

## PRETRIAL RELEASE IN THE AGE OF COVID-19: WHAT DID WE LEARN?

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*“In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”*<sup>1</sup>

### INTRODUCTION

Before signing the Bail Reform Act of 1966, President Lyndon B. Johnson stated that a poor defendant:

[L]anguishes in jail weeks, months, and perhaps even years before trial. He does not stay in jail because he is guilty . . . He does not stay in jail because he is any more likely to flee before trial. He stays in jail for one reason only—he stays in jail because he is poor.<sup>2</sup>

During his speech, President Johnson discussed the cycle that often plagues poor incarcerated defendants by sharing the story of a man who lost his job, his car, and his family because he could not afford bail, and as a result had no other choice but to spend two months in jail.<sup>3</sup> Although more than fifty years have passed since President Johnson’s signing of the now repealed Bail Reform Act of 1966, many advocates still believe that his words ring true today.

The Bail Reform Act of 1984 (Act) shifted the focus to flight risk and public safety.<sup>4</sup> Under the Act, if the “judicial officer” determines that “no condition or combination of conditions” will guarantee the defendant’s appearance in court or the safety of “any other person and the community,” the defendant should be incarcerated pretrial.<sup>5</sup> In *United States v. Salerno*, the defendant challenged this language, asserting that it violated the Eighth Amendment.<sup>6</sup> The Constitution references pretrial detention only once in the Eighth Amendment where it states that “excessive bail shall not be

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<sup>1</sup> *United States v. Salerno*, 481 U.S. 739, 755 (1987).

<sup>2</sup> Lyndon B. Johnson, *Remarks at the Signing of the Bail Reform Act of 1966*, THE AM. PRESIDENCY PROJECT (June 22, 1966), <https://www.presidency.ucsb.edu/documents/remarks-the-signing-the-bail-reform-act-1966>.

<sup>3</sup> *Id.* President Johnson also stressed the importance of the 1966 Act by including another example of the sometimes-harsh monetary bail system. A man arrested on a traffic violation, a crime punishable by no more than 5 days imprisonment, spent 54 days in jail because he could not afford the \$300 bail.

<sup>4</sup> 18 U.S.C. § 3142(e)(1).

<sup>5</sup> *Id.*

<sup>6</sup> *Salerno*, 481 U.S. at 752.

required.<sup>7</sup> The *Salerno* Court interpreted this language to prohibit the use of excessive bail without granting an absolute right to bail.<sup>8</sup> Historically, pretrial release was the default as the Court expressed in *Salerno*; that release is preferred when appropriate and bail should not be used for punitive purposes.<sup>9</sup>

In the early months of 2020, the novel coronavirus, commonly referred to as COVID-19, began its rapid sweep across our nation. In March 2020, the World Health Organization (WHO) declared COVID-19 a pandemic while President Donald Trump declared a National Emergency, which led to travel bans, quarantines, and unprecedented shutdowns.<sup>10</sup> In hopes of slowing infection rates, forty-two states and territories implemented mandatory stay-at-home orders between March 1st and May 31st.<sup>11</sup>

When the Centers for Disease Control and Prevention (CDC) recommended individuals maintain at least a six-foot distance from others, otherwise referred to as “social distancing,”<sup>12</sup> many became concerned about inmates and prison staff. With social distancing practically impossible in the confined spaces shared by inmates, it became apparent that this population was far more likely to become infected with COVID-19.<sup>13</sup>

Many lawyers quickly began advocating for their incarcerated clients, pushing for their release so as to protect them from contracting the virus. As the pandemic progressed, progressively more jurisdictions began implementing strategies to prevent the spread of the virus and protect those incarcerated. Some of the strategies implemented had a dramatic impact on the criminal justice system. Now, we ask, did the COVID-19 pandemic teach us anything?

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<sup>7</sup> U.S. CONST. amend. VIII.

<sup>8</sup> *Salerno*, 481 U.S. at 755 (“[T]he Eighth Amendment does not require release on bail.”).

<sup>9</sup> *Id.* at 747 (“Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on ‘whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].’”).

<sup>10</sup> AM. J. MANAGED CARE Staff, *A Timeline of COVID-19 Developments in 2020*, AM. J. MANAGED CARE (Jan. 1, 2021), <https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020>.

<sup>11</sup> Amanda Moreland et al., *Timing of State and Territorial COVID-19 Stay-at-Home Orders and Changes in Population Movement – United States, March 1–May 31, 2020*, in 69 MORBIDITY & MORTALITY WKLY. REP. 1198, 1199 (Sept 4, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6935a2.htm>.

<sup>12</sup> *How to Protect Yourself and Others*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 13, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html>.

<sup>13</sup> Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, 115 NW. L. REV. 59, 62 (2020).

## I. WHAT ARE THE CONCERNS WITH PRETRIAL DETENTION?

### A. *Jail Overcrowding*

Over the past several decades, America has relied heavily on imprisonment as a form of punishment.<sup>14</sup> Imprisonment is used so often that the term “mass incarceration” has become a widely used phrase to describe this “tough on crime” phenomenon.<sup>15</sup> In fact, the United States incarcerates more people per capita than any other nation in the world with around 2.3 million citizens incarcerated nationwide.<sup>16</sup>

Surprisingly, a majority of incarcerated individuals held in local jails across the United States have not been convicted. In fact, 74% of individuals being held in local jails are being held pre-conviction.<sup>17</sup> To put that percentage into perspective, approximately 470,000 individuals are detained in local jails across the country pre-conviction.<sup>18</sup> While the number of individuals incarcerated pre-conviction is alarming to those concerned with mass incarceration, the crimes associated with such a high amount of incarceration seem to be of greater concern. It is estimated that 13 million misdemeanor charges result in jail time each year.<sup>19</sup> These misdemeanor charges “account for over 25% of the daily jail population nationally, and much more in some states and counties.”<sup>20</sup>

Research shows that a significant portion of those held in local jails pending trial are being held on drug charges and other non-violent offenses.<sup>21</sup> Approximately 25% of those held in local jails pre-conviction have been accused of drug possession, drug trafficking, or some other drug related offense.<sup>22</sup> Interestingly, around 43% are being held for property or public order related crime with around 32% being held for violent crime.<sup>23</sup> Considering the majority of people being held pre-conviction are charged with non-violent offenses, many believe we have failed in our efforts to combat the mass incarceration problem in the United States.

Not surprisingly, the large amount of jail overcrowding occurring across our nation created concerns about unsafe conditions long before the COVID-19 pandemic. Local jails house “pretrial detainees” and those incarcerated for probation or parole violations.<sup>24</sup> The unfortunate reality is, at the time of booking, many inmates are already suffering from “medical or

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<sup>14</sup> Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OH. ST. J. CRIM. L. 133, 133 (2011).

<sup>15</sup> *Id.*

<sup>16</sup> Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL’Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See Carroll, *supra* note 13, at 73.

emotional distress.”<sup>25</sup> The jail population fluctuates rapidly due to new inmates coming in and out of the facility, the inmates suffering from medical or emotional distress are at a much higher risk of contracting illnesses while incarcerated.<sup>26</sup> Further, due to the costs associated with providing inmates appropriate medical treatment, many jails cannot afford to, or, opt not to provide treatment for these diseases or illnesses.<sup>27</sup> Therefore, when the inmates are released untreated, it can create a strain on local communities.<sup>28</sup>

### 1. Kentucky Specific Information

Eastern Kentucky has historically been plagued with jail overcrowding. The Kentucky River Regional Jail, located in Hazard, holds county inmates from both Perry and Knott counties.<sup>29</sup> While the jail is only a 135-bed facility, in the fall of 2018, it held 240 inmates.<sup>30</sup> The Kentucky River Regional Jail is certainly not the only jail in Kentucky operating over capacity. In February 2020, two-thirds of county jails were operating between 128% and 170% over capacity.<sup>31</sup> When asked what leads to the high rate of incarceration in this area, Lonnie Brewer, the Kentucky River Regional Jail administrator, listed many reasons, one of which being the loss of jobs in the area.<sup>32</sup> Brewer stated that he witnessed “a hundred dollars hold a guy in [jail] for a month.”<sup>33</sup>

Not only does jail overcrowding lead to concerns for inmate and jail staff safety, the large jail population has led to enormous costs on states and counties. The Kentucky River Regional Jail charges Perry and Knott counties twenty-six dollars per day per inmate.<sup>34</sup> In contrast, the jail charges the state thirty-five dollars per day per inmate which encourages local jails to house large amounts of state inmates to recover some of the cost.<sup>35</sup> In fact, of the 240 inmates housed there in the fall of 2018, one third were state inmates.<sup>36</sup> Unfortunately, the desire to house many state inmates can lead to massive overcrowding considering the amount of county inmates moving in and out of jails.

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 74.

<sup>28</sup> *Id.*

<sup>29</sup> Jack Norton & Judah Schept, *Keeping the Lights On: Incarcerating the Bluegrass State*, VERA IN OUR BACKYARD STORIES (Mar. 4, 2019), <https://www.vera.org/in-our-backyards-stories/keeping-the-lights-on>.

<sup>30</sup> *Id.*

<sup>31</sup> Kyle Ellison, *Overview of Kentucky's Prison and Jail System*, LOUISVILLE FOR (Oct. 12, 2020), <https://louisvillefor.org/2020/11/03/overview-of-kentuckys-prison-and-jail-system/> (“[I]f horses were treated this way there would be public outrage.”).

<sup>32</sup> See Norton & Schept, *supra* note 29 (Brewer stated that “[t]here are people here for whom there is no reason they should be in jail.” Brewer highlighted the loss of jobs in the area, the high rate of mental health issues among inmates in jail, and the amount of people incarcerated for child support obligations.).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

With the rise of pretrial detention, these rates can prove astronomical in counties that do not have a jail. At the time of this note, there are forty-one counties in Kentucky that do not have a jail. Of course, the counties without jails receive none of the benefits associated with housing state inmates. Instead, these counties are often left with large jail bills that impact the county's ability to place more money into different programs for its citizens.

For example, Lyon County, Kentucky does not operate its own jail and contracts with other counties to house its inmates.<sup>37</sup> The county's jail bill more than doubled from \$240,000 in 2018 to \$500,000 in 2019.<sup>38</sup> Lyon County Judge Executive Wade White stated that the county "collect[s] about \$780,000 for property taxes and [the] jail."<sup>39</sup> With inmate housing accounting for \$500,000, White stated that one can see "how small [the] budget gets real[ly] quick."<sup>40</sup> Concerned with the prospect of raising taxes to support the growing jail bill, White spent much of the 2019 year speaking out about and urging people to recognize the problem in his county.<sup>41</sup>

While many Kentucky counties experience great economic costs associated with jail overcrowding, the financial strain on communities arising from expensive jail bills is shared in other states as well. For example, West Virginia has struggled with the cost associated with housing inmates.<sup>42</sup> Several counties have reported full jails and large bills that they are unable to pay with some owing over one million dollars.<sup>43</sup> Logan County Commission President Danny Godby discussed the concerns that arise when between 15 to 18% of the county budget goes toward the jail bill.<sup>44</sup> Godby discussed the rising jail bill and how this uncertainty leads to concerns about how the county will fund programs for its youth, such as Little League baseball fields and athletic programs for high school students.<sup>45</sup>

### B. *Disproportionate Impact on Impoverished Communities*

Another common concern for advocates is the disproportionate impact that pretrial detention has on impoverished communities. Research shows that people with low incomes are far more likely to experience the negative impact of pretrial detention because they cannot afford bail amounts.<sup>46</sup> On average, those incarcerated are already considered poorer than the overall

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<sup>37</sup> Kelly Farrell, *Jail Costs, Housing of Inmates Prove County Burdens*, THE HERALD LEDGER (Oct. 30, 2019), [https://www.heralddledger.com/news/local/jail-costs-housing-of-inmates-prove-county-burdens/article\\_859d0260-a538-547f-bf76-9a20baa0795d.html](https://www.heralddledger.com/news/local/jail-costs-housing-of-inmates-prove-county-burdens/article_859d0260-a538-547f-bf76-9a20baa0795d.html).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Lacie Pierson, *Crowded Jails Costing Counties More Than They Can Pay*, THE HERALD DISPATCH (Jan. 31, 2021), [https://www.herald-dispatch.com/news/crowded-jails-costing-counties-more-than-they-can-pay/article\\_0f1176c8-743a-5c99-a170-ed40e8c016f7.html](https://www.herald-dispatch.com/news/crowded-jails-costing-counties-more-than-they-can-pay/article_0f1176c8-743a-5c99-a170-ed40e8c016f7.html).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> See Sawyer & Wagner, *supra* note 16.

population.<sup>47</sup> With the median felony bail bond at \$10,000, many incarcerated individuals find it difficult to break the cycle.<sup>48</sup> Considering \$10,000 equals roughly eight months' income for the average incarcerated individual,<sup>49</sup> it is easy to understand how many simply cannot afford to leave jail.

While Kentucky has been dubbed the “opioid capital of the world,”<sup>50</sup> methamphetamine (meth) use has been on the rise over the past several years.<sup>51</sup> With meth use increasing across the Commonwealth, some are concerned with the harsh penalties that are imposed on simple meth users. In Kentucky, mere possession of meth, or any other qualifying substance, is a Class D felony.<sup>52</sup> Although Kentucky is among the top ten poorest states in the country,<sup>53</sup> the amount of substance abuse in the state is alarming. With the high cost associated with a felony possession charge, we may assume that many cannot afford to pay bail and become trapped in the cycle that affects so many struggling with drug addiction.

Not only are those incarcerated typically poorer than the overall population, research shows that extended periods of incarceration lead to further problems in defendants' lives.<sup>54</sup> Long periods of incarceration can potentially lead to loss of employment,<sup>55</sup> hefty fines and court costs,<sup>56</sup> and the pressure to accept plea bargains.<sup>57</sup> Many worry that the pretrial process places too much emphasis on a defendant's financial abilities, or lack thereof, rather than whether they pose a risk to the community.<sup>58</sup>

There are also concerns that the negative implications flowing from incarceration significantly impact the nation's poor by leaving them in a worse position than when they entered jail. Despite the goal of pretrial detention being to guarantee court appearance and protect the community, studies have found that those detained pretrial were actually more likely to

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* (this is an estimate based on the United States population. In some areas, this amount may equal more than eight months' income).

<sup>50</sup> Al Cross, *Meth is Pikeville's 'Drug of Choice.' It's Epidemic, Involved in 80% of Arrests, and its Addiction is Harder to Treat than Opioid Addiction*, KY. HEALTH NEWS (Sept. 2, 2019), <https://ci.uky.edu/kentuckyhealthnews/2019/09/02/eth-is-pikevilles-drug-of-choice-its-epidemic-involved-in-80-of-arrests-and-its-addiction-is-harder-to-treat-than-opioid-addiction/>.

<sup>51</sup> *Id.* (citing Pikeville Police Sergeant Chad Branham, who revealed that “at least eight out of every ten arrests involve meth”).

<sup>52</sup> KY. REV. STAT. § 218A.1415(1)(c); KY. REV. STAT. § 218A.1415(2).

<sup>53</sup> *Top 10 Poorest States in the U.S.*, FRIENDS COMM. ON NAT'L LEGIS. (Oct. 5, 2020), <https://www.fcnl.org/updates/2020-10/top-10-poorest-states-us>.

<sup>54</sup> Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 202 (2018).

<sup>55</sup> *Id.*

<sup>56</sup> See Sawyer & Wagner, *supra* note 16 (“Time spent in prison destroys wealth, creates debt, and decimates job opportunities.”).

<sup>57</sup> See Dobbie et al., *supra* note 54.

<sup>58</sup> *Id.*

reoffend than those who posted bail.<sup>59</sup> In fact, one study based in Harris County, Texas,<sup>60</sup> found that “detained misdemeanor defendants were charged with 22[%] more misdemeanors” within one year after release compared to those who were released at their bail hearing.<sup>61</sup> Considering these bleak findings, many are concerned that the outcomes of pretrial detention are actually adverse to the goal of lowering crime rates.

## II. WHAT HAS BEEN THE RESPONSE TO THESE CONCERNS?

Over the years, pretrial reform efforts have frequently been met with success. Recently, recent years, states have begun moving away from monetary bail and are now focusing on assessing defendants’ risk levels.<sup>62</sup> When it comes to pretrial decision making, there has also been a shift away from allowing judges to make subjective decisions regarding the likelihood of future criminal activity.<sup>63</sup>

One example of change comes from New Jersey. In 2017, New Jersey began requiring the use of citations rather than arrest for low-level offenses while also “instructing judges to release defendants on non-monetary bail.”<sup>64</sup> Even so, this requirement left the option open for judges to require monetary bail, so long as it was the only reasonable way to ensure the defendant did not reoffend before trial and that he or she appeared in court.<sup>65</sup> New Jersey’s reform has proven largely successful since its implementation with no real increase in crime rates.<sup>66</sup>

Just this year, the Supreme Court of California ruled that state courts must consider an individual’s financial abilities when setting monetary bail and shall not set bail at an amount that the defendant cannot afford unless there is no other reasonable alternative that would protect community safety while also ensuring the defendant appears in court.<sup>67</sup> The case involved Kenneth Humphrey, a man arrested for allegedly stealing seven dollars and a bottle of cologne from his neighbor.<sup>68</sup> When the court set his bail in the hundreds of thousands of dollars, Humphrey was unable to pay.<sup>69</sup> While the

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<sup>59</sup> Wendy Sawyer & Emily Widra, *Findings from Harris County: Money Bail Undermines Criminal Justice Goals*, PRISON POL’Y INITIATIVE (Aug. 24, 2017), <https://www.prisonpolicy.org/blog/2017/08/24/bail/>.

<sup>60</sup> *Id.* (stating that Harris County, Texas, is the third largest county in the United States with 4.5 million citizens of very diverse backgrounds).

<sup>61</sup> *Id.*

<sup>62</sup> NAT’L CTR. FOR STATE CTS., PRETRIAL PREVENTIVE DET. (Feb. 2020), [https://www.ncsc.org/\\_data/assets/pdf\\_file/0026/63665/Pretrial-Preventive-Detention-White-Paper-4.24.2020.pdf](https://www.ncsc.org/_data/assets/pdf_file/0026/63665/Pretrial-Preventive-Detention-White-Paper-4.24.2020.pdf) [hereinafter NCSC WHITE PAPER].

<sup>63</sup> *Id.*

<sup>64</sup> Rachel Smith, *Condemned to Repeat History? Why the Last Movement for Bail Reform Failed, and How This One Can Succeed*, 25 GEO. J. POVERTY L. & POL’Y 451, 467 (2018).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Ari Shapiro, *California Does Away with Cash Bail for Those Who Can’t Afford It*, NAT’L PUB. RADIO (Mar. 29, 2021, 4:23 PM), <https://www.npr.org/2021/03/29/982417595/california-does-away-with-cash-bail-for-those-who-cant-afford-it>.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* (“The court set bail at \$600,000 and later reduced it to \$350,000.”).

Court recognized that the state has a compelling interest in protecting public safety and ensuring a defendant appears in court,<sup>70</sup> the Court also asserted that “conditioning freedom solely on whether an arrestee can afford bail is unconstitutional.”<sup>71</sup>

Illinois took matters one step further this year by becoming the first state in the country to completely eliminate cash bail.<sup>72</sup> Under this new approach, judges will no longer be permitted “to set any kind of bail for a defendant charged with a crime.”<sup>73</sup> Instead, judges will determine whether to detain a defendant pretrial solely on his or her flight and public safety risks.<sup>74</sup> Considering judges and attorneys will need time to adjust to this new system, which was part of a much larger law that focused on criminal justice reform, the complete elimination of cash bail will not occur until 2023.<sup>75</sup>

Over the years, actuarial risk assessment tools have also been used to “provide accurate, relevant, and reliable information to better inform the exercise of discretion by judges and other pretrial decision makers.”<sup>76</sup> While these assessment tools may prove helpful, they are not used to predict whether a specific defendant will reoffend.<sup>77</sup> Nonetheless, they do use information available, such as previous criminal history, and past court attendance, to determine whether the defendant is in a category of people that are more likely to reoffend.<sup>78</sup>

Considering these tools are “formulaic,” many believed they would be helpful in accurately assessing a defendant’s risk level.<sup>79</sup> Although the mentioned tools have the potential to help form decisions based on a defendant’s background information, researchers warn that there are still concerns that risk assessment mechanisms utilize historical biases in evaluating the defendant’s likelihood of reoffending.<sup>80</sup>

In 2014, then United States Attorney General Eric Holder cautioned that these assessment mechanisms may inadvertently “exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system and in our society.”<sup>81</sup> ProPublica conducted a study on the assessment tool called COMPAS by evaluating the risk scores of

<sup>70</sup> In re Humphrey, 11 Cal. Rptr. 135, 142 (App. Dep’t Super. Ct. 2021).

<sup>71</sup> *Id.* at 143.

<sup>72</sup> Cheryl Corley, *Illinois Becomes 1st State to Eliminate Cash Bail*, NAT’L PUB. RADIO (Feb. 22, 2021, 9:35 PM), <https://www.npr.org/2021/02/22/970378490/illinois-becomes-first-state-to-eliminate-cash-bail>.

<sup>73</sup> Maria Cramer, *Illinois Becomes First State to Eliminate Cash Bail*, N.Y. TIMES (Feb. 23, 2021), <https://www.nytimes.com/2021/02/23/us/illinois-cash-bail-pritzker.html>.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See NCSC WHITE PAPER, *supra* note 62.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*; Emily Hamer, *What Effects Do Pretrial Risk Assessments Have on Racial Biases in Justice System?*, WISCONTEXT (Feb. 18, 2019, 12:00 PM), <https://www.wiscontext.org/what-effects-do-pretrial-risk-assessments-have-racial-biases-justice-system>.

<sup>79</sup> Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 508 (2018).

<sup>80</sup> See NCSC WHITE PAPER, *supra* note 62; see Carroll, *supra* note 13, at 71.

<sup>81</sup> Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.



7,000 people arrested in Broward County, Florida between 2013 and 2014.<sup>82</sup> The study found the tool to be unreliable as it related to predicting violent crime with only 20% of those labeled high risk actually committing future violent crimes.<sup>83</sup> The study also found “significant racial disparities” with minority defendants nearly twice as likely to be incorrectly labeled high risk when compared with white defendants.<sup>84</sup>

In contrast, proponents of pretrial risk assessment tools assert that the study conducted by ProPublica is “flawed and misleading,” mainly because the results were based on one specific tool in one specific area.<sup>85</sup> Some law professors and criminologists who support the use of these tools recognized that “any assessment that relies on the data used by criminal justice agencies will have some level of bias.”<sup>86</sup> They assert that, while the use of the tools will not completely eliminate biases in pretrial decision making, they are “easier to fix than biased human decision-making.”<sup>87</sup> Therefore, instead of completely banning the use of these tools, they believe the appropriate response is to improve the tools by working toward limiting the amount of bias as much as possible.<sup>88</sup>

### III. 2020 AND ITS IMPACT

The COVID-19 pandemic undoubtedly had a significant impact on the criminal justice system in general. With infection rates climbing rapidly in the early months, many jurisdictions began implementing strategies to keep people out of jails as much as possible. While some chose to release inmates serving time for low-level offenses, probation or parole violations, and those nearing the end of their sentences,<sup>89</sup> others opted to increase cite and release procedures to avoid new jail entries altogether. Still, many jurisdictions decided on a combination of methods in an attempt to lower the jail population.

In April 2020, with COVID-19 cases on the rise, Attorney General William Barr implored federal prosecutors to consider the dangers associated with keeping defendants incarcerated pretrial.<sup>90</sup> Barr’s memo stressed the importance of allowing flexibility when considering appropriate action for defendants.<sup>91</sup> While Barr stated that “COVID-19 present[ed] real risks,” he recognized that “allowing violent gang members and child

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Ted Gest, *Pretrial Risk Assessment Tools More Accurate Than ‘Human Judgments Alone’: Experts*, CRIME REP. (Dec. 8, 2020), <https://thecrimereport.org/2020/12/08/pretrial-risk-assessment-tools-more-accurate-than-human-judgments-alone-experts/>.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> See Carroll, *supra* note 13, at 75.

<sup>90</sup> Josh Gerstein, *Barr Says Bail Decisions Should Consider Virus Risks*, POLITICO (Apr. 6, 2020, 5:17 PM), <https://www.politico.com/news/2020/04/06/william-barr-attorney-general-coronavirus-169232>.

<sup>91</sup> *Id.*

predators to roam free” also posed social dangers that outweighed health risks associated with COVID-19.<sup>92</sup> Still, he encouraged federal prosecutors to utilize other alternatives, such as home confinement programs, whenever they were deemed appropriate.<sup>93</sup>

One study revealed that, between April 16 and June 1, 2020, more than 81% of jurisdictions increased release during the pretrial stage.<sup>94</sup> The same study revealed that nearly 68% of jurisdictions increased the use of personal recognizance for non-violent offenses.<sup>95</sup> In fact, between March 1 and June 30, 2020, nearly 9% of individuals booked in jail “received an expedited release in response to COVID-19.”<sup>96</sup>

Before the COVID-19 pandemic, Kentucky had “the second highest rate of jail admissions in the nation.”<sup>97</sup> Similar to Barr’s approach, in March 2020, Kentucky Supreme Court Chief Justice John Minton, Jr. encouraged judges in the state to work towards lowering the jail population in an effort to slow the spread of COVID-19 and protect those incarcerated and working in those facilities.<sup>98</sup> Due to the efforts of judges, defense attorneys, and prosecutors across the state, the amount of individuals held pretrial “decreased dramatically” and, by mid-July 2021, Kentucky’s overall jail population had decreased by more than 15%.<sup>99</sup>

Along with these efforts to minimize the jail population, many areas also began implementing cite and release procedures.<sup>100</sup> The cite and release procedure allows law enforcement officers to deprioritize certain offenses, opting not to arrest an individual depending on the crime.<sup>101</sup> In some areas, this procedure has been used when an individual is suspected of simple

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> COVID-19 POLICY RESPONSE SURVEY, NAT’L ASS’N PRETRIAL SERVS. AGENCIES (June 19, 2020), <https://www.nyapsa.org/resources/national-association-of-pretrial-services-agencies-covid-19-policy-response-survey>.

<sup>95</sup> *Id.*

<sup>96</sup> Alexi Jones & Wendy Sawyer, *New Data on Jail Populations: The Good, the Bad, and the Ugly*, PRISON POL’Y INITIATIVE (Mar. 17, 2021), <https://www.prisonpolicy.org/blog/2021/03/17/jails/>.

<sup>97</sup> *COVID-19 and Criminal Justice: City and State Spotlights: Kentucky*, VERA, <https://www.vera.org/covid-19/criminal-justice-city-and-state-spotlights/kentucky> (last visited July 29, 2021).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Liz Kellar, *Cite and Release, Not Jail, for Some Over COVID-19 Concerns*, THE UNION (Mar. 18, 2020), <https://www.theunion.com/news/cite-and-release-not-jail-for-some-over-covid-19-concerns/>; Michael Gelb, *‘Dramatic’ Reforms to Pretrial Practice Triggered by Pandemic: Survey*, CRIME REP. (July 2, 2020), <https://thecrimereport.org/2020/07/02/dramatic-reforms-to-pretrial-practice-triggered-by-pandemic-survey/>.

<sup>101</sup> Cite and release procedures provide law enforcement officers with greater discretion on how to handle certain types of offenses. Depending on the offense, officers have the option to issue a citation or ticket rather than place the offender under arrest. Of course, cite and release may not be appropriate in certain situations. If the offender has committed a low-level offense, cite and release is an effective way to punish offenders while keeping them out of jail.

marijuana possession.<sup>102</sup> During 2020, 65% of jurisdictions surveyed increased use of this procedure.<sup>103</sup>

With a population of 12,500, Bath County, Kentucky is one county that does not operate its own jail. Instead, the county contracts with nearby jails to house its inmates. Between July 1, 2019, and June 30, 2020, Bath County paid \$379,704.84 to other counties to house its inmates.<sup>104</sup> During the COVID-19 pandemic, like many other areas, the county attempted to limit the amount of arrests occurring in the county. Therefore, between July 1, 2020, and March 31, 2021, the county paid \$202,179.00, resulting in \$126,145.84 worth of savings during the COVID-19 pandemic.<sup>105</sup>

Not only were arrest rates down during 2020, but many states also opted to release inmates that were being held for nonviolent offenses and had completed most of their sentence. Between April and August 2020, Kentucky Governor Andy Beshear released 1,800 inmates.<sup>106</sup> The first wave of releases was reserved for those inmates who had compromised immune systems and were within five years of their release date.<sup>107</sup> The second wave of releases included those inmates that were not immunocompromised but were within six months of their release date.<sup>108</sup> Inmates held for violent or sexual offenses were not eligible for release.<sup>109</sup>

Certainly, Kentucky was not the only state that opted to release inmates during the COVID-19 pandemic. States like Ohio, New Jersey, and Virginia all implemented plans to release inmates that were serving time for nonviolent offenses and nearing the end of their sentence.<sup>110</sup> Although the release of inmates played at least some part in reducing the number of people incarcerated, research tends to suggest that the real decrease in the number of individuals incarcerated comes from fewer jail admissions.<sup>111</sup>

In addition to the measures taken by states to release inmates and reduce the amount of arrests, jails, prisons, and sheriff's departments also began taking drastic measures to combat the potential for a COVID-19 outbreak. After many inmates and jail staff tested positive for the virus, some states decided to stop accepting new inmates in their facilities.<sup>112</sup> For example,

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<sup>102</sup> Jolie McCullough, *Texas DPS Officers Told not to Arrest in Low-Level Marijuana Cases After New Hemp Law*, TEX. TRIB. (Aug. 1, 2019, 4:00 PM), <https://www.texastribune.org/2019/08/01/texas-dps-marijuana-cite-and-release-hemp/>.

<sup>103</sup> See Gelb, *supra* note 100.

<sup>104</sup> Financial Statement, Appropriation Condition Report, Bath County, May 27, 2021.

<sup>105</sup> *Id.*

<sup>106</sup> Deni Kamper, *Beshear Administration Defends Decision to Release Inmates Amid Criticism*, WLKY (Dec. 3, 2020, 7:59 PM), <https://www.wlky.com/article/beshear-administration-defends-decision-to-release-inmates-amid-criticism/34864778#>.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *The Most Significant Criminal Justice Policy Changes from the COVID-19 Pandemic*, PRISON POL'Y INITIATIVE (Nov. 10, 2021), <https://www.prisonpolicy.org/virus/virusresponse.html>.

<sup>111</sup> *Id.*

<sup>112</sup> Brendon Derr et al., *States are Shutting Down Prisons as Guards are Crippled by Covid-19*, N.Y. TIMES (May 19, 2021), <https://www.nytimes.com/2021/01/01/us/coronavirus-prisons-jails-closing.html>.

states like Texas and Ohio changed their protocol during the pandemic. Some prisons in Texas stopped accepting new inmates for several months during the pandemic<sup>113</sup> and, in November 2020, the Cuyahoga County Jail in Cleveland, Ohio refused to accept inmates charged with new misdemeanor offenses unless it involved domestic violence.<sup>114</sup> Others, like the Chippewa County Sheriff's Office in Wisconsin, decided to allow inmates working in the community to return home following their shifts rather than return to the jail.<sup>115</sup>

The ultimate goal during the pandemic was to reduce the amount of people incarcerated whenever possible. Due to drastic efforts taken by law enforcement, courts, and jails, jail populations experienced a significant decrease.<sup>116</sup> Between June 2019 and June 2020, there were "1.67 million fewer jail admissions" in the United States, equaling about a 16% decrease.<sup>117</sup> Nevertheless, despite the decrease in jail admissions during the pandemic, in June 2020, "1 in 14 jails still held over 100% of their rated capacity."<sup>118</sup>

#### IV. WHAT HAVE WE LEARNED?

##### A. Re-Arrest Rates

It seems that the re-arrest rates of COVID-19's released inmates vary depending on the location. While some areas have witnessed no real change in re-arrest rates, other areas have experienced a suspected increase. Due to the amount of early release from jails and prisons, the increased use of cite and release, and an increase in release during the pretrial stage, it is difficult to calculate which group of offenders are responsible for either an increase or decrease in the crime rate.

One specific example of concern regarding release comes from New York where the New York Police Department has expressed frustration in those arguing for more releases.<sup>119</sup> In the early months of the pandemic, 1,500 inmates were released in New York, the majority being held for minor

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<sup>113</sup> Jolie McCullough, *With a Stalled Court System, Some Texas Jails are Dangerously Overcrowded in the Pandemic*, TEX. TRIB. (Jan. 28, 2021, 5:00 AM), <https://www.texastribune.org/2021/01/28/texas-jails-overcrowded-coronavirus/>.

<sup>114</sup> Cory Shaffer, *Cuyahoga County Jail Stops Accepting New Inmates Charged with Most Misdemeanors to Prevent 'Explosion' of Coronavirus Cases Amid Historic Surge*, CLEVELAND.COM (Nov. 17, 2020, 4:59 PM), <https://www.cleveland.com/court-justice/2020/11/cuyahoga-county-jail-stops-accepting-new-inmates-charged-with-most-misdemeanors-to-prevent-explosion-of-coronavirus-cases-amid-historic-surge.html>.

<sup>115</sup> Rich Kremer, *County Jails Reducing Inmate Populations to Prevent COVID-19 Outbreaks*, WIS. PUB. RADIO (Apr. 10, 2020, 3:00 PM), <https://www.wpr.org/county-jails-reducing-inmate-populations-prevent-covid-19-outbreaks>.

<sup>116</sup> See Jones & Sawyer, *supra* note 96.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Craig McCarthy et al., *Dozens of NYC Inmates Back in Jail After Coronavirus Release*, N.Y. POST (Apr. 19, 2020, 2:57 PM), <https://nypost.com/2020/04/19/dozens-of-nyc-inmates-back-in-jail-after-coronavirus-release/>.

or nonviolent crimes.<sup>120</sup> By April 2020, at least fifty, or roughly 3% of those released, had reoffended.<sup>121</sup> This report seems to indicate that, of that 3%, many reoffended multiple times following release.<sup>122</sup> The police department provided examples of several repeat offenders, one of which was arrested five times in a matter of weeks after being released due to COVID-19 concerns.<sup>123</sup>

Another example of concern comes from Tulare County, California. In April and July 2020, the Tulare County Superior Court ordered the release of more than 100 inmates over objection from prosecutors.<sup>124</sup> The Tulare County District Attorney's office conducted a study that found that around 50% of those released by the court reoffended.<sup>125</sup> Perhaps more concerning for District Attorney Tim Ward is that "one-third of these repeat offenders are now facing felony charges involving crimes such as robbery, kidnapping, and domestic violence."<sup>126</sup>

The Criminal Justice Research Institute also conducted a study by following 108 of Hawaii's COVID-19 released inmates.<sup>127</sup> The results determined that 58.3% of those released had reoffended.<sup>128</sup> Of the charges accumulated by those released individuals, 17% were felonies while 3% were violent crimes.<sup>129</sup> The Criminal Justice Research Institute director, Erin Harbinson, stated that the recidivism rate is low "for the few serious charges that were included in there."<sup>130</sup> Despite this, Hawaii ended the early release program in November 2020 and has instead decided to focus its efforts on building a new jail to combat jail overcrowding in the state.<sup>131</sup>

While some states have expressed concerns about reoffending, Kentucky Supreme Court Chief Justice Minton stated that the "re-arrest rate for defendants released by pretrial services between April 15 and May 31, 2020 was 4.6%, which was the same re-arrest rate for defendants released by pretrial services during the same period in 2019."<sup>132</sup> During that time period in 2020, 6,000 people were released from custody.<sup>133</sup> Interestingly,

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Sheyanne N. Romero, *DA: Half of Tulare County Inmates Released Under Emergency COVID-19 Order Have Re-Offended*, VISALIA TIMES DELTA (Nov. 23, 2020, 10:28 AM), <https://www.visaliatimesdelta.com/story/news/2020/11/23/50-inmates-released-under-emergency-covid-19-order-have-re-offended/6363251002/>.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Chelsea Davis, *Study: Half of the Hawaii inmates released early because of COVID reoffended*, HAWAII NEWS NOW (Jan. 15, 2021, 3:15 PM), <https://www.hawaiinewsnow.com/2021/01/15/new-study-reveals-more-than-half-hawaii-inmates-released-under-last-years-emergency-orders-reoffended/>.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Steve Rogers, *Fraction of inmates released early have reoffended so far: Judge*, WTVQ (June 8, 2020), <https://www.wtvq.com/2020/06/08/fraction-inmates-released-early-reoffended-far-judge/>.

<sup>133</sup> *Id.*

the rate did not increase despite being almost two times the 3,124 people released during that period in 2019.<sup>134</sup>

Administrative release was afforded to roughly 10% of Kentucky arrestees in 2018 and 2019.<sup>135</sup> During the COVID-19 pandemic, this figure increased by 20%, resulting in an estimated additional 20,000 people released from custody.<sup>136</sup> Despite the large increase, the public safety rate<sup>137</sup> remained nearly the same in Kentucky.<sup>138</sup> With 7% arrested on new offenses compared to 6% in 2018 and 2019, the increase seems minor when considering the nearly 300% increase in people released from jail.<sup>139</sup>

### B. Changes in Crime

The Federal Bureau of Investigation (FBI) revealed in its Preliminary Uniform Crime Report that between January and June 2020, property crime experienced nearly an 8% decline from 2019, with larceny down nearly 10% and burglaries down nearly 8%.<sup>140</sup> Overall, property crime rates decreased in all city population groups.<sup>141</sup> Cities with populations under 10,000 people reported the largest decrease in crime at 14.2%.<sup>142</sup>

One study evaluating crime rates in more than twenty-five of the United States' largest cities revealed a change in crime compared to previous years.<sup>143</sup> The study revealed that the amount of residential burglaries decreased while commercial burglaries and car thefts increased.<sup>144</sup> The amount of drug crimes in these areas also decreased by a drastic 65%.<sup>145</sup>

While the low crime rates seem promising, the study revealed that between April and May 2020, when states began issuing stay-at-home orders, crime fell drastically in more than twenty-five large cities when compared with previous years.<sup>146</sup> This study seems to suggest that the crime rate correlates with the “mobility drop” that occurred when people began staying home.<sup>147</sup> The study also revealed a decrease in residential burglaries

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<sup>134</sup> *Id.*

<sup>135</sup> Marcus Ray & Nicole Krider, *2020 Forced Kentucky to Think in New Ways about Criminal Justice*, KY. TODAY (Oct. 6, 2021), <https://www.kentuckytoday.com/stories/2020-forced-ky-to-think-in-new-ways-about-criminal-justice,30273>.

<sup>136</sup> *Id.*

<sup>137</sup> The public safety rate is determined by whether the individuals released pretrial went on to commit new offenses following release.

<sup>138</sup> See Ray & Krider, *supra* note 135.

<sup>139</sup> *Id.*

<sup>140</sup> FED. BUREAU OF INVESTIGATION NAT'L PRESS OFF., *Overview of Preliminary Uniform Crime Report, January–June, 2020* (Sep. 15, 2020), <https://www.fbi.gov/news/pressrel/press-releases/overview-of-preliminary-uniform-crime-report-january-june-2020>.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> David S. Abrams, *Crime in the Time of COVID*, ECONOFACT (Mar. 30, 2021), <https://econofact.org/crime-in-the-time-of-covid>.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

which may be attributed to the simple fact that many people were staying home during the COVID-19 pandemic.<sup>148</sup>

The study also revealed an increase in commercial burglaries and car thefts with Philadelphia reporting a car theft rate two and a half times higher than before the pandemic.<sup>149</sup> With businesses closed and people staying home, many commercial buildings were left unattended compared to previous years.<sup>150</sup> The study suggests that the lack of security surrounding these businesses could have led to more opportunities for offenders and the approximate 38% increase in these types of burglaries.<sup>151</sup> Further, because of the stay-at-home orders and many people working from home during the pandemic, people were not using their vehicles for travel during these times which could have led to the increase in vehicle thefts during the pandemic.<sup>152</sup>

Although drug crimes have seemingly decreased,<sup>153</sup> we cannot be sure that this is not directly related to the pandemic. In fact, every state reported an increase in overdose deaths during the pandemic.<sup>154</sup> Drug crimes are most often reported by police rather than citizens<sup>155</sup> and, as we know, police presence decreased during the pandemic with many states reporting much fewer arrests during 2020 than previous years in an effort to slow the spread of COVID-19. Considering the spike in overdose deaths across the nation, the decrease in drug crime is likely attributable to the lessened police presence during COVID-19.

The same can be said about domestic violence cases in 2020. While statistics show no significant change, many are skeptical.<sup>156</sup> Domestic violence is difficult to assess before factoring in COVID-19 complications because victims are in a fragile state where reporting abuse may be nearly impossible. With most people under mandatory quarantines, especially in the early months of the pandemic, it is reasonable to assume that many potential victims were trapped in the home with an abuser.<sup>157</sup> Similar to the decrease in drug crimes, domestic violence may have gone unreported during the pandemic as well.

Interestingly, while violent crime either stayed the same or experienced a slight decline in most areas,<sup>158</sup> murder and nonnegligent manslaughter experienced a sharp increase in many areas.<sup>159</sup> Specifically, homicides and

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> AM. MED. ASS'N, *Issue Brief: Nation's Drug-Related Overdose and Death Epidemic Continues to Worsen* (Sept. 20, 2021), <https://www.ama-assn.org/system/files/2020-12/issue-brief-increases-in-opioid-related-overdose.pdf>.

<sup>155</sup> See Abrams, *supra* note 143.

<sup>156</sup> German Lopez, *The Rise in Murders in the US, Explained*, VOX (Dec. 2, 2020, 10:35 AM), <https://www.vox.com/2020/8/3/21334149/murders-crime-shootings-protests-riots-trump-biden>.

<sup>157</sup> *Id.*

<sup>158</sup> See FED. BUREAU INVESTIGATION NAT'L PRESS OFF., *supra* note 140.

<sup>159</sup> *Id.*

shootings soared in the early summer months and continued into the fall before abruptly dropping.<sup>160</sup> While there is no concrete explanation for this increase, there are many things to consider when evaluating this information.

There are several theories as to why the increase in homicides and shootings occurred in 2020. One theory does not revolve around COVID-19, but rather around the Black Lives Matter protests sparked by the death of George Floyd in mid-April.<sup>161</sup> One study found that the rise in some violent crime coincides with the protests and the lifting of some quarantine orders that occurred during the summer months.<sup>162</sup> Some assert that “depolicing,” especially during the protests, could have led to more crime.<sup>163</sup> Yet, studies found that these rates “surge[d] again weeks later, after the protests had calmed.”<sup>164</sup> Therefore, it is impossible to identify the protests as the sole cause of this increase.

Other theories involve simple boredom, an unstable economy, the partial re-opening of society, and unpredictable behavior because of the virus.<sup>165</sup> While there are theories as to why this surge occurred, there are many factors that could have led to this increase in violence. Because there are a multitude of things that could have led to the increase in homicides and shootings, and while we may be able to speculate, we simply cannot identify a root cause for it.

#### V. IS THERE ANY ROOM FOR RECOMMENDATION?

With the lingering effects of 2020 still among us, it seems almost too soon to fully recommend any of the drastic measures taken during the COVID-19 pandemic. Although the numbers seem to indicate stability in crime rates, there are many other factors to consider. As we know, 2020 was not an average year by any means with mandated quarantines and record business closures, all the while raging war against an unrelenting virus.

While the statistics discussed above in “Changes in Crime” seem to indicate that overall property crime was down for the year 2020, there are studies that suggest business closures and mandatory quarantines are at least partly responsible for the decrease. While we see the numbers alone, it is too soon to understand to what extent the measures implemented to keep people safe during the pandemic either eliminated or created opportunities for offenders. As one study suggested, some of COVID-19’s consequences may have either eliminated or created opportunities for property crime in some areas.

While there are many factors to consider when reviewing crime rates for 2020, the COVID-19 pandemic did highlight the problems associated

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<sup>160</sup> See Lopez, *supra* note 156.

<sup>161</sup> *Id.*; see Abrams, *supra* note 143.

<sup>162</sup> See Abrams, *supra* note 143.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> See Lopez, *supra* note 156.



with pretrial detention. Although we must tread carefully in assessing any potential lessons from the pandemic, there may be some small improvements we can make while we wait to further understand how these factors played into the crime rates during the pandemic.

As it relates to the costs associated with incarceration, one thing to consider in the future is informing the public of the cost of incarcerating individuals for low-level offenses. Referring back to the comments made by President Johnson<sup>166</sup> and Lonnie Brewer,<sup>167</sup> poor defendants may be unable to pay an amount that seems quite attainable to the average citizen. The reality is that there are many individuals spending an extended amount of time in jail because they cannot afford bail.

As discussed, counties pay per inmate per day incarcerated. When we remember Bath County, Kentucky's exponential savings during COVID-19,<sup>168</sup> how important is it to keep a low-level offender in jail? With the average cost on counties at twenty-five dollars per day per inmate, if a defendant is incarcerated for a low-level offense but cannot afford to pay a relatively low bail amount, how many nights in jail will satisfy this debt in society's eyes?

During the COVID-19 pandemic, many jurisdictions substantially increased their use of cite and release procedures. Although it is too early to suggest that cite and release procedures be used at this magnitude, gradually increasing use of this procedure may prove beneficial. Allowing law enforcement greater discretion when it comes to nonviolent offenses may play a key role in combatting jail overcrowding across our country.

Research tells us that there is an alarming number of people arrested on drug charges and misdemeanor charges each year. When an individual is suspected of one of these offenses, allowing law enforcement officers greater discretion with how to handle these violations could alleviate some of the strain that comes with mass incarceration. For example, if a person is suspected of simple marijuana possession or a minor traffic violation, the appropriate answer may very well be to issue a citation rather than arrest depending on the circumstances surrounding the encounter.

While there are many, very real, concerns surrounding pretrial detention, this is not to say that pretrial detention is unnecessary or that it is no longer important for our society. To the contrary, pretrial detention serves to protect crime victims, ensure court appearance to answer for the alleged crime, and stop further crime from being committed by the defendant. In some instances, pretrial detention is the only reasonable way to ensure the defendant appears for trial and any potential victims receive protection and justice.

Certainly, violent and sexual crimes, as indicated by Kentucky's decision not to include those inmates in the state's COVID-19 release

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<sup>166</sup> See Johnson, *supra* note 2.

<sup>167</sup> See Norton & Schept, *supra* note 29.

<sup>168</sup> See Financial Statement, *supra* note 104.

procedures,<sup>169</sup> should be looked at seriously and carefully when considering release eligibility. We would not, and should not, classify a sexual or violent offender in the same category as a person who is charged with drug possession. No matter what we plan to do to combat the problems associated with pretrial detention, we must be careful not to jeopardize a system that is designed to protect crime victims and their families.

#### CONCLUSION

While 2020 was a trying year for all, and one we will not soon forget, the criminal justice community received a very unique opportunity during the COVID-19 pandemic. For decades, advocates have pressed for dramatic pretrial release reform. Practically overnight, the entire country had a front row seat to view some of these proposed practices in action.

During COVID-19, a record number of individuals were released from jails and prisons, police were not making as many arrests for non-violent offenses, and some jails were not accepting new inmates in fear of further spreading the virus. While these practices were viewed as a win for advocates, we recognize that there are many factors to consider before fully supporting and implementing these practices. Even though Illinois decided to make drastic changes to its criminal justice policies this year, we will have to wait until 2023 to see if and how the elimination of cash bail benefits their state as a whole.

One of the most important things we must remember when reviewing crime rates and contemplating possible criminal justice reforms is that 2020 was simply a year like no other. Comparing crime rates from previous years seems almost pointless when considering the drastic changes to everyday life for all United States citizens; therefore, when deciding how to combat the problems that arise with pretrial detention, we must tread lightly while keeping the public and the accused in mind.

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<sup>169</sup> See Kamper, *supra* note 106.