

Bail Reform in Chicago: *Un*-Solving Problems in Public Safety and Court Financing

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Introduction

Criminal justice policy always involves competing trade-offs. Incarcerate too many, and valuable resources are wasted; too few, and public safety deteriorates. “Stop, question, and frisk” policies reduced violence¹ but also clearly increased racial and ethnic antagonism. Mandatory misdemeanor arrest policies for domestic violence protected some women but endangered others.² More recently, efforts to shift policing resources to social services may have increased the number of social workers hired, but it also may have increased response times, reduced arrests, and increased crime. Some of these trade-offs can be clearly measured in lives lost and hospital admissions; others—like familial grief, investments not made, and the psychological toll of crime—are harder to quantify. Given the risks that attend such criminal justice reforms, we should expect reform efforts to be balanced, deliberately recognizing the costs and benefits of implementing one policy over another. The bail reform efforts undertaken in Chicago and the rest of Illinois do not seem to have been guided by such reflection.³

In the following brief, I examine the divergent evidence on Chicago bail reform, with an eye toward public safety. To be sure, defendants benefit from bail reforms, so my critique is not one aimed at preserving current cash bail practices. Instead, I argue that bail reforms need to allow prosecutors and judges the flexibility to keep some defendants detained pretrial, independent of their financial status. The best way to achieve balanced bail reform is to reorient bail practices away from the defendant’s financial abilities and toward the risks posed to the community by the defendant.

A growing number of people blame bail reform for the increases in Chicago’s crime rates, with even defenders of bail reform recognizing but downplaying this trend. Bail reform did increase the volume of crime in Chicago, but the available data suggest that the increases have been comparatively modest. Yet in a city racked by crime like Chicago, even modest increases

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in crime and violence may be too much. If bail reform has taught us anything, it is that quickly releasing dangerous offenders back onto the streets perpetuates violence and diminishes the legitimacy of the justice system.

Judicial Activism and Chicago's Bail Reform

Bail laws and practices were reformed in the past, albeit rarely. For example, Congress passed federal bail reforms in 1966—the first federal bail reform efforts in 177 years.⁴ With reforms also came controversy. Similar to today, the Bail Reform Act of 1966 was much criticized for releasing dangerous criminals with nominal or no bail. Only 18 years later did Congress revisit federal bail reform—in 1984, this time allowing defendants who posed a danger to the community to be detained until trial.⁵

States, too, have reformed their bail systems. In 2017, Cook County, Illinois, Chief Judge Timothy Evans unilaterally altered how Chicago judges determine bail and the options available to them.⁶ To understand Judge Evans's reforms, it helps to understand the bail system in Chicago. After arrest and the filing of charges, Chicago defendants see a judge to determine if and how they will be released pretrial. Some defendants are released on I-Bonds, which allow individuals to be free on their own recognizance. Of those who receive bail, a judge can allow a D-Bond, which allows defendants to pay only 10% of their total bond for release. In cases where there exists a flight risk or a threat to the community, a C-Bond can be used, which requires the full amount of the bond to be paid as a condition of release. Individuals can also be released on nonmonetary conditions, such as electronic monitoring, and they can be denied release entirely and remanded to pretrial detention.

Judge Evans's administrative order created a presumption of immediate release of defendants back into the community. When bail was imposed, Judge Evans's order required Chicago-area judges to set bail amounts commensurate with a defendant's ability to pay, which reduced bail amounts across the board.⁷ The combined effect of these changes would all but assure that most pretrial defendants, even some who posed a serious risk to the community, would be released prior to the resolution of their case.

According to a 2019 report issued by Judge Evans, within 15 months of the reforms, the number of felony defendants released with no bail (I-Bond) almost doubled, increasing from 26.3% of felony defendants to 52%.⁸ Black defendants particularly benefited from the increased use of I-Bonds, increasing 117% in the months after reforms took place. The use of D-Bonds, moreover, dropped from 48.5% of felony defendants to 31.2%, and no bail orders increased from 0.9% to 7.2%.⁹ Median bail amounts also declined from \$5,000 to \$1,000, often with just 10% being necessary to pay for release.¹⁰ For example, 10% of the median bail amount for a defendant accused of homicide pre-reform was \$75,000. Post-reform, that 10% figure amounted only to \$10,000—an 86% decrease. For Class X felonies, such as armed robbery and aggravated battery with a firearm, D-Bonds declined from \$8,000 to \$3,000—a 63% reduction.¹¹ The Chicago jail population also declined 16% only 15 months after reforms, which came on top of consistent jail declines since 2014.¹²

Chief Judge Evans's efforts were hailed as “extraordinary” by Cook County Commissioner Jesus “Chuy” Garcia, who exalted the decision because it would help end “the long-standing practice of jailing presumptively innocent persons prior to trial because they are too poor to post cash bail.” And Cook County State's Attorney Kimberly M. Foxx commended Judge Evans because

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“far too many people have been detained pre-trial because they are poor and unable to post even minimal amounts for bond.”¹³ Questions about the reform emerged, however, as detainees were released amid a wave of gun violence.¹⁴

For his part, Chief Judge Evans was unfazed, stating publicly that releasing defendants, many with extensive criminal histories or accused of violent crimes, didn’t jeopardize community safety. His 2019 report claimed that only 147, or 0.6%, of released felony defendants had been charged with a violent offense since his bail reform took effect.¹⁵ According to the report, bail reform allowed “more pretrial defendants to remain in their communities pending resolution of their cases where they can work, pursue education, and support their families *without an increased threat to public safety*” (emphasis added). Later, while requesting a budget increase of \$9.4 million for an additional 70 probation officers to manage the dramatic increase in pretrial defendants, Judge Evans again defended his reforms against charges that they increased crime. “It’s not by magic,” he said, “that we haven’t had any horrible incidents occur using this new [bail] system.”¹⁶

Contextualizing the Debate: Chesterton’s Fence

Policies championed by Judge Evans in Cook County are now spreading. The Safety, Accountability, Fairness and Equity-Today (SAFE-T) Act, which will eliminate cash bail statewide in January 2023, was signed into law by Illinois governor J. B. Pritzker in 2021.¹⁷ According to Judge Evans and the proponents of progressive reform groups, such as the Bail Project, cash bail should be eliminated for two reasons:

First, bail disproportionately harms the poor and racial minorities. “This legislation marks a substantial step toward dismantling the systemic racism that plagues our communities, our state and our nation,” said Governor Pritzker at the bill’s signing, “and brings us closer to true safety, true fairness, and true justice.”¹⁸ Defending the SAFE-T Act—specifically, the elimination of bail—Governor Pritzker would later say: “We do not want someone in jail because they were arrested for a low-level crime like shoplifting to be sitting in jail for months or maybe even years. At the same time, someone who is a wealthy drug dealer, perhaps accused of murder and arrested, can show up with a suitcase full of money and get out of jail.”¹⁹

Second, as articulated by Judge Evans, all defendants are presumed innocent; thus the loss of liberty prior to conviction contradicts the assumption of innocence—a bedrock principle of American jurisprudence.²⁰ These arguments resonate with American citizens, as they portray requiring bail as a tool of economic and racial unfairness, on the one hand, and as violating a virtue of American law, on the other. Framed this way, eliminating or substantially reducing the use of bail would appear consistent with the broader goals of fairness, equity, and individual liberty. These are appealing arguments, to be sure, and there are elements of truth to each. Some people have been jailed for lengthy periods of time, unable to make bail, despite posing minimal risk, and the presumption of innocence can be in tension with pretrial detention, although the legal foundation for bail is not in question.

What these arguments don’t confront is the concern regarding the risks to public safety that accompany failures to detain certain defendants.

A fence, G. K. Chesterton admonished us in his 1929 book, *The Thing*, represents a problem that had been solved by the person who erected the fence.²¹ Chesterton was concerned that the impulse of reformers was to take down every fence they encountered without first understanding *accurately* why the fence was erected. For Chesterton, understanding the problem solved by the fence was the first step in avoiding downstream problems caused by its removal. Perhaps the fence kept out dangerous predators, or it kept in helpless children, or it prevented injury and death from the cliff it concealed. Chesterton's fence is an admonishment to be concerned about second- and third-order problems.

Applied to bail, reformers have overemphasized a narrow set of problems with bail while underestimating, if not ignoring entirely, the risks associated with rapidly releasing dangerous defendants. Bail and pretrial detention, after all, have been used since the founding of the country, are mentioned specifically in the Constitution, and have been upheld by several Supreme Court decisions. Bail is an integral part of the justice system not only because it helps ensure that a defendant returns for trial; it also protects the public from crime and violence by selectively detaining, even for a short period of time, dangerous, active criminal offenders.

Bail, moreover, protects witnesses and victims of crime from retaliation and intimidation, incentivizing cooperation with justice officials. Cooperation between police, prosecutors, victims, and witnesses is often necessary to guarantee that criminals are charged and convicted. In Chicago, as in many large cities, lack of cooperation is a prime reason that dangerous criminal offenders escape justice. For many criminal offenders, moreover, the process of arrest, arraignment, and bail is the punishment. Many arrestees never see a prison or jail cell, and even those who cannot immediately make bail are rarely held for long.²² The inconvenience that can accompany bail is the only real punishment many will experience. But the bail process and the associated difficulties that it imposes on defendants serve as an important but overlooked deterrent mechanism.

Lastly, in Illinois, defendants who post bail receive 90% of their bail in return if they show for court. Ten percent of their bail—and in Chicago, an additional \$100, plus any bail forfeiture for failing to appear—helps fund Illinois courts, i.e., judges, lawyers, bailiffs, secretaries, and the infrastructure needed to keep the wheels of justice turning.²³ As we will see, the overall amounts are substantial and pose a serious budget shortfall if eliminated. As courts have ruled, cash bail represents a reasonable compromise between the rights of the accused, the rights of victims and witnesses, and the protection of the public. Cash bail exists because it solved problems—problems that will reemerge when eliminated, absent a mechanism to replace the safety benefits associated with the detentions that the pre-reform regime would have led to.

Critiques Undergirding Reform Efforts

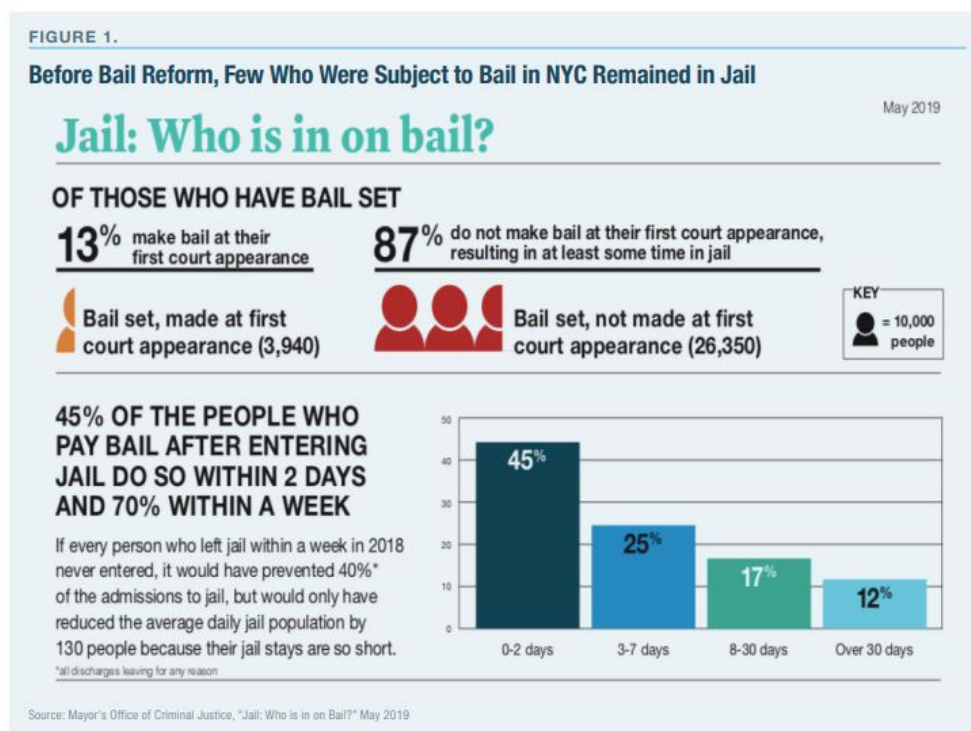
Despite the claims of reform advocates, the number of those subjected to pretrial detention *solely* as a result of not being able to make bail, it turns out, is difficult to ascertain because it is difficult to measure the totality of circumstances behind a defendant's detention. This has allowed advocates to make some rather bold accusations. "As many as 500,000 people are held across the country in local jails because of their inability to pay bail, mostly for low level offenses," wrote John Mathews and Felipe Curiel for an American Bar Association magazine in 2019.²⁴ California congressman Ted Lieu chimed in when he tweeted in 2018: "Every day over 450,000 Americans sit in jail not because they've been convicted of anything, but because they are too poor to pay bail & don't have high powered attorneys."²⁵ This is simply not true. As *PolitiFact* noted, Lieu conflated numbers from a Bureau of Justice Statistics report that found 458,600 unconvicted inmates housed in jails in 2016—but that is not equivalent to being too poor to pay

bail, which was Lieu's claim.²⁶ Unconvicted people are in jail for a variety of reasons, including their being held for parole or probation violations, warrants in other jurisdictions, or because they were denied bail altogether.

Data from the state of New York reveal the complexity. In 2017, the state Department of Corrections reported 63,758 total jail admissions in New York City in the preceding year.²⁷ About 78% were pretrial detainees. Of the 49,786 pretrial detainees, approximately 15% were remanded without bail, or 7,468 individuals. About 5%, 2,489 individuals, were released shortly after arraignment and "never actually spent time in a DOC facility,"²⁸ and another 8%, 3,982 inmates, had legal holds and other warrants making them ineligible for release. In total, about 28% of pretrial detainees were not eligible for bail or release. The rest, 72%, were in jail because they could not immediately make bail.

Few detainees are unable to make bail for long, however (**Figure 1**). A 2019 mayor's office report found that, of those who were arrested by New York City police in 2018 and had bail set, 13% made bail on their first court appearance. Of the remaining 87%, 45% would make bail within two days, 70% would within seven days, and almost 90% would within 30 days.²⁹

Figure 1



Source: Rafael A. Mangual, "Reforming New York's Bail Reform: A Public Safety-Minded Proposal," Manhattan Institute, March 2020, p. 4

National studies conducted on the crime heydays of the 1990s show the same pattern: analyzing data between 1990 and 2004 from the largest 75 counties in the U.S., Thomas H. Cohen and Brian Reaves found that only 6% of defendants were held without bail. Of those released on bail, 45% were released within one day, 76% were released within a week, and 92% within a month.³⁰ Contrary to the claims of reformers, jails are not packed full of people simply because they are poor and cannot make bail.

Evaluating Chicago's Bail Reform

Preventive detention is not to be taken lightly, nor is it overused. As bail reform advocates note, jobs can be lost, relationships marred or ended, social-welfare benefits withdrawn, and reputations ruined—not to mention the direct costs of incarceration. Yet there is an undeniable public safety benefit to pretrial detention to the extent that it incapacitates offenders who would otherwise continue to engage in criminal activity. Holding dangerous, active, and chronic criminal defendants in jail also minimizes the risks of retaliation against or intimidation of witnesses and can disrupt the retaliatory cycles of violence that drive many Chicago shootings.

Closer Inspection of the Evans Report: Media Analysis

Chief Judge Evans claimed that bail reform had no significant impact on public safety. Over 80% of defendants, his report stated, were not charged with a new crime while awaiting trial.³¹ Amazingly, the report argued, only 0.6% were charged with a violent crime while on pretrial release. In other words, 99.4% of the 24,504 defendants who were released pretrial after Evans's order went into effect avoided a new charge for a violent crime.³² Moreover, the percentage of felons who remained charge-free also did not vary much between the period prior to Judge Evans's reforms and after: 83.9% of defendants charged with a violent crime stayed charge-free prior to reforms, compared with 86.9% after bail reform; 77.7% of individuals charged with weapons offenses remained charge-free pre-reforms, compared with 82.7% post-reforms.³³

While heralded as a great achievement, a closer inspection of the report called into question the core claim that Chicago bail reform had no appreciable impact on crime and public safety. In a series of 2020 reports, the *Chicago Tribune* investigated the connection between bail reform and homicide.³⁴ Reporters accessed Chicago police data on adults charged with homicide, and then matched their records to court documents. The *Tribune* found 21 individuals arrested for murder who were released on bail after Evans's reforms, yet the judge's report claimed that only three homicides occurred by those on bail after reforms—a dramatic undercount.

Criminologists and the *Tribune* also found an unusual pattern of decisions that tilted the findings in Evans's report in his favor. The report, for example, included only defendants released at their initial bond hearing and excluded those released shortly thereafter.³⁵ This decision classified individuals as held on bail when, in fact, they had been released. The *Tribune* also noted that the report used a restricted, but somewhat defensible, definition of violent crime that encompassed only six offenses, including murder, rape, robbery, and aggravated battery. Many other violent crimes were excluded (e.g., domestic battery, assault, and assault with a deadly weapon).³⁶ Moreover, the pre- and post-periods used in Evans's report were dramatically different. Violent crime increases in the summer and declines through the winter, but the Evans report included more summer months in the pre-reform analysis than the post-reform analysis. All these decisions may result in an underestimation of the actual number of violent crimes caused by released defendants who benefited from Evans's policy.

Additionally, the likelihood of a defendant committing a new crime increases as the time between release and case disposition increases. The longer a defendant is free, the higher the likelihood of the defendant committing another crime. The report's study periods, however, used very different time intervals. Defendants were free, on average, for 243 days pre-reform and only 154 days post-reform. Given the truncated post-reform period, many cases had not been adjudicated. These differences likely biased downward estimates of new arrests and crimes.³⁷

So serious were the problems with Judge Evans's report that the *Tribune's* editorial board would later write: "Certainly this is clear: Evans' 2019 report evaluating his own program is deficient and therefore of limited value. Withdraw and redo it, Your Honor."³⁸

An Academic Assessment of the Evans Report

The Evans report was reanalyzed by University of Utah law professors Paul Cassell and Richard Fowles. Their study highlighted the flaws in the Evans report and, more importantly, provided more realistic evidence of crime increases associated with Chicago bail reforms.³⁹ Cassell and Fowles, for example, estimated the number of defendants released under bail reform charged with committing new crimes increased by 45%. Moreover, they estimated an increase of 33% in the number of released defendants who are charged with committing a new violent crime (compared with Evans's report of only 0.6%).

They also estimated that the Evans report undercounted the number of new crimes in the post-reform period by 1,212 crimes, which increased the total number of new crimes committed by defendants in post-reform era from 4,164 to an estimated 5,376—an undercount of 29%.⁴⁰ Using these estimates, Cassell and Fowles found that bail reform increased the number of pretrial defendants charged with a crime by 1,661, a 45% increase when compared with the pre-reform period. When applied to violent crime, Cassell and Fowles found that pre-reform releasees were charged with 143 new violent crimes while post-reform releasees produced an estimated 190 new violent crimes, about a 33% increase. Lastly, they found the share of defendants charged with crimes against persons who were released increased from 48.8% to 61.6%. The share of released defendants charged with weapons offenses increased from 60.6% to 76.4%.⁴¹

The Cassell and Fowles study laid to rest the claim that bail reform had no impact on crime in Chicago. Still, it is important to appreciate the scale of the crime problem in Chicago. Critics of the Cassell and Fowles study, for example, argue that even if crime increased, most of the increases were for misdemeanor offenses. Violent crimes remained a relatively small proportion of all crimes committed by newly released defendants. In 2016, the year before reforms, Chicago police arrested 85,752 people, including 4,587 for violent offenses. In 2017, that number declined to 83,598, with 4,242 arrests for violent crimes.⁴² By 2019, however, almost 91,000 people were arrested. The "additional" 1,661 defendants with new criminal charges attributed to the reforms represent a small, but important, part of the total increase. Even the additional increases in violence account for only 3%–4% of all violent crimes.⁴³

Herein lies the problem: even if Cassell and Fowles are correct and crime increased because of bail reform, the overall numbers of criminal events attributable to reform are comparatively modest. By letting more people avoid pretrial detention, crime will increase as a function of more criminally involved people being on the street. But how much is too much?

Pretrial Release and Crime: Complicating Variables

While the Cassell and Fowles study provided evidence of a crime increase related to bail reform, the study was not without limitations. It provided baseline estimates, for example, but couldn't account for other variables also related to bail release and to crime. Enter the work of Professors Don Stemen and David Olson from Loyola University.⁴⁴

Stemen and Olson followed a pre-reform group of 12,756 defendants and a post-reform group of 11,373 defendants. The groups were followed over the same period and over the same months, correcting problems identified in the original report. Owing to a much larger and more complete data set, Stemen and Olson were able to conduct sophisticated analyses that controlled for relevant variables. They found, first, that Judge Evans's reforms had the intended impact of reducing the use of cash bail. Prior to reforms, 20%–40% of defendants were released on I-Bonds, or on their own recognizance. That number jumped to 50%–60% after reforms.⁴⁵ Similarly, defendants released onto electronic monitoring declined from 20%–30% to less than 10%. Just 20%–40% of defendants received D-Bonds or C-Bonds after reform. And no bail decisions went up from 4% to 8%. They note that the reforms increased the number of people who didn't have to pay any form of financial guarantee. About 3,559 defendants were released without posting any bail, who otherwise would have had to do so.⁴⁶ While more defendants were able to escape detention without any financial obligation, relatively few were released who otherwise would not have been, largely because almost everyone in Chicago gets released. Stemen and Olson put this number at 500 individuals over the course of six months after reforms. While the reforms didn't change by much the overall percentage of people released pretrial, they note, reforms changed how people were released.

Stemen and Olson examined three indicators of public safety: failure to appear, new criminal activity, and changes in crime rates. For failure to appear and new crimes, they calculated the probability of those events within the pre- and post-reform groups.⁴⁷ The likelihood of a defendant not appearing for court increased from 16.7% in the pre-reform group (n=2,130) to 19.8% in the post-reform group (n=2,252). For new crimes, the probabilities were largely the same pre- and post-reforms (17.5% and 17.1%, respectively). In total, about 2,232 new charges were leveled at pre-reform defendants and 1,945 at post-reform defendants. The same pattern was found for new violent offenses. Only 3% of the pre- and post-reform groups had charges for new violent crimes. In total, about 382 defendants were charged with violent crimes in the pre-reform group, and 341 in the post-reform group.

Did bail reform increase Chicago crime rates? According to Stemen and Olson, the answer is no. It's important to understand how they arrived at this conclusion. Stemen and Olson calculated the statistically expected number of property and violent crimes, as well as violent crimes involving a gun. They then compared these estimates with the actual number of crimes. For property crimes, their estimates ranged from 107,613 at the high end, to 77,407 at the low end. The actual number was 88,085. For violent crimes, the estimates ranged from 31,623 to 22,341, with the actual number of violent crimes at 27,074. And for violent crimes with a gun, the estimates ranged from 12,487 to 5,635, with the actual number at 9,694.⁴⁸ Each estimate fell within the range of what was statistically expected, leading Stemen and Olson to conclude that the reforms had no measurable impact on the crime rate in Chicago.

Caveats to the Stemen-Olson Conclusion

The first problem of Stemen and Olson's conclusions is that even if the same proportion of defendants were charged with new crimes, the post-reform percentage would be applied to a larger population. More people were released, so there were more crimes. The Manhattan Institute's Charles Fain Lehman pointed out that "the release of just 500 additional people led to roughly 85 additional crimes including 16 additional violent crimes."⁴⁹ Thus, even though the reforms didn't change the probabilities of new crimes, crime nonetheless increased because the number of people released increased.

Second, by their criteria, released defendants would have had to commit and been arrested and prosecuted for an *additional* 19,528 property crimes, 4,549 violent crimes, and 2,793 violent gun crimes in the year after bail reform for Stemen and Olson to conclude that bail reform significantly increased crime in Chicago. Even if Chicago courts released increasing numbers of higher-risk

defendants, it is doubtful that these thresholds could be reached. Moreover, it is safe to say that an additional 19,000 property crimes, or 4,500 violent crimes, or 2,790 gun crimes—all below the targeted level to be considered meaningful by Stemen and Olson—would have laid waste Chicago and many of its residents.

Even Stemen and Olson's estimates of new crimes are underestimates of the true criminal activity of releasees. Most crimes are not reported and thus do not come to the attention of the police—and even when some crimes are reported to the police, they do not result in charges. Since 2017, for example, Chicago police have brought charges in less than 5% of nonfatal shootings,⁵⁰ and, in 2021, Chicago police filed charges in less than 50% of homicides.⁵¹ Moreover, Chicago police have not been immune to the “Ferguson effect” and thus haven't engaged as much in proactive policing.⁵² This would drop arrest rates, especially for those most criminally active.

There is also clear evidence that the Cook County state's attorney, Kimberly Foxx, has dramatically reduced the percentage of felony cases approved for criminal charges. Prior to Foxx's arrival in 2016, felony approval rates hovered between 82% and 88%. In 2017, months after she entered office, approval rates declined to 73%, 70% in 2018, and have since increased to 79% in 2021—still well below the traditional average. Her office also substantially increased rejection rates of felony charges. Prior to her taking office, rejection rates ranged between 8% and 12%. They jumped to 19% in the years immediately after she took office.⁵³ These changes reduced the number of felony defendants overall and likely reduced the number of individuals charged with new crimes while on pretrial release, at exactly the time bail reforms were put into place.

There are other reasons, too, to question Stemen and Olson's conclusion that bail reforms had no impact on crime. There are two electronic monitoring (EM) programs in Cook County. One is managed by Chief Judge Evans and the adult probation department, and the other is managed by the sheriff of Cook County, Tom Dart. About 2,300 people are in the sheriff's EM program, and about 1,600 are in the adult probation program.⁵⁴ Typically, defendants at greatest risk for a new crime are placed in the sheriff's program, where they usually have other restrictions applied to their release.

Pretrial populations differ substantially in the risk that individuals pose to the community. Most are low-risk, about a quarter are medium-risk, and the rest are high-risk. Increasing the number of defendants free on pretrial release necessarily means that a greater proportion with elevated risk levels will be released back into their communities. This affects public safety in ways not examined by Stemen and Olson. Bail reform appears to have placed more risky people on EM. The number of felony defendants released on EM after bail reform, for example, increased 2,189%, according to the *Tribune* investigation. The *Tribune* found 1,264 felony defendants charged with new crimes while on EM in 2018 and the first five months of 2019.⁵⁵ Six were charged with murder or attempted murder, and “hundreds [were] charged with armed robbery, aggravated battery or other gun and drug crimes.” More recently, in January 2022, Sheriff Dart stated that 130 people charged with murder or attempted murder were placed on EM, as were another 852 charged with aggravated gun possession.⁵⁶ In 2021, moreover, 133 people were arrested for a violent crime while on EM.⁵⁷ Chief Judge Evans told the *Tribune*: “I do not believe the public is as secure using electronic monitoring as I'd like to see.”⁵⁸

As bail reform became common and more high-risk individuals were released into their neighborhoods, the number of *victims* of crime also increased. Since 2020 in Chicago, 87 people have been murdered, allegedly by defendants free on bond for a pending felony case. Another 92 people were victims of attempted murder, allegedly by defendants free on bond, and 12 defendants free on bond have been charged with attempted murder of a police officer.⁵⁹ All told, at least 262 individuals have been physically injured or killed by defendants free on bail while awaiting trial for a felony in Chicago.⁶⁰

Reform Has “No Effect”? Ask the Victims

What can we conclude about the Chicago bail reforms’ impact on public safety? Did it have no impact, as Judge Evans and Stemen and Olson argue, or has it set off a chain reaction of violence and death, as critics claim? A cautious conclusion recognizes that the use of bail and other pretrial release mechanisms has always contributed, and will always contribute, to crime in the local area. No jurisdiction can, or should, remand everyone prior to case disposition. Who should be released, and the mechanisms and conditions of their release, should always be driven by objective legal criteria, such as the seriousness of the individual’s alleged crime, and by the risk that an individual poses to the community. Even when these factors are considered, however, predictions will sometimes be wrong and some proportion of defendants will reoffend, sometimes violently. Release decisions, in other words, inevitably place the community at risk for future crime. The best that can be done is to minimize risk to the community while maintaining an adherence to the rule of law and some semblance of assumed innocence.

We should also recognize that many dangerous people were frequently released by Chicago judges prior to bail reform. Chicago has more than 55 criminal gangs and a population of 100,000 gang members, most of whom have extensive criminal records and have been incarcerated.⁶¹ These offenders make up a nontrivial number of felony pretrial defendants.

With these caveats in mind, bail reforms further compromised public safety by releasing more individuals back into the community and by releasing a higher proportion of risky defendants. Many of these high-risk defendants were placed on EM, and they continued to commit crimes in their community. Overall, most of the additional crimes were charged as misdemeanors, and the additional amount of crime committed by those on pretrial was comparatively modest, since most pretrial defendants conclude their cases within six months of arrest. Bail reform, however, incrementally compromised public safety in the post-reform era—partly because of changes in release conditions but also because the bail system in Chicago already seriously jeopardized public safety prior to the reforms.

Critics will point out that a majority of those released pretrial didn’t commit new crimes, and even violent crimes committed by defendants on EM were proportionately few. These claims are true, to a degree, but they also conveniently overlook the damage wrought by released defendants. Herein lies the problem: even small reductions in public safety produce a disproportionate impact on innocent victims and their neighborhoods. The overall percentages may not be large, but it doesn’t take large-percentage changes in crime to have a dramatic impact on community safety in general, or to have a devastating impact on victims’ lives specifically. This is the trade-off that every policymaker must face: changing a crime policy like bail may benefit defendants, but it will also kill, maim, and harm others. Balancing this reality is not easy; but in the era of criminal justice reform, merely recognizing this reality has become politically challenging.

The Fiscal Risks of Bail Reform

After paying bail to secure release, the county clerk holds the funds until the conclusion of the case. Illinois law allows clerks of courts to retain 10% of the bond and 90% to be returned to the individual. Chicago, however, allows the clerk to keep just \$100 of the deposited bond. For defendants who are convicted, a judge can order any fines, fees, or other costs to be deducted from the offender’s bond. These fees help pay for the administration of justice, including paying court officers and private attorneys. In 2016, the total amount in Illinois paid out of bail funds was

\$154.7 million. In 2020, the amount declined to \$121.4 million.⁶² An analysis of bond payments by the Civic Federation found that Cook County, home to Chicago, typically accounts for 40% of the total bail bonds paid into the state.

To bail reform advocates, the bond system is built on the backs of the poor, and the money collected by the state of Illinois—particularly, Chicago—is evidence that bail exists merely to meet the needs of the state to fund its courts. The imposition of bail can impose a financial hardship on defendants, and nobody could seriously argue that the poor and destitute are not affected by even marginal amounts of bail. Recall, however, that Chief Judge Evans’s reforms mandated judges to consider a defendant’s ability to pay, and to increase releases when cash bail wasn’t necessary. Both the Evans report and the analysis by Stemen and Olson found that those reforms did work as intended. More people received I-Bonds and were not required to post bail, and, for those who were required to post, bail amounts dropped precipitously. According to Stemen and Olson, criminal defendants avoided paying \$31.4 million in bail bond payments in the first six months—at least temporarily.⁶³

The Evans reforms undoubtedly made the lives of criminal defendants a little easier. But these benefits may be short-lived and cause additional problems. The vast majority of Chicago defendants whose cases are prosecuted plead guilty or are adjudicated guilty. At that point, a judge will impose the fines, fees, restitutions, and assessments. Where a defendant once had money saved by the court clerk in bail funds, the offender will now need to generate the funds to pay court-ordered costs. For those who are unable to cover the costs immediately, most will be required to pay over time or as a condition of their probation. Not having the money up front increases the likelihood that probationers will not pay off their debts or will not pay them off on time, thus endangering their probation status. In this sense, there were financial benefits to defendants for paying bail up front, and there are potential costs not considered by reformers for paying fines and fees later, after case disposition. This may be why reformers also want to do away with court fees, most fines, and any other financial sanction.

Despite what the evidence above suggests about the role that Chicago’s bail reform played in its recent public safety woes, Judge Evans’s experiment was recently followed by a statewide bail reform law. The SAFE-T Act includes wide-ranging reforms of police and corrections, but the standout clauses are those that eliminate the use of cash bail throughout the state.⁶⁴

As in Chicago, the drop in bond revenue presents the state of Illinois with a serious problem. If the SAFE-T Act moves forward, revenues will drop considerably, as the SAFE-T Act will eliminate bond processing fees altogether. The 10% bond processing fee kept by circuit clerks totaled \$15.1 million in 2016.⁶⁵ By 2020, that number had declined to \$4.9 million, most of which was collected by Chicago. While the SAFE-T Act does not prevent courts from imposing fines and fees, it will change how that money is collected, risking overall collection amounts. The Civic Federation’s analysis of bail bond allocations found that, in 2016, \$111.9 million was allocated to assessments and fees, \$11 million went to fines, \$3.3 million to restitution, and \$28.3 million went to pay for attorneys. By 2019, those numbers had dropped to \$99.7 million in assessments and fees, \$9.2 million in fines, \$2.2 million in restitution, and \$22.7 million in payment to lawyers. A cashless system will likely drop these numbers further.

To bail reform advocates, defunding the bail system and the resulting loss of state revenue is something to be cheered, as they see the justice system as a public commodity. Taxpayers, they argue, should fund the justice system and not justice-involved individuals. Regardless of where one stands on this issue, judge, lawyers, clerks, and bailiffs still need to be paid, the lights need to be kept on, and computer systems need to be upgraded. Unfortunately, it appears that Illinois has no plan to make up for the lost revenue that will inevitably come with the implementation of the SAFE-T Act.

Illinois' Statewide Bail Reform

But the act will not just eliminate cash bail. The legal bases for remanding defendants to pretrial detention were narrowed. The act will require prosecutors to identify, and judges to make a finding, that the defendant is a threat to a specific person—an almost impossible requirement to meet.⁶⁶ Moreover, regardless of the crime committed, no person can be held in jail longer than 90 days. At the end of 90 days, prosecutors must show evidence that the person is a threat to a specific person. To hold people who are flight risks, judges will have to consider whether the defendant is “planning or attempting to intentionally evade prosecution by concealing oneself.”⁶⁷ Not even a history of evading prior court dates can be used as evidence that the person is a flight risk. Without a crystal ball or a court-approved mystic, the standard is all but impossible to meet. And if a defendant doesn't show for court, a criminal warrant will no longer be issued. The matter will be considered a civil issue.

Judge Evans's bail reforms promised to increase fairness and equity in Illinois courts by removing financial barriers to a defendant's pretrial freedom. The SAFE-T Act, however, goes well beyond Judge Evans's comparatively modest reforms by freeing immediately almost everyone after arrest.⁶⁸ Under Judge Evans's reforms, defendants could still be held without bond—especially if they represented a threat to the community. The SAFE-T Act, however, is remarkable in that it more stringently limits the ability of prosecutors and judges to protect the community from dangerous individuals.

Un-Solving Problems and Lessons Learned

Judge Evans's Chicago bail reforms reduced the financial burden of criminal defendants by qualifying thousands for a recognizance bond. Still others benefited from substantive reductions that they had to pay on D- and C-Bonds. There are undoubtedly collateral benefits to Judge Evans's reforms as well. Defendants were released almost immediately, thereby reducing the occurrence of job loss, disruptions in parenting, and other family stressors. These may be benefits that other jurisdictions look to emulate. But are they benefits in the broader context of Chicago crime?

Every criminal justice policy involves trade-offs, but it is unclear whether those benefits outweigh the costs. The costs include the accumulation of thousands more who will fail to show for their court date, especially as relatively more serious defendants are released. Judge Evans's report found that approximately 17% of defendants overall failed to appear for their trial both before and after reforms. For those at the highest level of risk, that number almost reached 30%.⁶⁹ These failures will increase and accumulate and may lead to further criminal charges and penalties.

More important, as more people are released pretrial, and more risky people are released, public safety will erode. Perhaps policymakers will accept the additional crimes of those released pretrial, given the context of the astronomical number of shootings and incidents of violent crime committed in Chicago. Before writing off marginal increases in crime and violence, however, they should consider that the devastating consequences of violent crime are almost never paid for by themselves or by reform advocates. The costs of crime are borne on the backs of individuals, families, and businesses that all too often occupy the least privileged neighborhoods in society. Fifty homicides in poor, crime-ridden neighborhoods is a travesty. Fifty in the neighborhoods

populated by advocates, judges, and politicians would be untenable. Those concerned about racial and social justice, as bail reform advocates claim to be, shouldn't be so quick to dismiss crime increases in neighborhoods already racked with incivility and decline. The victims are far more likely to be black, marginalized, and poor.⁷⁰

Just as there are collateral consequences associated with pretrial detention, there are also collateral consequences that emerge from increases in pretrial release. These consequences may include increased victim and witness intimidation, reduced justice system legitimacy, less cooperation with the police, and an increased gang presence on Chicago streets. No study so far has examined these possible consequences, but anecdotal evidence strongly shows the negative downstream consequences linked to bail reform. In Cook County and Chicago, for example, the chief of police, the sheriff, and even the Democratic mayor have all criticized bail reform for bringing various harms to their communities.⁷¹ Their criticisms should not be cavalierly dismissed.

Conclusion and Recommendations

While Judge Evans's reforms and the SAFE-T Act reforms depart in important ways, they have something in common: they un-solved a problem and thereby created, or will create, other problems. Yet in the calculus of justice policy, the continued defense of bail reform or cashless bail may prove difficult. Bail functioned like Chesterton's fence: it solved, even imperfectly, a range of problems. With bail removed as a fence, those problems will reemerge and include not only increased crime but also reduced funding to courts, increased problems collecting restitution and fines, and an increased need for more pretrial supervision. Bail reform advocates have ignored these issues in favor of a narrow sense of fairness. By this, I mean that they define fairness only in terms of the treatment of criminal defendants and not in terms of future victims or of the downstream consequences of their policies.

With most criminal justice reforms, public safety is too often only an afterthought, and expressed concerns are too easily dismissed as right-wing propaganda. There is a debate to be had about the role of fines, fees, restitution, and the financial penalties applied to criminal offenders, just as there is a debate to be had about the safest way to reform bail policies. To ignore, however, the direct and collateral consequences that emerge from releasing risky and dangerous defendants back into communities already struggling with violence and disrepute risks more than a failed policy; it risks the very lives that advocates are so concerned about.

There is a world of difference, too, between Judge Evans's reforms and the Illinois SAFE-T Act that abolishes cash bail. Where Judge Evans's reforms were targeted and allowed judicial discretion in pretrial detention decisions, the SAFE-T Act severely constrains the ability of prosecutors and judges to keep active, dangerous offenders confined. Even the comparatively modest reforms of Judge Evans will be removed if the SAFE-T Act goes into effect in January 2023. So concerned are state attorneys that a bipartisan group of more than 50 are filing lawsuits against the law. People can debate the provisions that eliminate cash bail, but the more serious problems have to do with the legal criteria that all but guarantee that jails will be emptied and dangerous offenders released. In Will County, for example, more than 600 inmates will be released, including 60 charged with homicide, according to the state's attorney.⁷²

The space between bail reform and bail elimination is vast. Congressional reform efforts in 1966 and 1984, as well as more recent reform efforts in Chicago and New York, have demonstrated that reforms can diminish public safety. As more and higher-risk defendants are released, the volume of crime can be expected to increase. To ameliorate public safety risks, legislators could,

as they have done in New Jersey, include a list of offenses for which exists a presumption of pretrial remand. The presumption could be challenged by the defense at a hearing, but this tool alone could be sufficient to offset some of the problems currently experienced in Chicago.

To pivot the bail system away from economic conditions and toward the risks that a defendant poses, jurisdictions should test and implement validated risk-assessment instruments and use these instruments as a guide in making pretrial detention decisions. Legislators could provide guidance to judges using the assessment instruments by creating presumptive remand for high-risk defendants. Other steps, too, can be taken to improve community safety while reforming bail. For example, ignoring a court date or committing a new crime while on bail should make it more difficult or even impossible to receive bail in the future. The punishments for committing a new crime while on bail could also be enhanced or new penalties applied. And new criteria could be developed to deny pretrial release to particular groups of active offenders, especially offenders involved in weapons offenses.

The point is, while reforms can safely release many defendants without monetary obligations, other, more dangerous defendants should be detained for as long as necessary. Not everyone who comes before the court poses a serious public safety hazard, but those who do should not be easily returned to the streets. At a minimum, dangerous, recidivistic people need to be separated from society. A balanced, empirically driven, approach recognizes the wide variation in the types of defendants who come before the court.

The SAFE-T Act rejects a balanced and evidence-based approach in favor of an abolitionist agenda—an agenda that will make it almost impossible for the court to keep detained dangerous offenders. Without basic and legal safeguards, crime and violence will increase and the legitimacy of the Illinois justice system will continue to decline. To be clear: the SAFE-T Act will make it substantially more difficult to detain pretrial individuals accused of a range of crimes (including domestic violence and witness intimidation), those who previously failed to show at their court date, those with the means to flee, and even those who commit new crimes while awaiting case disposition. This abolitionist approach unfairly and inexplicably places at risk much of the public, and it seemingly does so only because Illinois Democrats fail to take responsibility for the safety of their citizens.

The SAFE-T Act highlights a growing awareness that the criminal justice reform movement has been co-opted by increasingly radical voices.⁷³ Many reformers have shown little concern for public safety, often dismissing data and critiques as conservative drivel or racial dog whistles. Much of the reform movement has also embraced abolitionist goals. Defunding and defanging the police remains part of their agenda, but so, too, is the elimination of cash bail, the closing of jails,⁷⁴ electing progressive prosecutors⁷⁵ who prosecute only select crimes and crimes committed by select groups, and, of course, prison abolition. Reformists promise that their changes will improve justice and make for a fairer system. They would do well, however, to recall G. K. Chesterton's admonition not to remove fences without first understanding the problems solved by the fence.

Unfortunately, fences make the best neighbors.

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