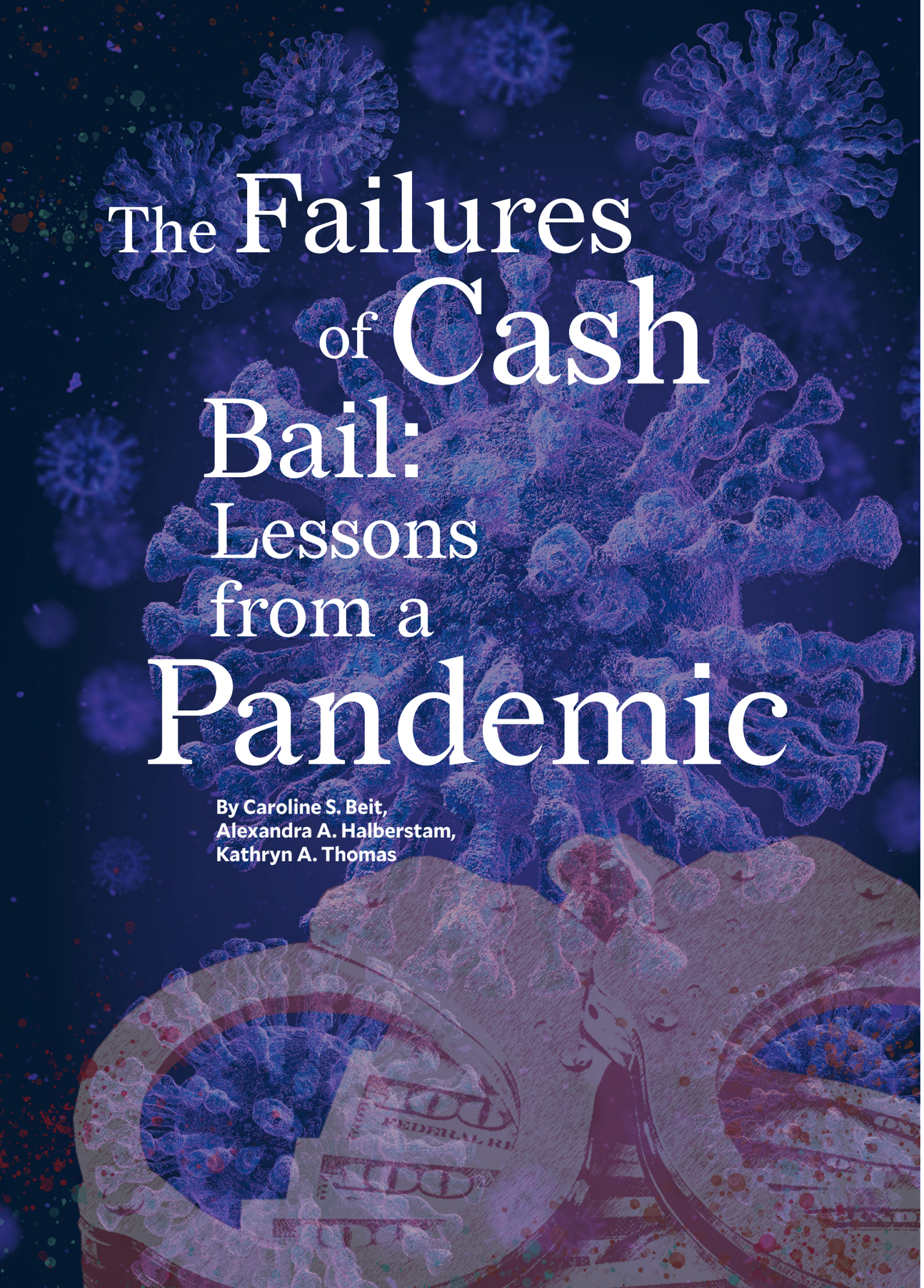

The Failures of Cash Bail: Lessons from a Pandemic

By Caroline S. Beit, Alexandra A. Halberstam, Kathryn A. Thomas

Cash Bail: A Detriment to Health and Justice

When individuals are arrested in the United States, they may be required to pay a sum—or "cash bail"—to leave jail pre-trial. Many take high-interest loans from a bond company to cover the cash bail deposit and owe massive interest post-trial. Others are not given an option to make bail during their pre-trial hearing, cannot afford bail, and/or choose not to take bond company loans. These defendants—disproportionately non-white and low-income—await trial in jail, and are exposed to the health risks of incarceration—particularly infectious diseases like COVID-19 (Page & Scott-Hayward, 2022; Wang et al., 2020) we analyze how the field of bail operates (and why it operates as it does.) Thus, cash bail is a public health crisis and health justice issue in need of urgent reform (Seibler & Snead, 2017).

This paper investigates how the goals of cash bail—decarceration, community protection, and trial attendance—have been lost or ignored. We argue that cash bail is a public health crisis, especially during a pandemic. We briefly review the literature on how COVID-19 exacerbates inequities of cash bail and two cases demonstrating the urgency of change. We next trace how cash bail became a key facet of mass incarceration that disproportionately increases confinement and harms low-income, non-white individuals' health, while profiting bail bond companies. Finally, we argue for the abolition of cash bail and suggest replacement with community-based programs that promote decarceration and more effectively foster community vitality.

COVID-19 and Bail

Pandemics like COVID-19 expose an urgent need for reform of incarceration, pre-trial detention, and cash bail. As of 2023, over 2900 people have died from COVID-19 while incarcerated in U.S. prisons, jails, and detention centers (Carson & Nadel, 2022; *COVID Prison Project, n.d.*). COVID-19 harmed those convicted and those awaiting trial who could not make bail (Reinhart & Chen, 2020). Racial and socioeconomic disparities in bail practices mean the health risks of pre-trial detention disproportionately affect low-income, non-white communities. Research has revealed that Black individuals arrested for violent crimes are 33 percent more likely to be denied bail than comparable white defendants (Schlesinger, 2005). Among those given bail, bond amounts differ by race, such that Black, Asian, and Hispanic defendants face bond amounts averaging $15,352, $34,258, and $13,529 higher than white defendants, respectively (McDowell, 2019).

Jail time increases disease exposure, as the spread of COVID-19 and other infectious diseases is accelerated by overcrowding and limited social distancing, hygiene protocols, and healthcare (Wang et al., 2020).

> Cash bail increases the jail population, thus exacerbating the negative impacts of COVID-19, and other infectious illness, on incarcerated people and contributing to community spread (Equal Justice Initiative, 2021; Reinhart & Chen, 2020).

For instance, cycling through Cook County Jail was associated with nearly 16% of Chicago's and over 15% of Illinois' COVID-19 cases (Reinhart & Chen, 2020). The COVID-19 pandemic led to delayed bail hearings, further increasing detention time and exposure to COVID-19 (Azhar-Graham & Gallo, 2021). Research revealed that reducing the number of people incarcerated in jail would dramatically reduce national daily COVID-19 case growth rates (Reinhart & Chen, 2021).

Further, COVID-19 exacerbated the mental health consequences of incarceration, and poor mental health, in turn, lowered immunity and increased disease vulnerability (Brinkley-Rubinstein, 2013; Mental Health America, n.d.; Shah & Seervai, 2020; Cash bail increases exposure to, and length of, pre-trial incarceration which is more stressful than post-trial incarceration due to high personnel turnover and lack of services in most jails (Toman et al., 2018). In fact, suicide rates are almost three times higher in jails than the general public (Cain & Ellison, 2022) and six times higher in pre-trial detention populations than convicted populations (Patton & Vars, 2020). The COVID-19 pandemic heightened the mental health harms of pre-trial incarceration, as many carceral facilities suspended their mental health treatment due to the pandemic (L. Johnson et al., 2021; Mayo Clinic Staff, 2023).

Ironically, the bail bond industry uses health risks of pre-trial detention to advertise industry services (Matt Mckeehan Bail Bonds, 2020). Release on bail reduces infectious disease exposure, yet bond companies have lobbied to maintain the practice of bail, thereby systematically increasing the number of people detained. While bail bond companies help individuals post bail, abolishing or drastically reforming bail practices would systematically decrease the number of individuals detained, and more effectively reduce disease exposure.

Following are two cases of pre-trial detention during the COVID-19 pandemic to characterize current discussions of infectious disease, cash bail, and health inequality. These cases make clear the hazard bail poses to health, and the urgent need for reform.

JERMAINE SMITH: Bail Increases Risk of Disease

Jermaine Smith's case illustrates the decisions faced by individuals held on bail. Smith was incarcerated pre-trial on December 16, 2019, with a $150,000 bail in Bridgeport, Connecticut, for non-violent charges (Lyons, 2020b). Even if a judge does not deliberately set a prohibitive bail, financial resources often decide if a defendant is released. For instance, over 60% of federal defendants are detained pre-trial because they cannot afford bail (U.S. Commission on Civil Rights, n.d.) During a pandemic, then, financial status dictates disease exposure. Given that 56% of Americans do not have more than $1000 expendable dollars (Gillespie, 2023), Smith's bail price virtually guaranteed his incarceration until trial.

While state laws vary, often individuals are released on a percentage of their bond. If the individual fails to attend trial, they owe the entire amount. To leave jail, Smith could either pay $15,000 (10 percent of his bond) or pay the bail company a $5,000 deposit. For someone like Smith, who supports a family and will be unemployed while incarcerated, $15,000 is insurmountable, but the required loan for the $5,000 deposit means years of debt (Lyons, 2020b).

> Remaining in detention risked COVID-19 exposure, and a higher likelihood of losing his case (as planning a defense in pre-trial detention is correlated with higher conviction rates; Lowenkamp et al., 2013a; Lyons, 2020b).

And pandemic-related court delays cause longer pre-trial detention periods thereby increasing health risks (Witte & Berman, 2021).

DANIEL OCASIO: Mental Health, Bail, & COVID-19

Daniel Ocasio's case highlights jail's effect on mental health, especially during COVID-19 (Lyons, 2020a). Ocasio, jailed on a low bail that he was unable to afford, died by suicide with a facemask around his neck. Ocasio was not the first incarcerated individual to die by suicide in Connecticut in 2022.

As COVID-19 exacerbates incarceration's mental health risks, treatment options in many correctional settings, including where Ocasio was incarcerated, were largely suspended (L. Johnson et al., 2021; Mayo Clinic Staff, 2023). Following service cuts in Connecticut, only those assigned a high "mental health score" by the facility were eligible for "elective" psychotherapy; 96% of Connecticut's incarcerated population have scores that disqualify them from receiving therapy (Chase & Tsarkov, 2020; Lyons, 2020a).

> These scores, too, compound racial disparities, as white individuals are disproportionately more likely to qualify for psychotherapy as compared to Black individuals (Chase & Tsarkov, 2020; Lyons, 2020a).

We next build on existing scholarship by considering the extended history of cash bail and prior reform attempts, specific alternatives to the bail system beyond bail decision-making reform, and pre-trial detention across state and federal systems.

History of Cash Bail

Cash bail is not new. In the late 7th century, Britain developed cash bail to support decarceration and lower the need for prisons. Jails began to release arrested individuals to someone who claimed responsibility for ensuring trial attendance (Schnacke et al., 2010). This "surety" paid a sum that would go to the victim if the arrested individual failed to appear in court, preventing a trial (Seibler & Snead, 2017).

Already in 1274, cash bail enabled corruption. Some sheriffs intentionally detained poor defendants with high bails and released "dangerous" defendants when bribed (Schnacke, 2018; Schnacke et al., 2010). Attempts to reduce corruption had little success until the 1679 Habeas Corpus Act,[1] which, in language adopted by the United States Bill of Rights, declared: "excessive bail ought not to be required, nor excessive fines imposed" (Schnacke, 2018; Schnacke et al., 2010; Seibler & Snead, 2017).

> In Colonial America, however, the Habeas Corpus Act insufficiently prevented excessive bail (Schnacke et al., 2010).[2]

For instance, in a famous 1735 trial, Peter Zenger, facing accusations of libel, was jailed for ten months pre-trial on a prohibitively high bail (Lewis, 1960). Zenger cited the Habeas Corpus Act during his bail hearing to no avail (Lewis, 1960).

In 1787, the United States Constitution prioritized protections against excessive bail (Tyler, 2021). But while the 8th Amendment prohibits excessive fines for those who received bail, it does not guarantee the right to bail. Thus, judges could still guarantee detention by denying bail. The 1789 Judiciary Act, the very first bill the Senate passed, attempted to remedy this, guaranteeing bail for those charged with a non-capital offense (Legal Information Institute, n.d.).

1960s Concerns

Cash bail legislation remained virtually untouched until the mid-20th Century, when policymakers identified the concerns that cash bail continues to have today (L. B. Johnson, 1966). President Lyndon B. Johnson recognized that cash bail exacerbates and criminalizes individual poverty. Pre-trial detention caused individuals to lose jobs and miss work (L. B. Johnson, 1966), and the bail system disproportionately detained low-income individuals. Johnson explained: "[A person] stay[s] in jail for one reason only… [:] because he is poor" (L. B. Johnson, 1966).

Johnson also recognized that cash bail burdens taxpayers. Cash bail increases incarcerated populations and incarceration duration, requiring staff and facilities (L. B. Johnson, 1966). In the 1960s, New York City spent $10 million [$87 million in 2022] yearly on pre-trial detention (The President's Commission on Law Enforcement and Administration of Justice, 1967). Today, pre-trial detention's cost means that limited public funds are directed towards jails, rather than community services.

Johnson's Commission on Law Enforcement and Administration of Justice also found that judges inequitably levied high bails to incarcerate defendants they feared would commit additional crimes pre-trial. While at first glance, such a practice might seem useful, it is of dubious legality and efficacy. First, legally, the use of cash bail was *solely* intended to ensure trial attendance: "in noncapital cases, the principal purpose of bail is to assure that the accused will appear in court for his trial."[3] Second, the 5th Amendment demands defendants be considered innocent until proven guilty; yet, selective pre-trial detentions involve judges making unilateral decisions to incarcerate based on an assumption of guilt. Third, levying high bails to keep someone incarcerated presumed to be dangerous was ineffective. Those most likely to commit additional crimes were members of professional crime organizations; accordingly, they often had access to extensive resources and faced little difficulty posting high bail (The President's Commission on Law Enforcement and Administration of Justice, 1967).

A Moment of Reform

Thus, the Johnson Administration had already identified three of the most persistent problems with cash bail: exacerbation of individual poverty, taxpayer cost, and inequitable sentencing based on socioeconomic status. Johnson attempted to address these concerns with the 1966 Bail Reform Act, which presumed that non-capital defendants would be released on bail (Bail Reform Act of 1966, 1966; L. B. Johnson, 1966). If such a release would not guarantee trial attendance, the judge could add qualifications from an ordered list, including, for instance, travel restrictions and curfews. Critically, judges did not impose conditions based on their perception of the defendant's dangerousness, but rather *solely* to guarantee trial appearance (Bail Reform Act of 1966, 1966).

In fact, community endangerment was only mentioned for capital cases, where defendants should be treated just as in non-capital cases, "unless the court or judge has reason to believe that no…conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community" (Bail Reform Act of 1966, 1966). Interestingly, if the court or judge believed the defendant dangerous, the Act did not recommend a high bail, but instead gave the court power of preventative detention: "If such a risk of flight or danger is believed to exist…the person may be ordered detained" (Bail Reform Act of 1966, 1966). Financial resources, then, would not dictate release.

Johnson's Act lowered the number of individuals held in pre-trial detention from 52% in 1967 to 38% in 1979 (Peter Jr., 1989). The Act also affirmed constitutional rights of defendants by presuming pre-trial release, and recentering trial attendance as bail's goal. These gains, however, were undermined in following years, such that the problems identified in the 1960s worsened.

Gutting Protections

Over the next decades, politicians marshaled emerging concerns about "law and order" into a new attitude toward federal cash bail legislation (Carlucci, 2020; Smith, 2018). Despite the absence of systematic evidence, politicians relied on several high-profile crimes committed pre-trial to suggest that the 1966 Act increased crime.

Law enforcement officials, activist groups, and the bail bond industry—which includes bond, insurance, and private equity companies, and lobbying organizations like the American Bail Coalition—drew on public fears to limit reforms (*As Criticism Grows, Supporters of Bail Reform Describe Fight as a Civil Rights Struggle*, 2020; *Bail Reform: A Curated Collection of Links*, 2023; *What Are Bail Bonds and Who Provides Them?*, n.d.; Carlucci, 2020; Gronewold & Durkin, 2022; Kennedy & Henry, 1996; McKinley et al., 2019; Schnacke et al., 2010; Scott & Barlyn, 2021; Smith, 2018). Public support for state-level bail reform declined while support for preventative detention grew (Peter Jr., 1989; Smith, 2018).

1 United States Constitution amend. I - X. 1789
2 28 United States Constitution §153; 31 Cha. 2 c. 2 (1969).
3 S.REP. No. 750, 89th Cong., 1st Sess. 6 (1965).

Preventative detention laws followed the 1966 Act's capital crime case exception, allowing judges to detain individuals they deemed potentially dangerous without bail. Federal legislation began to undo the 1966 Act. Richard Nixon's Attorney General John Mitchell drew on the 1966 Act's qualification that those charged with "capital crimes" could be detained pre-trial without bail.

Mitchell argued that the justification for this exception—namely that these defendants posed a risk to public safety—applied equally to those who committed "noncapital but dangerous crimes" (Mitchell, 1969). This logic propelled a looser interpretation of the 1966 Bail Act, widening the number of defendants judges deemed "dangerous," and detained preventatively (Mitchell, 1969). Defendant advocacy groups immediately raised concerns that this practice propelled socioeconomic and racial discrimination (Center on the Administration of Criminal Law, 2017).

Ronald Reagan replaced Johnson's 1966 Act with the Bail Reform Act of 1984 (Carson & Nadel, 2022). The 1984 Act authorized judges to order preventative detention of any defendant (not only those charged with capital crimes) to guarantee trial attendance or protect public safety and to consider factors beyond guaranteeing trial attendance (*e.g.*, history of alcohol abuse) in release decisions. The Act also (1) expanded the list of release conditions enumerated in the 1966 Act (Bail Reform Act of 1984, 1984); (2) granted law enforcement officers additional authority to arrest those in violation of release conditions; and (3) flipped the 1966 Act's presumption of release to a presumption of detention in several cases, including when a person had appealed their conviction (T. E. Scott, 1989).

Most concerningly, the 1984 Act left assessment of "danger" and bail assignment to judges without provisions to prevent bias (Bail Reform Act of 1984, 1984). This leeway effectively allowed courts to punish accused individuals regardless of guilt, and judge evaluations of "dangerousness" were often biased, as racial bias alters impressions of flight risk and potential danger (Arnold et al., 2018; Riley, 2020; Schlesinger, 2005). The 1984 Act was unsuccessfully challenged in the 1987 *United States v. Salerno* (Carlucci, 2020).[4]

Need for Reform

As Johnson recognized nearly 60 years ago, pre-trial incarceration is expensive—especially for communities hurt by a pandemic's financial strain—and contributes to inequitable sentencing practices, which were exacerbated by Reagan's 1984 Act.

Cash bail fails to achieve the goals it was designed to achieve: decarceration, community protection, and trial attendance. By setting bail at exorbitant rates or denying it, bail fails to promote decarceration or guarantee trial attendance (Lowenkamp et al., 2013b; Súilleabháin & Kristich, 2018; *The Hidden Costs of Pretrial Detention Revisted*, 2022). Far from protecting communities, as the 1984 Act prioritized, pre-trial detention increases crime and recidivism, and harms the health of individuals and communities (Cochran et al., 2018; Cochran & Mears, 2013; Gupta et al., 2016; Nagin et al., 2009; Súilleabháin & Kristich, 2018; *The Hidden Costs of Pretrial Detention Revisted*, 2022; Williams, 2020). Support for bail reform is mounting, including support from prosecutors and law enforcement (*More Than 80 Current and Former Prosecutors and Law Enforcement Leaders Call for Bail Reform in Legal Filing*, 2019), and recent research has revealed that eliminating bail is not associated with increased danger or trial non-appearance on a city or state level (Barno et al., 2020; Riley, 2020).

We must reduce bail costs and preventative detention—and ultimately eliminate bail—to promote community vitality and protect the health and safety of defendants and communities. Such reform requires a multi-pronged approach that focuses on reinvestment, uses caution regarding risk assessment, and creates community alternatives to bail.

Policy Recommendations:

Reinvest Resources Into Communities.

Reducing pre-trial detention—which cost $13.6 billion in 2017—would save resources, limit incarceration-related health harms (and associated costs), and allow individuals to continue working (Rabuy, 2016). Several organizations suggest recovered funds should be reinvested in community infrastructure and social services (Sakala et al., 2018). Studies suggest that in a city of 100,000, ten additional community-led organizations addressing violence and strengthening social ties would lower murder rates by 9% (Sharkey, 2018).

Use Caution When Relying on Risk Assessment Algorithms.

Actuarial risk assessment tools, which use algorithms to predict risk of violence or recidivism, are commonly considered as an alternative to cash bail. Partly created to reduce bias, significant research criticizes risk assessment algorithms for exacerbating sentencing racial disparities (Hogan et al., 2021). These algorithms incorporate statistics (such as recidivism rate and past arrests) that are subject to racially disparate policing and arrest practices (Hogan et al., 2021; Kochel et al., 2011). Thus, these risk scores may incorporate and reproduce bias.

> For instance, the number of people falsely predicted to commit additional crimes is higher for defendants from racial or socioeconomic groups with disproportionately high recidivism and re-arrest rates (Angwin et al., 2016; Hogan et al., 2021).

In addition, risk assessment algorithms tend to only be poorly or moderately accurate in predicting risk of recidivism or violence (Douglas et al., 2017). Further research is needed to address racial bias and predictive validity before risk assessment algorithms can be considered a viable alternative to cash bail.

Consider Alternative Practices that Support Trial Attendance and Decarceration.

Some states and cities have established alternative practices, such as community-based trial attendance encouragement programs, to improve trial attendance and support decarceration. In Spokane County, Washington, individuals released under a set of conditions or on their own recognizance attended hearings more often than those on bail (Richards & Griffin, 2019). In Orange County, California, replacing bail with non-monetary release and risk assessment increased attendance (Barno et al., 2020). Kentucky, Maryland, and Washington DC have started citing people in lieu of arrests, thus allowing them to stay home until their ordered court appearance (Rabuy & Kopf, 2016). In Seattle, the Law Enforcement Assisted Diversion program connects arrested individuals with social services rather than jail when cited (Rabuy & Kopf, 2016). In Los Angeles and Brooklyn, providing court reminders reduced non-appearance and secured attendance (Cyrus, 2022; Riley, 2020). The Bail Project advocates for subsidized transportation and childcare, and social support agency connections to increase court appearance (The Bail Project, 2020). Thus, there are a variety of established alternative practices to ensure trial attendance in place of cash bail and pretrial incarceration.

4 *United States v. Salerno,* (481 U.S. 739 1987)

Abolishing Cash Bail to Reduce Health Harms

Cash bail exposes individuals who have not been convicted to an environment that damages their health and the health of their communities, especially during pandemics like COVID-19. These individuals are disproportionately non-white and from low-income backgrounds. Cash bail has enabled racially and socioeconomically discriminatory pre-trial detention practices since its start in 7th Century Britain. Ensuing reform attempts, even when responding to persistent problems with cash bail, have failed to effectively and lastingly curb the health injustices of cash bail. Abolishing cash bail promises to reduce health harms, both by sparing people from dangerous jail conditions and by redirecting funds to address structural disadvantage that contribute to crime, thus promoting community vitality. The U.S. should replace cash bail and pre-trial detention with investments in community infrastructure and community-based reminder and trial attendance support programs. Such change would better achieve the goals of trial attendance, decarceration, and community safety that cash bail has sought to achieve in all of its historical iterations.

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