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Bail Discrimination: Racial Disparities in the United States Bail Determination Process

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Nationwide, there is a systemic problem with bail determination: the process that a citizen goes through after they are arrested and before they go to trial to determine guilt or innocence for the crime they have been accused of committing. The United States leads all other countries with approximately half a million individuals detained before trial each year, a number nearly double the next highest country (China) (Nejdl, 2017). The high rate of pre-trial detention in the United States is due to both widespread use of monetary bail and the limited financial resources of most defendants; specifically, African American men. Despite the potential long-term impact of bail determinations in criminal cases, bail officials have relatively few legal constraints and have significant discretion, especially in state courts where the initial bail determination is treated as a minor administrative processing task. Instead of engaging in a meticulous assessment of a defendant's flight and safety risk, pragmatically taking into consideration relevant factors such as ability to pay bail, bail officials all too often administer arbitrary money bonds that result in pre-trial detention for the poor and disadvantaged. In this paper, I start with the history of the bail system in the United States, showing its original intent. From there, I outline what the current laws and statutes from state and federal perspectives look like in theory before transitioning to what the system looks like in reality. Then, I take a deeper look using first- and second-generation studies to prove that there truly are racial disparities in bail determination. Finally, I contend that there are ways to improve this twisted system that has continued the systemic oppression of African Americans in the judicial system.

History of Bail and Bail Determination:

The importance of pre-trial release is grounded in the presumption of innocence, a right to protect defendants prior to any findings of guilt, and it has been for centuries. First highlighted

in the Judiciary Act of 1789, which stated that non-capital defendants should be entitled to some form of bail, the concept of ‘innocence until proven guilty’ arose. When combined with the Bail Clause of the Eighth Amendment, which states that “excessive bail shall not be required”, it was commonly understood that the pre-trial defendants had the undeniable right to be released on a reasonable amount of bail before being convicted of a crime. In effect, the bail system laid in place by this foundation remained largely the same for the next two centuries. However, within the past several decades, the right to bail has evolved significantly, shifting from a “substantive focus on solely preventing flight” to an “additional focus on preventing new crime” (Yang, 2017, p. 1411). Through five major Supreme Court cases and the passage of two Bail Reform Acts since the 1950’s, defendants facing pre-trial detention have faced significantly reduced constitutional protections with respect to bail and bail determination.

Starting with *Stack v. Boyle* (1951), one of the earliest Supreme Court cases addressing the right to bail, the appellant challenged the blanket imposition of 50,000 dollars of bail for all twelve defendants as “arbitrary and excessive”, claiming that the amount was set without an “individual assessment of each defendants’ risk of flight” (Justia Law). The Court articulated a broad view of the Eighth Amendment that appeared to encompass a constitutional right to bail, acknowledging that the function of bail is to assure the defendant’s appearance at trial and that the Eighth Amendment is violated if the bail is “set at a figure higher than an amount reasonably calculated to fulfill this purpose.” (Justia Law) The Court sent the case back down to the lower courts, demanding them to set bail in an amount that takes into account “the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail, and the character of the defendant.” (Justia Law) In his concurrence, Justice Jackson wrote that bail “is not a device for keeping persons in jail upon

mere accusation until it is found convenient to give them trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty.” He continues by stressing that “the question when application for bail is made relates to each one’s trustworthiness to appear for trial and what security will supply reasonable assurance of this appearance.” (Justia Law) Although never specifically expressing that the pre-trial defendant has the right to bail, the language in the majority and concurring opinions strongly suggested a presumption of “reasonable bail” for all defendants in non-capital cases (Jones, 2013).

In *Carlson v. Landon* (1952), four months after *Stack*, the Court declared that the Eighth Amendment creates no right to bail. Specifically, the Court stated that “the Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus, in criminal cases, bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable.” (Justia Law) Leaving out death penalty consideration from the possibility of bail was the Court’s first step towards eliminating the constitutional protection of pre-trial defendants facing pretrial detention.

Thereafter, designed to “reduce the increasingly high bail amounts imposed by judges” and as part of a “compromise with the critics of the bail system”, Congress passed the Bail Reform Act of 1966 (Yang, 2017, p. 1412). This Act, which sought to protect the right to pre-trial release without payment of money, became known as “release on recognizance” (ROR) and “explicitly introduced discretionary consideration of various factors”, including incorporation of a defendant’s record, to decide bail (Yang, 2017, p. 1413). The passage of this Act represented the first major federal bail reform since the passage of the Judiciary Act of 1789, making the release of defendants without money bail the norm, rather than the exception. And, shortly

thereafter, Congress passed the District of Columbia Crime Bill (1970) which authorized the detention of criminal defendants without bail if they were “assessed to be dangerous to society” (Yang, 2017, p. 1413). This was the first reform that displayed preventative detention in a context that included more than just first- or second-degree murder charges.

Post *Carlson* and continuing to follow the narrow interpretation of the Eighth Amendment Bail Clause, the Court further limited the constitutional rights of the accused. In *Bell v. Wolfish* (1979), the Court addressed constitutional challenges to conditions of confinement by a class of pretrial detainees in a federal detention facility in New York (Justia Law). The pre-trial detainees argued that the mistreatment and restrictions to which they were subjected did not respect their presumption of innocence and therefore were in violation of their Eighth Amendment and Due Process rights. Justice Rehnquist, who delivered the majority opinion for the Court, held that the presumption of innocence is a “doctrine that allocates the burden of proof in criminal trials, but has no application of the rights of a defendant in pretrial detention.” (Jones, 2013, p. 925) Although the opinion in *Bell* states that the “essential objective” of pretrial detention is to ensure the detainee’s appearance at trial, the Court did not address whether pre-trial detention could be justified for any other reason, like community safety or a defendant’s inclination to commit future crimes. This issue was first addressed by the Court in *Schall v. Martin* in 1984.

In *Schall v. Martin* (1984), the Court examined a New York statute that authorized pre-trial detention for juveniles in delinquency proceedings if there was a “serious risk” that the child would commit a crime while on pretrial release (Justia Law). In the ruling, the Court held that the New York’s juvenile pre-trial detention statute “did not unconstitutionally impose punishment prior to adjudication” because preventative detention for juveniles “advanced the

state's legitimate objective in protecting the juvenile and society" from the possibility that the juvenile would commit a crime while on pre-trial release (Justia Law). The Court also held that the New York statute had sufficient procedural protections to prevent the erroneous deprivation of rights, including the right to counsel, notice of the charges, a finding of probable cause prior to detention, and the requirement that the judge state on the record the facts and reasons for the detention (Jones, 2013). Although the Court's ruling in *Schall* upheld pretrial detention for juveniles in delinquency proceedings, it remained unclear whether adults who posed no flight risk could also be subjected to preventive pre-trial detention based solely on a finding of future dangerousness.

This question, in particular, was answered by Congress in the Bail Reform Act of 1984 in the wake of the "alarming problem of crimes committed by persons on release." (Yang, 2017, p. 1415) In this way, Congress amended the original 1966 Bail Reform Act to authorize preventive detention for federal defendants if the court found the defendant posed a risk of danger to the community or a risk of flight (Jones, 2013). The new reform contained procedural protections such as a defendant's right to a prompt detention hearing, the right to be represented by counsel, and the right to present evidence. Similarly, the government had the burden of showing by "clear and convincing evidence" that the defendant need be detained to prevent either of the two risk assessments (Jones, 2013, p. 928). However, as we will see later in this paper, the pre-trial rights of the defendant in law compared to the pre-trial rights of the defendant in practice proved to be quite different.

This idea of preventative detention for all defendants, assuming the defendant fit one of the two risk categories outlined in *Scall* and the Bail Reform Act of 1984, faced substantial criticism among judges and the scholarly community alike. In *United States v. Salerno* (1987),

the last major case determining current bail reform practices, the Second Circuit Court of Appeals ruled that the law violated the Due Process Clause of the Eighth Amendment by allowing judges to deny bail to defendants who they believed were dangerous to the community. The court declared that the basis of future dangerousness was “repugnant to the concept of substantive due process.” (Justia Law) Similarly, scholars commented that the use of preventative detention “contradicted the idea that there would be no punishment prior to conviction.” (Yang, 2017, p. 1414) Taken on by the Supreme Court, the justices reversed the decision of the Second Court of Appeals. The Court rejected claims that pre-trial detention on the basis of dangerousness violated the Due Process Clause of the Eighth Amendment and upheld the constitutionality of the 1984 Bail Reform Act. The justices concluded that although defendant Salerno had lost liberty when detained, he had not been “punished”, but simply subject to regulatory control, otherwise known as pre-trial detention (Justia Law). The Court noted that as long as those detained pretrial were ensured a “prompt hearing”, the period of detention was “limited by the Speedy Trial Act of 1974”, and pretrial detainees were “housed separately from convicted defendants”, the Act remained constitutional (Yang, 2017, p. 1415). The conditions set in *Salerno* regarding the right to a prompt hearing and the right to separate housing from convicted felons, although theoretically reasonable in nature, were unrealistic in practice as we will see later on and have contributed to a bail system that neglects the Eighth Amendment rights of defendants pre-trial.

Current Federal and State Bail Law:

The impact of *Salerno* on the bail system contributed to what became known as the “preventative state”, where almost all states adopted statutes explicitly allowing judges to consider dangerousness as a factor in pretrial release (Yang, 2017, p. 1416). Specifically, forty-

four states and the District of Columbia now have bail statutes that allow consideration of future dangerousness in setting bail (Jones, 2013). However, despite states following in the footsteps of the 1984 Bail Reform Act as it pertains to the incorporation of dangerousness as a pre-trial release factor, there really is no uniformity between federal and state bail laws. For example, contrary to the Supreme Court's restrictive interpretation of the Eighth Amendment, forty of the states have state constitutional provisions that grant pre-trial defendants a right to bail. Typically, these constitutional provisions include all defendants except those "charged with a capital offense." (Jones, 2013, p. 929) The use of money bonds as well as the use of commercial bail (via a bail bondsman) is the widespread practice except in Kentucky, Illinois, Oregon, and Wisconsin, where commercial bail has been abolished and replaced with "comprehensive programs" to provide "supervised community release." (Jones, 2013, p. 930) The resulting impact of the five major Supreme Court cases and the two Bail Reform Acts, decided within the last several decades, has created a system of bail determination pre-trial that has fundamentally restrained the rights of arrestees. In the next section, this paper discusses what the resulting bail system is theoretically supposed to look like today, followed by what the bail system has become in actuality.

The United States Bail System in Theory:

When a person is arrested, the next major decision in the criminal adjudication process is whether the defendant will be held in jail until the criminal charges are resolved or whether the defendant will be afforded an opportunity to be placed on pre-trial release. This decision between pre-trial detention and pre-trial release, based on past precedent from Supreme Court cases, is based on a range of factors. Specifically, these factors include the nature and severity of the charged offense, the strength of the government's evidence, the defendant's criminal history

(such as prior convictions, other pending charges, current criminal justice supervision status, prior failures to appear in court, etc.), community ties (like the length of residency in the jurisdiction, education level, employment status), and personal information (such as financial resources for bail, health issues, illegal drug use, mental health history, etc.) (Jones, 2013).

If the defendant qualifies for pre-trial release, the judge or bail official must also determine what conditions of release, if any, will be imposed (monetary, non-monetary, or neither). This can include release on recognizance (ROR), where defendants simply promise to return for all court proceedings, as well as other non-monetary conditions such as monitoring or drug treatment when the court finds that these measures are required to prevent flight or harm to the public (Dobbie et al., 2018). If a defendant is required to post a bail payment to secure pre-trial release (monetary condition of release), it must be because they pose “an appreciable risk of flight or threat of harm to the public.” (Dobbie et al., 2018, p. 5) Defendants, in this case, are typically required to pay 10% of the bail amount to secure release, with most of the bail money refunded after the case is concluded if there were no failures to appear in court or other release violations. Those who do not have the 10%, in theory, can borrow from a commercial bail bondsman (if it is legal in the state), who will accept cars, houses, jewelry, and other forms of collateral (Dobbie et al., 2018).

If the defendant does not qualify for pre-trial release, where the judge or bail official denies bail or other non-monetary conditional release all together, it must be a result of some substantiating factors. Specifically, bail denial is often mandatory in first- or second-degree murder cases but can be imposed for other crimes when the bail judge finds that no set of conditions for release will guarantee appearance in court or protect the community from the threat of harm posed by the arrestee (Dobbie et al., 2018).

The United States Bail System in Practice:

In 1952, Justice Jackson observed that “fixing bail is a serious exercise of judicial discretion that is often done in haste—the defendant may be taken by surprise, his counsel has just been engaged, or for other reasons, the bail is fixed without that full inquiry and consideration which the matter deserves.” (Jones, 2013, p. 931) Almost 70 years later and, unfortunately, this description of bail determination remains extraordinarily accurate with regard to state court bail determinations. Across the country, the reasoning behind bail determinations in state courts has become untethered from “legitimate governmental interests” in “protecting the community safety” and “reasonably assuring” the defendant’s appearance in court (Yang, 2017, p. 1404).

The procedural safeguards that the Court found adequate in *Schall* to protect defendants from “arbitrary and erroneous deprivations of rights” through preventative detention are not required in many state bail determination proceedings (Jones, 2013, p. 931). Similarly, a significant proportion of state bail laws generally do not require bail judges and officials to make oral or written statements to justify the bail imposed. This has led to an extremely large proportion of bail determination cases requiring arbitrary bail (Jones, 2013). Therefore, although constitutional protections, the Bail Reform Acts, and state statutes are supposed to grant arrestees the benefit of ‘innocent until proven guilty’, the determination between pre-trial release and pre-trial detention in practice is extraordinarily arbitrary.

Bail commissioners, magistrate judges, and other court officers exercise considerable power and virtually unbridled discretion in making bail determinations. Too often, determinations are corrupted by random amount of the bail imposed, the defendant’s lack of financial resources, the implicit bias of the bail official, and the race of the defendant (Jones,

2013). These factors combine to create an “extreme dysfunction” in the bail determination process, which produce “severe overcrowding of jails” with pre-trial defendants and “unwarranted racial disparities” in bail outcomes between White and African American pre-trial defendants (Jones, 2013, p. 921)

Similarly, as Justice Jackson observed in *Stack*, due to the unbridled discretion of bail officials, defendants in pre-trial detention are “handicapped in consulting with counsel, searching for evidence and witnesses, and preparing a defense.” (Jones, 2013, p. 938) They do not have the opportunity to obtain or continue employment, participate in drug treatment, or otherwise demonstrate to the court that they can be law-abiding citizens and do not pose a danger to the community (Yang, 2017). In turn, the result of unwarranted pre-trial detention of arrestees leads to increased plea bargaining and higher conviction rates at trial. The effect of being detained puts defendants in a disadvantaged position; a position of weakness.

In many jurisdictions, including the District of Columbia, a significant component of the bail determination process is the preparation of a bail report by a pretrial services agency, an agency that specializes in investigation, reporting, assessment, and supervision. Prior to initial appearance and bail determination, these agencies prepare a bail report that contains information on the defendant’s employment, residency, community ties, and criminal history (Yang, 2017). After gathering this data from interviews with the arrestee, verification of data by phone, and the completion of a criminal background check using local and national databases, the agency completes a full risk assessment that allows the court to properly evaluate the risk that the defendant will flee or commit a crime while on pre-trial release, determining whether there are supervised release conditions that will address or minimize those risks. (Jones, 2013) This pre-trial model has been successfully implemented in jurisdictions across the country to reduce

reliance on pre-trial detention without a corresponding increase in rearrests or failures to return to court among defendants who are placed in pretrial community supervision programs.

Although this system has been shown to work, many jurisdictions across the country do not utilize a pre-trial services agency. The lack of such services, despite the fact that most state bail laws require bail officials to consider the background and criminal history of defendants in setting bail, has forced bail officials to make “quick and dirty” decisions, relying solely on their “gut instincts” or the “customary policies and practices of the jurisdiction” (Jones, 2013, p. 931). All too frequently, this uninformed decision-making process causes bail officials to impose a conditional pre-trial release with a money bond, without giving full consideration to available non-financial release options. In addition to the overall lack of information available to bail officials, bail determinations are frequently made when there are many other defendants on the “crowded court calendar” that must be processed in a relatively short amount of time (Jones, 2013, p. 932). This adds to the dysfunction in the bail determination process. In Connecticut, for example, when determining bails, the average arraignment takes about five minutes, enough time for judges to get only a snapshot of each case. As one Connecticut judge admitted, “a judge can justify any bond... You can assemble a room full of judges and the range of bail for the same crime can vary from 5,000 to 250,000 dollars. It’s their individual decision.” (Jones, 2013, p. 933)

Another complicating factor is that in some jurisdictions, the bail official is not a judge or even a lawyer. In Maine, for example, bail determinations are made by a “bail commissioner” appointed by the chief judge of the state district court (Jones, 2013). Although they must be Maine residents and complete the eight-hour training course within a year of appointment, these “commissioners” are still able to make bail determinations before their training is complete. One

study found that some bail commissioners in Maine were former newspaper reporters, insurance salesmen, and maintenance workers (Appleman, 2012). Similarly, initial bail determinations in Baltimore are made by non-judicial officers. Bail commissioners are separated from the inmates by a sheet of glass with a partition used to speak to the defendants and pass papers to them. The bail hearings are not recorded, closed to the public, and traditionally take place without counsel present. Moreover, although the commissioner's bail determination is subject to review by a judge, studies show that the judges adjust the initial bail determination in less than a quarter of cases (Appleman, 2012). In a different study of Philadelphia County, bail guidelines are only followed by the bail judge about half the time, with judges imposing monetary bail instead of the recommended non-monetary options (Dobbie et al., 2018). While a defense lawyer is present at these bail hearing, there is no real opportunity for defendants to speak with the attorney prior to the hearing, rendering their presence practically useless.

Because many defendants lack the funds to post the arbitrary bail amounts set by justices and bail officials, they are placed in jails for weeks for committing mere misdemeanors, sentences that if resulting in conviction wouldn't even illicit jailtime. In New York City, for example, most charges are for minor "quality-of-life offenses", such as smoking marijuana in public, jumping a subway turnstile, or shoplifting, and bail was set at 1,000 dollars or less (Appleman, 2012, p. 1305). Yet, the overwhelming majority of defendants are still unable to pay and are sent to jail where they remain, "on average, for more than two weeks." (Appleman, 2012, p. 1305)

Relative to conviction in New York City, one in five detainees will not be convicted. Similarly, data from the New York State Division of Criminal Justice Services indicates that eight out of ten convicted misdemeanor arrestees receive sentences that do not include jail time.

(Appleman, 2012) For misdemeanor cases especially, pretrial detention is a disproportionate restriction of rights, particularly in light of the nonthreatening, petty nature of most of the charged nonfelony crimes. And, although detainees are typically housed in local or municipal jails, separate from incarcerated prisoners, “resources are scarcer, the staff is ‘less professionalized,’ classification of inmates is haphazard, and rapid turnover makes for generally chaotic conditions.” (Appleman, 2012, p. 1301)

The bail determination process in many state courts, as we have seen, creates a substantial risk of erroneous and arbitrary deprivation of liberty. When taking into consideration the lack of background information on the arrestee, the overwhelming legal restrictions placed on bail determinations, and the overall lack of formality and accountability of the bail determination process, it becomes clear that there is very little protections offered against the consideration of race and class, especially in jurisdictions where the bail official is not a lawyer and the defendant is not represented by counsel at the bail hearing. Therefore, although theoretical presumptions regarding bail based off federal and state statutes seem to reasonably protect the rights of arrestees, in practice they are violated often.

Consequences of the Current Bail System:

According to a 2013 Department of Justice report, over 60% of the people housed in jails across the country are pretrial detainees and a significant contribution to nationwide jail overcrowding (Jones, 2013; Yang, 2017). These high rates of pretrial detention have been coupled with the increasingly prevalent use of financial conditions of release. For example, one study showed that between 1990 and 2009, the fraction of felony defendants who were released with financial conditions increased from 40% to 62% (Yang, 2017). While a percentage of pretrial defendants are confined because the court has determined that they pose a risk of danger

to the community or a risk of flight, 75% of pretrial detainees are charged with relatively minor property crimes, drug offenses, or other non-violent acts, and remain in jail simply because their money bond was set in an amount they cannot afford to pay (Jones, 2013, p. 935). ‘Bail eligible’ pretrial detainees sit in jails for weeks or months until their crimes are resolved and, because most pretrial detainees are charged with minor offenses, they most likely would not receive a sentence of incarceration if convicted. Therefore, these defendants spend far more time behind bars pre-trial while they are ‘presumed innocent’ than they would be required to serve after a conviction.

Pre-trial detention also has an adverse impact on the case outcome. According to the Department of Justice, 78% of defendants held on bail are eventually convicted, but just 68% of released defendants are ultimately convicted (Jones, 2013). Similarly, defendants placed in pre-trial detention are also more likely to plead guilty and tend to get worse plea deals than released defendants. As a result, pre-trial detainees plead more often and to more serious offenses. Furthermore, defendants subject to pre-trial detention also face a much greater prospect of incarceration and receive longer prison sentences than released defendants with similar charges and a similar criminal history. For example, a national study from 2007 found that defendants placed in pre-trial detention were four times more likely to be sentenced to incarceration and received sentences 86% longer than defendants who were released pre-trial (Jones, 2013).

On top of the long-term impact of pre-trial detention on a pending case, time spent in jail can negatively impact the mental and physical health, employment, and family and community interactions of those incarcerated (Appleman, 2012, p. 1315). Furthermore, due to the harsh conditions and overcrowding in some local jails, pre-trial detainees can be exposed to disease, physical violence, sexual assault, and face a “very real” risk of death (Jones, 2013, p. 937). As

we continue to delve into the adverse effects of pre-trial detention on defendants awaiting trial sentencing, it becomes more and more clear that pre-trial detention and the use of arbitrary money bonds to hold arrestees captive significantly affects all areas of the case thereafter, as well as the mental and physical health of the accused. Similarly, as we will see in the next section, there is a disproportionate effect of pre-trial detention on the African American population in the country which has contributed to the well documented and systemic issue of mass incarceration in the nation.

Race Disparities in Bail Determination:

Studies have consistently found that African American defendants receive significantly harsher bail outcomes than those imposed on White defendants. This phenomenon is not isolated to particular regions of the country. In fact, it is highly pervasive all across the country. The harsher bail outcomes, as we will see through numerous first- and second-generation studies, have contributed to a sickening overrepresentation of Black men convicted and marked as criminals in the current judicial system. Indeed, although African Americans comprise 28% of people arrested and 38% of prison inmates, they only represent 13% of the national population (Kutateladze et al., 2014, p. 515). Because the criteria used for making pre-trial release decisions are less restrictive than the criteria considered legally relevant for making sentencing decisions, defendants of color, the group most likely to benefit from non-financial release, is also the group least likely to qualify for non-financial release (Demuth, 2003).

When looking at racial biases in the system of bail determination, the focal concerns perspective has become the dominant framework surrounding contemporary research. According to this perspective, the decisions of court actors, including prosecutors and judges, reflect their assessment of the “blameworthiness or culpability of the offender”, their “desire to protect the

community by incapacitating dangerous offenders or deterring potential offenders”, and their “concerns about the practical consequences, or social costs, of their decisions.” (Kutateladze et al., 2014, p. 519) This perspective assumes that decision-makers attempt to tailor outcomes to fit the facts and circumstances of each case, but in practice, often have incomplete information about the important details relating to the crime and the defendant. When these decision-makers are faced with incomplete information and the predictions they are required to make are uncertain, defendant characteristics such as race may be used as “proxies for culpability or dangerousness” (Kutateladze et al., 2014, p. 519). Not having all of the information needed to fashion sentences to fit crimes and offenders, prosecutors and judges develop “perceptual shorthands” based on stereotypes and attributions that are linked to defendant characteristics (Kutateladze et al., 2014). These arguments are consistent with broader perspectives on structural racism that suggest that patterns of disadvantage “evolve over time” and may become “institutionalized in organizational norms and decision-making routines.” (Nejdl, 2017) As it pertains to bail determination, the evolution of accepted practices that have created the foundation for precedent in determining factors of dangerousness and flight risk, as we will see, are overtly racist in nature. Looking at both first- and second-generation studies, this section of the paper seeks to prove that racial disparities do in fact exist all across the country in the bail determination process and that there are certain types of crime that increase judicial discrimination more than others for pre-trial detention of African Americans.

First Generation Studies (1970-2000)

In 2003, Professor Marvin D. Free, Jr. completed a meta-analysis of 25 different studies on the impact of race in bail determinations published between 1970 and 2000. In 18 of the 25 studies, researchers concluded that African American defendants were subjected to more severe

treatment than White defendants (Jones, 2013). Moreover, research studies showed that even when judges have access to relevant background information, both prevalent and extraneous, race still played a role in the outcome of the bail determination.

One major national study found, after examining bail determination in over 5,000 felony cases adjudicated in federal district courts in Brooklyn, Manhattan, Chicago, Philadelphia, Baltimore, Dallas, Kansas City, Atlanta, Los Angeles, and Detroit, that White defendants with a prior felony conviction received more favorable bail outcomes than “similarly situated” African American defendants (Jones, 2013, p. 940).

Moreover, although both African American and White defendants benefitted in the bail determination based on their education and income level, these factors “operate at the greater advantage of Whites than Blacks” in the bail determination process (Jones, 2013, p. 940). Specifically, a study by Patterson and Lynch (1991) found that non-white defendants were significantly less likely to receive bail below schedule guidelines due to “legal agents” failing to give Black defendants the same “benefit of the doubt” as White defendants (Demuth, 2003, p. 879). The study was cited as possibly due to the stereotype of Blacks as less dependable and more likely to be serious criminals than Whites, even if education level was high (Demuth, 2003).

Other first-generation studies found that African Americans were charged a higher money bond to secure their pre-trial release than were White defendants. Local community ties, generally viewed as a positive factor in determining risk of flight, was found to decrease the bond amount for white resident defendants, but not African American resident defendants (Appleman, 2012).

Second Generation Studies (2001-present)

The second generation of research studies relies primarily on the volume of national criminal justice data compiled by the Department of Justice as part of State Court Processing Statistics Project (SCPS) (Jones, 2013). One study examined bail determinations in over 30,000 property, drug, and violent criminal cases filed in over 45 counties across the country. After controlling for both legal and extralegal factors relevant to bail determinations, the study found that African Americans were 66% more likely to be in jail pre-trial than were white defendants (Demuth, 2003). Overall, the odds that similarly situated African American's being held on bail because they were unable to pay the bond amounts imposed were twice that of White defendants (Jones, 2013).

Another study, completed in 2005, examined bail determinations in over 36,000 felony state court cases across the country and found that "being black increases a defendant's odds of being held in jail pretrial by 25%." (Jones, 2013, p. 942) Similarly, researchers found that even when the court imposed a money bond, African Americans "have the odds of making bail that are approximately half those of Whites with the same bail amounts and legal characteristics." (Jones, 2013, p. 942)

Outside of data collected on racial disparities using SCPS, Freiburger, Marcum, and Pierce (2010) used pre-sentence investigation (PSI) reports written in 2000, 2001, 2002, and 2003 for all individuals charged with a drug offense in a midsized county in Pennsylvania (N=312). Additional data was collected from the offenders' official court dockets from the Pennsylvania Unified Judicial System containing data on the defendant's pre-trial release status and bail amounts. The results of this study showed that a "strong racial difference" was found in judges' decisions to grant release on recognizance (ROR) and in the actual release status of the

defendants (Freiburger et al., 2010, p. 80). The findings that Black defendants are less likely to be granted ROR and more likely to remain detained prior to trial is consistent with the focal concerns perspective, likely due to judges' perceptions of Black defendants as being more "dangerous, blameworthy, and better able to serve time incarcerated." (Freiburger, 2010, p. 84) The strong racial impact found among this sample of drug offenders also is consistent, as Black drug offenders are believed to initiate especially strong stereotypical images among judges (Freiburger et al., 2010). Also consistent with the focal concerns perspective, several legal variables were found to influence pre-trial release including number of prior felony convictions and seriousness of offense (Freiburger et al., 2010). The focal concerns perspective, in this case, suggests that those who commit more serious offenses and have a more extensive criminal record are more likely to be treated harshly by the judge because they are viewed as more dangerous and blameworthy. The problem with the use of this factor in deciding pre-trial detention is that it is inherently racist due to the fact that Black men are arrested and incarcerated at much higher rates than White men. Using criminal record to justify pre-trial detention simply continues to encourage the cycle of systemic oppression in the judicial system.

The two most recent studies—both published since 2010—found that African American defendants face higher bail amounts than White arrestees with similar criminal charges and criminal histories. And, when race was combined with other legally relevant factors, African Americans were found to have lower odds of non-financial release and greater odds of pre-trial detention (Jones, 2013). Data for one of the studies, in particular, was collected over a 20-month period and consisted of 159,206 misdemeanors and 26,069 felonies accepted for prosecution and disposed of in 2010-2011 (Kutateladze et al., 2014). There is strong evidence from this study, like others in this paper, that shows that Blacks were significantly more likely than Whites to be

detained at arraignment. Specifically, controlling for legal and extralegal factors, Black arrestees were 47.8% more likely to be detained (Kutateladze et al., 2014). Broken down into type of crime, Black defendants arrested for a felony charge were detained 61.3% of the time compared to White defendants who were detained 43.2% of the time. For misdemeanor charges, Black defendants were detained 22.5% of the time compared to 10.3% of the time for White defendants (Kutateladze et al., 2014). This data shows that racial disparities were more significant for misdemeanor charges than felony charges. Compared with Whites, Blacks were more than twice as likely to be detained, nearly three times as likely to receive a plea offer, and nearly twice as likely to be sentenced to jail for misdemeanor offenses (Kutateladze et al., 2014). This finding is consistent with research that suggests that less serious offenses involve greater discretion, which may be associated with larger racial disparities.

Potential Causes for Racial Disparities

As we have seen through the first- and second-generation research, the criminal justice system in the United States is not post-racial. While Black men have a higher rate of criminal activity in some crime categories, this does not explain why Black defendants who commit the same crimes and have the same criminal history as White defendants are more likely to be denied pre-trial release and are sentenced more harshly. Most likely, the biggest culprit of racial disparities in bail determination is discretionary power; specifically, who has it and how they use it to administer bail outcomes.

The research finds that Black men are seen as “aggressive, criminal, dangerous, irresponsible, and intimately connected to drug use and trade”, factors that, when taken into consideration for bail determination, prove to be costly (Schlesinger, 2005, p. 3). Drug use and violence are often portrayed as ‘ghetto pathologies’ that are beginning to invade ‘white space’.

As such, Blacks are portrayed not only as “intimately involved with illicit drugs”, but also as “preeminently dangerous”, and therefore subject to pre-trial detention (Schlesinger, 2005, p. 3). Because bail reform legislation has generally mandated that judges base the denial of bail on the need to protect the community from the defendant, attributions concerning dangerousness (and the capacity for violence) are most likely to affect this decision. Similarly, as this paper has mentioned earlier, reforms in the last several decades mandate that the decision to grant non-financial release should be based on the perceived flight risk of the defendant, a perceived risk that might be influenced by the judge’s “propensity to believe the defendant is irresponsible” (Schlesinger, 2005, p. 4).

Race-neutral explanations of the persistent patterns of racial disparities are contradicted by the fact that the relevant information that bail officials could legitimately use to differentiate bail outcomes for White and African American defendants is rarely known by the bail official at the time of the bail determination (Jones, 2013). Judges’ perceptions shape their decision-making processes by helping them to efficiently categorize defendants as dangerous (or not), reliable (or not), and blameworthy (or not). Judges use racialized attributions to fill in the knowledge gaps created by limited information on cases and defendants. Through this process, racial stereotypes become pertinent ‘knowledge’ that direct criminal justice decisions. Therefore, the broad breadth of judicial discretion, combined with established practices and stereotyping to ‘fill in the gaps’, has created a system of bail determination in the United States that is extraordinarily racist and continues to oppress the African American community into an era that Michelle Alexander calls “The New Jim Crow”.

Pre-trial Race Reform:

While there is no ‘one size fits all’ cure for the problems in the bail system, there are some measures that may improve the discretionary decision-making process and prevent the unwarranted detention of thousands of “bailable” non-violent, and low and moderate risk” pre-trial defendants (Jones, 2013, p. 955). These reforms could allow the court to have more transparency and better oversight of the bail process, and reform some of the policies and practices that can lead to racial disparities in bail determinations.

Although the presumption of release and the right to bail are core components of most state bail laws, as we have seen, these principles are largely ignored in practice. There is a stigma that bail proceedings are “insignificant administrative proceedings”, and bail officials, therefore, are not given adequate training on the basic legal principles of bail or given guidance on how to make proper bail decisions (Appleman, 2012). Through training on “national standards” and “best practices” by experts in pre-trial justice across the country, both state and county criminal justice systems can implement reforms that “expand pretrial release, protect the safety of the community, and reduce jail overcrowding” without increasing the “failure to appear rate” in an effort to decrease racial disparities in bail determinations (Jones, 2013, p. 956). The national standards and best practices for bail determination include the creation of pre-trial services agency, or performance of the pre-trial services function within an existing agency (like probation). In this way, the collection of data to better determine bail determinations in a less discriminatory way could be utilized.

Similarly, in addition to collecting the proper information needed to make a bail determination, bail officials should be required to document the factual basis for their finding that the defendant poses a risk of dangerousness or flight which justifies any decision to impose a

monetary bond or other conditions that could result in pre-trial detention. A factual justification requirement is critical to ensure that bail officials “comply with state bail laws and do not make arbitrary bail determinations” based on “impermissible factors” such as using the race or ethnicity of the defendant (Appleman, 2012, p. 1315). Although bail officials might argue that this practice is not practical, due to a need for expediency in processing a large number of defendants, there is evidence that suggests that court proceedings in many jurisdictions already require bail officials to create some form of written record of the bail determination. Often this record includes, at a minimum, recording the bond amount, the next court date, and any other release conditions imposed (Yang, 2017). By simply having the bail official add the factual basis for finding a defendant poses a flight or safety risk, bail determinations based solely on an official’s ‘instincts’ or impermissible factors such as race could be decreased.

Another potential route to decrease pre-trial detention could be a greater use of electronic monitoring. In fact, since the 1980s, electronic monitoring has been utilized as an alternative to pre-trial detention in the United States. Broadly speaking, it uses some form of radio or GPS device to track a defendant’s movement and is often combined with other conditions such as curfew or home confinement (Yang, 2017). As technology increases, states and other countries are considering using electronic monitoring to a much greater capacity. Belgium, for example, is currently investigating whether an electronic monitoring system could replace pre-trial detention altogether and serve as a solution to prison overcrowding (Yang, 2017). The promise in this technology lies in its ability to reduce social and private costs relative to pre-trial detention. Researchers suggest that electronic monitoring imposes “smaller costs on society” and “smaller social costs to the individual” than detaining individuals (Yang, 2017, p. 1481). Compared to the daily costs of housing a detainee, which ranges from 15 to 25 dollars a day, the costs of

electronic monitoring would be substantially lower, closer to between 2.77 and 9.04 dollars a day (Yang, 2017). As it pertains to social costs, defendants who are released on electronic monitoring may be less likely to plead guilty, reducing the likelihood of wrongful conviction and incarceration, as well as keeping arrestees out of jails that can cause physical and emotional damage.

Lastly, in practice, we have seen that bail determinations are low visibility proceedings that are sometimes conducted without lawyers present and frequently occur outside of the courtroom. There is, all too often, very little scrutiny of individual bail determinations, and almost no systemic review of the thousands of bail decisions made by bail officials. Implementing a system of oversight and accountability in bail determinations through a “permanent bail oversight committee”, using representatives from each agency involved in the bail determination process, will increase the accountability of bail officials in making decisions (Jones, 2013). Perhaps this could help states break away from foundational practices in the bail determinations process that, at one point or another, led to the extreme racial disparity in bail determination we see today.

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