

**PRETRIAL INCARCERATION:
A PUBLIC HEALTH CRISIS MITIGATED BY
EARLY APPOINTMENT OF COUNSEL**



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The Sixth Amendment Center's Law Student Network harnesses the power of law schools throughout the country to transform its research capacity by enlisting law students passionate about indigent defense reform to further its mission. This research paper is written through an externship curriculum offered at Boston College Law School and an Applied Learning Experience curriculum offered at Tufts University School of Medicine.

ABOUT THE STAKEHOLDER INTERVIEWS

Four interviews were conducted with anonymous participants—a judge, a clinical social worker, a nurse practitioner, and a public defender—who provided information in their professional capacity for this research paper. We express gratitude to these interviewees for sharing their perspectives and experiences.

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TABLE OF CONTENTS

INTRODUCTION	1
I. PRETRIAL INCARCERATION IS A PUBLIC HEALTH CRISIS	3
A. <i>WHAT IS PRETRIAL INCARCERATION?</i>	4
1. THE PURPOSE OF PRETRIAL INCARCERATION	4
2. COSTS TO MAINTAIN PRETRIAL INCARCERATION	6
B. <i>DIRECT IMPACTS OF PRETRIAL INCARCERATION ON DETAINEES’ MENTAL AND BODILY HEALTH</i>	8
1. MENTAL HEALTH	8
a. Shock of Confinement	9
b. Insufficient Mental Health Care Protocols and Support	11
1. BODILY HEALTH AND HEALTHCARE	13
a. Access to Healthcare	14
b. Unresponsiveness to Detainees’ Medical Requests	15
c. Substance Abuse Needs	16
d. Violence Inside Jails.....	18
C. <i>INDIRECT IMPACTS OF PRETRIAL INCARCERATION ON DETAINEES’ SOCIAL DETERMINANTS OF HEALTH</i>	19
1. EMPLOYMENT	20
2. HOUSING.....	22
II. EARLY APPOINTMENT OF COUNSEL REDUCES PRETRIAL INCARCERATION	23
A. <i>THE LEGAL CONSTRUCTION OF COUNSEL AT INITIAL BAIL DETERMINATION</i>	24
1. THE U.S. SUPREME COURT	24
2. STATES’ POSITIONS ON COUNSEL AT INITIAL BAIL DETERMINATION	26
B. <i>PRESENCE OF COUNSEL AT INITIAL APPEARANCE REDUCES THE RATE OF PRETRIAL INCARCERATION</i>	27
C. <i>EARLY APPOINTMENT MATTERS</i>	30
1. BETTER REPRESENTATION	31
2. THE EARLIER THE BETTER.....	32
CONCLUSION	33

Pretrial Incarceration: A Public Health Crisis Mitigated by Early Appointment of Counsel

INTRODUCTION

In 2010, 16-year old Kalief Browder was accused of stealing a backpack. His family could not post his bail that the court set at \$3,000, and as a result, he was jailed in Rikers Island for three years awaiting trial. While incarcerated, he became a victim of violence, and he attempted suicide on numerous occasions. Even after his release, Kalief continued to suffer from depression. In 2015, he committed suicide at his mother's home.¹

The due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution guarantee all individuals accused of committing a crime with a presumption of innocence, and this presumption stays with the defendant unless the government proves guilt beyond a reasonable doubt.² However, approximately three-quarters of the 631,000 people detained in the 3,134 local jails³ in the United States have not yet been found guilty, convicted, or sentenced of *any* crime.⁴

One of the earliest events that takes place in a criminal proceeding is bail determination: a judicial officer must determine whether to release the accused back into the community on

¹ TIME: THE KALIEF BROWDER STORY (Netflix 2017).

² See *Coffin v. U.S.*, 156 U.S. 432, 453 (1895) (“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”).

³ Jails and prisons are qualitatively different institutions. A jail is “[a] confinement facility generally operated under the authority of a sheriff, police chief, or county or city administrator. . . . Facilities include jails, detention centers, county or city correctional centers, special jail facilities (such as medical or treatment centers and pre-release centers), and temporary holding or lockup facilities that are part of the jail’s combined function. Jails are intended for adults but can hold juveniles before or after their cases are adjudicated.” *Terms & Definitions: Local Jail Inmates and Jail Facilities*, BUREAU OF JUSTICE STATISTICS, <https://www.bjs.gov/index.cfm?ty=tdtp&tid=12> (last visited Apr. 24, 2021). On the other hand, prisons are “longer-term facilities owned by a state or by the federal government. Prisons typically hold felons and persons with sentences of more than a year; however, the sentence length may vary by state.” *Id.*

⁴ See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POLICY INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> (finding that 470,000 people in U.S. local jails are not convicted of any crime); see also 18 U.S.C. § 3142 (2018) (describing the release or detention of a defendant pending trial); *U.S. v. Salerno*, 481 U.S. 729, 755 (1987) (Rehnquist, C.J.) (“In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”).

personal recognizance⁵ or under some condition without the need to post cash bail,⁶ set cash bail, or deny cash bail.⁷ Those who are incarcerated before trial (“pretrial incarceration”) are either detained without bail or admitted to a cash bail that they cannot afford to pay. Not surprisingly, those who are indigent are less able to have the necessary money to post cash bail, so they are likely to remain incarcerated while awaiting a resolution to their case.

Although pretrial incarceration is a deprivation of liberty, the U.S. Supreme Court has made clear that, under the due process clause, pretrial detainees cannot be subject to conditions that constitute punishment.⁸ However, pretrial incarceration adversely impacts the health and wellbeing of those behind bars in a myriad of ways by worsening mental and physical illnesses, increasing suicidal tendencies, increasing exposure to violence, interrupting child and family care, and triggering the loss of employment and housing.⁹ The depth and enormity of negative health consequences that pretrial incarceration directly and indirectly causes is sufficient to classify pretrial incarceration as a *public health* crisis because it affects hundreds of thousands of people at any given time,¹⁰ jeopardizes their short- and long-term health outcomes,¹¹ and mitigating it requires systemic policy reform on the state and national levels.¹²

⁵ Personal recognizance is “[t]he release of a defendant in a criminal case in which the court takes the defendant’s word that he or she will appear for a scheduled matter or when told to appear.” *Personal Recognizance*, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁶ Bail is “[a] security such as cash, a bond, or property; esp., security required by a court for the release of a criminal defendant who must appear in court at a future time.” *Bail*, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁷ See 18 U.S.C. § 3142(a) (describing the judicial officer’s options for release or detention of individuals pending trial).

⁸ See *Bell v. Wolfish*, 441 U.S. 520, 535 (“In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee. For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.”).

⁹ See *infra* Part I.B., I.C.

¹⁰ See *supra* note 3–4 and accompanying text (stating that 470,000 people—comprising three-quarters of the entire U.S. jail population—are locked up in pretrial incarceration).

¹¹ See *infra* Part I.B., I.C. Although not limited to the pretrial population, one study finds that each year of a person’s incarceration loses two years of their life expectancy. See Evelyn J. Patterson, *The Dose-Response of Time Served in Prison on Mortality; New York State, 1989-2003*, 103 AM. J. PUB. HEALTH 523 (2013).

¹² Although there is no formal epidemiological definition of “public health crisis,” Dr. Sandro Galea from the Boston University School of Public Health proposes three key factors to labeling something a public health crisis:

Although national efforts to reduce pretrial incarceration have recently emerged,¹³ one tool that can mitigate this public health crisis is the early appointment of counsel. Appointing counsel early enough to represent an accused during the initial bail determination hearing¹⁴ significantly improves bail determination outcomes, thereby reducing the rate of and length of stay in pretrial incarceration.¹⁵ Part I discusses the various negative health outcomes caused by pretrial incarceration.¹⁶ Part II examines the effectiveness of early appointment of counsel to mitigate this public health crisis.¹⁷

I. PRETRIAL INCARCERATION IS A PUBLIC HEALTH CRISIS

Pretrial incarceration is designed to hold individuals in custody before the final disposition of their case.¹⁸ However, there are significant drawbacks to maintaining a system that houses hundreds of thousands of people on any given day. Jails are extraordinarily expensive, and individuals held in pretrial custody risk various direct and indirect negative health outcomes. Section A provides an overview of the purpose of pretrial incarceration and costs associated with

“The problem must affect large numbers of people, it must threaten health over the long-term, and it must require the adoption of large-scale solutions.” Sandro Galea, *Crying “Crisis,”* B.U. PUB. HEALTH (Apr. 23, 2017), <https://www.bu.edu/sph/news/articles/2017/crying-crisis/>.

¹³ See Bail Reform Act, 18 U.S.C. §§ 3141–3150 (2018) (expanding bail rights); see, e.g., 2018 NEW JERSEY COURTS, REPORT TO THE GOVERNOR AND THE LEGISLATURE (2019) (implementing Criminal Justice Reform and eliminating monetary bail); ALASKA CRIMINAL JUSTICE COMMISSION, 2018 ANNUAL REPORT (2018) (implementing a risk assessment tool for pretrial detention to reduce the number of detained individuals).

¹⁴ Because certain terms can mean different things in different jurisdictions, for consistency, this paper will refer to the “initial bail determination hearing” to indicate the first stage in the criminal proceedings during which an accused individual encounters a court official (judge, magistrate etc.), who decides to release on personal recognizance, release on some bail amount, or detain without the option of bail. See *supra* notes 5–7 and accompanying text.

¹⁵ See *infra* Part II.B.

¹⁶ See *infra* notes 18–126 and accompanying text.

¹⁷ See *infra* notes 127–184 and accompanying text.

¹⁸ A final disposition of a case includes: a *nolle prosequi*, not guilty, guilty after a plea, guilty after a conviction at trial, or some other disposition that marks the finality of a case. See *nolle prosequi*, BLACK’S LAW DICTIONARY (11th ed. 2019); *Criminal Cases*, UNITED STATES COURTS, <https://www.uscourts.gov/about-federal-courts/types-cases/criminal-cases> (last visited Apr. 26, 2021); *Plea Bargains*, JUSTIA (May 2019), <https://www.justia.com/criminal/plea-bargains/>.

it.¹⁹ Section B discusses the direct health impacts of pretrial incarceration.²⁰ Section C discusses the impacts of pretrial incarceration on a person’s social determinants of health.²¹

A. WHAT IS PRETRIAL INCARCERATION?

1. THE PURPOSE OF PRETRIAL INCARCERATION

Criminal procedures vary by jurisdiction, but a general overview of the stages of a criminal proceeding leading to the final disposition of a case is as follows: arrest, bail determination at or near the time of the arrested individual’s initial appearance, arraignment, preliminary hearing or grand jury proceeding, litigation (involving discovery and/or motions), plea negotiations, and disposition (may involve trial).²² A person charged with a crime is presumed innocent through each and every one of these stages *unless* she is convicted after a trial or admits to the offense(s) charged.²³

At or near the time of an accused’s initial appearance, a judicial officer makes a bail determination.²⁴ This is one of the earliest and most critical events that takes place in a criminal case because it determines whether someone charged with a crime remains in pretrial incarceration pending part of or for the duration of the entire criminal case. Although each state’s laws are different, a judicial officer typically considers the following factors in determining bail: nature and circumstances of the offense charged; weight of the prosecution’s evidence; the accused’s character, physical and mental condition, family ties, employment, financial resources, length of residence, community ties, past conduct, history of alcohol or drug abuse, prior

¹⁹ See *infra* notes 22–42 and accompanying text.

²⁰ See *infra* notes 43–104 and accompanying text.

²¹ See *infra* notes 105–126 and accompanying text.

²² *Stages of a Criminal Case*, JUSTIA (Apr. 2018) <https://www.justia.com/criminal/docs/stages-of-a-criminal-case/>.

²³ See *Coffin*, 156 U.S. at 453; see also *supra* note 2 and accompanying text (discussing the presumption of innocence given to accused individuals).

²⁴ See *supra* notes 5–7 and accompanying text (describing the options of release or detention of an accused individual pending final disposition of a case).

criminal record, and prior record of appearing at court proceedings; and potential danger posed to the community if released.²⁵

If someone is held in pretrial custody because she could not afford to post cash bail or had no option to, she is entitled to receive the same quality of medical care that is afforded to convicted prisoners.²⁶ But, as argued in subsequent sections, many pretrial detainees receive inadequate healthcare, sometimes worse than that of convicted prisoners.²⁷ Further, a pretrial detainee should not be incarcerated unless necessary because:

time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. . . . Imposing those consequences on anyone who has not yet been convicted is serious.²⁸

Thus, it is imperative that the cash bail reflects only the amount that is necessary to assure that an individual will appear for future court proceedings.²⁹ However, the reality is that bail is often set too high, and many people are detained for their inability to have the requisite money to post bail. For instance, one study states:

The high rate of pretrial detention in the United States is due to both the widespread use of monetary bail and the limited financial resources of most defendants. Nationwide, less than 25 percent of felony defendants are released without financial conditions, and the typical felony defendant is assigned a bail amount of more than \$55,000. Furthermore . . . the typical defendant earned less than \$7,000 in the year prior to arrest, likely explaining why less than 50 percent of defendants are able to post bail even when it is set at \$5,000 or less.³⁰

²⁵ See 18 U.S.C. § 3152(g) (2018); *see, e.g.*, MASS. GEN. LAWS ANN. ch. 276, § 58. (West 2021).

²⁶ See *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983) (“[D]ue process rights of a [pretrial detainee] are at least as great as the Eighth Amendment protections available to a convicted prisoner.”).

²⁷ See *infra* Part I.B.

²⁸ *Barker v. Wingo*, 407 U.S. 514, 532–33 (1972).

²⁹ See *supra* note 6 and accompanying text (defining bail as a form of security needed to assure a defendant’s future appearance in court).

³⁰ Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 201–02 (2018) (citations omitted).

A more recent study from last year showed that the median bail amount for felonies was \$10,000, which “is equivalent of 8 months’ income for the typical detained defendant.”³¹ One judge in an interview emphasized that bail should *only* be set in the amount that it takes to assure the accused’s appearance at a future court date and that every judge should take into account the arrested individual’s financial ability to pay.³² However, this judge acknowledged that judges in other jurisdictions set bail at hundreds of thousands of dollars that would be impossible for many people and their families to ever meet.³³

2. COSTS TO MAINTAIN PRETRIAL INCARCERATION

Pretrial incarceration is extraordinarily costly, a fact that the U.S. Supreme Court has recognized.³⁴ There are large monetary costs incurred in hiring personnel in jails, maintaining detention facilities, conducting programs for detainees, and more.³⁵ In 2017, the Prison Policy Initiative estimated that the annual national cost of pretrial detention was \$13.6 billion.³⁶ Further, “[w]ith an average daily population of 735,983 [in jails], this means that taxpayers are paying daily for over 440,000 people to sit unproductively in jail.”³⁷ While the cost to house detainees vary among local jails, taxpayers are paying an average of approximately \$35 million *per day* to house legally innocent people in pretrial detention.³⁸

³¹ Sawyer & Wagner, *supra* note 4.

³² Virtual interview with a judge (Mar. 3, 2021).

³³ *Id.*

³⁴ *See Barker*, 407 U.S. at 520–21 (“[L]engthy pretrial detention is costly. The cost of maintaining a prisoner in jail varies from \$3 to \$9 per day, and this amounts to millions across the Nation.”).

³⁵ Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. REV. 1, 6 (2017) (describing the various costs to society associated with pretrial detention).

³⁶ Bernadette Rabuy, *Pretrial Detention Costs \$13.6 Billion Each Year*, PRISON POLICY INITIATIVE (Feb. 7, 2017), https://www.prisonpolicy.org/blog/2017/02/07/pretrial_cost/.

³⁷ SIXTH AMENDMENT CENTER, EARLY APPOINTMENT OF COUNSEL: THE LAW, IMPLEMENTATION, AND BENEFITS 9 (2014).

³⁸ *See id.* This estimate of \$35 million was calculated on the basis that it costs between \$58.61 and \$100.05 per day to house a single detainee. *See id.*

Intuitively, reducing the sheer number of people sitting in pretrial detention would save such costs. In light of COVID-19, King County Correctional Facility in Seattle estimated that it would save \$4 million every year by detaining 600 fewer inmates.³⁹ Similarly, one study estimated in 2015 that Cook County would save significant costs by reducing the number of incarcerated detainees.⁴⁰ Interestingly, this study’s authors also found that Cook County would save between \$12.7 million and \$34.9 million every year if all inmates had counsel appointed within twenty-four hours of arrest because early representation leads to significantly shorter jail stays.⁴¹

It would be valuable to design and implement a national cost-benefit analysis that balances expenses incurred in maintaining jails and costs of releasing charged individuals. One study does conduct such an analysis and concluded that it is more economically and socially beneficial to release more people instead of detaining them prior to trial.⁴²

³⁹ Linda So et al., *America’s Inmate Population Fell by 170,000 amid COVID. Some See a Chance to Undo Mass Incarceration*, REUTERS (Oct. 28, 2020), <https://www.reuters.com/investigates/special-report/usa-jails-release/>.

⁴⁰ Bryan L. Sykes, Eliza Solowiej & Evelyn J. Patterson, *The Fiscal Savings of Accessing the Right to Legal Counsel Within Twenty-Four Hours of Arrest: Chicago and Cook County, 2013*, 5 U.C. IRVINE L. REV. 813, 815 (2015).

⁴¹ *Id.* The estimated save—\$12.7 million to \$43.9 million—would even allow “for the closure of approximately twenty-two jail units throughout the Chicagoland area.” *Id.*

⁴² Dobbie et al., *supra* note 30 at 204 (“We estimate that the net benefit of pretrial release at the margin is between \$55,143 and \$99,124 per defendant. The large net benefit of pretrial release is driven by both the significant collateral consequences of having a criminal conviction of labor market outcomes and the relatively low costs of apprehending defendants who fail to appear in court. The results from this exercise suggest that unless there are large general deterrence effects of detaining individuals before trial, releasing more defendants will likely increase social welfare.”).

B. DIRECT IMPACTS OF PRETRIAL INCARCERATION ON DETAINEES' MENTAL AND BODILY HEALTH

1. MENTAL HEALTH

In 2015, Sandra Bland was pulled over for a traffic violation, assaulted by an officer, then arrested. Her bail was set at \$515, which she and her family could not afford. Despite her mental health needs, she was not given any assistance or hospitalized. After spending a whole day crying alone in the local county jail cell, three days after her arrest, Sandra hanged herself.⁴³

Mental health is a grave public health concern in America's jails. Suicide is *the* leading single cause of death in jails, accounting for approximately one third of all jail deaths, even though suicide is the tenth leading cause of death in the U.S. and accounts for 1.7% of all deaths.⁴⁴ In 2016 alone, more than 1,000 people died in local jails and 31% of those deaths was from suicide.⁴⁵ Of the 7,571 jail deaths documented by one study from 2008 to 2019, more than 2,000 were from suicide; importantly, 1,500 of the 2,000 suicides were committed by those awaiting indictment or trial.⁴⁶

In addition to suicide, the general mental health needs of those held in jails is also concerning. A 2017 Bureau of Justice Statistics Report found that approximately two thirds of the jail population had a current indicator of a mental health need—measured in “serious

⁴³ Debbie Nathan, *What Happened to Sandra Bland?*, THE NATION (Apr. 16, 2016), <https://www.thenation.com/article/archive/what-happened-to-sandra-bland/>.

⁴⁴ See *Deaths and Mortality*, Centers for Disease Control and Prevention, <https://www.cdc.gov/nchs/fastats/deaths.htm> (last visited Apr. 26, 2021).

⁴⁵ E. ANN CARSON & MARY P. COWHIG, U.S. DEP'T OF JUSTICE, MORTALITY IN LOCAL JAILS, 2000-2016 1 (2020).

⁴⁶ Peter Eisler et al., *Why 4,998 Died in U.S. Jails Without Getting Their Day in Court*, REUTERS (Oct. 16, 2020), <https://www.reuters.com/investigates/special-report/usa-jails-deaths/>.

psychological distress (SPD)”⁴⁷—or a history of a mental health illness.⁴⁸ Further, less than 30% of those in jail who currently met the SPD threshold were actually receiving treatment in the form of medication or counseling.⁴⁹ Interestingly, more female jail inmates (32%) met the threshold for SPD than their male counterparts (26%), and more female jail inmates (68%) had a history of a mental health disorder than their male counterparts (41%).⁵⁰

It is notable that the pretrial population in jails is more susceptible to mental health ailments than those in prisons. Whereas only 5% of the general population met the threshold for SPD, 14.5% of the prison population and 26.4% of the jail population met that same threshold.⁵¹ Similarly, 36.9% of the prison population had a history of a mental health illness compared to 44.3% of the jail population.⁵²

There are several reasons that can explain the alarming rate of suicides and general mental health ailments in jails, particularly among pretrial detainees:

a. Shock of Confinement

When people are first removed from their communities and taken into pretrial custody, they experience a “shock of confinement,” such that incarceration *itself* becomes a source of trauma. Corrections expert Steve J. Martin coins the term “shock of confinement” to describe the phenomenon in which individuals are traumatized from the experience of being held in a jail

⁴⁷ The measure of serious psychological distress (SPD) is based on a six-question tool to ask individuals how often they felt nervous, hopeless, restless, depressed, everything was an effort, and worthless in the last 30 days prior to the test. JENNIFER BRONSON & MARCUS BERZOFKY, U.S. DEP’T OF JUSTICE, INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND INMATES, 2011–12 2 (2017).

⁴⁸ *Id.* at 3. A list of mental health problem history the study used includes: major depressive disorder, bipolar disorder, schizophrenia or other psychotic disorder, post-traumatic stress disorder, anxiety disorder, and personality disorder. *Id.*

⁴⁹ *Id.* at 8.

⁵⁰ *Id.* at 4.

⁵¹ *Id.* at 3.

⁵² *Id.* at 4.

because “it overtakes [their] being in the sense that normalcy is gone.”⁵³ This phenomenon coincides with empirical data showing that a significant percentage of deaths in jails occur within just days after admission into pretrial custody. The Bureau of Justice Statistics reports that 40% of all inmate deaths in 2016 occurred during the *first seven days* of admission into jail.⁵⁴ Similarly, a study by the Huffington Post found that, even though the average length of stay in jails is 21 days, at least one third of all inmate deaths in jails occurred within the *first three days* of incarceration and almost half of the deaths occurred within the first seven days of incarceration.⁵⁵

When asked in an interview whether being detained in jail can itself be considered a trauma, a mental health clinical social worker who worked inside jails answered, “yes, absolutely.”⁵⁶ This clinician explained: first, the physical environment of incarceration is traumatic because people are “literally in cages.”⁵⁷ Second, people are removed from their families and caretaking roles in their communities, and they do not know what is happening to their children, parents, or pets.⁵⁸ Third, they do not know what will happen to their own future because of the unknowns and uncertainties with their legal case.⁵⁹ Upon admission, individuals in pretrial custody become extremely frantic because they may not be able to get a hold of their lawyer or their children may be taken from their custody.⁶⁰ This is reflected in the observation that those in pretrial detention tend to be more psychiatrically unstable than those who are

⁵³ Martin Kaste, *The ‘Shock of Confinement’: The Grim Reality of Suicide in Jail*, NPR (July 27, 2015) <https://www.npr.org/2015/07/27/426742309/the-shock-of-confinement-the-grim-reality-of-suicide-in-jail>.

⁵⁴ CARSON & COWHIG, *supra* note 45 at 2.

⁵⁵ Shane Shifflett, Hilary Fung & Alissa Scheller., *Since Sandra: Here Are the 815 People (and Counting) Who Have Lost Their Lives in Jail in the Year After Sandra Bland Died*, THE HUFFINGTON POST (July 20, 2016), <http://data.huffingtonpost.com/2016/jail-deaths>.

⁵⁶ Virtual interview with a mental health clinician (Mar. 5, 2021).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

convicted and sentenced because those in pretrial detention sit in limbo, flooded with unknowns and uncertainties.⁶¹ Thus, pretrial detainees generally require more mental health attention than those who are convicted.

b. Insufficient Mental Health Care Protocols and Support

Mental health care and suicide-prevention protocols in jails are insufficient to address the mental health needs of those held in pretrial incarceration. Not only is suicide the leading cause of death in jails,⁶² but the decision to commit suicide is also often very impulsive.⁶³

According to the American Bar Association’s standards on the treatment of suicidal inmates:

(a) Correctional officials should implement procedures to identify prisoners at risk for suicide and to intervene to prevent suicides.

(b) When the initial screening pursuant to Standard 23-2.1 or any subsequent observation identifies a risk of suicide, the prisoner should be placed in a safe setting and promptly evaluated by a qualified mental health professional, who should determine the degree of risk, appropriate level of ongoing supervision, and appropriate course of mental health treatment.

(c) Instead of isolating prisoners at risk of suicide, correctional authorities should ordinarily place such prisoners in housing areas that are designed to be suicide resistant and that allows staff a full and unobstructed view of the prisoners inside. A suicidal prisoner’s clothing should be removed only if an individualized assessment finds such removal necessary, and the affected prisoner should be provided with suicide resistant garments that are sanitary, adequately modest, and appropriate for the temperature. Physical restraints should be used only as a last resort and their use should comply with the limitations in Standard 23-5.9.

(d) At a minimum, prisoners presenting a serious risk of suicide should be housed within sight of staff and observed by staff, face-to-face, at irregular intervals of no

⁶¹ *Id.*

⁶² See *supra* notes 45–46 and accompanying text.

⁶³ See Yari Gvion et al., *On the Role of Impulsivity and Decision-Making in Suicidal Behavior*, 5 *WORLD J. PSYCHIATRY* 255 (2015); Craig J. Bryan et al., *Advances in the Assessment of Suicide Risk*, 62 *J. CLINICAL PSYCHOL.* 185 (2006); J. John Mann et al., *Toward a Clinical Model of Suicidal Behavior in Psychiatric Patients*, 156 *AM. J. PSYCHIATRY* 181 (1999). Paul Nestadt from Johns Hopkins School of Medicine said, “[a] majority [of people] who decide to [take their life] act within an hour . . . and nearly a quarter act within five minutes.” Kim Tingley, *Will the Pandemic Result in More Suicides*, *N.Y. TIMES* (Jan. 21, 2021) <https://www.nytimes.com/2021/01/21/magazine/will-the-pandemic-result-in-more-suicides.html>.

more than 15 minutes. Prisoners currently threatening or attempting suicide should be under continuous staff observation. Suicide observation should be documented, and prisoners under suicide observation should be evaluated by a qualified mental health professional prior to being removed from observation.

(e) Correctional authorities should minimize the risk of suicide in housing areas and other spaces where prisoners may be unobserved by staff by eliminating, to the extent practicable, physical features that facilitate suicide attempts.

(f) When staff observe a prisoner who appears to have attempted or committed suicide, they should administer appropriate first-aid measures immediately until medical personnel arrive and assess the situation. Cut-down tools should be readily available to security personnel, who should be trained in first aid and cardiopulmonary resuscitation, cut-down techniques, and emergency notification procedures.⁶⁴

While these measures may address *security* risks by potentially reducing the number of suicides, they do not proactively address the *mental health needs* of those at risk of committing

suicide. One clinician explained in an interview that such suicide-

prevention measures in jails are not only ineffective but also

“completely unethical.”⁶⁶ The jail’s response to someone who is

at risk of committing suicide is to *further* remove her from her possessions and coping mechanisms, which is contrary to what a

mental health clinician would do.⁶⁷ For example, in the highest

level of suicide watch, detainees are stripped of all possessions,

are required to wear an anti-suicide smock, and must remain

inside of a cell *alone* for all hours of the day while being observed

by a corrections officer (often male) from outside the cell.⁶⁸ The corrections officer must write



⁶⁴ A.B.A., ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONER STANDARDS (3d ed. 2011) 125 (Standard 23-5.4 Self-harm and suicide prevention).

⁶⁵ See FERGUSON SAFETY PRODUCTS, <https://www.preventsuicide.com/> (last visited Apr. 26, 2021).

⁶⁶ Virtual interview with a mental health clinician, *supra* note 56.

⁶⁷ *Id.* The interviewee stated, “as a clinician, this was really difficult because I was limited in the tools I had for clients who were facing a suicide risk.” *Id.*

⁶⁸ *Id.*

notes detailing observations of a pretrial detainee every fifteen minutes; although some corrections officers are supportive of detainees in suicide watch, others taunt them.⁶⁹ Further, corrections officers control all access to detainees' property and accessories, such as toilet paper, shower shoes, food, and tampons.⁷⁰ Such suicide-prevention protocols are far from tending to the mental health needs of someone who is distressed enough to attempt suicide.

1. BODILY HEALTH AND HEALTHCARE

"I need to go to the hospital . . . I'm gonna die in here."

Matthew Loflin was in pretrial custody in Chatham County Detention Center in Georgia while awaiting trial on drug-possession charges. Despite numerous occasions of blackouts, coughing up blood, and difficulties breathing, Matthew was not taken to the hospital. By the time he was finally hospitalized, he suffered irreversible brain damage. He died at age 32, eleven weeks after his admission into jail.⁷¹

The U.S. Supreme Court has written about the importance of having access to adequate medical care in jails, stating that a facility "that deprives prisoners of basic sustenance, including adequate medical care, is incompatible to the concept of human dignity and has no place in civilized society."⁷² The American Bar Association's standards also state that jails must provide humane and healthful living conditions, safety, and necessary healthcare.⁷³ However, the prevalence of medical neglect and injury inside jails reflect a different reality that betrays these normative guidelines put forth by our nation's legal authorities. Between 2000 and 2016, 9,884

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See Jason Szep et al., *U.S. Jails Are Outsourcing Medical Care – And the Death Toll Is Rising*, REUTERS (Oct. 26, 2020), <https://www.reuters.com/investigates/special-report/usa-jails-privatization/>.

⁷² *Brown v. Plata*, 563 U.S. 493, 511 (2011) (J. Kennedy); see *supra* note 26 and accompanying text (establishing that individuals in pretrial incarceration receive at least the same level of constitutional protection as do convicted prisoners).

⁷³ A.B.A., *supra* note 64 at 16 (Standard 23-1.1 General principles governing imprisonment). The American Bar Association's standard for treatment of prisoners also applies to individuals held in pretrial custody. See *id.* ("For a prisoner not serving a sentence for a crime, the purpose of imprisonment should be to assure appearance of the prisoner at trial and to safeguard the public, not to punish.").

people inside jails died from physical illnesses, accounting for 58% of all jail deaths.⁷⁴ These physical illnesses include heart disease, cancer, AIDS-related disease, respiratory disease, liver disease, and drug or alcohol intoxication.⁷⁵

Once again, there are several factors that could explain the severity of physical illnesses inside jails:

a. Access to Healthcare

Access to healthcare is a barrier for many pretrial detainees, particularly for those who are indigent. Many U.S. jails require a copay between \$2 and \$5 in order for detainees to submit sick slips.⁷⁶ Although this medical copay may seem insignificant, it is relatively expensive for the incarcerated population who typically earn between 14 and 63 cents per hour for working inside jails.⁷⁷ For example, in 2017, this required medical copay in jails would have been equivalent to an individual earning their state's minimum wage and subject to a medical copay of: \$656.25 in California; \$362.50 in Idaho; \$725.00 in North Carolina; \$127.94 in Tennessee; and \$1,093.75 in West Virginia.⁷⁸ The disproportionately expensive medical copay would deter pretrial detainees—most of whom are so poor that they did not have the requisite cash to pay bail or hire a lawyer—from seeking necessary medical attention.

⁷⁴ See CARSON & COWHIG, *supra* note 45 at 10.

⁷⁵ *Id.*

⁷⁶ AMY SMITH, THE NATIONAL ACADEMY OF SCIENCES HEALTH AND INCARCERATION: A WORKSHOP SUMMARY 31 (2013).

⁷⁷ Wendy Sawyer, *The Steep Cost of Medical Co-Pays in Prison Puts Health at Risk*, Prison policy initiative (Apr. 19, 2017), <https://www.prisonpolicy.org/blog/2017/04/19/copays/>.

⁷⁸ *Id.* These calculations are based on copay, prison job minimum wage, and state minimum wage as of 2017 and may have changed since.

b. Unresponsiveness to Detainees' Medical Requests

"I need help, something is wrong."

In 2016, Michael Ramey was held in pretrial custody at Worcester County Jail in Massachusetts. On numerous occasions, Michael complained about headaches, pain, and dizziness. He fell down multiple times, but the medical staff did not believe him and dismissed his symptoms as "med seeking behavior." When he was finally hospitalized, he was diagnosed with meningitis, a detectable and treatable condition. He died within one month, at age 36.⁷⁹

Pretrial detainees who are able to submit sick slips and request medical attention are often dismissed. For example, an interview with a nurse practitioner inside a jail revealed that detainees' requests for medical help often get ignored.⁸⁰ This nurse practitioner explained: on a typical day in their pretrial detention facility, an individual will fill out a sick slip detailing their need for medical attention, such as a sore throat or stomach pain.⁸¹ A medical staff would look through all the sick slips and triage them, determining who gets to make it on "the list" of patients that get to see a medical provider; those who do not make it to the list are not seen by any medical provider, and their medical concerns are ignored.⁸² For those who make it onto the list, a medical provider would go through that list and determine who needs to be seen, based on seriousness, urgency, and the length of time that has lapsed since the submission of the slip.⁸³ This process results in ignoring many detained individuals' medical needs because many sick slips never make it to the attention of medical providers.⁸⁴

The nurse practitioner provided two reasons for this process: (1) there is not enough medical staff to address the medical needs of the high number of incarcerated detainees inside a

⁷⁹ Christine Willmsen & Beth Healy, *When Inmates Die of Poor Medical Care, Jails Often Keep It Secret*, WBUR (Mar. 23, 2020), <https://www.wbur.org/investigations/2020/03/23/county-jail-deaths-sheriffs-watch>.

⁸⁰ Virtual interview with a nurse practitioner (Mar. 9, 2021).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

jail facility, and (2) many corrections officers and medical staff hold prejudices against detained individuals, believing that they are “overexaggerating” or “lying” about their medical needs when they request help or that they should not have done something wrong to begin with to have landed in pretrial custody.⁸⁵

Unfortunately, the stories of Matthew⁸⁶ and Michael⁸⁷ are not unique. Hundreds of lawsuits have been filed against detention facilities and correctional healthcare companies for avoidable deaths in jails caused from unresponsiveness to requests for medical care: failing to diagnose or treat illnesses; refusing to grant transfers to hospitals; and neglecting to provide timely care, thereby contributing to minor conditions’ becoming life-threatening.⁸⁸

c. Substance Abuse Needs

Kyra Warner, who had been using amphetamines and methamphetamines, was arrested and held for a preliminary hearing, which never took place. Less than 90 minutes after arriving in jail, Kyra displayed signs of drug overdose distress—unresponsive and twitching. She was moved to a solitary cell where she was occasionally observed, despite being in obvious need of emergency medical treatment. By the time she was given medical attention, it was too late. Kyra died from drug overdose complications.⁸⁹

Substance abuse needs are not adequately addressed in jails. Between 2000 and 2016, 1,221 people died from drug and alcohol intoxication inside jails.⁹⁰ Whereas the median number of days spent in jail before dying from a physical illness was 33 and from suicide was 9, the

⁸⁵ *Id.*

⁸⁶ *See supra* notes 71 and accompanying text.

⁸⁷ *See supra* notes 79 and accompanying text.

⁸⁸ *See* Blake Ellis & Melanie Hicken, *Behind Bars, They Beg for Medical Attention from a Giant Government Contractor. For Some, Help Doesn't Come – Or It Comes Too Late. A CNN Investigation Exposes Preventable Deaths and Dangerous Care that Government Agencies Have Failed to Stop*, CNN (June 25, 2019), <https://www.cnn.com/interactive/2019/06/us/jail-health-care-ccs-invs/>.

⁸⁹ Complaint at 2–6, 13–15, *The Estate of Kyra Warner v. Wellpath*, No. 1:19-cv-00774 (S.D. Ind. Feb. 22, 2019).

⁹⁰ CARSON & COWHIG, *supra* note 45 at 11.

median number of days spent in jail before dying from drug or alcohol intoxication was only 1.⁹¹ The time spent in jail before death caused by drug or alcohol intoxication is the shortest compared to that of all other causes of death, suggesting that complications arising from substance abuse are acute and need close monitoring and treatment. Moreover, the number of deaths from drug or alcohol intoxication more than doubled from 2000 to 2016, indicating an increasing trend.⁹²

Further, female detainees are more likely than their male counterparts to experience alcohol addiction and die in jails. In the 16-year period from 2000 to 2016, 12.5% of all female deaths were attributable to drug or alcohol intoxication compared to 6.45% of male deaths.⁹³ Then, from 2017 to 2019, more than 24% of female deaths were attributable to drug or alcohol intoxication, double the rate of male deaths.⁹⁴

However, pretrial detainees are often not eligible for substance abuse treatment inside jails. The interviewed nurse practitioner noted that one major difference between pretrial detainees and convicted inmates is that pretrial detainees are not allowed treatment for substance abuse because they could be relocated to a different pretrial detention facility or released into a community that would not continue such treatments.⁹⁵ Although these are valid medical reasons for not providing substance abuse treatment to pretrial detainees, the nurse practitioner stated that “it was frustrating” because many pretrial detainees are in clear medical need of such treatment.⁹⁶

⁹¹ *Id.* at 13.

⁹² *Id.* at 5.

⁹³ *See id.* at 11 (finding that 262 out of 2,090 female deaths were due to drug or alcohol intoxication whereas 959 out of 14,866 male deaths were due to drug or alcohol intoxication).

⁹⁴ Peter Eisler et al., *As More Women Fill America's Jails, Medical Tragedies Mount*, REUTERS (Dec. 16, 2020), <https://www.reuters.com/investigates/special-report/usa-jails-women/>.

⁹⁵ Virtual interview with a nurse practitioner, *supra* note 80.

⁹⁶ *Id.*

d. Violence Inside Jails

Pretrial detainees are at risk of being victim of violence. Between 2000 and 2016, 389 people died from homicide in jails.⁹⁷ Homicidal deaths inside jails are caused by violence among inmates, use of force by corrections officers, and injuries sustained prior to admission into jail.⁹⁸ Further, the percentage of jail deaths caused by homicide increased from 2% in 2000 to 3% in 2016.⁹⁹

In particular, pretrial detainees in jails are subject to sexual victimization, defined as “all types of sexual activity, e.g., oral, anal, or vaginal penetration, hand jobs; touching of the inmate’s buttocks, thighs, penis, breasts, or vagina in a sexual way; abusive sexual contacts; and both willing and unwilling sexual activity with staff.”¹⁰⁰ According to the latest national inmate survey of sexual victimization, between 2011 and 2012, 11,900 individuals in jails reported incidents of sexual victimization by other inmates, 13,200 reported incidents by staff, and 2,400 reported incidents by both other inmates and staff.¹⁰¹ In the same 2011–2012 period, 5,100 individuals in jail reported incidents of nonconsensual sexual acts with other inmates, involving unwanted oral, anal, vaginal penetration, and hand jobs; 6,800 individuals in jail reported incidents of abusive sexual contacts, involving unwanted contacts of buttocks, thigh, penis, breasts, or vagina in a sexual way; 10,000 individuals in jail reported incidents of unwanted sexual contacts with staff due to physical force, pressure, or offers of special favors or privileges; and 6,200 individuals in jail reported willing sexual contact with staff, although any form of sexual contact between inmates and staff—whether willing or unwilling—is illegal.¹⁰² Further,

⁹⁷ CARSON & COWHIG, *supra* note 45 at 11.

⁹⁸ *Id.* at 11.

⁹⁹ *See id.* at 2.

¹⁰⁰ ALLEN J. BECK ET AL, U.S. DEP’T OF JUSTICE, NCJ 241399, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12 9 (2012).

¹⁰¹ *Id.* at 8.

¹⁰² *Id.* at 9.

the overall rates of sexual victimization remained stable from 2007 to 2012,¹⁰³ despite national efforts to reduce incidents of sexual violence, such as the Prison Rape Elimination Act of 2003.¹⁰⁴

C. INDIRECT IMPACTS OF PRETRIAL INCARCERATION ON DETAINEES' SOCIAL DETERMINANTS OF HEALTH

The Centers for Disease Control and Prevention (CDC) defines social determinants of health as “conditions in the places where people live, learn, work, and play that affect a wide range of health and quality-of-life risks and outcomes.”¹⁰⁵ That is, social determinants of health are intricate social factors that overlap, intersect, and account for health outcomes of individuals. In fact, social determinants can account for 30% to 55% of health outcomes, more influential than healthcare or lifestyle choices.¹⁰⁶ Examples of social determinants of health include: availability of resources to meet housing and food needs; access to education; access to job opportunities; access to healthcare services; quality of education; access to transportation; public safety; social support; social norms; language barriers; literacy; access to technologies; culture; neighborhood; race and racism; and socioeconomic status.¹⁰⁷

These social determinants not only affect health outcomes but also contribute to health inequities among individuals. Health inequity occurs when there are discrepancies among individuals in “attain[ing] his or her full health potential” and some are “disadvantaged from

¹⁰³ See *id.* at 6;

¹⁰⁴ See 34 U.S.C. § 30303 (2018) (requiring the Bureau of Justice Statistics to collect and analyze incidents of sexual violence in prisons and jails).

¹⁰⁵ *Social Determinants of Health: Know What Affects Health*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/socialdeterminants/index.htm> (last visited Apr. 26, 2021).

¹⁰⁶ *Social Determinants of Health*, WORLD HEALTH ORGANIZATION, https://www.who.int/health-topics/social-determinants-of-health#tab=tab_1 (last visited Apr. 26, 2021).

¹⁰⁷ Paula Braveman et al., *The Social Determinants of Health: Coming of Age*, 32 ANNU. REV. PUB. HEALTH 381, 387 (2011); *Social Determinants of Health*, HEALTH PEOPLE, <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-of-health> (last visited Apr. 26, 2021).

achieving this potential because of social position or other socially determined circumstances.”¹⁰⁸

Individuals held in pretrial custody are inevitably disadvantaged from attaining their full health potential because pretrial incarceration aggravates their social determinants of health, such as the potential loss of employment¹⁰⁹ or housing.¹¹⁰

1. EMPLOYMENT

“Most of our clients are people who have crawled their way up from poverty or are in the throes of poverty,” one public defender said. “Our clients work in service-level positions where if you’re gone for a day, you lose your job. . . . So when our clients have bail set, they suffer on the inside, they worry about what’s happening on the outside, and when they get out, they come back to a world that’s more difficult than the already difficult situation that they were in before.”¹¹¹

Most Americans derive their primary income from employment, which influences health outcomes through work-related benefits, such as medical insurance, paid leaves, childcare, elderly care, working conditions, working schedules, and retirement benefits.¹¹² Those who are employed full-time at well-paying jobs typically have greater financial security and access to healthcare, whereas those who are employed part-time or are unemployed are typically disadvantaged in these respects.¹¹³ For example, individuals with employer-provided insurance are able to seek healthcare without drastic financial barriers whereas individuals without employer-provided insurance are uninsured, underinsured, or insured at greater out-of-pocket costs, thereby reducing their likelihood of seeking healthcare. Individuals with flexible work schedules and paid leaves are able to schedule medical appointments during business hours

¹⁰⁸ *Attaining Health Equity*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Oct. 25, 2013), <https://www.cdc.gov/nccdphp/dch/programs/healthycommunitiesprogram/overview/healthequity.htm>.

¹⁰⁹ See *infra* notes 111–119 and accompanying text.

¹¹⁰ See *infra* notes 120–126 and accompanying text.

¹¹¹ Nick Pinto, “*The Bail Trap*,” N.Y. TIMES (Aug. 13, 2015), <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html>.

¹¹² Braveman et al., *supra* note 107 at 385.

¹¹³ *Id.*

should they need to see a medical provider, whereas individuals who are limited in their work flexibility or do not have access to paid leaves are limited in seeking healthcare because they do not have the time or means outside of a work day to schedule medical appointments.

Pretrial incarceration increases the likelihood of employment disruption or termination because individuals held in pretrial custody cannot physically go to their workplaces or perform work-related tasks. In particular, many who are indigent work in industries in which even one day of missing work can lead to unemployment.¹¹⁴ Further, upon getting arrested, individuals often have their phones taken away by the police and are unable to contact their employers to inform them of their inability to attend work the following day.¹¹⁵ In a stakeholder interview, one public defender witnessed “so many people who lost their jobs within forty-eight hours because they could not get a hold of their boss or get a hold of someone to take over their shift.”¹¹⁶

Moreover, the effect of pretrial incarceration is not limited to a one-time loss of employment. One study found that pretrial incarceration decreases the likelihood of *future* employment even several years after one’s bail hearing by 9.4 percentage points,¹¹⁷ suggesting that the mere experience of being held in pretrial incarceration can have lasting effects on one’s employment opportunities, which are closely associated with health outcomes.¹¹⁸ One study even estimated that an individual held in pretrial custody for just three days would lose \$29,000 in income over the course of their lifetime compared to an individual released in the community on bail or personal recognizance.¹¹⁹

¹¹⁴ See Pinto, *supra* note 111.

¹¹⁵ Virtual interview with a public defender (Mar. 12, 2021).

¹¹⁶ *Id.*

¹¹⁷ Dobbie et al., *supra* note 30 at 204.

¹¹⁸ See *supra* notes 112–113 and accompanying text (describing the close linkage between employment as a social determinant of health and health outcomes).

¹¹⁹ Will Dobbie & Crystal Yang, *The Economic Costs of Pretrial Detention 2* (Brookings Papers on Economic Activity, Conference Draft, Mar. 25, 2021), available at <https://www.brookings.edu/bpea-articles/the-economic-costs-of-pretrial-detention/>.

2. HOUSING

“Many of our clients . . . live in shelters, where if they miss their curfews, they lose their housing.”¹²⁰

Housing is another social determinant of health that can affect physical and mental well-being. Housing affects health in four ways: 1) the instability of a home—such as fear of eviction, the trauma of homelessness or shelters, and rent delinquency—affects psychological health; 2) inadequate or unsafe structural features of a home—such as mold, pest, lead, water leaks, high or low temperature, and crowding—affect physical health in the form of respiratory illnesses, injuries, and exposure to neurotoxins or diseases; 3) the lack of affordable housing options affects individuals by draining resources that could otherwise be spent on healthcare or healthy choices; and 4) the neighborhood affects physical health in the form of respiratory illnesses, accidents, and exposure to crime.¹²¹

Pretrial incarceration leads to a loss of housing. One survey found that 25% of individuals released in the community pending a criminal case indicated that they may lose their housing compared to 61% of individuals held in pretrial custody pending a criminal case.¹²² Also, 40% of individuals released in the community indicated that their arrest may impact their children’s housing compared to 57% of individuals held in pretrial custody.¹²³ One public defender described two examples of how pretrial incarceration impacted their clients’ housing status. One client, as a result of being taken into pretrial custody, lost their job and could not pay

¹²⁰ Pinto, *supra* note 111.

¹²¹ Diana Hernandez & Shakira Suglia, *Housing as a Social Determinant of Health*, 27–28 (A Robert Wood Johnson Foundation Convening, June 1–2, 2016); Lauren Taylor, *Housing and Health: An Overview of the Literature*, HEALTH AFFAIRS (June 7, 2018), <https://www.healthaffairs.org/doi/10.1377/hpb20180313.396577/full/>.

¹²² PRETRIAL JUSTICE INSTITUTE, HAVE YOU ASKED THEM? TALKING TO DEFENDANTS ABOUT MONEY BOND AND PRETRIAL RELEASE 3–4 (2014).

¹²³ *Id.*

rent; as a result of not being able to pay rent, the client’s family lost their apartment and the client’s three young children were sent to a homeless shelter.¹²⁴ Another client was on the waitlist for Section 8 Housing¹²⁵ for ten years and finally obtained an apartment, but the client was arrested for an offense that took place prior to obtaining the apartment; this client could not afford to pay bail, and he ultimately lost his Section 8 housing.¹²⁶

II. EARLY APPOINTMENT OF COUNSEL REDUCES PRETRIAL INCARCERATION

One of the earliest stages of a criminal case is a judicial officer’s determination of bail, which can dictate the trajectory of whether an accused will be held in pretrial custody or released into the community pending the criminal case.¹²⁷

Although jurisdictions vary in appointing an attorney to represent an accused at the initial bail determination hearing, studies show that the presence of an attorney at this stage leads to better pretrial custody outcomes—reduced likelihood of pretrial detention, reduced bail amount, and shorter jail stay length—which correlate with better health outcomes. Section A explains the U.S. Supreme Court’s holdings on the right to counsel at the initial bail determination hearing and different states’ positions on the right to counsel at this stage.¹²⁸ Section B summarizes studies that show the relationship between the presence of counsel at the initial bail

¹²⁴ Virtual interview with a public defender, *supra* note 115.

¹²⁵ Section 8 Housing refers to the U.S. Department of Housing and Urban Development’s Housing Choice Voucher program that assists very low-income individuals to afford safe housing. *See Housing Choice Vouchers Fact Sheet*, DEP’T OF HOUSING & URB. DEV., https://www.hud.gov/topics/housing_choice_voucher_program_section_8 (last visited Apr. 26, 2021); *see also* 24 C.F.R. pt. 982.

¹²⁶ Virtual interview with a public defender, *supra* note 115.

¹²⁷ *See supra* notes 5–7 and accompanying text.

¹²⁸ *See infra* notes 131–151 and accompanying text.

determination hearing and pretrial incarceration outcomes.¹²⁹ Section C examines how early appointment can reduce the rate of pretrial incarceration.¹³⁰

A. THE LEGAL CONSTRUCTION OF COUNSEL AT INITIAL BAIL DETERMINATION

1. THE U.S. SUPREME COURT

The Sixth Amendment to the U.S. Constitution guarantees an individual charged with a crime the right to an attorney if they cannot afford to hire one.¹³¹ In 1963, the U.S. Supreme Court in *Gideon v. Wainwright* guaranteed the right to appointed counsel to indigent individuals in felony cases and held that this right, through the Fourteenth Amendment, applies to state prosecutions.¹³² In 1972, *Argersinger v. Hamlin* expanded this right and held that the right to appointed counsel applies whenever imprisonment is a possibility, even in misdemeanor charges.¹³³ In 2002, *Alabama v. Shelton* expanded this right even further to individuals subject to suspended sentences.¹³⁴ In summary, if someone is charged with a jailable offense and cannot afford to hire an attorney, the state must appoint that person with an attorney to represent them at all critical stages of a case.

The U.S. Supreme Court has held that the right to counsel attaches “at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty,”¹³⁵ such as conditions for pretrial release.¹³⁶

¹²⁹ See *infra* notes 152–168 and accompanying text.

¹³⁰ See *infra* notes 169–184 and accompanying text.

¹³¹ U.S. CONST. amend. XI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”).

¹³² 372 U.S. 335 (1963).

¹³³ 407 U.S. 25, 37 (1972) (“We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.”).

¹³⁴ 535 U.S. 654, 662 (2002) (holding that a suspended sentence that results in incarceration cannot be imposed to an indigent defendant who was not provided counsel during the prosecution of his offense of probation violation).

¹³⁵ *Rothgery v. Gillespie*, 554 U.S. 191, 194 (2008); see also *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986); *Brewer v. Williams*, 430 U.S. 387, 398–399 (1977).

¹³⁶ *Rothgery*, 554 U.S. at 199.

However, even though the right to counsel *attaches* at the initial appearance when formal judicial proceedings begin, counsel does not have to be *present* at the initial appearance unless it is a critical stage.¹³⁷ Further, even if the right to counsel attaches at a particular stage in the criminal proceedings and that stage is considered critical, there still is no precise rule as to how quickly an attorney must be appointed to represent the defendant at that stage,¹³⁸ but it is imperative that “counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself.”¹³⁹

Rothgery v. Gillespie provided that an event is considered a critical stage if there is a “need to counsel’s presence,” such as situations which “amount to ‘trial-like confrontations, at which counsel would help the accused ‘in coping with legal problems or meeting his adversary.’”¹⁴⁰ Following this standard, the U.S. Supreme Court has incrementally expanded the events in a criminal case that are categorized as critical stages, such as custodial interrogation,¹⁴¹

¹³⁷ See *id.* at 211 (distinguishing the “attachment question (whether formal judicial proceedings have begun) [from] the distinct ‘critical stage’ question (whether counsel must be present at postattachment proceeding unless the right to assistance is validly waived)); see also SIXTH AMENDMENT CENTER, *supra* note 37 at 4 (“If the event that triggers attachment of counsel is not itself a critical stage, then that event can theoretically occur without counsel being appointed or being present; attachment of the right to counsel triggers the need to appoint counsel to represent the defendant at *future* critical stages. On the other hand, if the event that triggers attachment of counsel is itself a critical stage, then that event cannot occur unless the defendant is represented by counsel during the critical stage or has waived the right to counsel. And in theory at least there can be an event that is a critical stage, *during* which counsel must be present, but that does not trigger the attachment of the right to counsel beyond the event itself.”).

¹³⁸ *Rothgery*, 554 U.S. at 212 n.15 (“We do not here purport to set out the scope of an individual’s post-attachment right to the presence of counsel. It is enough for present purposes to highlight that the enquiry into that right is a different one from the attachment analysis.”).

¹³⁹ *Id.* at 212.

¹⁴⁰ *Id.* at 212 n.16 (quoting *United States v. Ash*, 413 U.S. 300, 313 (1973)).

¹⁴¹ See *Brewer*, 430 U.S. at 399 (holding that interrogations taking place while someone is in custody constitutes a critical stage at which defense counsel “is the essential medium through which the demands and commitments of the sovereign are communicated to the citizen”).

preliminary hearing,¹⁴² pretrial lineup,¹⁴³ plea negotiation and plea acceptance,¹⁴⁴ and arraignment.¹⁴⁵ However, the U.S. Supreme Court has yet to rule that the initial bail determination hearing is a critical stage.

2. STATES' POSITIONS ON COUNSEL AT INITIAL BAIL DETERMINATION

Because the U.S. Supreme Court has not yet held that the initial bail determination hearing is a critical stage requiring representation by an attorney, states have created their own rules on this issue.¹⁴⁶ Further, counties within states have different practices as to whether counsel is present at the initial bail determination hearing. In many jurisdictions, defense counsel is not present at the initial appearance when bail is determined, and the minority of states guarantee representation by appointed counsel at this stage within their entire jurisdiction.¹⁴⁷

¹⁴² See *Coleman v. AL*, 399 U.S. 1, 9–10 (1970) (holding that preliminary hearing in Alabama is a critical stage because defense counsel can cross-examine witnesses to weaken the State's case or make arguments for the accused individual).

¹⁴³ See *U.S. v. Wade*, 388 U.S. 218, 236–38 (1967) (holding that a “post-indictment lineup [i]s a critical stage of a prosecution”).

¹⁴⁴ See *Lafler v. Cooper*, 566 U.S. 156, 177 (2012) (holding that “the *acceptance* of a plea is a critical stage”); *Padilla v. KY*, 559 U.S. 356, 373 (2010) (“In sum, we have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.”).

¹⁴⁵ See *Hamilton v. AL*, 368 U.S. 52, 54 (1961) (holding that arraignment is a critical stage because “[w]hat happens there may affect the whole trial”).

¹⁴⁶ See *Gerstein v. Pugh*, 420 U.S. 103 (1975) (stating that states were not required to provide counsel for indigent defendants at initial appearance); John P. Gross, *The Right to Counsel, but not the Presence of Counsel: A Survey of State Criminal Procedures for Pre-Trial Release*, 69 FL. L. REV. 832, 840 (2018) (“The Supreme Court has never specifically addressed whether there is a legal requirement that counsel be present at a defendant’s initial appearance where his liberty is subject to restriction.”).

¹⁴⁷ See Gross, *supra* note 146 at 11 (determining that “in thirty-two states, counsel for indigent defendants is not physically present at the initial appearance” based on statutes, court rules, cases, and empirical data); Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 389 (2011) (using surveys to determine that “only 10 states uniformly provide counsel at the first bail and pretrial release judicial determination that typically is conducted within 24–48 hours of arrest. In contrast, 10 states continue to deny counsel at the initial bail hearing. The remaining 30 states decide representation at the pretrial release hearing on a county-by-county basis.”); Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1724 (2002) (determining based on statutes and court rules that “[i]n a country that prides itself on guaranteeing poor people equal access to justice, eighteen states refuse to provide lawyers at th[e] initial bail determination stage] anywhere within their borders. The remaining twenty-four states decline to provide representation at bail in all but a few of their counties. Only eight states and the District of Columbia uniformly protect an indigent person’s need for counsel at the bail stage.”).

Below are examples of how states differ on whether counsel must be present at a defendant's initial bail determination hearing:

Present: Massachusetts guarantees every indigent person charged with a crime in its state counsel at the initial bail determination hearing. The Supreme Judicial Court in Massachusetts held in *Lavellee v. Justice in the Hampden Superior Court* that “[n]either a bail hearing nor a preventive detention hearing may proceed unless and until the defendant is represented by counsel.”¹⁴⁸

Hybrid: In Illinois, there are 102 counties, and each county determines whether an attorney must be present at the initial bail determination hearing.¹⁴⁹

Not Present: Alabama does not require appointed counsel at the initial bail determination stage.¹⁵⁰ Alabama's highest court clarified that the initial bail determination hearing “is not a critical stage in the criminal proceedings against the defendant and that a defendant is not entitled to the assistance of counsel” during it.¹⁵¹

B. PRESENCE OF COUNSEL AT INITIAL APPEARANCE REDUCES THE RATE OF PRETRIAL INCARCERATION

Bail determination outcomes vary depending on whether counsel is appointed in time for when bail is set by the judicial officer. The remainder of this section provides a summary of several notable studies exploring the difference that the presence of an attorney makes at an individual's initial bail determination hearing.

¹⁴⁸ 812 N.E. 895, 903 (Mass. 2004).

¹⁴⁹ See *The Right to Counsel in Illinois*, SIXTH AMENDMENT CENTER, <https://sixthamendment.org/know-your-state/illinois/> (last updated 2019).

¹⁵⁰ See ALA. R. CRIM. P. 4.4 (“At defendant’s initial appearance the judge shall . . . inform the defendant of the right to be represented by counsel, advise the defendant that he or she will be afforded time and opportunity to retain counsel, advise the defendant that, if he or she is indigent and unable to obtain counsel, counsel will be appointed to represent him or her, and inform the defendant of the right to remain silent; and (4) Determine conditions of release in accordance with Rule 7.3.”).

¹⁵¹ *Ex parte Cooper*, 43 So. 3d 547, 550 (Ala. 2009).

In 1985, Ernest Fazio and others studied the effectiveness of early appointment of counsel through empirical research.¹⁵² Funded by the National Institute of Justice, the report selected three jurisdictions—Passaic County, New Jersey; Shelby County, Tennessee; and Palm Beach County, Florida—and studied more than 5,000 individuals charged with crimes.¹⁵³ To test the effect of early representation of counsel, these individuals were randomly assigned into test and control groups, whereby individuals in the test group would be appointed an attorney from the county’s public defender office within twenty-four hours of arrest and prior to the initial bail determination hearing, and individuals in the control group would not be appointed one.¹⁵⁴

The results demonstrated that the test group (represented by counsel at initial bail determination hearing) experienced significant improvements in their bail determination outcomes. In Shelby County, 51.6% of the test group was released on recognizance and cash bond compared to 36.9% of the control group, and this result was statistically significant at the 0.001 level.¹⁵⁵ Specifically with respect to the likelihood of release on personal recognizance without any cash bail set, 56.7% of the test group in Shelby County was immediately released on recognizance compared to 44.2% of the control group.¹⁵⁶ The results were similar in Palm Beach County where 50.8% of the test group was immediately released on personal recognizance compared to 39.5% of the control group.¹⁵⁷ Further, at all three sites, individuals from the test group were released earlier than their control group counterparts were.¹⁵⁸ In particular, in Passaic County, the average number of days a defendant was held in pretrial custody was 5.3 days for the

¹⁵² ERNEST J. FAZIO ET AL., U.S. DEP’T OF JUSTICE, EARLY REPRESENTATION BY DEFENSE COUNSEL AND FIELD TEST: FINAL EVALUATION REPORT (1985).

¹⁵³ *Id.* at 27.

¹⁵⁴ *See id.* at 4, 129–37.

¹⁵⁵ *Id.* at 194, 198.

¹⁵⁶ *Id.* at 198.

¹⁵⁷ *Id.*

¹⁵⁸ *See id.* at 197.

test group compared to 12.8 for the control group, meaning that those who were represented by counsel at the initial bail hearing regained their freedom more than one week sooner than their unrepresented counterparts.¹⁵⁹

Alissa Pollitz Worden and others also explored the effectiveness of counsel at the initial bail determination hearing in 2018. The study examined rural and small-town courts in upstate New York where providing early representation was more difficult than doing so in courts in more metropolitan areas due to the lack of resources and personnel.¹⁶⁰ In the selected counties, most individuals charged with a crime were unable to post any amount of cash bail exceeding \$500.¹⁶¹ Although there were variances among the counties, some of the key findings affirmed that early representation improved bail determination outcomes by lowering bail amounts and reducing the number of days spent in pretrial detention. In Bleek County, 41.4% of represented individuals had bail set at lower than \$500 compared to 18.0% of unrepresented individuals,¹⁶² and 41.4% of represented individuals for whom bail was set spent 0 days in detention compared to 26.9% of unrepresented individuals.¹⁶³ In Lake County, 46.8% of represented individuals for whom bail was set spent 0 days in detention, compared to 6.6% of unrepresented individuals.¹⁶⁴ In Hudson County, approximately 10% more represented individuals for whom bail was set were released as opposed to being detained.¹⁶⁵

¹⁵⁹ *Id.*

¹⁶⁰ Alissa Pollitz Worden et al., *What Difference Does a Lawyer Make? Impacts of Early Counsel on Misdemeanor Bail Decisions and Outcomes in Rural and Small Town Courts*, 0 CRIM. JUST. POL. REV. 1, 2, 5 (2018).

¹⁶¹ *Id.* at 10.

¹⁶² *See id.* at 12.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 13. Interestingly, the authors partially attribute this significant increase in the number of individuals avoiding time behind bars to appointed public defenders' concentrated outreach to individuals' families and friends who could contribute to paying the set amount of bail. *Id.* at 13–14.

¹⁶⁵ *Id.* at 14–15.

In 2020, Worden and others conducted a similar study in six upstate New York counties, randomly assigning individuals charged with crimes to a control group (unrepresented at initial bail determination stage) and a test group (represented at initial bail determination stage).¹⁶⁶ Despite wide variation across counties, the overall results showed that represented individuals had better outcomes: they were more likely to be released on personal recognizance, less likely to be booked in the county jail, had lower amounts of cash bail set, and spent fewer days in pretrial detention.¹⁶⁷ The following details notable findings from this study: in Hudson County, 50% of represented individuals charged with misdemeanor offenses were released on personal recognizance or under supervision compared to 38% of unrepresented individuals; in Bleek County, 18% of represented individuals were set to bail under \$500 compared to 8.8% of unrepresented individuals; also in Bleek County, 10.1% of represented individuals spent time in pretrial detention for misdemeanor charges compared to 24.6% of unrepresented individuals; and in Williams County, 46.7% of represented individuals charged with felonies were released on personal recognizance or released under supervision compared to 13% of unrepresented individuals.¹⁶⁸

C. EARLY APPOINTMENT MATTERS

Empirically, having an attorney present during the initial bail determination hearing positively affects outcomes for individuals charged with crimes by lowering the likelihood of their admission into and the length of stay in jail.¹⁶⁹ The success of having counsel present at the initial bail determination hearing can partially be attributed to better representation made by

¹⁶⁶ ALISSA POLLITZ WORDEN ET AL., U.S. DEP'T OF JUSTICE, EARLY INTERVENTION BY COUNSEL: A MULTI-SITE EVALUATION OF THE PRESENCE OF COUNSEL AT DEFENDANTS' FIRST APPEARANCES IN COURT: FINAL SUMMARY REPORT (2020).

¹⁶⁷ *Id.* at i.

¹⁶⁸ *See id.* at 22–28

¹⁶⁹ *See supra* II.B.

attorneys.¹⁷⁰ Further, earlier appointment benefits not only the accused individuals, but also public defenders and judicial officers.¹⁷¹

1. BETTER REPRESENTATION

An accused who is unrepresented by counsel at the initial bail determination hearing may not be able to communicate relevant information that a judicial officer statutorily must consider when deciding bail.¹⁷² For example, without counsel to present information about one's ties to the community or employment history, it is more likely for a judicial officer to make a less-informed decision and set a higher bail.¹⁷³ An unrepresented person may be nervous or fearful to appear before a judicial officer and may not be able to produce information pertaining to community ties, flight risk, and danger to public safety.¹⁷⁴

On the other hand, when counsel is present at the initial bail determination hearing, more relevant, helpful, and authenticated information that pertain to pretrial release is presented to the judge.¹⁷⁵ Defense attorneys can also speak to the accused's inability to post bail.¹⁷⁶ As evidence that the presence of counsel contributes to an accused's being heard at initial bail determination hearing, one study found that the bail hearing itself took *longer in time* when counsel was present—on average, an unrepresented individual was heard for 1 minute and 47 seconds, whereas a represented individual was heard for 2 minutes and 37 seconds.¹⁷⁷

¹⁷⁰ See *infra* notes 172–177 and accompanying text.

¹⁷¹ See *infra* notes 178–184 and accompanying text.

¹⁷² These factors include: nature and circumstances of the offense charged; weight of the evidence against the individual charged with a crime; the individual's character, physical and mental condition, family ties, employment, financial resources, length of residence, community ties, past conduct, history of alcohol or drug abuse, history of crime, and prior record of appearing at court proceedings; and danger posed to the community by the individual's release. *Supra* note 25 and accompanying text.

¹⁷³ Colbert et al., *supra* note 147 at 1776.

¹⁷⁴ Alissa Pollitz Worden et al., *The Impact of Counsel at First Appearance on Pretrial Release in Felony Arraignments: The Case of Rural Jurisdictions*, 0 CRIM. JUST. POL. REV. 1, 3 (2019).

¹⁷⁵ Colbert et al., *supra* note 147 at 1755.

¹⁷⁶ See *id.*; Sarah Ottone & Christine S. Scott-Hayward, *Pretrial Detention and the Decision to Impose Bail in Southern California*, 19 CRIMINOLOGY, CRIM. JUST., L. & SOC'Y, 24, 29 (2018).

¹⁷⁷ Colbert et al., *supra* note 147 at 1755.

2. THE EARLIER THE BETTER

In a stakeholder interview, one judge stated that although they take into consideration the direct and indirect effects of pretrial incarceration, judicial officers are usually not aware of any given person’s financial ability, medical conditions, mental health needs, or substance abuse history unless appointed defense counsel brings it to their attention.¹⁷⁸ Thus, it is imperative for appointed counsel to be present at the initial bail determination hearing to present more data and facts that allow judicial officers to make better-informed decisions pertaining to pretrial incarceration or release. In fact, “the more information a judge has, the better decision one hopes a judge can make.”¹⁷⁹ Also, although this view may not be representative of all judicial officers, it is notable that the interviewed judge said “I try to look for any reason not to hold someone. I look for reasons not to detain. *I want attorneys to give me reasons.*”¹⁸⁰

A public defender affirmed that there is “no question” that the earlier counsel is appointed, the better likelihood of pretrial incarceration release for an accused individual.¹⁸¹ From the perspective of public defenders, earlier appointment means that they have more time to meaningfully prepare for the initial bail hearing, such as contacting witnesses, engaging in early advocacy, contacting family, and authenticating information such as housing and employment.¹⁸² Earlier appointment means that public defenders can provide higher quality representation¹⁸³ and can give what judges want—more information to make better-informed decisions.¹⁸⁴

¹⁷⁸ Virtual interview with a judge, *supra* note 32.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* (emphasis added).

¹⁸¹ Virtual interview with a public defender, *supra* note 115.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *See supra* note 178–180 and accompanying text (delineating what judicial officers want at initial bail determination stage).

CONCLUSION

Pretrial incarceration must be considered a *public health* crisis. Public health declarations “interrogate the systems and structures rather than dismiss inequalities as the fault of the individual,”¹⁸⁵ and this perspective is much needed in the context of pretrial incarceration, which currently penalizes individuals under the name of justice and lacks systemic reform. Pretrial incarceration is a punishment reserved for those who are too poor to hire an attorney or to pay bail for their freedom, and it causes irreversible damage to the lives of those with the least political power. Declaring pretrial incarceration as a public health crisis recognizes the hundreds of thousands of legally innocent people held behind bars in America’s jails who are directly and indirectly at risk of illness, violence, and death.

One simple and effective tool to mitigate this public health crisis is to appoint counsel early, in time for the initial bail determination. Treating the initial bail determination hearing as a critical stage would ensure the presence of attorneys to represent indigent individuals and provide information to judicial officers making bail decisions. Early appointment of counsel would reduce the number of people held and days spent in pretrial incarceration, thereby effectively mitigating this public health crisis.

¹⁸⁵ Harmeet Kaur & Skylar Mitchell, *States Are Calling Racism a Public Health Crisis. Here’s What That Means*, CNN (Aug. 14, 2020), <https://www.cnn.com/2020/08/14/health/states-racism-public-health-crisis-trnd/index.html>.