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BAILING OUT THE PROTESTER

Alireza Nourani-Dargiri[†]

The United States cash bail system unconstitutionally hinders protest rights enshrined in the First Amendment. Protesting on controversial issues, while protected activity, often risks arrests and other interactions with police. Unfortunately, studies show that protesters of color are arrested at higher rates than white protesters.

Cash bail, in turn, increases the cost associated with the arrests related to protests, further disincentivizing protesters from engaging in lawful activity. Although the overwhelming majority of these protests and demonstrations are peaceful, and many of the charges in these arrests are eventually dropped, arrested protesters are still required to put up hundreds—sometimes even thousands—of dollars to be released pretrial. If they cannot, they must remain in jail until their trial, until the charges are dropped, or until they are able to raise enough money to be released. This pretrial detention, even if it only lasts a few days, has significant consequences. Furthermore, these consequences are not shared evenly: the cash bail system disparately impacts people of color, who are imposed bail at higher rates and at higher amounts, meaning they will also experience negative consequences at a disproportionate rate.

Because states are criminalizing more conduct, elevating charges from misdemeanors to felonies, and continuing to impose bail amounts on protesters, the intersection between cash bail and protests is unavoidable. In turn, many people could be afraid to protest because they do not have enough money to afford their bail if they are arrested at the protest, and because they cannot afford the negative consequences of awaiting their trial in jail.

This Article discusses how cash bail dissuades First Amendment expression by compounding existing consequences created by government action that also curtails lawful protests. Furthermore, the disparate rates at which

[†] Judicial Clerk, Colorado Supreme Court. B.A. University of Texas at Dallas; J.D. Case Western Reserve University, School of Law. Thank you to the faculty at CWRU for allowing me to workshop an early version of this piece. Thank you in particular to Bryan Adamson, Jonathan Adler, Eric Chaffee, Atiba Ellis, and Jessie Hill for your insightful feedback. Lastly, my sincerest gratitude to the editors at *Columbia Journal of Race and Law* for their superb editorial assistance.

protesters of color are arrested and later imposed bail raises an equal protection concern, deterring people of color from expressing constitutional rights. Removing cash bail in limited circumstances associated with otherwise lawful protesting, measured reform may help alleviate some of the disparate risks involved with protected activity. While eliminating bail altogether is the ultimate goal, this measured reform would be an incremental step towards broader change, building public support for holistic reform.

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INTRODUCTION

Protests are a fundamental aspect of progressing societies, acting as catalysts for necessary change. The United States, in particular, is a country that has benefited from protests throughout its existence and has since recognized protesting as protected activity under the First Amendment.

Expressing fundamental freedoms, however, should not risk significant consequences if you do not have access to sufficient financial resources. Though many protests are lawful and peaceful, protesters often face arrests, and institutional obstacles exacerbate the consequences of those arrests. More specifically, participating in protests can entail significant risks for those who lack sufficient financial resources to pay their bail amount in the event of their arrest.

The protests in Akron, Ohio between April of 2022 and July of 2023, exemplify this issue. Thousands of protesters marched in Downtown Akron after eight officers fatally shot Jayland Walker.¹ During the demonstrations, Akron police used chemical agents on, such as tear gas and pepper spray, and arrested non-violent protesters.² Though the federal judge would later issue an injunction prohibiting the unjustified use of these chemicals,³ the court order did not prohibit wrongfully arresting protesters. Despite many of their charges were eventually dropped, the set bail amounts forced many of those arrested to remain in jail until they could pay.⁴ Fortunately, activists, bail funds, and companies got them released generously posted bail on protester's behalf.⁵

Unfortunately, many people are not as lucky and are unable to pay their bail fees, dissuading constitutional expression of their protest rights.⁶ Unable to afford bail, the arrested protester would have to wait in jail pretrial, joining the over half a million people incarcerated in local jails, most of whom

¹ See *Complete Coverage of the Jayland Walker Police Shooting in Akron, Ohio*, AKRON BEACON J. (Apr. 9, 2023), <https://www.beaconjournal.com/story/news/local/2023/04/09/what-happened-to-jayland-walker-read-about-akron-police-shooting/70007086007/>.

² Conor Morris, *Akron Police, Mayor Stand by Officers' Use of Chemical Irritants during Jayland Walker Protest*, IDEASTREAM (April 22, 2023), <https://www.ideastream.org/law-justice/2023-04-22/akron-police-mayor-stand-by-officers-use-of-chemical-irritants-during-jayland-walker-protest>.

³ See *Joint Temporary Stipulated Order, Akron Bail Fund v. City of Akron*, No. 5:23-cv-837 (N.D. Ohio April 21, 2023).

⁴ Doug Livingston, *What we Know about 61 People Arrested in July During Jayland Walker Protests in Akron*, AKRON BEACON J. (Sept. 23, 2022), <https://www.beaconjournal.com/story/news/crime/2022/09/23/jayland-walker-protest-arrests-akron-police/69512399007/>.

⁵ Abbey Marshall, *\$50,000 Raised to Bail out Activists Jailed During Jayland Walker Protests in Akron*, AKRON BEACON J. (July 13, 2022), <https://www.beaconjournal.com/story/news/2022/07/13/50000-raised-bail-activists-jailed-akron-jayland-walker-protests-police-shooting-serve-the-people/10016945002/>.

⁶ See, e.g., Katelyn Smith, *Judges Reduce Bail for 9 People Arrested after Riot in Lancaster Following Fatal Police Shooting*, WGAL (Sept. 17, 2020), <https://www.wgal.com/article/judges-reduce-bail-for-nine-people-arrested-after-riot-following-fatal-police-shooting-in-lancaster/34056851#>.

simply because they are too poor to pay for their pretrial release.⁷ While cash bail is used as a collateral guarantee to ensure a defendant's return to future court appearances,⁸ its use is felt unevenly.⁹ As reports demonstrate that Black people are arrested at as high as five times the rate as white people,¹⁰ it does not come as a surprise that 43% of the pretrial population is Black.¹¹ These disparate arrest rates continue in the context of protests, with protesters of color arrested, and later imposed bail, at significantly higher rates than white protesters¹²—some jurisdictions arresting people of color ten times as often as their white counterparts.¹³

This Article discusses how cash bail dissuades First Amendment expression by compounding existing consequences created by government action that also curtails lawful protests. Protesting is a constitutionally protected right, but protesting on controversial issues often risks arrest and the subsequent consequences involved with that arrest. Such as bail. Thus, because the cash bail system increases the potential consequences to arrested protesters—such as higher likelihoods of pleading guilty, losing housing, and damaging an individual's reputation¹⁴—it increases, in tandem, the disincentive provided by the risk of arrest.

Part I discusses the effect protests have on society and its legal protections. This part also addresses the recent rise in legislation that increases punishments for engaging in certain forms of demonstrations, despite consistent data demonstrating the overwhelming majority of protests remain peaceful. Part II then provides an overview of cash bail, discussing how it works, the consequences involved for those unable to post bail, and disparate impacts involved in the system. Part III connects how cash bail exacerbates the consequences of arresting protesters, emphasizing how disincentives to

⁷ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POLY INITIATIVE (March 14, 2023), <https://www.prisonpolicy.org/reports/pie2023.html> [hereinafter *Mass Incarceration Report*]. Since writing this piece, the Prison Policy Initiative has released a new report, adding data from 2023 and 2024. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2024*, PRISON POLY INITIATIVE (March 14, 2024), <https://www.prisonpolicy.org/reports/pie2024.html>.

⁸ *Trujillo v. State*, 483 S.W.3d 801, 805–06 (Ark. 2016) (noting the purpose of bail is to ensure presence of defendant).

⁹ See *infra* Section II(C).

¹⁰ Pierre Thomas, John Kelly & Tonya Simpson, *ABC News Analysis of Police Arrests Nationwide Reveals Stark Racial Disparity*, ABC NEWS (June 11, 2020), <https://abcnews.go.com/US/abc-news-analysis-police-arrests-nationwide-reveals-stark/story?id=71188546>.

¹¹ Wendy Sawyer, *How Race Impacts who is Detained Pretrial*, PRISON POLY INITIATIVE (Oct. 9, 2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/.

¹² *E.g.*, Christian Davenport, Sarah A. Soule & David A. Armstrong II, *Protesting While Black? The Differential Policing of American Activisms, 1960 to 1990*, 76 AM. SOCIOLOG. REV. 152 (2011) [hereinafter *Protesting While Black*].

¹³ *E.g.*, Pierre Thomas, John Kelly & Tonya Simpson, *ABC News Analysis of Police Arrests Nationwide Reveals Stark Racial Disparity*, ABC NEWS (June 11, 2020), <https://abcnews.go.com/US/abc-news-analysis-police-arrests-nationwide-reveals-stark/story?id=71188546>.

¹⁴ See *infra* Section II(C).

protest increase due to the effects of cash bail. Lastly, Part IV discusses avenues for change, providing attainable ways to reform to ensure that a person's finances do not determine whether they can exercise their constitutional rights.¹⁵ Though eliminating bail is the ultimate goal, this final section's limited measures aim to serve as an incremental step to build public support for more comprehensive reform.

I. PART 1 – THE BEDROCK RIGHT TO PROTEST

Historically, protesting has positively impacted societies, often acting as a catalyst for necessary change. Recognizing its importance, countries¹⁶ and international organizations¹⁷ protect this right in an effort to encourage its expression, collectively understanding that in the absence of protests, significant societal change may not occur. While limited restrictions on protest rights have been rationalized and upheld, obstacles that may otherwise hinder or discourage the right to peacefully protest have not. Unfortunately, while the vast majority of protests are peaceful, recent legislation heightens the risks associated with engaging in protests, threatening its future expression.

A. Rich History of Protests

For centuries, protests have centered and uplifted the voices of marginalized communities to help effectuate change.¹⁸ As one commentator put it, “Protests are signals.”¹⁹ Constituents signal to their officials that they are unhappy and refuse to sit silently and put up with the status quo.²⁰ While it may take time to address the plights involved—as protests do not always present solutions—this should not minimize the impact protests can have.

In the same respect, protests are a defining aspect of United States history. In 1773, American colonists protested a tax on tea by throwing several thousand pounds of tea into the Boston Harbor.²¹ The “Boston Tea Party” is commonly seen as the first significant protest by American colonist against the British, sparking the First Continental Congress in 1774, the American Revolution beginning in 1775, the Declaration of

¹⁵ This Article is limited in its scope to only address the intersection of protesting and bail, but this is not to qualify the system's use in other contexts.

¹⁶ *E.g.*, Art. 31 of the 1987 Constitution of the Republic of Haiti (as amended) (“Freedom of unarmed assembly and association for political, economic, social, cultural or any other peaceful purposes is guaranteed.”). For a discussion on how various countries and international bodies recognize and protect protest rights, see Alireza Nourani-Dargiri, *The Universal Effort to Curtail Protests*, 62 UNIV. LOUISVILLE L. REV. (forthcoming 2024).

¹⁷ *E.g.*, *Global Assessment on Protest Rights 2022*, CIVICUS (2022), <https://protestrights2022.monitor.civicus.org/>.

¹⁸ See Patrick Manning et al, *Earliest Evidence of Social Protest*, H-NET LIST FOR WORLD HIST. (May 1996), <http://www.hartford-hwp.com/archives/20/005.html>.

¹⁹ Zeynep Tufekci, *Do Protests Even Work?*, THE ATLANTIC (June 24, 2020), <https://www.theatlantic.com/technology/archive/2020/06/why-protests-work/613420/>.

²⁰ *Id.*

²¹ *Boston Tea Party*, ENCYCLOPAEDIA BRITANNICA (June 8, 2023), <https://www.britannica.com/event/Boston-Tea-Party>.

Independence in 1776, and British recognition of independence in 1783.²² Thus, the Boston Tea Party was a powerful catalyst in transforming the colonies into the United States.

Protesting is not limited to independence movements; it has also proven to be effective in advocating for individual rights, such as women's suffrage. After nearly sixty years of women fighting for suffrage, more than 5,000 people demonstrated during President Woodrow Wilson's inauguration to bring attention to the movement.²³ The Women's Suffrage Parade successfully revived attention around women's voting rights, leading to seven more years of protests, and the adoption of the Nineteenth Amendment in 1920.²⁴ Had the Parade not happened, women's suffrage may have taken much longer to become a reality.

Importantly, more general protests have also been fruitful in spurring change. In 1963, approximately 250,000 people gathered to voice their outrage against racial inequalities prevalent in the United States.²⁵ While the focus of this protest is less issue-specific than the Boston Tea Party and the Women's Suffrage Parade, the "March on Washington for Jobs and Freedom" still effectively brought around necessary reform.²⁶ This protest, the largest civil rights gathering of its time, led to civil rights leaders meeting with President John F. Kennedy and Vice President Lyndon B. Johnson, ultimately resulted in the enactment of the Civil Rights Act of 1964.²⁷

As some commentators have noted, protesting is *at least* as important as voting to spur societal change.²⁸ Since studies indicate that only the affluent wield significant influence over policymaking, protesting is one of the primary ways less-wealthy citizens can impact policy.²⁹ Lobbying, for instance, can undermine constituents' ability to receive adequate representation, often "allowing lobbyists to advance the priorities of their wealthy and corporate clients at the expense of the public interest."³⁰ Even if influence through voting was equally accessible,

²² See BENHAMIN L. CARP, *DEFIANCE OF THE PATRIOTS: THE BOSTON TEA PARTY AND THE MAKING OF AMERICA* (Yale Univ. Press 2010); see also Nicole Dudenhoefer, 7 *Influential Protests in American History*, UCF TODAY (July 2, 2020), <https://www.ucf.edu/news/7-influential-protests-in-american-history/>.

²³ *Marching for the Vote: Remembering the Women Suffrage Parade of 1913*, LIBR. OF CONG. (Sept. 6, 2018), <https://guides.loc.gov/american-women-essays/marching-for-the-vote>.

²⁴ *Id.*

²⁵ *March on Washington for Jobs and Freedom*, NAT'L PARK SERV., <https://www.nps.gov/articles/march-on-washington.htm>

²⁶ *Id.*

²⁷ *Id.*; see also Dudenhoefer, *supra* note 24.

²⁸ Andre M. Perry & Carl Romer, *Protesting is as Important as Voting*, BROOKINGS INST. (Aug. 28, 2020), <https://www.brookings.edu/articles/protesting-is-as-important-as-voting/>.

²⁹ E.g., Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPECTIVES ON POL. 564 (2014); MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* (Princeton Univ. Press 2012).

³⁰ Sam Hananel, *Fighting Special Interest Lobbyist Power Over Public Policy*, CTR. FOR AM. PROG. (Sept. 27, 2017), <https://www.americanprogress.org/wp-content/uploads/sites/2/2017/09/LobbyingSpecialInt-factsheet1.pdf>.

protests can influence voting outcomes.³¹ Protests can successfully drive media coverage, inform public opinion, and catalyze congressional action.

Change may not happen overnight, but a protest can still have other immediate impacts.³² Protests force people to listen to the plights of the marginalized and encourage the necessary dialogue.³³ Furthermore, protesting can make “an apathetic majority sympathetic to the demonstrators’ cause.”³⁴ Without protests, societies would stick to the status quo and not appropriately progress to make their communities better.

Admittedly, while protests can inspire positive change, they can also have a negative impact on public opinion or result in reactionary backlash to protest demands. Particularly when a protest is perceived as violent, “people may perceive them as less reasonable[,] . . . lead people to identify with them less, and ultimately become less supportive.”³⁵ Largely, however, research seems to refute that stance. Coupled with research that demonstrates “news organizations have struggled to accurately and fairly portray protests that challenge the political and societal status quo,”³⁶ studies continue to validate that protests can lead to meaningful change.³⁷

B. The Protected Right to Protest

Governments also regularly seek to protect the right to protest. Internationally, the 1966 International Covenant on Civil and Political Rights Articles 18 to 22 enumerate how protests are a human right. “Everyone shall have the right to freedom of thought,”³⁸ “to hold opinions without interference,”³⁹ and to peacefully assemble in which “[n]o restrictions may be placed on [their] exercise.”⁴⁰ Additionally, the U.N.’s Human Rights Committee has further interpreted this right in its General Comment No. 37.⁴¹ In addition to providing a comprehensive overview on

³¹ Daniel Q. Gillion, *Why Protests Matter in American Democracy*, PRINCETON UNIV. PRESS (June 02, 2020), <https://press.princeton.edu/ideas/why-protests-matter-in-american-democracy>.

³² See Mae Cromwell *7 Times that Protests Changed U.S. History*, ASPEN INST. (Dec. 15, 2016), <https://www.aspeninstitute.org/blog-posts/7-times-protests-changed-us-history/>.

³³ Keith Allen, *Understanding Protests: The Importance of Meaningful Dialogue*, 36 ABA J. (2021), https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/fall2020/understanding-protests-importance-meaningful-dialogue/.

³⁴ Omar Wasow, *Agenda Seeding: How 1960s Black Protests Moved Elites, Public Opinion and Voting*, 114 AM. POL. SCI. REV. 638 (2020).

³⁵ Melissa D. Witte, *Violence by Protesters can Lead the Public to Support them Less, Stanford Sociologist Says*, STAN. NEWS (Oct. 12, 2018), <https://news.stanford.edu/2018/10/12/how-violent-protest-can-backfire/>.

³⁶ D.K. Brown & S. Harlow, *Protests, Media Coverage, and a Hierarchy of Social Struggle*, 24 INT’L J. OF PRESS/POL. 508, 509 (2019).

³⁷ See, e.g., Belinda Archibong, Tom Moerenhout & Evans Osabuohien, *Protest Matters: The Effects of Protests on Economic Redistribution*, BROOKINGS GLOB. WORKING PAPER (April 2022).

³⁸ International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 18, 6 I.L.M. 368, 999 U.N.T.S. 171.

³⁹ *Id.* at art. 19.

⁴⁰ *Id.* at art. 21.

⁴¹ Human Rights Committee, General Comment no. 37, U.N. Doc. CCPR/C/GC/37 (Sept. 17, 2020).

the importance of the right, the Human Rights Committee discusses state responsibility to codify, promote, and protect the right to protest.⁴²

Domestic law must recognize the right of peaceful assembly, clearly set out the duties and responsibilities of all public officials involved, be aligned with the relevant international standards[,] and be publicly accessible. States must ensure public awareness about the law and relevant regulations, including any procedures to be followed by those wishing to exercise the right, who the responsible authorities are, the rules applicable to those officials, and the remedies available for alleged violations of the rights.⁴³

Furthermore, in instances of alleged violations, the U.N.'s Office of the High Commission on Human Rights has a mandate to "promote and protect the right of peaceful assembly."⁴⁴ More regional international bodies have also clearly defined these rights to ensure that protest rights are codified, promoted, and protected in every country in those regions.⁴⁵

Similarly, the United States protects the right to protest in its Constitution. While there is no specific mention of "protest," the U.S. Constitution's First Amendment provides "Congress shall make no law . . . abridging the freedom of speech . . . or the right of people peaceably to assemble, and to petition the Government for a redress of grievances."⁴⁶ Therefore, the right to protest is found in the manifestation of the rights to speech, assembly, and petition. In fact, the U.S. Supreme Court recognizes "the right to peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. . . . [O]ne that cannot be denied without violating those fundamental principles which lie at the base of all civil and political institutions."⁴⁷

Recognizing the importance of protesting, many institutions seek to keep governments accountable for protecting protest rights. Outside the U.S., nongovernmental agencies such as Human Rights Watch and Amnesty International document and report instances where the right has been abridged in order to put pressure on individual governments.⁴⁸ Domestically, groups like the American Civil Liberties Union will take a similar approach, but will also take further action in providing public

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *OHCHR and the Right of Peaceful Assembly*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, <https://www.ohchr.org/en/peaceful-assembly>.

⁴⁵ *See, e.g.*, European Convention on Human Rights, arts. 9–11, Sept. 4, 1950, 213 U.N.T.S. 222.

⁴⁶ U.S. Const. amend. I.

⁴⁷ *Jonge v. State of Oregon*, 299 U.S. 353, 364 (1937).

⁴⁸ *E.g.*, *USA: Rights Expert Decries Wave of Anti-Protest Laws 'Spreading Through the Country'*, UN NEWS (May 5, 2021), <https://news.un.org/en/story/2021/05/1091322>; *Protect the Protest*, AMNESTY INT'L, <https://www.amnesty.org/en/what-we-do/freedom-of-expression/protest/>; *The Enduring Power of Protest*, HUM. RTS. WATCH, <https://www.hrw.org/news/2019/12/09/enduring-power-protest>.

information about protest rights, as well as filing lawsuits on behalf of people who have had their rights violated.⁴⁹

In response to those lawsuits, courts consistently protect this right in the face of violations or unlawful restrictions. Specifically, the judicial system found First Amendment freedoms to be “delicate and vulnerable, as well as supremely precious in our society.”⁵⁰ In a case concerning a statute that *could* abridge First Amendment expression, the Court held that even the threat of sanction was improper “[b]ecause First Amendment freedoms need breathing space to survive.”⁵¹ Governments, therefore, may only regulate with “narrow specificity.”⁵²

This applies to protests’ speech and conduct. While protests are not unconditionally protected, any restrictions on how its expression must be content-neutral, fairly administered, and be narrowly tailored to achieve a governmental interest. For instance, the First Amendment does not protect speech that is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁵³ This is different from speech made in the heat of the moment, because it is not a “serious” expression of an intent.⁵⁴ Further, mere advocacy of lawbreaking or violence remains protected speech as long as it is not intended to, and unlikely to provoke, immediate unlawful action.⁵⁵

Similarly, expressive conduct, also referred to as symbolic speech, have similar protections. While different that verbal speech, symbolic speech is sufficiently imbued with elements of communication that qualifies to receive First Amendment protection.⁵⁶ Non-expressive conduct, however, does not receive First Amendment protection because it is not sufficiently imbued with elements of communication that would convey a message.⁵⁷

⁴⁹ *Know Your Rights*, ACLU, <https://www.aclu.org/know-your-rights/protesters-rights>; *ACLU of Hawaii Filed Federal Lawsuit on Behalf of Peaceful Protesters*, ACLU (Aug. 8, 2006), <https://www.aclu.org/press-releases/aclu-hawaii-files-federal-lawsuit-behalf-peaceful-protesters>.

⁵⁰ *NAACP v. Button*, 371 U.S. 415, 433 (1963).

⁵¹ *NAACP v. Button*, 371 U.S. 415, 433 (1963). Similarly, true threats are also not protected. True threats are “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343 (2003). The speaker “need not actually intend to carry out the threat.” *Id.*

⁵² *NAACP v. Button*, 371 U.S. 415, 433 (1963), citing *Cantwell v. Connecticut*, 310 U.S. 311 (1940).

⁵³ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

⁵⁴ *See Watts v. United States*, 394 U.S. 705 (1969) (holding that political hyperbole is not a true threat).

⁵⁵ *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

⁵⁶ For instance, the U.S. Supreme Court has found First Amendment protection for wearing an armband at school to protest a war as well as upholding the ability to burn the U.S. flag. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969); *Texas v. Johnson* 491 U.S. 397 (1989). Interestingly, the Supreme Court upheld, however, a governmental prohibition against burning draft cards stating it was justified to maintain an efficient and effective military draft system. *United States v. O’Brien*, 391 U.S. 367 (1968).

⁵⁷ For instance, engaging in property damage, while it could be part of an otherwise justified protest, does not convey a message that can be understood by the listeners. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (holding physical assault of another person is not expressive

Governments *may*, however, place limitations based on the manner in which the speech is made.⁵⁸ In *Cox v. New Hampshire*, the U.S. Supreme Court upheld the convictions for parading without a permit because permits were a valid time, place, and manner restriction.⁵⁹ There, the Court stressed that the regulations were set to create order and safety for the community, rather than restrict the protest's content.⁶⁰ Additionally, the regulation had no opportunity to wield undue or arbitrary power, nor was there evidence that the statute had been administered unfairly.⁶¹ Thus, the Court found the regulation's limited, content-neutral scope did not infringe on constitutional rights.

Similarly, in *Heffron v. International Society for Krishna Consciousness*, the Court upheld a state's prohibition against selling or distributing written material at a state fair except from designated, fixed-location booths.⁶² The Society for Krishna Consciousness challenged the regulations, arguing it violated their First Amendment rights because Krishna religious doctrines commanded its members to go out into public spaces.⁶³ Still, the Court upheld the regulation, ruling that since the regulations applied equally, didn't restrict based on content, and the state had an important interest in protecting the safety of the fair's patrons, it was a valid time, place, and manner restriction.⁶⁴

In *Ward v. Rock Against Racism*, the Court held that the government does not need to choose the least restrictive alternative⁶⁵ in imposing time, place, and manner restrictions.⁶⁶ After receiving high-decibel complaints, New York City mandated the use of city-provided sound systems and technicians for all concerts in Central Park.⁶⁷ Rock groups challenged this mandate, claiming the inability to use their own sound equipment and technicians in a public forum interfered with their First Amendment rights.⁶⁸ Again, the Court upheld the mandate, giving broad deference to the government's interest in protecting citizens from unwelcome and excessive noise.⁶⁹ As long as "the means chosen are not substantially broader than necessary to achieve the government's

conduct). See also *Spence v. Washington*, 418 U.S. 405, 409–11 (1974) (protecting expressive conduct so long as that conduct conveys a particularized message and is likely to be understood in the surrounding circumstances).

⁵⁸ Such restrictions come in many forms, such as imposing limits on noise levels, permit requirements, capping the number of protesters who can occupy an area, barring early-morning or late-evening demonstrations, and even restricting the size or placement of signs on government property. Kevin Francis O'Neill, *Time, Place and Manner Restrictions*, FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1023/time-place-and-manner-restrictions>; see, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

⁵⁹ *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941).

⁶⁰ *Id.* at 574.

⁶¹ *Id.* at 577.

⁶² *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981).

⁶³ *Id.* at 645.

⁶⁴ *Id.* at 649–50.

⁶⁵ Meaning, the option for government response that would restrict the constitutional rights the least.

⁶⁶ *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

⁶⁷ *Id.* at 787.

⁶⁸ *Id.* at 781.

⁶⁹ *Id.* at 782–83.

interest,” the regulation is a valid time, place, and manner restriction.⁷⁰ The government’s regulation need not be the least-speech-restrictive.⁷¹

But again, the restrictions must be content neutral. Even when an ordinance limiting speech is on its face neutral, cases have found government action unconstitutional if, as applied, an ordinance led to an unequal freedom of expression.⁷² In *Police Department of the City of Chicago v. Mosely*, the Court unanimously held that carving out exemptions for a picketing prohibition was unconstitutional because it violated the equal protection clause.⁷³ Chicago’s ordinance prohibited picketing within 150 feet of a school during school hours, *except* for peaceful labor picketing.⁷⁴ Mosely, who had been picketing near a high school protesting “black discrimination,” challenged the city’s ordinance on First Amendment and equal protection grounds.⁷⁵ The Court agreed with Mosely, ruling the regulation exemption limited other speech based on its content.⁷⁶

Furthermore, protesting rights are not checked at the door⁷⁷ simply because there is a “desire to avoid the discomfort and unpleasantness that accompany an unpopular viewpoint.”⁷⁸ Governments cannot “seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.”⁷⁹ As the Court has expressed, in public debate, insulting and even outrageous speech *must* be tolerated, in order to provide adequate breathing space to the freedoms protected by the First Amendment.⁸⁰ “Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’”⁸¹

Arguably, this principle can go as far as protecting protesters who cause emotional harm to listeners. In *Snyder v. Phelps*, the Court held that the First Amendment shielded protesters who picketed signs—such as “Thank God for dead soldiers”—outside a deceased Marine’s funeral.⁸² Even though some of the signs appeared to target only the deceased’s family, the “overall thrust and dominant theme” of the speech related to broader public issues making it public speech protected under the First

⁷⁰ *Id.* at 800.

⁷¹ *Id.* at 797; *see also* *Williams-Yulee v. Florida Bar*, 575 U.S. 433 (2015).

⁷² *Police Department of the City of Chicago v. Mosely*, 408 U.S. 92, 100 (1972.)

⁷³ *Id.* at 94–95.

⁷⁴ *Id.* at 94.

⁷⁵ *Id.* at 93.

⁷⁶ *Id.* at 98.

⁷⁷ *See* *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969) (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”)

⁷⁸ *Id.* at 509 (1969)

⁷⁹ *Cohen v. California*, 403 U.S. 15, 26 (1971)

⁸⁰ *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (citing *Boos v. Barry*, 485 U.S. 312, 322 (1988)) (“Such a risk is unacceptable; ‘in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate ‘breathing space’ to the freedoms protected by the First Amendment.”)

⁸¹ *Matal v. Tam*, 582 U.S. 218, 246 (2017), citing *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

⁸² *Snyder v. Phelps*, 562 U.S. 443, 458 (2011).

Amendment.⁸³ Furthermore, while speech may have been upsetting, the Court was unable to find any evidence that it interfered with the funeral.⁸⁴ Thus, even offensive, hurtful speech is protected under the First Amendment.⁸⁵

In sum, protests are largely protected, even if they are controversial. While some limitations exist, government restrictions cannot be used to censor certain messages or make First Amendment rights a freedom for a particular demographic or socioeconomic status.

C. Overwhelmingly Peaceful Protests

When discussing restricting protests, a common argument is that non-peaceful protests are not protected. Protests that cease to be peaceful fall outside the bounds of constitutional protection. In those instances, courts have reaffirmed those protests are illegal because they fall out of permissible First Amendment protections and could be subject to government action that restrict speech such as arresting people at those protests. Still, those instances remain the exception, not the rule.⁸⁶

Traditionally, protest movements avoided liability if the demonstrations were largely peaceful, even if some acts and threats of violence occurred. In *NAACP v. Claiborne Hardware*, the NAACP launched a boycott to promote equality and racial justice by nonviolent picketing, but some acts and threats of violence also occurred.⁸⁷ Merchants sued the NAACP for damages to their businesses as a result of the boycott, particularly after some unintended violence occurred.⁸⁸ The Court held that the NAACP was not liable for the damages on the grounds that when acts of violence are committed in conjunction with lawful expression, regulations can impose damages *only* upon those who are guilty of the wrongful conduct.⁸⁹

This principle, however, may be on its way out. In *Doe v. Mckesson*, the Fifth Circuit recently held that a protest leader can be sued, and therefore be found liable, for violence caused by other people at the protest.⁹⁰ “Mckesson directed the protest at all times, and when demonstrators looted a grocery store for water bottles to throw at the assembled police officers, he did nothing to try to discourage this.”⁹¹ Therefore, the Fifth Circuit held that McKesson “knew, or should have known, that violence would likely ensue,” meaning Mckesson could be sued

⁸³ *Id.* at 454.

⁸⁴ *Id.* at 460.

⁸⁵ *Id.* at 461.

⁸⁶ *See infra* note 96.

⁸⁷ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 904–06 (1982).

⁸⁸ *Id.* at 930 (noting that while some isolated incidents of violence occurred, the record does not support that any NAACP member “had actual or apparent authority to commit acts of violence or to threaten violent conduct.”).

⁸⁹ *Id.* at 924–25.

⁹⁰ *Doe v. Mckesson*, 71 F.4th 278 (5th Cir. 2023).

⁹¹ *Id.* at 281–82.

for the actions of an unidentified protester who struck and injured a police officer.⁹²

While media coverage tends to amplify more violent protests and the damage they cause,⁹³ most protests remain peaceful. For example, in a study researching the Black Lives Matter Movement, the Armed Conflict Location & Event Data Project found the protests “remained overwhelmingly non-violent.”⁹⁴ “Approximately 94% of all pro-BLM demonstrations have been peaceful.”⁹⁵ Of the 6% that involved reports of violence, it “is not clear who instigated the violent or destructive activity.”⁹⁶ While some of those violent instances involved the demonstrators, other events were a result of escalation from aggressive government action and violent intervention from counter-protesters.⁹⁷ Other research has reached similar conclusions, finding the overwhelming majority of protests are non-violent.⁹⁸

This is not to discount the effect that non-peaceful protests have had on society. While the overall ethos of the Civil Rights Movement was peaceful protesting, the catalyst of tangible change was arguably the violence that brought it worldwide attention such as the riots that occurred after the assassination of Dr. King.⁹⁹ Because non-peaceful protests often make headlines, they are better able to reach wider audiences that can influence policy and effect change. Even though the immediate public reaction to non-peaceful protests may be negative,¹⁰⁰ studies demonstrate

⁹² *Id.* at 281.

⁹³ *E.g.*, *Capital Insurrection Updates*, NPR, <https://www.npr.org/sections/insurrection-at-the-capitol>; Anjali Sastry Krbechek & Karen Grigsby Bates, *When LA Erupted in Anger: A Look Back at the Rodney King Riots*, NPR (Apr. 26, 2017), <https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots>.

⁹⁴ *A Year of Racial Justice Protests: Key Trends in Demonstrations Supporting the BLM Movement*, THE ARMED CONFLICT LOCATION & EVENT DATA PROJECT 1 (May 2023), https://acleddata.com/acleddatanew/wp-content/uploads/2021/05/ACLED_Report_A-Year-of-Racial-Justice-Protests_May2021.pdf [hereinafter ACLED Report].

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 6.

⁹⁸ *See id.*; *Global Protest Tracker*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Aug. 2, 2023), <https://carnegieendowment.org/publications/interactive/protest-tracker>; Catherine Caruso & Count Love, *Count Love Project Reveals Protest Patterns*, THE BRINK (Nov. 15, 2017), <https://www.bu.edu/articles/2017/counting-american-protests/>.

⁹⁹ Emily Arntsen, *Are Peaceful Protests More Effective than Violent Ones?*, NORTHEASTERN GLOB. NEWS (June 10, 2020), <https://news.northeastern.edu/2020/06/10/are-peaceful-protests-more-effective-than-violent-ones/>.

¹⁰⁰ Melissa De Witte, *Violence by Protesters Can Lead the Public to Support them Less*, *Stanford Sociologist Says*, STANFORD NEWS (Oct. 12, 2018), <https://news.stanford.edu/2018/10/12/how-violent-protest-can-backfire/>.

public attitudes to even violent protests look better in hindsight,¹⁰¹ resulting in a net positive effect.¹⁰²

D. Recent Legislation Attempting to Curtail Lawful Protests by Raising Costs

Recent legislation attempts to expand regulation of otherwise lawful, peaceful activity. These regulations dissuade protesters by making protest rights expensive to express.

“Individuals and groups involved in organizing, participating in, and supporting protest actions, including some of the racial justice and police brutality demonstrations, are subject to a range of civil costs and liabilities.”¹⁰³ These costs—increasing fines and penalties, expanding definitions of what is considered a “riot,” and expanding liability for protesters while decreasing liability for harm against protesters—largely fly under the radar.¹⁰⁴ Administratively, permit fees, policing fees, cleanup costs, and liability insurance requirements can easily amount to “[several] thousands of dollars even for mid-size events.”¹⁰⁵

Some bills create large penalties for protest-related offenses. For instance, a 2020 law enacted in Tennessee makes obstructing a sidewalk or street—where most protests occur—an offense punishable by a year in jail.¹⁰⁶ Others, criminalize attributes that would make a protest difficult to express. For instance, under a new Louisiana law, demonstrators who trespass near a pipeline construction site could face five years in prison.¹⁰⁷ This law came into effect a mere months after a lawsuit was filed to block Louisiana’s Bayou Bridge Pipeline.¹⁰⁸ Thus, this law would make it

¹⁰¹ *Going Too Far: The American Public’s Attitudes Toward Protest Movements*, ROPER CTR. (Oct. 22, 2014), <https://ropercenter.cornell.edu/going-too-far-american-publics-attitudes-toward-protest-movements> (noting complicated feelings toward protests. For instance, polls suggest that Americans are skeptical about protests, but are also quite supportive of protests overseas. Furthermore, Americans viewed previously unpopular protest movements more favorably as time passed.).

¹⁰² See Soumyajit Mazumder, *The Persistent Effect of U.S. Civil Rights Protests on Political Attitudes*, 62 AM. J. OF POL. SCI. 922, 925 (Oct. 2018) (suggesting that violent protests may catalyze institutional change even where they have a negative impact on public opinion); but see Bret Simpson et al., *Does Violent Protest Backfire? Testing a Theory of Public Reactions to Activist Violence*, 4 SOCIUS 1, 12 (2018) (suggesting that violence at protests by white nationalist protesters has a negligible effect on public opinion because the public already views them as violent, while violence by antiracist *counter-protesters* against white nationalists has a negative effect on public opinion).

¹⁰³ Timothy Zick, *The Costs of Dissent: Protest and Civil Liabilities*, 89 GEO. WASH. L. REV. 233, 235–36 (2021).

¹⁰⁴ See ACLED Report, *supra* note 96 at 18.

¹⁰⁵ Zick, *supra* note 105 at 236.

¹⁰⁶ H.B. 8005, 111th Gen. Assemb., 2d Extraordinary Sess. (Tenn. 2020).

¹⁰⁷ H.B. 727, 2018 Leg., Reg. Sess. (La. 2018) (amending the criminal law relating to offenses against critical infrastructure to explicitly include “pipelines”).

¹⁰⁸ Mark Schleifstein, *Environmental Groups sue Corps to Block Bayou Bridge Pipeline Permit*, NOLA.COM (Jan. 11, 2018), https://www.nola.com/news/environment/environmental-groups-sue-corps-to-block-bayou-bridge-pipeline-permit/article_dbb295f4-afdb-5390-9097-cb627ca3fca3.html. Mere months later the law went into effect. La. Stat. Ann. § 14:61.1.

impossible to legally engage in First Amendment expression if the protest concerns pipelines.¹⁰⁹

Legislatures have also expanded definitions of what constitutes a “riot” to capture peaceful protesters who do not engage in violence themselves but are simply perceived to “threaten” violence.¹¹⁰ For instance, under Florida law, no actual property destruction needs to occur for those in a crowd to be guilty of “rioting.”¹¹¹ Simply, the “imminent danger” of damage is sufficient, giving broad discretion to police and prosecutors to determine what that means.¹¹² In Ohio, legislators attempted to further expand the definition of a riot to include “recklessly caus[ing] inconvenience [or] annoyance,” not one that ends in violence.¹¹³ While this bill did not ultimately pass, similar bills have also been introduced,¹¹⁴ indicating that legislators are entertaining greater hostility¹¹⁵ towards protesters.

Other novel claims are currently making their way through the courts that, if accepted, would further curb protest rights. For example, the organizers of the “Unite the Right” protests in Charlottesville, Virginia are being sued under a “conspiracy to protest” theory. Under this theory, it would be an actionable civil wrong for anyone to organize a lawful protest at which violent activity later occurred.¹¹⁶ Many bills are attempting to use this theory, expanding liability for groups and organizers who may not have even attended the protest in question.¹¹⁷ This includes in the bail context. For example, Georgia’s Senate passed a bill outlawing bail funds for protest groups.¹¹⁸ This bill would require any charitable individual or group to register as, and meet the requirements of, a bail bond company.¹¹⁹ Not only does law enforcement have the ability to deny who registers as a bondsman, but the bill also would limit the number of people an individual or group could bail out every year.¹²⁰ While the bill has not yet become law,

¹⁰⁹ Perhaps unsurprisingly, this law was a subject of a lawsuit arguing it is an unconstitutional restriction of First Amendment rights. *See* *White Hat v. Landry*, No. 6:20-CV-00983, 2023 WL 3854717 at *6 (W.D. La. June 5, 2023).

¹¹⁰ *E.g.*, C.S./H.B. 1, 2021 Leg. (Fla. 2021).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ H.B. 784, 133rd Gen. Assemb., Reg. Sess. (Ohio 2020). This would necessarily include most protests that divert traffic routes, increase noise levels, and dominate news stories.

¹¹⁴ S.B. 33, 133rd Gen. Assemb., Reg. Sess. (Ohio 2021) (increasing and enhancing penalties for criminal violations commonly connected to protesting).

¹¹⁵ Some reports indicate that these laws would encourage people to attend protests armed to harm protesters. *See* H.B. 784, *supra* note 115 (allowing people “escaping a riot” to use force, including deadly force).

¹¹⁶ *See* *Sines v. Kessler*, 324 F. Supp. 3d 765, 773 (W.D. Va. 2018).

¹¹⁷ *See* *U.S. Protest Law Tracker*, INT’L CTR. FOR NOT-FOR-PROFIT L., <https://www.icnl.org/usprotestlawtracker/>.

¹¹⁸ S.B. 63, 2023 Leg., Reg. Sess. (Ga. 2024).

¹¹⁹ *Id.*

¹²⁰ *Id.*

similar arrests have already occurred in Georgia after activists bailed out protesters.¹²¹

To be clear, while this article discusses the consequences connected with cash bail, damage awards resulting from civil causes of actions also represent a particularly concerning threat to protests.¹²² In addition to incurring liability under a variety of torts claims including nuisance, trespass, defamation, and interference with business relations, organizers can also be held liable for harms simply because a particular action is “foreseeable.”¹²³ Similar to the tactic in *Mckesson*,¹²⁴ this “negligent protest” theory would make protest organizers liable for *all* foreseeable damages that occurred during the protest, including those caused by unplanned or unintended actions as well as unlawful acts of counter-protesters and agitators not associated with the organizer’s protest.¹²⁵

The consequences of protesting may extend beyond the act of protesting itself. School children may face discipline for off-campus protest activities,¹²⁶ and university students may face disciplinary measures, including expulsion, for engaging in “disruptive” protests on or off campus.¹²⁷ Public employees may face termination or other adverse consequences for participating in public protests and other protest activities.¹²⁸

Furthermore, these bills have also created protections for individuals who harm protesters. In 2020 alone, there were over one hundred instances of protesters being hit by vehicles.¹²⁹ These laws, however, shield those the drivers from civil liability if the protester was seen to “unlawfully” block a road during a protest, so long as the driver was exercising “due care.”¹³⁰

¹²¹ Kate Brumback, *Bond Granted for 3 Activists Whose Fund Bailed Out People Protesting Atlanta ‘Cop City’ Project*, AP NEWS (June 2, 2023), <https://apnews.com/article/police-training-center-arrests-cop-city-1468a138ed4b17ed394e4b1e4fe202fe> (“Stop Cop City” activists were arrested on charges of “charities fraud and money laundering” for leading the bail fund).

¹²² See generally Zick, *supra* note 105 (outlining the chilling effects on speech associated with civil penalties and fines incurred by protesters).

¹²³ For an in-depth discussion, see Zick *supra* note 105; see also *Doe v. Mckesson*, 71 F.4th 278 (5th Cir. 2023).

¹²⁴ See *Doe v. Mckesson*, 71 F.4th 278, 284 (5th Cir. 2023) (concluding that the First Amendment does not prohibit holding protesters liable for organizing protests in a manner that makes violent police response “reasonably foreseeable”).

¹²⁵ Zick, *supra* note 105 at 237–38.

¹²⁶ *Morse v. Frederick*, 551 U.S. 393 (2007).

¹²⁷ Gregory P. Magarian, *When Audiences Object: Free Speech and Campus Speaker Protests*, 90 U. COLO. L. REV. 551 (2019).

¹²⁸ See Anne Barnard, *Teachers in New York City Barred from Attending Climate Protest*, N.Y. TIMES (Sept. 19, 2019), <https://www.nytimes.com/2019/09/19/nyregion/youth-climate-strike-nyc.html>.

¹²⁹ Grace Hauck, *Cars have hit Demonstrators 104 times Since George Floyd Protests Began*, USA TODAY (July 9, 2020), <https://www.usatoday.com/story/news/nation/2020/07/08/vehicle-ramming-attacks-66-us-since-may-27/5397700002/>.

¹³⁰ *E.g.*, S.F. 342, 89th Gen. Assemb. (Iowa 2021); see also *Anti-Protest Laws in the United States*, FIRST AMEND. WATCH, <https://firstamendmentwatch.org/deep-dive/states-rush-to-pass-anti-protestor-laws/>.

Scholars have noted that, on their own, increasing “costs and liabilities on First Amendment protest rights” amount to a chilling effect on those rights.¹³¹ “Even if protesters plan to engage in only lawful conduct, they may still fear being caught up in legal action that can be costly to defend against and which could result in uncertain legal outcomes.”¹³² Expanding this body of research, the following sections demonstrate bail is an additional, significant consequence for lawful protesting, serving as yet another disincentive to lawful protesting.¹³³

II. PART II – CASH BAIL’S DISPARATE IMPACT ON MARGINALIZED COMMUNITIES

Generally, cash bail—also known as bond—is the process in which arrested people must pay a certain monetary amount in exchange for pretrial release. Unfortunately, while a large percentage of arrested people go through this process, the impact of the cash bail system is not felt evenly and disparately affects poorer communities and people of color. For those unable to pay bail, they must remain in jail until their trial, enduring consequences associated with their employment, housing, and even parental rights. Because these consequences can dramatically alter a person’s life, bail is responsible for eliciting guilty pleas from those who otherwise would not plead. Unfortunately, despite calls for reform, bail continues to dominate pretrial systems.

A. What is Cash Bail and How Does it Work?

Cash bail is a collateral guarantee that a defendant will return for their future hearings and trial.¹³⁴ The defendant pays a sum of money to be released from jail that is to be returned after they make all necessary court appearances. Otherwise, the government will keep their bail amount *and* incarcerate defendants pretrial.¹³⁵ In theory, this process should be quick, taking about twenty-four to forty-eight hours between arrest to potential release on bail.¹³⁶

1. How and Why is Bail Set?

Bail is set for two reasons: (1) the court is concerned the defendant poses a significant risk to the community; or (2) the court is concerned that the defendant will not appear for their trial. Therefore, the primary concerns when setting bail are whether the bail amount will ensure public

¹³¹ Zick, *supra* note 105 at 240.

¹³² Nick Robinson & Elly Page, *Protecting Dissent: The Freedom of Peaceful Assembly, Civil Disobedience, and Partial First Amendment Protections*, 107 CORNELL L. REV. 229, 252 (2022).

¹³³ Sample footnote text

¹³⁴ See, e.g., Adureh Onyekwere, *How Cash Bail Works*, BRENNAN CTR. FOR JUST. (Feb. 24, 2021), <https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works>.

¹³⁵ *Id.*

¹³⁶ See, e.g., N.J. Rev. Stat. § 2C:25-26 (2023) (“Bail shall be set as soon as is feasible, but in all cases within 24 hours of arrest.”); *Walker v. City of Calhoun*, 901 F.3d 1245, 1252–53, 1262, 1266 n.12 (11th Cir. 2018) (discussing a standing order that guarantees bail would be set within forty-eight hours); see also *Protesters: Know Your Rights*, ACLU, <https://www.acluohio.org/en/protesters-know-your-rights#KeepInMind> (“The whole process, from arrest to release on bail, should take about 24–36 hours.”).

safety and is reasonably calculated to ensure the defendant's appearance at trial.¹³⁷

Allegedly, these justifications relate to two main benefits. First, pretrial detention reduces the likelihood that defendants will fail to make court appearances, thereby preventing wasted judicial resources.¹³⁸ Additionally, pretrial detention reduces the likelihood of new criminal legal system involvement, "prevent[ing] detained individuals from participating in crime while they are detained."¹³⁹ Accordingly, pretrial detention can act as a preventative measure for high-risk defendants, particularly in terms of flight and recidivism.¹⁴⁰

Cash-bail-setting practices are not a uniform practice. The amount that a person must pay depends on their situation, but "the bail setting process can often be hard to comprehend."¹⁴¹ Technically, judges have broad discretion to raise, lower, deny, or even waive bail.¹⁴² Accordingly, that discretion will look at the severity of the crime,¹⁴³ whether the defendant has employment or personal connections in the area,¹⁴⁴ criminal history and past court appearances,¹⁴⁵ and the perceived impact the defendant has on public safety.¹⁴⁶

Conveniently, however, bail is sometimes set using "bail schedules." These schedules impose a standard bail amount that correlates to a particular offense. For example, Ohio's Warren County follows a "uniform bond schedule," delineating the particular fine that the court imposes for particular crimes.¹⁴⁷ Under this schedule, an M-1 misdemeanor carries with it a \$12,500 bond.¹⁴⁸ Importantly, while this schedule follows some of the underlying considerations such as more serious crimes receive higher bail amounts, the schedule does not mention the factors to be considered in

¹³⁷ John-Michael Seibler, *As Bail Reform Progresses, Yes, Bail is Constitutional*, FEDERALIST SOC'Y (Nov. 22, 2017), <https://fedsoc.org/commentary/fedsoc-blog/as-bail-reform-progresses-yes-bail-is-constitutional>.

¹³⁸ Sandra Susan Smith, *Pretrial Detention, Pretrial Release, & Public Safety*, ARNOLD VENTURES (July 2022), at 4.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 5.

¹⁴¹ *E.g.*, *How Judges Calculate and Set Bail*, ALL CITY BAIL BONDS, <https://www.allcitybailbonds.com/2017/12/judges-calculate-set-bail/>.

¹⁴² Nicholas P. Johnson, *Cash Rules Everything Around the Money Bail System: The Effect of Cash-only Bail on Indigent Defendants in America's Money Bail System*, 36 BUFF. PUB. INT. L.J. 29, 31 (2019).

¹⁴³ Minor crimes usually have lower bail amounts compared to severe crimes. *Id.* at 51.

¹⁴⁴ *Id.* at 52–53.

¹⁴⁵ Judges will often raise the amount for those who have prior convictions or missed appearances *Id.*

¹⁴⁶ If the court believes the defendant poses a risk to public safety, they are likely to increase or deny bail. *Id.* at 48.

¹⁴⁷ *Warren County Court Bond Schedule*, WARREN COUNTY COURT (April 4, 2023), <https://www.co.warren.oh.us/countycourt/forms/BondSchedule.pdf>.

¹⁴⁸ *Id.*

setting bail, nor that there is the discretion to raise, lower, or waive the bail amount listed on the schedule.¹⁴⁹

In practice, judges use both bail schedules and their own discretion in setting bail. The bail schedules would allow defendants to post bail with the police before they go for their first court appearance with the judge.¹⁵⁰ Then, at the hearing, the judge has the discretion to alter the amount, considering the facts to raise, lower, deny, or waive bail.¹⁵¹ Thus, the “bail schedule pertains to release of alleged offenders prior to First Appearance, when a judge . . . may increase or decrease/eliminate the amount of bail.”¹⁵²

Modern technology, however, can significantly influence on the way bail is set.¹⁵³ In some areas of the country, a computer program can quickly determine what an “appropriate” bail amount for a defendant would be, incorporating the defendant’s criminal history, age, type or crime, and assessment of a flight risk.¹⁵⁴ Unfortunately, research finds these algorithms may have racist implications of their own.¹⁵⁵

Thus, bail amounts can vary from jurisdiction to jurisdiction, meaning there is no true uniform bail practice. In fact, an individual’s ability to pay their bail amount can mean the difference between getting arrested in a particular county or being assigned to a particular judge.¹⁵⁶ A 2018 report on the bail-setting practices in New York City demonstrated this predicament.¹⁵⁷ Analyzing felony arraignments in 2017 handled by the Legal Aid Society in Kings, New York, Bronx, Queens, and Richmond Counties, the report described the frequency in which each judge either imposed bail, held without bail, or released without bail.¹⁵⁸ The results demonstrated that each county, as well as each judge in each jurisdiction, imposed bail at a different rate, even for the same crime.¹⁵⁹ When bail was imposed, the amount also differed.¹⁶⁰ Finally, the report demonstrated that

¹⁴⁹ *See id.*

¹⁵⁰ *Bail Schedules*, JUSTIA, <https://www.justia.com/criminal/bail-bonds/bail-schedules/>.

¹⁵¹ *Id.*

¹⁵² *See, e.g., Bail Schedule – Flager, Putnam, Nt. Johns & Volusia Counties*, SEVENTH JUDICIAL CIR. OF FLORIDA, https://circuit7.org/Administrative%20Orders/criminal/Bail_Schedule.pdf.

¹⁵³ *See generally* Ric Simmons, *Big Data Machine Judges, and the Legitimacy of the Criminal Justice System*, 52 U.C. DAVIS L. REV 1067 (2018) (discussing the increasing use of predictive algorithms to assist in bail hearings); Samuel R. Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L.J. 1344 (2014) (suggesting electronic monitoring as an alternative to pretrial detention and the bail system).

¹⁵⁴ Simmons, *supra* note 154 at 1074.

¹⁵⁵ *See* Ember McCoy, *The Risks of Pretrial Risk Assessment Tools: Policy Considerations for Michigan*, FORD SCH. OF PUB. POL’Y (May 2023) (finding “substantial evidence that pretrial risk assessment tools replicate the racial and socioeconomic disparities that bail reform seeks to address.”).

¹⁵⁶ Anna Maria Barry-Jester, *You’ve Been Arrested. Will You Get Bail? Can You Pay It? It May All Depend on Your Judge*, FIVETHIRTYEIGHT (June 19, 2018), <https://fivethirtyeight.com/features/youve-been-arrested-will-you-get-bail-can-you-pay-it-it-may-all-depend-on-your-judge/>.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

New York City is not unique, illustrating similar results from judges in Buffalo, New York, hinting that the same results could be found around the country.¹⁶¹ While judicial discretion is sometimes necessary, the expansive nature of discretion when setting bail leads to an inequitable practice in what should be a uniform system

2. Bail for Arrested Protesters

Arrested protesters are not exempt from this system—they are also subject to bail as a condition of pretrial release. Protests are uniquely fraught with wrongful arrests and dropped charges, but arrests of protesters largely continue undeterred.

While there are many reasons as to why a protester may be arrested, certain charges appear more commonly than others: unlawful assembly, trespassing, obstruction of pedestrian or vehicular traffic, and charges related to rioting.¹⁶² Largely, protesters do not face felony charges.¹⁶³ Those that do, however, involve protests around race and police brutality.¹⁶⁴ While prosecutors often drop or reduce those felony charges,¹⁶⁵ protesters were still arrested for serious charges that have excessive bail amounts.¹⁶⁶

Research shows that protesters of color can expect increased police interactions including being arrested at disparate rates. In a study discussing the demographics of New York City arrestees during the 2020 George Floyd protests, Black protesters were arrested at a staggeringly “lopsided” rate.¹⁶⁷ Analyzing demographic data from arrested protesters found “about half of the arrestees were identified as white and the other half as Black.”¹⁶⁸ Considering that the 2020 George Floyd protests were racially diverse, and accounting for the fact that “Black people do not compose even close to half of the U.S. population,” there is a “lopsided racial

¹⁶¹ *Id.*

¹⁶² *See, e.g.*, Meryl Kornfield et al., *Swept up by Police*, WASH. POST (Oct. 23, 2020), <https://www.washingtonpost.com/graphics/2020/investigations/george-floyd-protesters-arrests/> (reviewing data of over 2,600 people detained in fifteen cities, most of whom were arrested for unlawful conduct such as a curfew violation or resisting police orders).

¹⁶³ *See id.* (“The Post’s analysis found the overwhelming majority arrested in those 15 cities—2,059 of the 2,652—were accused of nonviolent misdemeanors, most on charges of violating curfew or emergency orders.”).

¹⁶⁴ *See Protesting While Black*, *supra* note 14 at 163 (finding protests involving primarily Black people are more likely to be policed); *see also* Jacey Fortin & Allyson Waller, *87 Face Felony Charges After Protesting Breonna Taylor’s Death*, N.Y. TIMES (July 17, 2020), <https://www.nytimes.com/2020/07/15/us/protesters-arrested-breonna-taylor-kentucky.html>.

¹⁶⁵ *E.g.*, Akela Lacy, *Protesters in Multiple States are Facing Felony Charges, Including Terrorism*, THE INTERCEPT (Aug. 27, 2020), <https://theintercept.com/2020/08/27/black-lives-matter-protesters-terrorism-felony-charges/>. Three days after police arrested eighty-seven activists protesting the death of Breonna Taylor, the district attorney dropped the felony charges, leaving open the possibility of bringing misdemeanor charges in the future.

¹⁶⁶ *See, e.g.*, Natasha Lennard, *How the Government is Turning Protesters into Felons*, ESQUIRE (Apr. 12, 2017), <https://www.esquire.com/news-politics/a54391/how-the-government-is-turning-protesters-into-felons/>.

¹⁶⁷ Karen J. Pita Loo, *An Argument Against Unbounded Arrest Power: The Expressive Fourth Amendment and Protesting While Black*, 120 MICH. L. REV. 1581, 1606 (June 2022).

¹⁶⁸ *Id.*

breakdown of arrests.”¹⁶⁹ Combined with studies that find disparate treatment in policing in general, the study suggest that “protest policing—like traditional policing—disparately harms Black people and that such harms result in Black individuals enjoying an unequal (in)ability to express and practice dissent.”¹⁷⁰

Regrettably, these results mirror studies analyzing protests from earlier decades. In a study analyzing protests from 1960 to 1990, “a greater proportion of African American protest events were met with police presence than were white events.”¹⁷¹ Some years included large disparities. For example, in 1967, “70 percent of African American events had police present at them, while only 42 percent of white events did.”¹⁷² Perhaps unsurprisingly, the study also showed that police were more likely to arrest, use force or violence, and make arrest using force or violence against protesters of color, even after “control[ing] for measures of behavioral threat.”¹⁷³ The researchers’ statistical analyses concluded that race did, in fact, affect the probability of various policing strategies being employed above and beyond the threats posed by protester behavior.¹⁷⁴

Furthermore, even if the charges are eventually dropped,¹⁷⁵ protesters who have bail set against them must still pay that amount to obtain pretrial release. After their arrest, the bail amount will depend on the county’s bail practice, the county’s bail schedule, the judge assigned to the case, or any combination of the three.¹⁷⁶ Therefore, with protesters of color arrested at higher rates than white protesters,¹⁷⁷ and bail generally imposed on arrested persons, this means cash bail has a larger impact on people of color.¹⁷⁸

B. Consequences of Inability to Pay Bail Pretrial Detentions

Not everyone who protests can be expected to face the many consequences associated with getting arrested at a protest. Admittedly, for

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 1613.

¹⁷¹ *Protesting While Black*, *supra* note 14 at 162.

¹⁷² *Id.*

¹⁷³ *Id.* at 163.

¹⁷⁴ *Id.* at 168.

¹⁷⁵ See Tom Perkins, *Most Charges Against George Floyd Protesters Dropped, Analysis Shows*, THE GUARDIAN (Apr. 17, 2021), <https://www.theguardian.com/us-news/2021/apr/17/george-floyd-protesters-charges-citations-analysis>.

¹⁷⁶ See *infra* Section II(A)(i).

¹⁷⁷ See *Protesting While Black*, *supra* note 14 at 167–68. While the authors also note that this disparity has not been entirely consistent over time, the data does support the phenomena “that once police arrive at an event with African Americans present, they are more likely to make arrests, to use force/violence, and to use force/violence in conjunction with arrests than they are to do nothing, although only the last of these outcomes is significantly more likely.”

¹⁷⁸ Libby Doyle & Colette Marcellin, *How Bail Reform Can Protect Protestors and Address System Injustices*, URBAN INST. (June 17, 2020), <https://www.urban.org/urban-wire/how-bail-reform-can-protect-protestors-and-address-system-injustices> (discussing how bail is “systematically set higher” for people of color over white people with similar charges and criminal histories).

some protesters, the point of their protest is to get arrested;¹⁷⁹ but, for the majority of protesters, this is not the intended goal. While Dr. King and other prominent civil rights leaders were arrested multiple times at various protests, they had access to a support network most people do not.¹⁸⁰ Famously, when Dr. King was arrested in Birmingham, Alabama for protesting in violation of an injunction (eventually leading to the famous Letter from Birmingham Jail) a millionaire, A.G. Gaston, posted his bail.¹⁸¹

Arrested protesters face the same challenge to post bail amounts as other pretrial detainees. As the U.S. Commission on Civil Rights reported, “[m]ore than 60% of inmates are detained prior to trial due to an inability to afford posting bail.”¹⁸² In other words, most people incarcerated pretrial, including those for protest-related offenses, remain behind bars before their trial simply because they are poor. Admittedly, protest-related arrests are different because the large proportion of those arrests never get arraigned or were dismissed, so pretrial detention is often shorter in duration.¹⁸³

While a few days in jail may not initially seem as a large consequence, pretrial detention “carries enormous consequences for the individual charged and has serious downstream effects throughout the entire justice system.”¹⁸⁴ “Data shows that pretrial detention can result in numerous irreparable harms and consequences such as a higher likelihood of being convicted, losing one’s job, housing, and parental rights, harsher sentences, higher likelihood of pleading guilty, and increased recidivism.”¹⁸⁵ Even if the defendant is ultimately found not guilty or have their charges are dropped, their pretrial detention can damage a person’s reputation and relationships in the community.¹⁸⁶ Mugshots, for instance, can permanently harm an individual’s image and reputation, even if the person was never charged with a crime.¹⁸⁷

Pretrial detention also impacts the mental, emotional, and physical health of those incarcerated. Scholarship indicates that pretrial detention is especially harmful, with individuals held in pretrial detention showing higher levels of anxiety, depression, and other mental conditions than even

¹⁷⁹ See, e.g., *Feb. 6, 1961: “Jail, No Bail” in Rock Hill, South Carolina Sit-Ins*, ZINN EDUC. PROJ., <https://www.zinnedproject.org/news/tidih/jail-no-bail/> (discussing how some members of the Student Non-Violent Coordinating Committee used the “Jail, No Bail” tactic to protest segregation).

¹⁸⁰ See Clint Smith, *Martin Luther King Jr. Was Bailed Out by a Millionaire*, THE ATLANTIC (Feb. 2018), <https://www.theatlantic.com/magazine/archive/2018/02/clint-smith-freedom-aint-free/552506/>.

¹⁸¹ *Id.*

¹⁸² U.S. COMM’N ON C.R., THE CIVIL RIGHTS IMPLICATIONS OF CASH BAIL, at ii (January 2022) [hereinafter USCCR Report].

¹⁸³ Loor, *supra* note 168 at 1616.

¹⁸⁴ *The Hidden Costs of Pretrial Detention Revisited*, ARNOLD VENTURES (March 21, 2022), <https://craftmediabucket.s3.amazonaws.com/uploads/HiddenCosts.pdf>.

¹⁸⁵ USCCR Report, *supra* note 183 at 45.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 46–47.

those held in state prisons.¹⁸⁸ People detained pretrial are six times more likely to die by suicide than people who have been convicted and sentenced.¹⁸⁹ Additionally, because pretrial detention has become the norm, jails are “overcrowded, unhygienic, chaotic, and violent environments.”¹⁹⁰ One in thirty people in jail report experiencing sexual assault while incarcerated.¹⁹¹ Furthermore, pretrial incarceration also disrupts ongoing health coverage and threatens individuals’ continuity of care, exacerbating existing health issues.¹⁹² More, pretrial detainees—who have not been convicted—are at higher risks of contracting diseases such as COVID-19, HIV/AIDS, and hepatitis C because they are subjected to this jailhouse environment.¹⁹³ Specifically, in 2020 and 2021, when COVID-19 rates were high, people in jails were at a higher risk of transmission than the general public, placing them at a higher risk of negative consequences associated with getting the coronavirus.¹⁹⁴

Rikers Island may perhaps demonstrate the epitome of the deep-rooted problems troubling pretrial detention. As others have noted, the facilities “have rotting floorboards, malfunctioning heating and cooling systems, sewage backups, leaking roofs, broken showers, and flooded bathrooms,” creating a dangerous and inhospitable environment.¹⁹⁵ People incarcerated typically have no privacy and little space to receive social services.¹⁹⁶ Furthermore, people held there “endure physical and mental abuse, a rampant culture of violence, and overly punitive conditions,” including correctional officers’ use of excessive force on people detained.¹⁹⁷ Here—what others have called “hellhole” and “torture island”—these poor

¹⁸⁸ Elisa L. Toman, Joshua C. Cochran & John K. Cochran, *Jailhouse Blues? The Adverse Effects of Pretrial Detention for Prison Social Order*, 45 CRIM. JUST. & BEHAVIOR 316, 319 (2018).

¹⁸⁹ Samuel Johnson, Tanisha Pruitt & Piet van Lier, *Bail Reform will Make Ohioans Healthier*, POLY MATTERS OHIO (Nov. 2021), <https://www.policymattersohio.org/files/research/bailreformfinal.pdf>.

¹⁹⁰ David Berry, *The Socioeconomic Impact of Pretrial Detention*, OPEN SOC’Y FOUNDATIONS (2011), at 20. <https://www.justiceinitiative.org/uploads/84baf76d-0764-42db-9ddd-0106dbc5c400/socioeconomic-impact-pretrial-detention-02012011.pdf>.

¹⁹¹ *Facts on Money Bail*, C.R. CORPS, <https://civilrightscorps.org/wp-content/uploads/2021/10/9i2UrGPoQJeM6uCmG5VZ.pdf>.

¹⁹² Natasha Camhi, Dan Mistak & Vikki Wachino, *Medicaid’s Evolving Role in Advancing the Health of People Involved in the Justice System*, THE COMMONWEALTH FUND (Nov. 18, 2020), <https://www.commonwealthfund.org/publications/issue-briefs/2020/nov/medicaid-role-health-people-involved-justice-system>. (outlining how policies excluding inmates from Medicaid coverage disrupt care for system-impacted persons); see also Kam-Suen et al, *Effects of Continuity of Care on Health Outcomes Among Patients with Diabetes Mellitus and/or Hypertension: A Systematic Review*, 22 BMC FAMILY PRACTICE 145, 155 (2021) (finding “strong associations between high continuity of care and reduced healthcare utilization, mortality rate and complication risk” for patients).

¹⁹³ Camhi, Mistak & Wachino, *supra* note 193.

¹⁹⁴ Abigail I. Leibowitz et al., *Association Between Prison Crowding and COVID-19 Incidence Rates in Massachusetts Prisons, April 2020–January 2021*, 181 JAMA INTERNAL MEDICINE 1315, 1320 (2021) (finding both increased transmission and increased mortality rates of COVID-19 among carceral populations).

¹⁹⁵ Michael Jacobson et al., *Beyond the Island: Changing the Culture of New York City Jails*, 45 FORDHAM URB. L.J. 373, 380 (2018).

¹⁹⁶ *Id.* at 381.

¹⁹⁷ *Id.*

conditions have been attributed to an unprecedented number of pretrial detainee deaths.

Further, even when a person can post bail, that burden of doing so is often spread among the larger community network, disrupting economic stability for everyone involved.¹⁹⁸ If a person is unable to post bail, any possibility to pay that amount would then fall on family members, friends, and the individual's community to pool together enough money for pretrial release.¹⁹⁹ This often results in family members also being punished for pretrial incarceration, often themselves enduring long-term costs from trying to release their family member pretrial.²⁰⁰ This could endanger communities even more, as research shows that economic instability is known to increase the risk of crime and violence.²⁰¹

“A pretrial stretch in jail can unravel the lives of vulnerable defendants in significant ways.”²⁰² The long-term damage that bail inflicts is immense and extends well beyond incarceration.²⁰³ People miss out on personal and work obligations, lose weeks, if not months or years, of income, and are subjected to physical, mental, and emotional abuse during their incarceration.²⁰⁴ For many who cannot afford their bail, this can also jeopardize housing and separate families.²⁰⁵ If the person unable to post bail is a caretaker, this leaves someone without a caretaker.²⁰⁶ If the person unable to post bail has immigration concerns, pretrial detention would place them, and possibly their family, at greater risk of related consequences such as deportation.²⁰⁷ If the person unable to post bail has custody concerns, pretrial detention would place them at a greater risk of losing familial relationships.

Faced with the prospect of going to jail because they are unable to afford bail, many defendants accept plea deals, leaving a conviction on their record. Across the criminal legal system, bail “acts as a tool of compulsion, forcing people who would not otherwise plead guilty to do so.”²⁰⁸ A 2012 report, based on a decade's worth of criminal statistics, demonstrated how

¹⁹⁸ Allie Preston, *5 Ways Cash Bail Systems Undermine Community Safety*, CTR. FOR AM. PROGRESS (Nov. 3, 2022), <https://www.americanprogress.org/article/5-ways-cash-bail-systems-undermine-community-safety/>.

¹⁹⁹ *Id.*

²⁰⁰ See, e.g., Alex Jorney et al., *Crimsumerism: Combating Consumer Abuses in the Criminal Legal System*, 54 HARV. CIVIL RTS.-CIVIL LIBERTIES L. REV. 107, 108, 125, 151 (2019).

²⁰¹ Hannah Love, *Want to Reduce Violence? Invest in Place*, BROOKINGS INST. (Nov. 16, 2021), <https://www.brookings.edu/articles/want-to-reduce-violence-invest-in-place/>.

²⁰² Nick Pinto, *The Bail Trap*, N.Y. TIMES (Aug. 16, 2015), <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html>.

²⁰³ USCCR Report, *supra* note 183 at 39–40, 46–47, 50, 59.

²⁰⁴ *Id.* at 46–48.

²⁰⁵ *Id.* at 46.

²⁰⁶ *Id.* at 53, 72.

²⁰⁷ Amairini Sanchez et al., *Punishing Immigrants: The Consequences of Monetary Sanctions in the Cimmigration System*, 8 RSF: THE RUSSELL SAGE FOUND. J. OF THE SOC. SCI. 76, 90–91 (Jan. 2022).

²⁰⁸ Pinto, *supra* note 203.

bail is used to leverage pleas.²⁰⁹ In nonfelony cases in which people were not detained pretrial—either because they didn’t get bail set or were able to pay it—only half were eventually convicted.²¹⁰ On the other hand, when defendants were incarcerated throughout pretrial, conviction rates jumped to 92 percent.²¹¹ For felony cases, even when controlling for all other factors, pretrial detention was the single greatest predictor of conviction, suggesting “that detention itself creates enough pressure to increase guilty pleas” that places a conviction on the defendant’s record.²¹²

In turn, prosecutors offer defendants plea deals to spend a fraction of the time in jail and “be done with it.”²¹³ For example, at arraignment for a possession of controlled substances case, the prosecutor may offer a plea for thirty days in jail in exchange for a guilty plea.²¹⁴ While these plea deals may provide short-term relief, the long-term consequences a person faces if they plead guilty are often not immediately clear. In many cases, there is no telling how long someone might be incarcerated pretrial, as they may remain in jail for years awaiting their trial.²¹⁵ Therefore, despite the litany of negative consequences associated with a guilty plea on someone’s record, thirty days is much less time than the amount they could spend if they went all the way to trial. This means although they would have a conviction on their record, the plea deal makes it appear that in just a short time they could go back to work, go back to their families, and generally get back to their lives.

This makes people from a lower socioeconomic status stuck between a rock and a hard place. Even if they want to maintain their innocence, some cannot afford the process of proving their innocence. Even when a person claims that they are freely and voluntarily pleading guilty, that is not always the case. “They’re making a decision coerced by money. . . . [I]f they had money, they wouldn’t be pleading.”²¹⁶ Unfortunately, when they get out after accepting the plea deal, “they come back to a world that’s more difficult than the already difficult situation that they were in before.”²¹⁷

The fact that the majority of cases result in plea bargaining²¹⁸ could suggest that its use is to ensure expediency of the criminal legal system. Proponents of plea-bargaining claim that it saves the criminal system time

²⁰⁹ Mary T. Phillips, A DECADE OF BAIL RESEARCH IN NEW YORK CITY, NEW YORK CITY CRIM. JUST. AGENCY (Aug. 2012), at 21, 112, 115–16, <https://www.prisonpolicy.org/scans/DecadeBailResearch12.pdf>.

²¹⁰ *Id.* at 116.

²¹¹ *Id.*

²¹² *Id.* at 116–17.

²¹³ See Pinto, *supra* note 203.

²¹⁴ This is the plea deal Tyron Tomlin received. See *id.*

²¹⁵ See, e.g., Jennifer Gonnerman, *A Boy Was Accused of Taking a Backpack. The Courts Took the Next Three Years of His Life*, NEW YORKER (Sept. 29, 2014), <https://www.newyorker.com/magazine/2014/10/06/before-thelaw>.

²¹⁶ Pinto, *supra* note 203.

²¹⁷ See *id.*

²¹⁸ Lindsey Devers, *Plea and Charge Bargaining*, BUREAU OF JUST. ASSISTANCE (Jan. 24, 2011).

and expense associated with the lengthy trial process.²¹⁹ If people did not accept pleas, the criminal courts would be overwhelmed.²²⁰ Without bail's ability to elicit quick guilty pleas, courts would be under immense strain to fulfill all the procedural rights afforded to defendants. Thus, by encouraging the most vulnerable to plead guilty, bail keeps judges' dockets smaller and the courts operating. A quicker system, however, does not make it a fair system.

C. Disparate Impact of Cash Bail

Regrettably, the inconsistencies with how bail is applied are not simply a matter of certain judges being harsher when setting bail than others. Rather, reports consistently indicate the cash bail system is fraught with inequities, disparately impacting poorer communities and people of color.²²¹

Rather than use cash bail, “[m]ost other common law countries criminalize the practice of requiring money in exchange for pretrial liberty.”²²² In fact, the United States is *one of only two* nations in the world that use a cash bail system.²²³ Specifically, the for-profit commercial bail bond industry collects billions of dollars in profit every year, meaning there are strong incentives to keep this system to protect their bottom line.²²⁴ Even though calls for reform have consistently been brought to governments for decades, the U.S. cash bail system has persisted.

Currently, cash bail is the most common form of pretrial release.²²⁵ At any one time, over 400,000 people in the U.S. are detained pretrial, impacting over a million people every year.²²⁶ Of the sixty percent detained pretrial, over thirty were in jail simply because they are unable to post

²¹⁹ *How Courts Work*, AM. BAR ASS'N (Nov. 28, 2021), https://www.americanbar.org/groups/public_education/resources/law_related_education_net_work/how_courts_work/pleabargaining/.

²²⁰ *But see* Ralph Adam Fine, *Plea Bargaining: An Unnecessary Evil*, 70 MARQ. L. REV. 615, 616 (1987) (claiming that the overburdening argument is a myth). Additionally, Fine argues that the reliance on plea bargaining weakens the ways in which we use criminal law to protect society by failing to reach penological justifications such as deterrence, isolation, and rehabilitation.

²²¹ Mass Incarceration Report, *supra* note 9; USCCR Report, *supra* note 183 at 33–45; *see generally* Connor Concannon and Chongmin Na, *Examining Racial and Ethnic Disparity in Prosecutor's Bail Requests and Downstream Decision-making*, RACE SOC PROBL. (2023).

²²² *Smart Justice – Ending Cash Bail*, ACLU, <https://www.aclupa.org/en/smart-justice-ending-cash-bail> [hereinafter *Smart Justice*].

²²³ *See* Alireza Nourani-Dargiri, *Guilty? Or Just Poor? Potential International Human Rights Violations in the U.S. Bail System*, 54 CASE W. RESV. J. INT'L L. 509, 520 (2022); *Smart Justice supra* note 223.

²²⁴ Allie Preston & Rachael Eisenberg, *Profit Over People: The Commercial Bail Industry Fueling America's Cash Bail Systems*, CTR. FOR AM. PROGRESS (July 6, 2022), <https://www.americanprogress.org/article/profit-over-people/>.

²²⁵ Allie Preston & Rachael Eisenberg, *Profit Over People: Primer on U.S. Cash Bail Systems*, CTR. FOR AM. PROGRESS (July 6, 2022), <https://www.americanprogress.org/article/profit-over-people-primer-on-u-s-cash-bail-systems/> (“Commercial bail is the most common form of pretrial release, accounting for 49 percent of all felony pretrial releases and nearly 80 percent of releases with monetary conditions in 2009, the last time these data were collected at the federal level.”).

²²⁶ Mass Incarceration Report, *supra* note 9.

their bail amount²²⁷—the median of which is \$10,000 for felonies.²²⁸ In 2019, an estimated \$15 billion in bail bonds were written, the overwhelming majority of which were written by a commercial bondsman.²²⁹ While the exact profit is difficult to calculate, reports estimate these companies collect as much as \$2.4 billion in profit each year.²³⁰ These profit interests are likely the driving force in maintaining this system as the most common form of pretrial release.

This unfair mechanism has also increased rates of incarceration. Interestingly, the U.S. government is aware that the cash bail system overly punishes the poor. In 2022, the U.S. Commission on Civil Rights released a report on the U.S. cash bail system, revealing that between 1970 and 2015, there was a “433% increase in the number of individuals who have been detained pretrial.”²³¹ The report highlighted that most pretrial detainees are in jail because they are too poor to post bail, highlighted the negative consequences that occur as a result of pretrial detention,²³² and validated research concluding that the cash bail system is the leading cause of the mass incarceration crisis in the United States.²³³

The U.S. Commission on Civil Rights’s report also revealed stark racial and gender disparities in the cash bail system. Specifically, these reports found “Black and Latinx individuals have higher rates of pretrial detention, are more likely to have financial conditions imposed and set at higher amounts, and lower rates of being released on recognizance bonds or other nonfinancial conditions compared to white defendants.”²³⁴ While the report notes that jurisdictions handle bail differently, it acknowledges that “[d]ecades of research regarding pretrial release and bail decisions have shown that people of color are treated more harshly during the pretrial release decision-making process,”²³⁵ including bail.²³⁶

²²⁷ USCCR Report, *supra* note 183 at 45.

²²⁸ *Pretrial Detention*, PRISON POLY INITIATIVE at 50, https://www.prisonpolicy.org/research/pretrial_detention/. National data only exists for felony defendants. While it is true that protesters are not often charged with felonies, and misdemeanor bail is much less than for felonies, individuals have still demonstrated an inability to pay. For instance, previous research from New York City found that even when bail was set at or below \$500, the majority of pretrial detainees could not pay it. Phillips, *supra* note 210 at 50 (noting that with the exception of Staten Island, the majority of defendants could not make bail at or below \$500).

²²⁹ Allie Preston, *Fact Sheet: Profit Over People: Inside the Commercial Bail Bond Industry Fueling America’s Cash Bail Systems*, CTR. FOR AM. PROGRESS (JULY 6, 2022), <https://www.americanprogress.org/article/fact-sheet-profit-over-people/>.

²³⁰ *Id.*

²³¹ USCCR Report, *supra* note 183 at ii.

²³² *Id.*

²³³ *E.g.*, Mass Incarceration Report, *supra* note 9; *Cash Bail*, ACLU, <https://www.aclupa.org/en/issues/criminal-justice-reform/cash-bail>; Allie Preston & Rachael Eisenberg, *Cash Bail Reform is Not a Threat to Public Safety*, CTR. FOR AM. PROGRESS (Sept. 19, 2022), <https://www.americanprogress.org/article/cash-bail-reform-is-not-a-threat-to-public-safety/>; Udi Ofer, *We Can’t End Mass Incarceration Without Ending Money Bail*, ACLU (Dec. 11, 2017), <https://www.aclu.org/news/smart-justice/we-cant-end-mass-incarceration-without-ending-money-bail>.

²³⁴ USCCR Report, *supra* note 183 at 33.

²³⁵ *Id.* at 35.

²³⁶ *Id.*

D. The Need for Bail Reform

The impact of bail does not occur in a vacuum and is not an academic exercise—it has greatly affected many people. Spending time in jail awaiting your trial is not simply an unfortunate, administrative occurrence—it has a life-altering, often ruining, impact.²³⁷ Fortunately, bail reform has received necessary national attention in the recent years, recognizing the need to address the unfair system currently put in place.

At any time, several thousand people are wrongfully imprisoned simply because they cannot pay their bail fee and wanted to maintain their innocence, not wishing to accept a plea deals to be convicted for a crime that they did not commit. The disparities are worth repeating. Reports show that “there was a 433 percent increase in the number of individuals who have been detained pre-trial between 1970 and 2015, with pretrial detainees representing a larger proportion of the total incarcerated population in that same amount of time.”²³⁸ For more than sixty percent of pretrial detainees, approximately half a million people, they are in jail awaiting trial simply because they cannot afford bail.²³⁹ Further, studies show that the average yearly income for people who cannot afford bail is \$16,000 for men and \$11,000 for women.²⁴⁰ For context, the 2023 poverty line is \$14,580 for an individual.²⁴¹ To compound more injustice, this population is overwhelmingly Black.²⁴²

While there are justifications for bail, including efficiency rationalizations to ensure defendants appear for trial²⁴³ as well as trying to protect the public, the benefits of the system are greatly outweighed by these costs. While this bail system could create quicker processes, it is plagued with inequities and can induce guilty pleas for innocent defendants. Accordingly, courts can find its use to be unconstitutional, due to equal protections concerns because of bail’s disparate impact on poorer people and communities of color. For instance, in post-conviction precedent, courts have held that confinement based on wealth is unconstitutional.²⁴⁴ It would not be a far stretch to expand this ruling to apply to pretrial

²³⁷ *E.g.*, Gonnerman, *supra* note 216.

²³⁸ USCCR Report, *supra* note 183 at ii.

²³⁹ *Id.*

²⁴⁰ *Id.* at 74.

²⁴¹ *2023 Poverty Guidelines: 48 Contiguous States (All States Except Alaska and Hawaii)*, DEP’T HEALTH & HUMAN SERVS. (2023), <https://aspe.hhs.gov/sites/default/files/documents/1c92a9207f3ed5915ca020d58fe77696/detailed-guidelines-2023.pdf>. This assumes, however, that the individual does not have dependents and lives alone.

²⁴² USCCR Report, *supra* note 183 at ii.

²⁴³ As mentioned later, data does not demonstrate that bail creates an additional incentive to show up for trial. *Supervised Release Quarterly Scorecard*, N.Y.C. CRIM. JUST. (March 2019), <https://criminaljustice.cityofnewyork.us/wp-content/uploads/2019/06/Scorecard-Jan-to-Mar-2019-TJ06072019-2-pgs.pdf>; Onyekwere, *supra* note 135.

²⁴⁴ Cassidy Heiserman, *Punishing Indigency: Why Cash Bail is Unconstitutional Under the Equal Protection Clause*, DREXEL L. REV. (2020), <https://drexel.edu/law/lawreview/blog/overview/2020/September/cash-bail/>.

confinement. Additionally, lawsuits have had some measured success in challenging cash bail practices, finding those systems unconstitutional.²⁴⁵

Socially, the bail system's benefits are also outweighed by its costs. While proponents in favor of the cash bail system argue that this process benefits society and keeps communities safe,²⁴⁶ research has indicated the exact opposite. Research has associated cash bail with a six to nine percent increase in recidivism,²⁴⁷ meaning pretrial incarceration *increases*, rather than decreases, crime.²⁴⁸ After only 23 hours in pretrial incarceration, any additional time in detention has been "associated with a consistent and statistically significant increase in the likelihood of rearrest."²⁴⁹ As homelessness is inextricably linked to arrest rates, cash bail also perpetuates cycles of homelessness and later incarceration.²⁵⁰ For the individual, studies have found that one year of incarceration can result in "an irreparable lifetime wage depression of nine percent," because cash bail disrupts their current employment and creates barriers for future employment.²⁵¹

Economically, the system's costs are also outweighed by its benefit. While a justification for bail is to avoid wasting judicial resources, the system creates more financial burdens than it saves. Rather, bail is part of an incredibly expensive system of pretrial detention, which studies estimate costs the United States at least \$13.6 billion each year.²⁵²

²⁴⁵ O'Donnell v. Harris County, 251 F.Supp. 3d 1052 (S.D. Tex. 2017); *see also Excessive Bail*, JUSTIA, <https://law.justia.com/constitution/us/amendment-08/01-excessive-bail.html>.

²⁴⁶ *See, e.g.*, Dermot Shea, *New York's New Bail Laws Harm Public Safety*, N.Y. TIMES (Jan. 23, 2020), <https://www.nytimes.com/2020/01/23/opinion/shea-nypd-bail-reform.html>.

²⁴⁷ Arpit Gupta, Christopher Hansman & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEGAL STUD. 471 (2016); *see also* Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, CRIM. JUST. & CRIMINOLOGY: FAC. PUBL'NS & OTHER WORKS 2 (Jul. 2017). ("At the individual level, there is also some evidence that incarceration itself is criminogenic, meaning that spending time in jail or prison actually increases a person's risk of engaging in crime in the future. This may be because people learn criminal habits or develop criminal networks while incarcerated, but it may also be because of the collateral consequences that derive from even short periods of incarceration, such as loss of employment, loss of stable housing, or disruption of family ties.").

²⁴⁸ Allie Preston & Rachael Eisenberg, *Don't Blame Bail Reform for Gun Violence*, CTR. FOR AM. PROGRESS (June 23, 2022), <https://www.americanprogress.org/article/dont-blame-bail-reform-for-gun-violence/>.

²⁴⁹ Christopher Lowenkamp, *The Hidden Costs of Pretrial Detention Revisited*, ARNOLD VENTURES (March 21, 2022).

²⁵⁰ Madeline Bailey, Erica Crew & Madz Reeve, *No Access to Justice: Breaking the Cycle of Homelessness and Jail*, VERA INST. 7–8 (Aug. 2020), <https://www.vera.org/downloads/publications/no-access-to-justice.pdf>.

²⁵¹ Alan Butkovitz, *Economic Impacts of Cash Bail on the City of Philadelphia*, CITY OF PHILADELPHIA PENNSYLVANIA OFFICE OF THE CONTROLLER 7 (Oct. 2017), <https://www.prisonpolicy.org/scans/philadelphiacontroller/cashbail.pdf>.

²⁵² Bernadette Rabuy, *Pretrial Detention Costs \$13.6 Billion Each Year*, PRISON POLY INITIATIVE (Feb. 7, 2017), https://www.prisonpolicy.org/blog/2017/02/07/pretrial_cost/. Some reports have found this number to be even higher, finding the actual cost being close to \$22 billion. *Pretrial Detention*, MACARTHUR JUST. CTR., <https://www.macarthurjustice.org/issue/ending-the-punishment-of-poverty/pretrial-detention/>.

Bail reform can bring meaningful change in these areas. Evidence continues to demonstrate that bail reform policies are not linked to rising crime rates.²⁵³ Instead, studies show that “reducing pretrial detention and eliminating money considerations from decisions about detention have had minimal negative effects on public safety.”²⁵⁴ For example, a 2016 initiative in New York City called the Supervised Release Program demonstrated that releasing defendants pretrial, without imposing bail, “delivered an 88 percent court appearance outcome, comparable to results of a defendant being released on their own recognizance or bail.”²⁵⁵

Recent changes across the country demonstrate that the country is willing to shift away from a cash bail system.²⁵⁶ While each state has a varying degree of willingness to reform the bail system, these changes indicate an increasing recognition that cash bail unfairly infringes on constitutional rights. Among these infringements, as the next section will elaborate, should also be regarding how bail exacerbates existing disincentives to express protest rights.

III. PART III – CASH BAIL AND GOVERNMENT ACTION TO CRIMINALIZE OTHERWISE LAWFUL PROTESTS

Cash bail exacerbates the consequences of existing government action that seeks to criminalize otherwise lawful conduct. Protesting is protected, but protesting on “controversial” issues, like racial justice, often receives disparate treatment, involving higher risks of arrest or other interactions with police.²⁵⁷ Cash bail increases the cost of that arrest, and, in turn, acts as a disincentive to engage in otherwise protected activity.

A. Government’s Unconstitutional, Disparate Use of Less Than Lethal Force to Quell Protests

Outside of the recent spate of legislation curtailing the right to protest, governments have increasingly used less than lethal force²⁵⁸ to quell protests.²⁵⁹ While these government actions resulted in settlements

²⁵³ Preston & Eisenberg, *supra* note 235.

²⁵⁴ Don Stemen & Davis Olson, *Is Bail Reform Causing an Increase in Crime?*, HARRY FRANK GUGGENHEIM FOUND. 20 (Jan. 2023), <https://www.hfg.org/wp-content/uploads/2023/01/Bail-Reform-and-Crime.pdf>.

²⁵⁵ *Supervised Release Quarterly Scorecard*, NYC CRIM. JUST. (March 2019), <https://criminaljustice.cityofnewyork.us/wp-content/uploads/2019/06/Scorecard-Jan-to-Mar-2019-TJ06072019-2-pgs.pdf>; Adureh Onyekwere, *How Cash Bail Works*, BRENNAN CTR. FOR JUST. (Feb. 24, 2021), <https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works>.

²⁵⁶ See Sandra Susan Smith, *The Current State of Bail Reform in the United States: Results of a Landscape Analysis of Bail Reforms Across All 50 States*, HARV. KENNEDY SCH. 2, 19, 28–30 (Dec. 2021), <https://www.hks.harvard.edu/publications/current-state-bail-reform-united-states-results-landscape-analysis-bail-reforms-across>; Bill Raftery, *Bail Reform in 2023? 2022 Effects in 3 States May Impact the Courts*, NCSC (Jan. 4, 2023), <https://www.ncsc.org/information-and-resources/trending-topics/trending-topics-landing-pg/bail-reform-in-2023-2022-efforts-in-3-states-may-impact-the-courts>.

²⁵⁷ *Protesting While Black*, *supra* note 14 at 153, 162.

²⁵⁸ Less than lethal force is forced intended to incapacitate, but not kill. This includes use of batons, chemical sprays, and conducted energy devices. See *The Use-of-Force Continuum*, NAT’L INST. OF JUST. (Aug. 3, 2009), <https://nij.ojp.gov/topics/articles/use-force-continuum>.

²⁵⁹ See ACLED Report, *supra* note 96 at 6–7.

and dropped charges due to courts holding the state's actions as unconstitutional, they have largely gone on undeterred and only addressed after the fact.

The actions of the Seattle Police Department against Black Lives Matter protesters in 2020 are an illustrative example. The Seattle Police Department used pepper spray, tear gas, batons, rubber bullets, blast balls, and flash-bang grenades against protesters during four separate protests.²⁶⁰ While a court issued an injunction to prohibit the use of those weapons outside of imminent danger, the Seattle Police Department still indiscriminately used chemical irritants and projectiles against protesters.²⁶¹ In other words, clear direction by a court to not do unconstitutional acts was not enough to prevent them from happening. Governments may still act in a way to curtail protests, without many serious repercussions. This may be because governments often do not distinguish between lawful activity and unlawful activity when policing protests. Unfortunately, prior studies show that the frequency of government action is based on the protest's message or race, some calling this a "Protesting While Black" phenomenon.²⁶² Like other cities across the country, Seattle over-policed and over-arrested Black protesters, but later dropped the vast majority of charges.²⁶³

More recently, studies have also found that police respond differently when the protest is perceived to be "left-wing." A 2020 study analyzed arrests at 64 demonstrations in the United States in 2017 and 2018, categorizing "left-wing" protests—those favoring gun control, immigration, and civil rights—and "right-wing" protests—those favoring anti-abortion measures, Confederate statutes, white supremacy, and President Trump.²⁶⁴ The study found that left-wing protesters were arrested ten times the amount as right-wing protesters.²⁶⁵ "Because police repress on the basis of their understanding of threat, it means that left-

²⁶⁰ Complaint at 4, *Black Lives Matter v. Seattle Police Department*, 2020 WL 3064492 (W.D. Wash. Dec. 7, 2020) (No. 20-cv-0087-RAJ).

²⁶¹ *Black Lives Matter Seattle-King Cnty. v. City of Seattle, Seattle Police Dep't*, 516 F. Supp. 3d 1202, 1205 (W.D. Wash. 2021).

²⁶² *Protesting While Black*, *supra* note 14 at 153.

²⁶³ Michael Balsamo et al., *AP Finds Most Arrested in Protests Aren't Leftist Radicals*, SEATTLE TIMES (Oct. 20, 2022), <https://www.seattletimes.com/nation-world/nation/protest-arrests-show-regular-americans-not-urban-antifa/> ("Of more than 300 arrested [in Seattle], there are about 286 defendants, others had charges dropped. Some . . . local prosecutors declined to bring some protest-related charges."). While approximately thirteen percent of the U.S. population is Black, this report indicated that "[a]t least a third" of the arrests were Black and did not make any exceptions for particular cities. This is consistent with other data that demonstrated an over-policing of people of color during protests. *See, e.g.*, Melissa Chan, *These Black Lives Matter Protesters Had no Idea How One Arrest Could Alter Their Lives*, TIME (Aug. 19, 2020), <https://time.com/5880229/arrests-black-lives-matter-protests-impact/> ("[W]hen it came to arrests, the faces were less diverse. While there is no racial breakdown of protest arrests nationwide, some analyses of city and county arrest records the first weekend after Floyd's death show that many who were jailed were Black. Of the 2,172 people the Chicago police department arrested from May 29 to May 31, more than 70% were Black and 10% were white, according to an analysis of police department records by the Chicago Reader. In Atlanta, 48 of the 82 people processed through the Fulton County jail that same weekend were Black, Georgia Public Broadcasting found.").

²⁶⁴ Lesley Wood, *Policing Counter-Protest*, 14 SOCIO. COMPASS 1 (2020).

²⁶⁵ *Id.* at 2.

wing protesters, racialized protesters, protesters who are seen as ideological or irrational, are more likely to be arrested and have militarized tactics used against them.”²⁶⁶ Even bail fund organizers have been arrested in an effort to intimidate a left-wing protest movement.²⁶⁷

Police are not the only groups who treat protesters of color differently—other government groups must also share the blame.²⁶⁸ For instance, recent studies compared reports from the Black Lives Matter protests and the January 6 Insurrection to illustrate the disparate treatment.²⁶⁹ For instance, U.S. Customs and Border Protection’s Law Enforcement Safety and Compliance Directorate implemented an “all hands on deck” response to racial justice protests, but only provided support “as needed” in a “standby status” ahead of January 6.²⁷⁰ Comparably, racial justice protests were 93% peaceful, reporting 155 officers injured over the course of the first week of protests.²⁷¹ Compared to the over 1,000 assaults on officers, 250 injured officers and at least seven deaths, one would expect more arrests have been made on January 6.²⁷² Instead, government action resulted in more than five times as many arrests at the height of the Black Lives Matter protests than on the day of the insurrection.²⁷³ Based on this data, one could conclude that there is a higher likelihood for government intervention simply because you are a person of color and are protesting an issue perceived to be more left-wing.²⁷⁴ Not everyone can freely express their protest rights.

B. Cash Bail is Another Disincentive to Engage in Lawful Protesting

Responding to protests with criminal prosecution has an explicit purpose: to scare community members into silence, even in the face of grave

²⁶⁶ Richard Allen Greene, *Police Respond Differently When It’s a Left-Wing Protest, Study Finds*, CNN (Jan. 16, 2021), <https://www.cnn.com/2021/01/15/us/protest-disparity-study-trnd> (interviewing Lesley Wood about her findings).

²⁶⁷ *Atlanta City Council Member: Arrests of ‘Cop City’ Bail Fund Organizers Appear to be ‘Intimidation Tactic’*, FOX 5 ATLANTA (June 3, 2023), <https://www.fox5atlanta.com/news/cop-city-bail-fund-organizer-arrest-city-councilmember-response> (reporting that an Atlanta City Council member called these arrests an intimidation tactic to dissuade people from speaking out about a planned police training center that has been nicknamed “Cop City.”).

²⁶⁸ Ryan J. Reilly, *Jan. 6 Response Would Have Been ‘Vastly Different’ If Rioters Were Black, House Sergeant at Arms Told Investigators*, NBC NEWS (Dec. 28, 2022), <https://www.nbcnews.com/politics/congress/jan-6-response-vastly-different-rioters-black-house-sergeant-arms-told-rcna63457>.

²⁶⁹ Laura Iheanachor, *Docs Show: “All Hands on Deck” for Racial Justice, “No Credible Threats” From Alt-Right Groups on January 6*, CITIZENS FOR RESP. & ETHICS (Jan. 5, 2022), <https://www.citizensforethics.org/reports-investigations/crew-investigations/docs-show-all-hands-on-deck-for-racial-justice-no-credible-threats-from-alt-right-groups-on-january-6/>.

²⁷⁰ *Id.*

²⁷¹ Lauren White & Sara Wiatrak, *Black Lives Matter Faced an Extreme Police Response. The January 6th Mob Was Met with Something Completely Different*, CITIZENS FOR RESP. & ETHICS (March 28, 2023), <https://www.citizensforethics.org/news/analysis/black-lives-matter-faced-an-extreme-police-response-the-january-6th-mob-was-met-with-something-completely-different/>.

²⁷² *See id.*

²⁷³ *Id.*

²⁷⁴ As of 2024, this premise has also applied to protests calling for a ceasefire in Gaza. *See* James C. Cobb, *A Historian’s Case for Protecting Even Offensive Speech on Campus*, TIME (Feb. 8, 2024), <https://time.com/6555716/campus-free-speech-codes-history/>.

injustice.”²⁷⁵ As more protest activity faces increasing criminalization, the frequency of arrests also increase, charges faced become more severe, and cash bail becomes unavoidable.

Some jurisdictions have been rather clear on their intention to quell only certain kinds of protests. Following the wake of the 2020 George Floyd Protests, Florida Governor Ron DeSantis signed a bill into law that would enforce a zero-tolerance policy for “disorderly” assemblies.²⁷⁶ Governor DeSantis claimed this law would uphold protected First Amendment and only focus on “violent” protests. The law expanded the definition of what constitutes a “riot” and would detain arrested protesters until their first court appearance.²⁷⁷ Interestingly, Governor DeSantis maintains that January 6 was not an insurrection, but rather a protest that ended up devolving.²⁷⁸

More laws criminalizing otherwise lawful protesting will also increase the use of cash bail on protesters. As previously noted, laws curtailing protest rights are on the rise, often criminalizing otherwise lawful activity using vague and overbroad provisions.²⁷⁹ For instance, bills in Alabama requires anyone charged with the expanded definition of a “riot” to either be held without bail for up to twenty-four hours²⁸⁰ or creates

²⁷⁵ Tameka Greer, *Tennessee’s Attack of First Amendment Right to Protest Turns Attention Away from Real Issues*, COM. APPEAL (Apr. 10, 2023), <https://www.commercialappeal.com/story/opinion/contributors/2023/04/10/criminalizing-right-to-protest-deflects-attention-from-the-real-issue/70099339007/>

²⁷⁶ *Governor Ron DeSantis Signs Hallmark Anti-Rioting Legislation Taking Unapologetic Stand for Public Safety*, RON DESANTIS 46TH GOV. OF FLORIDA (April 19, 2021), <https://www.flgov.com/2021/04/19/what-they-are-saying-governor-ron-desantis-signs-hallmark-anti-rioting-legislation-taking-unapologetic-stand-for-public-safety/>. This statute was eventually blocked by a federal judge. See *A Judge Has Blocked the ‘Anti-Riot’ Law Passed in Florida After George Floyd Protests*, NPR (Sep. 9, 2021), <https://www.npr.org/2021/09/09/1035687247/florida-anti-riot-law-ron-desantis-george-floyd-black-lives-matter-protests>

²⁷⁷ *Ron DeSantis Signs Hallmark Anti-Rioting Legislation supra* note 277.

²⁷⁸ Michelle L. Price, *DeSantis Downplays Jan. 6, Says it Wasn’t an Insurrection but a ‘Protest’ that ‘Ended up Devolving’*, AP NEWS (July 21, 2023), <https://apnews.com/article/ron-desantis-jan-6-insurrection-cdad8e378179939549659cc8b23a643>.

²⁷⁹ For a collection of these statutes, see *Analysis of U.S. Anti-Protest Bills*, INT’L CTR. FOR NOT-FOR-PROFIT L. (Feb. 25, 2023), <https://www.icnl.org/post/news/analysis-of-anti-protest-bills?location=&status=&issue=12&date=>.

²⁸⁰ H.B. 2, § 13A-11-3.1(d) (Alabama 2022) (“If the defendant is arrested for . . . inciting to riot . . . the defendant shall be in custody until brought before the court within 24 hours for consideration of bail.”); S.B. 3 (Alabama 2022) (same).

a rebuttable presumption against granting bail.²⁸¹ Similar bills are found in Kentucky,²⁸² Nebraska,²⁸³ Texas,²⁸⁴ and Utah.²⁸⁵

Furthermore, these new laws give discretion to police and prosecutor to arrest otherwise nonviolent protesters,²⁸⁶ increasing the probability of arrest. In many arrests, the protester will be issued bail—for an amount that can vary based on the judge—that many struggle to pay. If they cannot pay their bail, even if eventually found innocent, they will have to remain in jail, facing the consequences associated with pretrial detention. In sum, more laws turn into more arrests, those arrests turn into more people getting imposed bail, and more people are detained pretrial because they are unable to post their bail, resulting in more negatively impacted lives because of their pretrial detention. This is a heavy burden.

Even if the frequency of arrests and number of people imposed bail remained the same, these new laws could have a deterrent effect on protesters by elevating charges from misdemeanors to felonies. Broadly, bail amounts for felonies are much higher than for misdemeanors, the median amounting to approximately \$10,000.²⁸⁷ If they cannot pay their—now higher—bail amount, they must be detained pretrial and face the consequences associated with their incarceration, even if their charges are eventually dropped.

For instance, a Florida law makes it a felony to engage in “rioting.”²⁸⁸ That law, however, would encompass peaceful protests as well because no actual property destruction needs to occur, there just needs to be “imminent danger” of damage.²⁸⁹ Similar laws would increase the number of protesters arrested on felony charges instead of misdemeanors, meaning the bail amount associated will also increase, even if their protest would be considered a “peaceful” protest in a different jurisdiction.

While not expressly done to curtail protests, the indirect consequence of cash bail could have the same effect. Similar to other forms of government action that arguably curtails expressing constitutional

²⁸¹ H.B. 445, § 13-11-4(b) (Alabama 2021) (“Inciting to riot is a Class A misdemeanor. The defendant *shall* serve a minimum term of imprisonment of 30 days without consideration of probation, parole, good time credits, or any other reduction in time.”).

²⁸² S.B. 211, § 3 (Kentucky 2021) (creating mandatory fines of \$500–\$5,000 for participation in a “riot” and “incitement to riot”).

²⁸³ L.B. 111 § 29-901(2)(a)(iv) (Nebraska 2021) (carving out exceptions for a bailable offense when the “defendant is charged for any crime, including violation of a city or village ordinance, arising out of a riot.”).

²⁸⁴ H.B. 2461, § 17.03(b)(1)(L) (Texas 2021) (“Only the court before whom the case is pending may release on personal bond a defendant who . . . was participating in a riot.”).

²⁸⁵ S.B. 138 (Utah 2021) (“This bill . . . provides that a person may be denied bail if charged with rioting.”).

²⁸⁶ *See infra* note 295–97.

²⁸⁷ USCCR Report, *supra* note 183 at 45.

²⁸⁸ CS/HB 1 (Fla. 2021) at 15.

²⁸⁹ *See id.* at 31.

rights—voter ID laws, for instance²⁹⁰—cash bail and its attached consequences create enough disincentives to prevent some from exercising their First Amendment rights.

C. Cash Bail Prevents *Free* Exercise of First Amendment Freedoms

Cash bail dissuades people from otherwise expressing their constitutional right to protest out of fear that if they are arrested, they may face serious, long-term consequences. Consider the following calculus. If you are rich and white, the risk of getting arrested and imposed a bail amount you cannot pay is statistically on your side,²⁹¹ so you likely are not concerned about negative consequences when you attend a protest. If you are a poor person of color, however, statistics demonstrate that not only are you under a higher chance of an arrest, but you are also at a higher risk to receive a bail amount that you cannot pay.²⁹² Further, an arrest—even if the charges are later dropped—would have disastrous consequences for both you and your family.²⁹³ Logically, when you compare the two scenarios, protesting loses its appeal for one group, largely due to the risks and potential consequences involved. In turn, this means that marginalized groups will struggle to be able to express their viewpoints, ultimately making this constitutional right reserved for white,²⁹⁴ wealthy,²⁹⁵ and often more conservative individuals.

Even though there are these great risks involved, law enforcement has not appreciated the negative impact bail can have on protest rights—they’ve weaponized it. Reports have shown these government officials have treated arresting protesters as a game, “high-fiving each other” and congratulating each other for the number of arrests made.²⁹⁶ These tactics,

²⁹⁰ See, e.g., Nicole R. Gabriel, *Resurrecting the Nineteenth Amendment: Why Stricter Voter ID Laws Unconstitutionally Discriminate Against Transgender Voters*, 56 IDAHO L. REV. 155, 157 (2021).

²⁹¹ See Karina Brown, *Black People Nearly Twice as Likely as Whites to Be Arrested at Portland Protests*, COURTHOUSE NEWS SERV. (Aug. 21, 2020), <https://www.courthousenews.com/black-people-nearly-twice-as-likely-as-whites-to-be-arrested-at-portland-protests/>; Mass Incarceration Report, *supra* note 9; USCCR Report, *supra* note 183.

²⁹² *Protesting While Black*, *supra* note 14; see also Brown, *supra* note 292; Mass Incarceration Report, *supra* note 9; USCCR Report, *supra* note 183.

²⁹³ *Protesting While Black*, *supra* note 14; see also Brown, *supra* note 292; Mass Incarceration Report, *supra* note 9; USCCR Report, *supra* note 183.

²⁹⁴ Brown *supra* note 292; see also Neil MacFarquhar, *Why Charges Against Protesters Are Being Dismissed by the Thousands*, N.Y. TIMES (Feb. 11, 2021), <https://www.nytimes.com/2020/11/19/us/protests-lawsuits-arrests.html>; Perkins *supra* note 176; Elise Schmelzer, *Whatever Happened to the Hundreds of People Arrested During Denver’s 2020 George Floyd Protests?*, DENVER POST (Dec. 26, 2021), <https://www.denverpost.com/2021/12/26/denver-george-floyd-protest-prosecutions/>

²⁹⁵ After being arrested at protests, many have spoken out about how those arrests have drastically altered their lives. E.g., Melissa Chan, *These Black Lives Matter Protesters Had no Idea How One Arrest Could Alter Their Lives*, TIME (Aug. 19, 2020), <https://time.com/5880229/arrests-black-lives-matter-protests-impact/>. Sometimes, to be “wealthy” is to have the luxury to not face consequences when expressing constitutional rights that could alter your life.

²⁹⁶ Ali Watkins, *They Were Arrested During the Protests. Here’s What Happened Next*, N.Y. TIMES (Aug. 7, 2020), <https://www.nytimes.com/2020/08/07/nyregion/ny-protest-arrests.html>.

although improper,²⁹⁷ are largely swept under the rug and treated as normal with little recourse for wrongfully arresting protesters. Cash bail is another weapon in a government's arsenal to circumvent the right to protest.²⁹⁸

Bail being used to dissuade people from protesting is nothing new. In fact, bail fund donation patterns may indicate that society understands the dangers bail poses on expressing constitutional rights. During widespread protests, bail funds will often receive sudden influxes in donations, at least in part due to societal recognition that bail can deter people from otherwise protesting.²⁹⁹ This societal recognition of bail's impact stretches back to the 1960s, even becoming the basis for the "Jail, No Bail" protest. There, activists recognized that it was hard to scrape up bail money to free those arrested in other protests, understanding that this fact can deter protesters or otherwise get people involved with the movement.³⁰⁰ Therefore, refusing bail became its own protest. By refusing bail after getting arrested, the "Jail, No Bail" movement sought to render the no-money-for-bail barrier for protesting by purposefully refusing bail and serving time to put financial pressure on local authorities to pay the costs of incarcerating them.³⁰¹ While this movement is admirable, the goal at most protests is not to be incarcerated.

Additionally, current efforts to reform bail would not effectively protect First Amendment expression, likely because they fail to put bail's impact in this perspective. All fifty states have some flavor of bail reform, "though there is a large variation across jurisdictions as to what constitutes bail reform and how reforms are applied."³⁰² As one study discussed, bail is

²⁹⁷ See Edison Lanza, *Protest and Human Rights*, OFFICE OF THE SPECIAL RAPPORTEUR FOR FREEDOM OF EXPRESSION OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 51 (2019), <https://www.oas.org/en/iachr/expression/publications/Protesta/ProtestHumanRights.pdf>

²⁹⁸ Commentators and studies have documented prior attempts to unjustly restrict the right to protest. *E.g.*, Zick, *supra* note 105; Jonathan Pedneault, *US States Take Aim at Protesters' Rights*, HUMAN RIGHTS WATCH (Feb. 16, 2021), <https://www.hrw.org/news/2021/02/16/us-states-take-aim-protesters-rights>; *Protect the Protest*, AMNESTY INT'L, <https://www.amnesty.org/en/what-we-do/freedom-of-expression/protest/>; Belinda Archibong, *Can Protests Lead to Meaningful Changes in Government Policy, Particularly Around Economic Redistribution?*, BROOKINGS INST. (Apr. 6, 2022), <https://www.brookings.edu/articles/can-protests-lead-to-meaningful-changes-in-government-policy-particularly-around-economic-redistribution/>.

²⁹⁹ Jessica Brand & Jessica Pushko, *Bail Reform: Explained*, THE APPEAL (June 14, 2018), <https://theappeal.org/bail-reform-explained-4abb73dd2e8a/>; Camila Domonoske, *Protest Arrests Led to Surge of Bail Fund Donations: Impact Could be Long Lasting*, NPR (June 23, 2020), <https://www.npr.org/2020/06/23/879711694/protest-arrests-led-to-surge-of-bail-fund-donations-impact-could-be-long-lasting>; Libby Doyle & Colette Marcellin, *How Bail Reform Can Protect Protestors and Address System Injustices*, URBAN (June 17, 2020), <https://www.urban.org/urban-wire/how-bail-reform-can-protect-protestors-and-address-system-injustices>.

³⁰⁰ Feb. 6, 1961: "Jail, No Bail" in Rock Hill, South Carolina Sit-Ins, ZINN EDUC. PROJECT, <https://www.zinnedproject.org/news/tdih/jail-no-bail/#:~:text=Saying%20%E2%80%9CJail%2C%20No%20Bail%2C,when%20financial%20resources%20were%20limited.>

³⁰¹ *Id.*

³⁰² Isabella Jorgensen & Sandra Susan Smith, *The Current Bail Reform in the United States: Results of a Landscape Analysis of Bail Reforms Across All 50 States*, HKS FACULTY RESEARCH WORKING PAPER SERIES 2 (Dec. 2021),

dependent on the local political climate and can be difficult to assess faithful implementation of bail reforms.³⁰³

Cash bail's benefits are outweighed by the costs it creates, particularly on protest rights. The bail system is not experienced evenly throughout society, disproportionately impacting poorer communities and people of color, deterring participation. If First Amendment expression is to be a "supremely precious" right,³⁰⁴ meaningful change to bail must occur. Otherwise, bail will deter the central premise of protests: to have marginalized voices heard.

IV. PART IV – ATTAINABLE AVENUES FOR CHANGE

There are many ways that substantial bail reform can occur immediately, including avenues in each branch of government. Every state has attempted to reform bail, but none have done so for the specific purpose of protecting First Amendment expression.³⁰⁵ Bail costs societies a lot and is not needed to keep communities safe.³⁰⁶ Therefore, tactical, measured reform can demonstrate the efficacy of a broader overhaul.³⁰⁷

Reforming bail to ensure that protesters would not need to pay bail if arrested has been successfully implemented in several jurisdictions.³⁰⁸ The District of Columbia, for example, took steps to eliminate bail as early as the 1960s³⁰⁹ without threatening public safety—even during widespread

https://dash.harvard.edu/bitstream/handle/1/37370366/RWP21-033_Smith.pdf?sequence=3&isAllowed=y.

³⁰³ *Id.* at 8.

³⁰⁴ *NAACP v. Button*, 371 U.S. 415, 433 (1963). Other scholars have noted that this "supremely precious" right must holistically include freedom of speech. See, e.g., Alix H. Bruce, *Augmenting our reality: The (Un)official Strategy Guide to Providing First Amendment Protection for Players and Designers of Location-Based Augmented Reality Video Games*, 92 ST. JOHN'S L. REV. 943, 950 (2018) ("The Court has noted that freedom of speech must be protected, not only because it is important in society but also because the right itself would be easy to destroy."). Because protests necessarily include speech, this means that by extension, protests are also a supremely precious right. See Alix H. Bruce, "Enough's Enough": *Protest Law and the Tradition of Chilling Indigenous Free Speech*, 8 AM. INDIAN L. J. 53 (discussing the "supremely precious" right of speech in the context of protests).

³⁰⁵ Jorgensen & Susan Smith, *supra* note 303 (their study did not find that First Amendment concerns motivated bail reforms).

³⁰⁶ E.g., Allie Preston, *5 Ways Cash Bail Systems Undermine Community Safety*, CTR. FOR AM. PROGRESS (Nov. 3, 2022), <https://www.americanprogress.org/article/5-ways-cash-bail-systems-undermine-community-safety>.

³⁰⁷ E.g., Lea Hunter, *What You Need to Know About Ending Cash Bail*, CTR. FOR AM. PROGRESS (March 16, 2020), <https://www.americanprogress.org/article/ending-cash-bail/> ("Washington, D.C., was an early pioneer in pretrial reform, taking steps to eliminate the use of cash bail as early as the 1960s. The results have been extraordinary: 94 percent of defendants are released pretrial, and 91 percent of them appear in court for their trial. New Jersey passed a suite of criminal justice reforms in 2016 that essentially eliminated cash bail and created a new pretrial services program. Since implementing these reforms in 2017, New Jersey saw a 20 percent reduction in its jail population. In 2017, 95 percent of defendants were released pretrial and 89 percent of them appeared at their trial date. Harris County, Texas, home to the third-largest jail system in the country, reformed its pretrial system as part of a consent decree to virtually eliminate the use of money bail for misdemeanor charges. Prior to these reforms, 40 percent of people arrested on a misdemeanor charge were detained until their case was adjudicated. Experts estimate that reforms will result in pretrial release for 90 to 95 percent of misdemeanor defendants.")

³⁰⁸ *Id.*

³⁰⁹ *Id.*

protests. Instead, when people are arrested at protests, financial resources are no longer a mandate for pretrial release. Rather, those arrested on misdemeanors are presumed releasable, and those arrested on felonies undergo a risk assessment to determine if they should be detained pretrial.³¹⁰

The unique nature of protesting warrants specific focus for bail reform. Even if performed in its purest sense, protesting still runs the risk of unwarranted arrest and subsequent consequences. Therefore, targeted reform to affect bail considerations for the crimes associated with protesting may be more palatable for those concerned with more holistic bail reform, particularly regarding concerns about public safety. Admittedly, there may be some who oppose protesting altogether, but prior research suggests that a majority support most forms of protected protests such as handing out fliers, boycotting, marching, and picketing.³¹¹

This section proposes some avenues for bail reform, targeting efforts to protect the right to protest. To note, this section is not meant to qualify bail's use in other contexts; rather, by focusing solely on its impact on protest rights, this method could strategically lead to broader reform in the future. Through this limited reform, critics of bail reform would also be able to see that bail is not a necessary for all defendants to keep a community safe.

A. Legislative Means for Reform

While some states have successfully made steps to abolish their bail systems,³¹² most states as well as the federal government have been largely unsuccessful. While broad reform has been unsuccessful, voters have signaled considerable support for bail reform such as by electing prosecutors who campaigned on a bail reform platform.³¹³ Accordingly, a narrower bail reform could be more palatable option to opponents. Incremental reform, starting with reform surrounding protesters, could be the solution. While broad reform may be the ultimate goal, critics would not readily get on board due to public safety concerns. Instead, legislation that focuses solely on waiving bail for arrested protesters could remove bail's disincentives as well as alleviate concerns of critics.

To do so, legislatures can reform their laws to waive bail for the charges commonly associated with protests.³¹⁴ Some crimes comprise of the majority of charges when there are protest arrests and largely surround

³¹⁰ For an example of how this can play out, see Eliana Block & Evan Koslof, *VERIFY: Will Protesters Arrested in DC Need to Pay Bail?*, WUSA9 (June 4, 2020), <https://www.wusa9.com/article/news/verify/verify-cash-bail-dc-george-floyd-protesters/65-a2a8df03-97c2-4c16-a58c-b2e4abc7a59c>.

³¹¹ *YouGov Survey: Causes and Protesting*, YOUGOV (2023), https://ygo-assets-websites-editorial-emea.yougov.net/documents/Causes_and_Protesting_poll_results_20231005.pdf.

³¹² See Raftery, *supra* note 257.

³¹³ See Udi Ofer, *Despite Backlash Voters and Lawmakers Continue to Choose Criminal Justice Reform*, ACLU (Sept. 12, 2022), <https://www.aclu.org/news/criminal-law-reform/despite-backlash-voters-and-lawmakers-continue-to-choose-criminal-justice-reform>.

³¹⁴ See *Analysis of U.S. Anti-Protest Bills*, INT'L CTR. FOR NOT-FOR-PROFIT L. (Feb. 25, 2023), <https://www.icnl.org/post/news/analysis-of-anti-protest-bills?location=&status=&issue=12&date=>

rioting, traffic interference, or complying with orders.³¹⁵ For example, when 61 people were arrested at a protest during the Jayland Walker protests in Akron in 2022, rioting, failure to disperse, disorderly conduct, and misconduct at an emergency comprise 90% of the charges.³¹⁶ In many states, these charges are misdemeanors and are viewed as relatively minor offenses.³¹⁷

Waiving bail for the misdemeanors most common to occur at protests would also follow a recent push by legislatures to exclude bail considerations for other minor offenses. For example, a recent Maine bail reform ended cash bail requirements for most minor charges.³¹⁸ Specifically, the new law eliminates cash bail for disorderly conduct arrests, a common charge against arrested protesters.³¹⁹ Similar to Maine, states could poll the most common, minor charges that occur at protests and eliminate cash bail considerations for those arrests.

Importantly, for states that would elevate the charges to felonies, legislatures should still waive bail for those charges. In some states, traffic interference, rioting, and trespass crimes are elevated to felonies, even if the protests are nonviolent and do not amount to any damage. Legislatures can still anticipate those felony charges and waive bail for those arrested during an otherwise lawful protest. These measured legislative changes would likely be introduced during widespread protests, but should remain implemented even after those movements to demonstrate that bail is not a necessary component to protecting public safety.

Eliminating bail for these minor charges could be an incremental step to demonstrate the efficacy of bail reform. While complete bail reform may be the eventual goal, targeting reform to the specific charges faced in conjunction to a protest could assuage the disincentives bail causes to future protesters.

B. Judicial Means for Reform

Because the courts are largely in charge of imposing bail, they also have the means to alleviate its impact on protest rights. Regardless of legislative action, bail is set at a judge's discretion, meaning that discretion can be used to remove money considerations for every case involving an arrested protester. To be sure, this does not mean that courts should *deny* bail and incarcerate all arrested protesters pretrial; this means *waiving* bail, releasing them without paying any bail fee.

Bail reform in the courts could start in the form of recognition. In other words, court leaders can collect data on how bail is used in their jurisdiction, analyzing its impact on marginalized groups. This is nothing new: several state courts have created task forces to research this topic, discussed disparate impacts, and made recommendations to various

³¹⁵ *See id.*

³¹⁶ Livingston, *supra* note 6.

³¹⁷ *See Analysis of U.S. Anti-Protest Bills, supra* note 315.

³¹⁸ An Act to Amend the Bail Code, L.D. 1703 (Me. 2021).

³¹⁹ *Id.* at 2 (eliminating cash bail for "Class E" crimes, of which disorderly conduct is one).

branches of government as to how to alleviate those concerns.³²⁰ Some, more outspoken, jurists have taken this a step further to actively call on legislators to reform the state's bail system.³²¹

Reform can follow through the court's bail schedules. As mentioned previously, these schedules impose predetermined bail amounts for certain crimes, often leaving little judicial discretion to amend those amounts until the first hearing. These schedules, however, are created by the jurisdiction's courts and are edited regularly, leaving the opportunity to reform the practice to exclude its use on arrested protesters for the commonly charged offenses. In the case that courts do not conform to bail schedules, creating published guidelines restricting bail's use can demonstrate a uniform practice that avoids otherwise setting bail for arrested protesters.

Reform can also take place in the court room, indicated by courts striking down bail systems as unconstitutional. For instance, a justice in New York held that the state's bail system violated a person's due process and equal protection clauses.³²² The arrested person was charged with a misdemeanor, but imposed a \$5,000 bail, nearly half his annual income, forcing him to remain in jail for five months until he agreed to a plea deal.³²³ In holding his pretrial incarceration violated his due process rights, the justice also noted that over sixty percent "have not been convicted of a crime but are awaiting arraignment or trial."³²⁴

Because judges are largely at the forefront of setting these bail amounts, their participation is the most crucial to addressing the detrimental effect bail has on constitutional rights. There is little uniformity in how courts and judges impose bail, making pretrial release a luck-of-the-draw for those arrested.³²⁵ Creating a uniform judicial policy³²⁶ to no longer impose bail on the charges attributed to arrested protesters would create the necessary uniformity to alleviating bail's ability to dissuade lawful protests.

³²⁰ See, e.g., CUYAHOGA COUNTY BAIL TASK FORCE, REPORT AND RECOMMENDATIONS (March 16, 2018).

³²¹ See, e.g., Jonathan Lippman, *Our Cash Bail System Isn't Working. We can Fix It.*, WASH. POST (Nov. 28, 2017), https://www.washingtonpost.com/opinions/our-cash-bail-system-isnt-working-we-can-fix-it/2017/11/28/3f0dd2ce-cf9f-11e7-a1a3-0d1e45a6de3d_story.html.

³²² *People ex rel. Desgranges On Behalf of Kunkeli v. Anderson*, 72 N.Y.S.3d 328 (N.Y. Sup. Ct. 2018).

³²³ See Alan Feuer, *Judge Says New York's Bail Law Treats Poor Unfairly*, N.Y. TIMES (Feb. 11, 2018), <https://www.nytimes.com/2018/02/11/nyregion/judge-says-new-yorks-bail-law-treats-poor-unfairly.html>.

³²⁴ *Kunkeli*, 72 N.Y.S.3d at 330.

³²⁵ See, e.g., Anna Maria Barry-Jester, *supra* note 157 (examining the lack of uniformity of bail imposition in New York).

³²⁶ Because the majority of federal courts do not use bonds, these judicial policies would likely need to be introduced at the state-level. This being said, there are arguments for federal change to create uniformity. J.G. Carr, *Bail Bondsmen and the Federal Courts*, 57 FED. PROB. 9 (1993) (advocating for a change in the Federal Bail Reform Act).

C. Executive Means for Reform

The executive branch also has the power to protect protest rights. Executive officials enjoy broad powers to influence how bail is used. For instance, Attorney Generals and District Attorneys have discretion in how prosecutions operate, including bail amounts. Generally, they create the policies that outline how the jurisdiction will prosecute crimes, including considerable discretion in both the charges brought as well as requesting a certain bail amount be set. Some prosecutors have demonstrated this ability, previously instituting policies that they would not seek bail for a particular range of charges.³²⁷ For example, in 2017 the lead prosecutor for Chicago announced that they would no longer seek bail for defendants accused of low-level offenses.³²⁸ This means it is possible for prosecutors to create internal directions that request that bail be waived for anyone arrested at a protest in an effort to encourage First Amendment expression.

Top executive officials can also directly protect protest rights, especially during widespread demonstrations, by enacting bail moratoriums. Similar to executive actions taken place during the COVID-19 pandemic impacting eviction cases,³²⁹ a moratorium can be put in place to prohibit the use of bail against arrested protesters. During the pandemic, the U.S. President placed a moratorium on evictions, recognizing the numerous negative consequences losing housing during that time would have.³³⁰ Not only did evictions drop significantly during the moratorium, but also even after the moratorium was lifted, eviction rates were lower than before the moratorium was put in place.³³¹ In a similar vein, moratoriums on bail, particular during times of racial justice protests that receive higher rates of arrest, can demonstrate the government's commitment to upholding constitutional rights by recognizing the disincentives bail can have. As an added benefit, even after the bail moratorium is lifted, lessons from the eviction moratorium suggest that bail rates would remain lower than before the moratorium is put in place.

D. Other Means for Reform

While government buy-in is necessary for lasting reform, constituents can help to get the ball rolling. While not a long-term solution, bail funds³³² can alleviate the burden bail can have on arrested protesters

³²⁷ *E.g.*, Justin Miller, *The New Reformer DAs*, AM. PROSPECT (Jan. 2, 2018), <https://prospect.org/health/new-reformer-das/>; *see also* Allison Siegler & Kate M. Harris, *How Did the "Worst of the Worst" Become 3 Out of 4?*, N.Y. TIMES (Feb. 24, 2021), <https://www.nytimes.com/2021/02/24/opinion/merrick-garland-bail-reform.html>.

³²⁸ Steve Schmadeke, *Foxx Agrees to Release of Inmates Unable to Post Bonds of up to \$1,000 Cash*, CHI. TRIB. (March 1, 2017), <https://www.chicagotribune.com/news/breaking/ct-kim-foxx-bond-reform-met-20170301-story.html>.

³²⁹ Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 FR 55292 (Sept. 4, 2020).

³³⁰ *Id.* at 55295–96.

³³¹ Lindsey Smith, *Effects of the Federal Eviction Moratorium Being Lifted: The Feared Wave of Evictions that Never Hit*, PEPPERDINE SCH. OF L. (2023), <https://law.pepperdine.edu/surf-report/posts/effects-of-federal-eviction-moratorium-being-lifted-lindsey-smith.htm>.

³³² *E.g.*, CO. FREEDOM FUND, <https://www.coloradofreedomfund.org/>.

in two ways. First, through educating the general public on the availability of these funds and how they work, bail funds can help reduce bail's deterrence effects on protesting. Additionally, these funds work directly with those who cannot afford their bail amounts, meaning the bail funds are able to influence government officials by recounting specific stories of people impacted by bail.³³³ Particularly considering bail system's lack of uniformity, bail funds can provide important information to governments illuminating its inconsistencies and disparate impacts. Rather than criminalize these bail funds as some jurisdictions have sought to do,³³⁴ government should look to collaborate with these organizations.

Litigants can also bring necessary reform. Several organizations have attempted litigation campaigns in an effort to create common law precedent to reform the bail system.³³⁵ While these campaigns may have measured success, the effects are admittedly not as extensive, and wide-reaching as they would need to be to create substantial reform. For instance, the ACLU announced in 2017 its initiative to end cash bail which included targeted litigation,³³⁶ the results have been at best piecemeal rather than the hoped-for overhaul. While the organization is doing important work such as filing class action lawsuits challenging this discriminatory practice, but the states they have brought those lawsuits still use cash bail to this day.³³⁷ Additionally, litigation campaigns can be costly, both in terms of money and time, requiring several years—if not decades—and large financial investments to make the end-goal a reality.³³⁸

Pressure campaigns on commercial bail companies could also be the means of creating measured reform. Optimistically, past efforts have also had measured success. For example, following a multi-year campaign by the ACLU and Color of Change to pressure private equity firm Endeavour Capital to exit involvement in the bail system, Endeavour divested from

³³³ For an explanation of how storytelling can influence and encourage reform, see Ella Saltmarsh, *Using Story to Change Systems*, STAN. SOC. INNOVATION REV. (2018).

³³⁴ Jeff Amy & Kate Brumback, *Atlanta Police Arrest 3 Organizers Behind Bail Fund Supporting Protests Against 'Cop City'*, PBS (May 31, 2023), <https://www.pbs.org/newshour/politics/atlanta-police-arrest-3-organizers-behind-bail-fund-supporting-protests-against-cop-city>

³³⁵ See *Challenging the Money Bail System*, C.R. CORPS, <https://civilrightscorps.org/our-work/>.

³³⁶ See *ACLU Announces Nationwide Campaign to Support Movement to End Money Bail*, ACLU (Dec. 11, 2017), <https://www.aclu.org/press-releases/aclu-announces-nationwide-campaign-support-movement-end-money-bail>.

³³⁷ *ACLU Files Federal Class Action Lawsuit Challenging Discriminatory Cash Bail System that Punishes Poor People in Detroit*, ACLU (April 14, 2019), <https://www.aclu.org/press-releases/aclu-files-federal-class-action-lawsuit-challenging-discriminatory-cash-bail-system>.

³³⁸ See Lawrence M. Friedman, *Claims, Disputes, Conflicts and the Modern Welfare State*, in ACCESS TO JUSTICE AND THE WELFARE STATE 251, 258 (Mauro Cappelletti ed., 1981) (“Litigation had also become terribly expensive. No one decided, deliberately, to raise the price of law. This simply happened or evolved over the years. The reasons hardly matter. Access to the courts for relief against mistakes and injustices of the state became very, very costly. . . . Quality, of course, is always expensive. A well-trained, professional body of judges costs money. . . . The legal profession is now highly professional, as well. . . . Good lawyers have become extremely expensive.”).

the largest for-profit bail bond company in the country.³³⁹ These campaigns, while lengthy and limited in effect, can help remove economic reliance on the bail system by damaging bail bond companies' profits.³⁴⁰

Finally, while not every state has this method available, ballot initiatives can also be an avenue for change.³⁴¹ These initiatives are proposed by constituents by putting the proposals on the ballot for voter considerations.³⁴² In order to get on the ballot, the ballot initiative needs to collect enough signatures to demonstrate substantial societal attention to the particular issue.³⁴³ The ballot initiative would then need a certain number of votes to pass in order to come into law.³⁴⁴ While bail reform can occur in this manner, this would require a large, coordinated grassroots movement that requires careful steps to ensure that the initiative can appear on the ballot, and these efforts are limited to states that have these processes in place.

E. Responding to Oppositions to Reform

Even with numerous studies supporting bail reform, that does not mean reform will be met with open arms. Understandably, the prospect of releasing arrested persons brings concerns that public safety will be jeopardized. In the protesting context, there may be concerns about violent protests going on without repercussions, allowing unlawful protesters to further damage and endanger the community. However, not only does data demonstrate the overwhelming majority of protests are peaceful,³⁴⁵ but also studies consistently demonstrate releasing people pretrial did not negatively impact public safety.³⁴⁶

Commonly, critics of bail reform argue that releasing more people pretrial will endanger society by sending "dangerous" people back into the community.³⁴⁷ While statistics have regularly refuted this fact on a broader scale,³⁴⁸ this argument has been largely successful in stalling necessary change.

³³⁹ *ACLU and Color of Change Statement on Endeavour Capital's Divestment from Predatory, For-Profit Bail Industry*, ACLU (Feb. 21, 2020), <https://www.aclu.org/press-releases/aclu-and-color-change-statement-endeavour-capitals-divestment-predatory-profit-bail>.

³⁴⁰ *Id.*; Smart Justice *supra* note 223.

³⁴¹ *States with Initiative or Referendum*, BALLOTPEDIA, https://ballotpedia.org/States_with_initiative_or_referendum.

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *See infra* Section I(C)

³⁴⁶ Sarah Staudt, *Releasing People Pretrial Doesn't Harm Public Safety*, PRISON POLY INITIATIVE (July 6, 2023), <https://www.prisonpolicy.org/blog/2023/07/06/bail-reform/>; *see also* Benjamin S. Case, *Speaking of Riots: The Complicated Reality of Violence vs. Nonviolence*, POL. VIOLENCE AT A GLANCE (Feb. 8, 2021), <https://politicalviolenceataglance.org/2021/02/08/speaking-of-riots-the-complicated-reality-of-violence-vs-nonviolence/>.

³⁴⁷ Dermot Shea, *New York's New Bail Laws Harm Public Safety*, N.Y. TIMES (Jan. 23, 2020), <https://www.nytimes.com/2020/01/23/opinion/shea-nypd-bail-reform.html>.

³⁴⁸ *E.g.*, Mass Incarceration Report, *supra* note 9; *Cash Bail*, *supra* note 234; Preston & Eisenberg, *supra* note 234; Ofer, *supra* note 234.

Specifically, critics often point to attention-grabbing reports involving individuals who commit subsequent crimes after their initial arrest because they were not imposed bail. For example, a *New York Post* article documented how New York City’s bail reform was not achieving its goal of eliminating bail while keeping communities safe.³⁴⁹ Particularly, the article points to NYPD data showing the same ten people were arrested nearly a total of 500 times since the bail reform began, as well as data showing an increase in recidivism rates more generally.³⁵⁰

While instances like those in the *New York Post* should be addressed, those instances appear to be the exceptions, not the rule. Importantly, recent studies still do not show a clear and obvious pattern in violent crime as a result of bail reform. A 2023 study by the Data Collaborative for Justice examined the impact of New York’s bail reform law on recidivism in New York.³⁵¹ Contrary to the conclusions by the *New York Post*, the report found “[e]liminating bail for most misdemeanor and nonviolent felony charges reduced recidivism.”³⁵² Even for violent felony offenses, the study found that “reducing the use of bail through measures such as supervised release . . . did not affect recidivism in either direction.”³⁵³

While public safety is a justified concern, data does not support that communities are endangered after eliminating bail for most misdemeanor and nonviolent felony charges. Accordingly, bail reform that focuses on the charges most commonly arising from protests largely focus on misdemeanors and nonviolent felonies.³⁵⁴ Furthermore, as the data suggests, even for violent crimes, which is often defined to include attributes such as “rioting” that results in property damage,³⁵⁵ bail is not necessary to protect the public because alternatives such as supervised releases “did not affect recidivism.”³⁵⁶

Targeting bail reform to waive protest-related, minor charges could be an incremental step to alleviating those concerns. Resistance to bail

³⁴⁹ Bernadette Hoga, Tina Moore & Bruce Golding, *10 Career Criminals Racked up Nearly 500 Arrests Since NY Bail Reform Began*, N.Y. POST (Aug. 3, 2022), <https://nypost.com/2022/08/03/career-criminals-rack-up-nearly-500-arrests-since-ny-bail-reform-began/>.

³⁵⁰ *Id.*

³⁵¹ Summary, René Ropac & Michael Rempel, *Does New York’s Bail Reform Law Impact Recidivism? A Quasi-Experimental Test in New York City*, DATA COLLABORATIVE FOR JUST. 4 (March 2023), <https://datacollaborativeforjustice.org/wp-content/uploads/2023/04/RecidivismReportSummary.pdf>

³⁵² Main Report, René Ropac & Michael Rempel, *Does New York’s Bail Reform Law Impact Recidivism? A Quasi-Experimental Test in New York City*, DATA COLLABORATIVE FOR JUST. 43 (March 2023), <https://datacollaborativeforjustice.org/wp-content/uploads/2023/03/RecidivismReport-4.pdf>.

³⁵³ *Id.*

³⁵⁴ *See id.*

³⁵⁵ *Over 300 People Facing Federal Charges for Crimes Committed During Nationwide Demonstrations*, DEP’T OF JUST. OFF. OF PUB. AFF. (Sept. 24, 2020), <https://www.justice.gov/opa/pr/over-300-people-facing-federal-charges-crimes-committed-during-nationwide-demonstrations> (listing “inciting a riot” in a group of crimes connected to “[v]iolent opportunists.”).

³⁵⁶ *See* René Ropac & Michael Rempel, *supra* note 353.

reform comes along with the long history of resistance to other criminal justice reforms.³⁵⁷ These concerns are unlikely to dissipate overnight. Because protesters are often charged with crimes such as blocking traffic or disorderly conduct—not extremely violent crimes such as murder that would be of public concern—this limited reform could demonstrate the efficacy of broader reform. For critics worried that releasing “rioters” would endanger the public because they would go out and cause more riots, judges could always impose conditions, such as supervised release, not related to money to reach similar ends.³⁵⁸ Finally, a periodic rollout could also demonstrate the reform’s efficacy, especially if data is collected to compare recidivism before and after the reform.

CONCLUSION

Protesting is a fundamental right that cannot be reserved only for those who can afford high bail amounts. The impact that protests have on progressing societies cannot be taken lightly. Nearly every significant change in the country has come as a result of some kind of protest. Unsurprisingly, countries around the world, like the United States, wish to promote and protect this right, upholding the right in light of government action that threatens to restrict it.

Cash bail, however, threatens free expression of this constitutional right. Cash bail, the process in which a defendant must pay a monetary amount to be released pretrial, is an unjust system that is treated differently between jurisdictions. Regrettably, research also indicates that cash bail is not felt evenly across demographics, disparately impacting poorer communities and communities of color. This means that the negative consequences involved, including the effect that bail has on eliciting pleas from those who otherwise would not plea, affects these demographics at a disproportionate rate.

Unfortunately, the recent rise in laws criminalizing otherwise lawful protests creates large disincentives for future protesters. In addition to increasingly criminalizing protected activity, laws have also elevated crimes from misdemeanors to felonies. Arrests, and subsequent charges, however, do not occur evenly, as research shows people of color and “left-wing” protesters arrested at significantly higher rates. In turn, the disparate arrest rates and disparate impact of bail exacerbates the existing disincentives of government action on lawful protests.

Fortunately, several avenues exist to alleviate the effect bail has caused on the right to protest. In all three branches of government as well as through grassroots initiatives, the bail system can be reformed to at least waive bail for instances of arrested protesters, alleviating disincentives. Finally, targeting reform to only waive bail for the charges most commonly attributed to arrested protesters will assuage public safety

³⁵⁷ See *Backlash on Reform Due to Concerns About Crime*, MARSHALL PROJECT, <https://www.themarshallproject.org/records/11987-backlash-on-reform-due-to-concerns-about-crime>.

³⁵⁸ To be clear, this has discriminatory practices in its own right and would be the case for a “lesser evil” because many judges waive money considerations as it relates to supervised release.

concerns, and could demonstrate the efficacy of broader reform. So yes, while these reform recommendations focus on arrested protesters, its impact would be a vital incremental step in reaching comprehensive reform to eliminate the practice altogether.