 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.³³ 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 billion³⁴ – and spent an estimated \$9 billion just on housing pretrial detainees.³⁵ 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.³⁶ Today, per-inmate spending in the state is \$70,836,³⁷ compared with per-student spending of \$18,050.³⁸ 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.³⁹ 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.⁴⁰ 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.⁴¹ 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.⁴² 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.”⁴³ 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

decisions about guilt *before* trial as guilt was properly determined *during* trial. Under the common law, the entire purpose of bail was to ensure that a criminal defendant would appear for trial. Early US law largely followed English law by requiring bail to be presumed for all but capital defendants, where there was significant proof that the person committed the alleged crime. The guarantee of returning to court did not provide any sort of protection against the defendant committing other crimes, as this was not the focus of bail. The focus of bail changed, starting in the 1940s and particularly in the 1960s–1980s, as the presumption of bail was often not respected and judges were allowed to weigh evidence against defendants in determining whether to release them and consider additional factors in determining whether to release a defendant on bail. This chapter traces these historical changes to highlight the changes that have led us to the current bail model, which aims to prevent danger a defendant may pose to the community.

CHAPTER 2: BAIL AS A CONSTITUTIONAL RIGHT

Chapter 2 lays the theoretical groundwork for the book by tracing the changes in constitutional case law that allowed for major changes in American bail. The theoretical argument underlying this book is that the right to release on bail was historically respected as a constitutional right and it should maintain this status. Due process principles and the presumption of innocence demanded a guarantee of bail for all defendants. One of the most familiar maxims in criminal justice is the presumption of innocence: the principle that a person is innocent until proven guilty by a court of law. This goes hand in hand with the principle of due process that prohibits punishing a person or taking their liberty without proper court processes. Establishing a constitutional and theoretical basis for a defendant's release before trial is important in demonstrating that bail is a right for all defendants.

CHAPTER 3: THE BAIL PROCESS: HOW PRETRIAL RELEASE OPERATES AND THE TYPES OF RELEASE BEFORE TRIAL

After establishing a background of historical and constitutional changes in bail, Chapter 3 traces the typical process of bail in America. In order to understand the current system of bail in America, or even begin discussing reform of the current system, it is important to understand how bail typically operates and the different types of pretrial release that are typically available. This chapter explains the current process and goals of pretrial release, defines bail (or pretrial release), and discusses the types of release that are available in

the US criminal justice system. It briefly describes each type of release and discusses the procedures for obtaining release on bail in America. The various types of pretrial release discussed include release on recognizance, supervised release, money bail, property bail, conditional release, surety bail, and deposit bail. It highlights how the different types of release respect a defendant's constitutional right to bail.

CHAPTER 4: BAIL AND PREDICTION OF CRIME

After an understanding of how American bail currently works, Chapter 4 focuses how judges try to use the bail decision to predict which defendants are likely to commit crimes while released. In essence, judges attempt to release individuals who do not pose a threat to public safety and detain individuals who they believe will commit additional crimes. But what do judges look at in deciding which defendants to release on bail? Is it possible for judges to actually know which defendants will commit a crime when released? This chapter focuses on the answers to these questions based on my empirical research and reveals that judges can predict which defendants will commit crimes with some accuracy, and exposes what factors they focus on in deciding who to release. The biggest concern for judges in releasing defendants is whether the defendant is dangerous or will commit a violent crime.

This chapter also examines how judges determine who will commit a violent crime if released and whether they are doing a good job with this decision. It also considers the current release rate of defendants nationally and considers how judges may be able to release more defendants without an increase in violent crime – which is the biggest concern for judges in deciding bail. My empirical research based on the last fifteen years of pretrial detention practices reveals that judges are often releasing and detaining the wrong groups of people. The data suggest that about half of those detained are less likely to commit a violent crime pretrial than many of the people released. If this data were taken into account with my proposed model, judges could make more efficient decisions and increase the number of people released pretrial, without increasing danger to the public.

CHAPTER 5: INDIVIDUAL AND SOCIETAL COSTS OF PRETRIAL DETENTION

After examining the data on bail and pretrial violent crime, Chapter 5 focuses on the costs of bail and violent crime to society. Over the past few decades, the

amount of money expended on the administration of the criminal justice system has skyrocketed. Specifically, the amount spent on pretrial detention calls out for reform. On top of detention costs, there are large costs to victims and society when more crimes are committed while an individual is released. The costs of murder, rape, burglary, robbery, and other violent crimes are tremendous both financially and in other intangible ways. This chapter explores how to make the pretrial release decision with consideration of costs to defendant and the costs to society. Relying on my own research and on data aggregated from prior studies, I quantify the costs and benefits of pretrial detention and compare those to the costs of pretrial release. I ultimately find that in the realm of violent felonies judges maximize economic savings when they detain a relatively low number of defendants – those statistically most likely to pose a danger to society. I demonstrate that only detaining the most dangerous defendants could save US jurisdictions up to \$78 billion. At a minimum, considering the costs and benefits of pretrial detention is helpful for policy-makers hoping to increase efficiency in criminal justice and reduce expanding criminal justice budgets.

CHAPTER 6: RACE AND BAIL IN THE CRIMINAL JUSTICE SYSTEM

Chapter 6 provides an in-depth analysis of race and bail. Despite the efforts to create equality in criminal laws, blacks are imprisoned at far higher rates than whites before trial. Indeed, one in every three black males can expect to go to prison during their lifetime compared to one in six Latino males and one in every seventeen white males, with current incarceration trends.⁴⁴ This chapter provides an analysis of race and the bail decision and whether racial bias enters the decision to detain minority defendants over white defendants. With a close look at the numbers and consideration of factors ignored by others, my research confirms some conventional wisdom but also makes several surprising findings. This chapter confirms through an empirical analysis of pretrial data of the 75 largest US counties what many commentators have suspected – that police arrest black defendants more often for drug crimes than white defendants. However, judges, who are often blamed for racial bias in the bail decision, actually detain white defendants pretrial *more* than similarly situated black defendants for all types of crimes. However, this chapter also discusses the bias against minority defendants who pay higher bail amounts and receive less favorable release options before trial for similar crimes than white defendants.

CHAPTER 7: BAIL AND THE SIXTH AMENDMENT RIGHTS
TO COUNSEL AND JURY TRIAL

Chapter 7 discusses how release on bail can be restored as a constitutional right by rejuvenating the Sixth Amendment, which guarantees the right to a jury trial and access to counsel for a criminal defendant. These two Sixth Amendment rights are critical to protecting the constitutional right to bail. The first part of this chapter explains the importance of the right to a jury after trial, and that facts should not be determined before trial. Currently, judges decide facts before trial in the bail decision and “weigh evidence” against defendants. In recent years, the Supreme Court has reinvigorated the importance of the jury in the sentencing phase, stopping judges from making important factual determinations related to punishment, and instead reserving these decisions for the jury. This part argues that because the role of judges is limited they should not be deciding facts about a defendant’s guilt before trial, and this should be left to the jury after trial. This rationale has not been applied to judges deciding important pretrial facts, like bail, but the same rationale should apply to rejuvenate the Sixth Amendment right pretrial. The second part of this chapter discusses the importance of providing counsel to defendants in their bail hearing, a right that should also be guaranteed by the Sixth Amendment and is critical to a defendant’s constitutional right to bail. Providing counsel to the accused at a bail hearing will also increase pretrial release generally, so more individuals have the opportunity to prepare their case outside of jail. Overall, rejuvenating the Sixth Amendment will increase rights for defendants before trial and better respect the constitutional right to bail.

CHAPTER 8: PRETRIAL DETENTION AND TERRORISM
IN POST-9/11 AMERICA

Chapter 8 discusses how in the wake of the September 11 attacks on the World Trade Center the basic guarantee of American justice, “innocent until proven guilty,” has transformed into “guilty until proven guilty” for suspected terrorists. The world of pretrial detention after 9/11 has changed dramatically. So much so that it is difficult to discuss modern bail rights without comparing the various differences in detention for suspected terrorists with average criminal defendants. National security interests have led to indefinite detention without bail for terror suspects, while some cry foul at the abuse of human rights. The key question with the increased suspicion of homegrown terror after 9/11 is what are the rights to pretrial release of suspected terrorists? In other words, should suspected terrorists be granted the right to release before trial or do

they pose a danger too great to be released? This chapter demonstrates that suspected terrorists do not have a constitutional right to pretrial release. Bail laws applicable to other dangerous defendants prohibit suspected terrorists from obtaining pretrial release. But there are a handful of other federal laws (Special Administrative Measures, Patriot Act, etc.) that also provide justification to detain suspected terrorists pretrial and to limit their communication and rights vis-à-vis the outside world. Some terrorism suspects have been detained in military centers, like Guantanamo, and while these detentions have been criticized greatly, detaining these individuals safely on US soil presents substantial budgetary and security challenges. As a whole, however, after detention, terrorism suspects have been tried successfully in federal and military courts, with greatest success in federal courts, given the plethora of federal statutes available to charge defendants.

CHAPTER 9: INTERNATIONAL BAIL

Chapter 9 provides a comparative perspective on how pretrial detention is handled across the globe. Unfortunately, the situation for pretrial detainees outside of the United States is often worse in some ways than conditions in the United States. Internationally, individuals lack access to release before trial, much like in the United States, but often for longer periods. About one-third of inmates internationally are held in pretrial detention and are not convicted criminals. While each country maintains individual pretrial release standards or practices, international law requires that people receive release before trial unless there is a danger the individual might flee or if they will disrupt the opportunity for a fair trial. Individuals must only be detained in the first place if there is a reasonable belief that they committed the alleged crime. Countries that mirror international standards often release individuals in a short amount of time. Those countries that lack adequate standards for judges or processes for pretrial detention allow defendants to suffer from excessive periods of detention. Many countries lack appropriate lack of counsel before trial, allow forced confessions, corrupt practices, and other abuses and poor conditions for inmates. Internationally, there are reports of inmate illness and death, lack of access to healthcare, food, water, and time out of a jail cell, and other inhumane treatment.

CHAPTER 10: MONEY BAIL

Chapter 10 focuses on the uniquely American money bail problem. America is one of only two countries in the world that requires a defendant to pay

money to be released before trial. To make matters worse, the commercial money bail system requires a defendant to pay a fee to be released and never refunds the money to defendant. And despite the fact that pretrial release is a time-honored and constitutionally protected right of a defendant, money bail has grown dramatically in the last twenty years such that it is now the most popular pretrial release option. Money bail discriminates against poor people who cannot obtain release simply because they cannot afford to pay even less than \$500 bail. It also leads to increased detention for poor people and allows higher-risk wealthy defendants obtain release while lower-risk poor defendants remain in jail. This chapter discusses the history of money bail and how it became commercial. It discusses constitutional challenges to money bail – including recent Eighth and Fourteenth Amendment challenges that have led to abolishing money bail in some cities nationwide. The harms money bail imposes on defendants are significant and states are beginning to take steps to mitigate the harmful effects. Some states and cities have outright banned money bail and others have introduced legislation favoring other release options, like pretrial release and risk assessments. There is an active struggle between the money bail industry and the criminal justice community as states are constantly proposing pretrial reforms, and the bail industry is constantly fighting to retain its lucrative claim on criminal justice.

CHAPTER 11: OPTIMAL BAIL: USING CONSTITUTIONAL AND EMPIRICAL TOOLS TO REFORM AMERICA'S BAIL SYSTEM

And finally, Chapter 11 focuses on the way forward for American bail reform in an age of mass incarceration. Bail “reform” in America has typically resulted in locking more people up and reducing rights for defendants, but true bail reform is needed to address the bloated and expensive US jail system. The Bail Reform legislation of the 1960s and 1980s resulted in judges obtaining more legitimate reasons to keep someone behind bars pretrial. For this reason, this chapter discusses what “optimal bail,” or bail reform in the modern age, should look like. Optimal bail, in contrast to “bail reform,” focuses on correct constitutional principles to govern bail as well as a focus on releasing as many defendants safely while cutting incarceration costs. It identifies three principles that federal and state courts and legislatures should apply to ensure that all defendants have this right and that the public remains safe. The first principle of optimal bail is that pretrial restraints of liberty should be limited to only what is necessary and only where there is a proper legal basis. The second principle is that there should be no pretrial determination of guilt without access to counsel and no bail hearing without counsel. And the third principle is that

a defendant's pretrial release should not be contingent on wealth or ability to pay a bail. After introducing these three principles, this chapter highlights state efforts – often backed with empirical data – that exemplify optimal bail and serve as a guide for the rest of the country.

This volume serves as an empirical and constitutional guide for improving the US criminal justice system through a hidden key: bail. The changes in bail recommended by this book can lead to dramatic improvements in the rights of defendants, help reduce jail overcrowding, and allow for a more efficient and just criminal justice system.