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Article

Requiring Written Bail Determinations

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Many states' laws governing bail and pretrial release give the impression that courts think through a myriad of factors when deciding whether to set bail. But things often don't work out this way in practice. Judicial officers setting bail carry out assembly-line-style, truncated hearings which often result in the imposition of bail in accordance with predetermined offense-based schedules. As a result, many defendants are ordered incarcerated pending further proceedings solely because they are unable to pay. Many of these defendants then plead guilty out of a desire to avoid remaining in jail pending trial.

This Article makes a straightforward proposal: written justifications should be required for all bail and pretrial release rulings that do not order defendants released on their own recognizance. By forcing courts to commit to writing the reasons behind their rulings, this reform pushes them to engage with the relevant laws governing bail and the circumstances of the defendants before them. It also increases the legitimacy of a system that badly needs it by creating a record of explanations for pretrial release determinations and acknowledging the need to spend time on these serious proceedings.

Critics are likely to paint this proposal as hopelessly impractical. Courts address millions of criminal cases each year, and requiring written rulings on pretrial release in many of them is a substantial burden. But this is not a problem with the proposal. Instead, this objection derives its force from a system that prosecutes more people than it possibly can while complying with minimal standards of due process and reasoned justifications. Requiring written bail determinations simply surfaces this defect. But, in doing so, the reform acts to oppose existing incentives that perpetuate overenforcement and oppressive prosecution. Alongside alternate reform measures, requiring written bail justifications is a step toward aligning pretrial release practices with the law on the books, and reducing the harms it causes to defendants, their families, and the rest of society.

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MICHAEL L. SMITH*

INTRODUCTION

In *ODonnell v. Harris County,* several plaintiffs who had been charged with misdemeanors sued over Harris County's bail and pretrial release procedures.[1] Under the Texas Code of Criminal Procedure and the Harris County Rules of Court, judges and hearing officers were required to consider a number of rules in setting bail, including avoiding the use of bail as "an instrument of oppression," the "nature of the offense and the circumstances under which it was committed," the "ability to make bail," and the safety of victims and the community.[2]

All of these factors are supposed to be considered during probable cause and bail-setting hearings which, in Harris County, were mass proceedings where up to forty-five arrestees would undergo successive one- to two-minute video-hearings before a hearing officer and an assistant district attorney.[3] Defendants "almost never" had counsel at these hearings, and were often instructed not to speak.[4] Hearing officers rarely deviated from pre-set bail schedules for defendants' offenses—setting lower bail amounts "in 7.2 percent of cases" and raising the bail amount "in 10.7 percent of cases" in 2015.[5] While these bail amounts were subject to review by a judge in a hearing one business day later, judges changed the pre-set bail amounts "in fewer than 1 percent of misdemeanor cases," leading the district court to conclude that the judges, "like the Hearing Officers . . . are not making individualized bail assessments."[6]

The Harris County experience exemplifies the assembly-line style approach that courts tend to take toward bail and pretrial release

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[1] ODonnell v. Harris Cnty., 251 F. Supp. 3d 1052, 1058 (S.D. Tex. 2017).

[2] *Id.* at 1085–86 (quoting TEX. CODE CRIM. PROC. ANN. art. 17.15 (West 2025)).

[3] *ODonnell*, 251 F. Supp. 3d at 1092.

[4] *Id.* at 1093.

[5] *Id.* at 1095.

[6] *Id.* at 1104.

determinations in criminal cases.[7] Laws often require that courts make individualized determinations about whether defendants should be required to post bail, the bail amount, and other conditions of release.[8] Statutes and court rules frequently refer to a diverse array of factors for courts to consider when making these rulings, including defendants' ability to pay, their employment status and history, their character and relationships, whether they pose a risk to the community, and others.[9] Yet courts frequently handle bail determinations en masse—deciding bail and release conditions for numerous defendants in single sittings and devoting only a few minutes to each bail determination.[10] Many defendants remain detained following these hearings, even when bail is set at relatively low amounts.[11]

This system has consequences. Those who are detained pretrial are more likely to plead guilty solely because they've been incarcerated.[12] Those in jail have a harder time preparing their defense.[13] And incarceration, even without a conviction, has profound consequences, including loss of liberty and the potential loss of employment, income, and housing, among other things.[14] Decisions regarding bail and pretrial release are profoundly

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[7] *See* Marlowe Freifeld, Note, *Out with the Old, in with the New: Michigan's Case for Ending Cash Bail, Inspired by Illinois*, 102 U. DET. MERCY L. REV. 183, 192 (2024) (explaining how bail decisions are made through shortcuts).

[8] *See, e.g.*, OKLA. STAT. ANN. tit. 20, § 55 (West 2025) ("It is the intent of the Oklahoma Legislature that a criminal defendant shall be entitled to an individualized determination of bail as guaranteed by the Oklahoma Constitution."); WASH. REV. CODE ANN. § 10.19.055 (West 2025) ("Bail for the release of a person arrested and detained for a class A or B felony offense must be determined on an individualized basis by a judicial officer.").

[9] *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 17.15(a)(1)–(7) (West 2025) (listing seven factors to be considered during bail determinations).

[10] Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, *in* 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 21, 23–25 (Erik Luna ed., 2017).

[11] *Id.* at 23 (noting that, in Philadelphia, "40% of defendants with bail set at $500 remained jailed pretrial," and that "more than half of all misdemeanor defendants" in Houston were detained with an average bail amount of $2,786).

[12] *See* Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 771 (2017) (concluding that pretrial "detention increases the likelihood of pleading guilty by 25% for no reason relevant to guilt."); *see also* Thea L. Sebastian & Alec Karakatsanis, *Challenging Money Bail in the Courts*, 57 JUDGES J. 23, 24 (2018) (reviewing data from Harris County and noting that in 2015 and 2016, "[o]f misdemeanor arrestees who were detained at case disposition, 84 percent pleaded guilty and cases took a median of 3.2 days," while of those "who were released before disposition, 51 percent avoided conviction altogether, while cases took a median of more than 100 days.").

[13] *See* Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1419 (2017) (explaining how pre-trial detention hinders building a defense).

[14] *See* Sandra G. Mayson, *Detention by Any Other Name*, 69 DUKE L.J. 1643, 1655–56 (2020) (recognizing the deprivation of liberty that occurs when people are unable to pay bail); Shima Baradaran Baughman, *The History of Misdemeanor Bail*, 98 B.U. L. REV. 837, 842 n.33 (2018) ("Studies have shown that being denied bail or being unable to pay bail substantially impacts an individual's personal life and has been linked with 'decreased employment rates, lower wages, physical and psychological conditions, damaged familial bonds, and higher rates of recidivism.'") (quoting Meghan Sacks & Alissa Ackerman, *Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment?*, 25 CRIM. JUST.

important—yet they are treated in an automated, cookie-cutter manner that is out of step with this reality.

Criticism of bail and pretrial release practices is nothing new. Some critics call for procedural reforms, including involving defense counsel in initial bail determinations or implementing more robust systems for the timely appeal of bail decisions.[15] Others call for reforms to statutes and rules regarding bail eligibility—arguing that certain classes of offenses should be exempted from ever requiring the posting of bail.[16] Still others call for the elimination of the cash bail system altogether, urging its replacement with a more robust system of risk assessment and pretrial release conditions.[17]

This Article adds to these reform discussions with a relatively simple and straightforward proposal: when courts require bail or any conditions of release beyond release on one's own recognizance, courts should be required to issue a written justification for their determination. This justification should account for the facts of the defendant's particular case and should engage with any applicable statutory factors for courts to consider when setting bail. And courts must issue this written justification in a timely manner—either contemporaneous with the bail determination, or within a short, specified period.

This proposal calls for judges to do what they're often expected to do: write out opinions justifying their orders and rulings. Giving reasons for a ruling creates a record and "enables interested parties to hold judges accountable for their reasons."[18] The public may also gain insight into how courts go about answering questions, enabling "people to evaluate and

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POL'Y REV. 59, 63 (2014)); Barnett J. Harris, *Is Misdemeanor Cash Bail an Unconstitutional Excessive Fine?*, 2021 PEPP. L. REV. 72, 79 (2021) ("For indigent misdemeanor offenders, bail operates as an unconstitutional excessive fine because it punishes poverty and deprives individuals of their livelihood.").

[15] *See* Henry F. Fradella & Christine S. Scott-Hayward, *Advancing Bail and Pretrial Justice Reform in Arizona*, 52 ARIZ. ST. L.J. 845, 877–78 ("Dozens of other advocacy groups and scholars agree with the American Bar Association's long-standing recommendation that counsel be 'provided to the accused as soon as feasible and, in any event, after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs earliest.'"); Dorothy Weldon, Note, *More Appealing: Reforming Bail Review in State Courts*, 118 COLUM. L. REV. 2401, 2401, 2405 (2018) (calling for reforms to procedures for appealing bail determinations).

[16] *See* Brandon L. Garrett, *Models of Bail Reform*, 74 FLA. L. REV. 879, 883–84 (2022) (describing various models of bail reform).

[17] *See* Jordan Gross, *Devil Take the Hindmost: Reform Considerations for States with a Constitutional Right to Bail*, 52 AKRON L. REV. 1043, 1089–98 (2018) (discussing options for reducing or eliminating cash bail, and the benefits and consequences of these potential reforms); Sydney Romaine, Comment, *The American Way: A High Price on Freedom and the Analysis of the Cash Bail System in California in Face of Excess Pretrial Detention*, 51 W. ST. L. REV. 237, 261 (2024) (calling for the replacement of cash bail systems with a risk assessment tool accompanied by regular auditing practices); Editorial Board, *End Money Bail. Now.*, WASH. POST (Sept. 2, 2018), https://www.washingtonpost.com/opinions/end-money-bail-now/2018/09/02/fe90f788-ac90-11e8-a8d7-0f63ab8b1370_story.html (discussing the need for bail reform).

[18] Nina Varsava, *Professional Irresponsibility and Judicial Opinions*, 59 HOUS. L. REV. 103, 118 (2021).

critique the system."[19] Writing "well-reasoned" opinions is important for parties who depend on the court for guidance and for those who may rely on opinions by the court in the future, and is "the goal of all members of the bench."[20]

Despite the common practice of writing out opinions, most rulings on bail and pretrial release take the form of brief, oral pronouncements by judges, magistrates, or hearing officers.[21] This renders judges vulnerable to a variety of implicit biases and heuristics that may influence the outcomes of their determinations.[22] The proposed reform would force courts to explain their justifications for bail amounts and release conditions, thereby prompting increased engagement with each case and the relevant law.[23] The time and effort required to commit justifications to writing may also impress upon courts and the public the seriousness of bail determinations.[24] And written justifications for bail determinations may enhance the legitimacy of the process—both to the extent that it leads to more accountability and deliberation through the process of creating more of a record, and to the extent that it boosts the perceived legitimacy of courts' determinations by demonstrating that bail determinations are more than kneejerk rulings based on little more than the charged offense and the relevant bail schedule.[25]

This proposal is not without its flaws. The few courts that have contemplated requiring written or particularized justifications for bail determination often reject these requirements as impractical.[26] With millions of cases filed each year, requiring written bail justifications is no small thing.[27] And yet, the force of this objection derives not so much from the written justification reform itself, but from the oversized, overextended nature of criminal prosecution practices. Rather than revealing the flaws

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[19] *Id.* at 118–19.

[20] S.I. Strong, *Writing Reasoned Decisions and Opinions: A Guide for Novice, Experienced, and Foreign Judges*, 2015 J. DISP. RESOL. 93, 93–94 (2015).

[21] Stephanie Holmes Didwania, *Discretion and Disparity in Federal Detention*, 115 NW. U. L. REV. 1261, 1302 (2021) (noting that, in federal cases, "detention decisions are rarely appealed, usually do not produce a written decision, and do not need to be explained in detail by the judge.").

[22] *See* Kacey Henning, Note, *Inconsistencies in Bail Determinations: An Analysis of Judicial Decision-Making*, 10 IND. J.L. & SOC. EQUAL. 437, 444–47 (2022) (discussing how social psychological concepts impact judicial decision making).

[23] *See* Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 IOWA L. REV. 1159, 1186–87 (2004) (discussing how writing out an opinion requires more critical thinking).

[24] *See infra* Part IV.B.

[25] *See infra* Part IV.C.

[26] *See* ODonnell v. Harris Cnty., 892 F.3d 147, 159–60 (5th Cir. 2018) (rejecting the district court's order that certain bail determinations be justified in writing and emphasizing the number of opinions that would be required); Schultz v. Alabama, 42 F.4th 1298, 1333 n.10 (11th Cir. 2022) (rejecting a requirement for oral justifications based on statutory factors governing bail determinations on the ground that this would pose too high of an administrative burden).

[27] *See* ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 41 (2018) (estimating that "over 13 million misdemeanor cases were filed in the United States in 2015").

with requiring written bail justifications, this critique instead reveals that existing systems only function through shortcuts and rushed determinations. That requiring some measure of justification and explanation for the profoundly important determination of bail and pretrial release would crash the system demonstrates the need for systemic reform—not problems with the reform itself.[28]

Valid concerns with the proposal do exist, however. Written justification requirements may further delay proceedings or lead to courts attempting workarounds with minimalistic or boilerplate explanations. I suggest several ways in which these concerns may be mitigated, including supplemental reforms that might accompany written bail justifications, such as requiring prompt written explanations, timely review requirements, and detailed, case-specific explanations for courts' pretrial release rulings.[29] While these reforms may not entirely eliminate delay and noncompliance, they may at least mitigate these outcomes.

Part I of this Article describes the state of bail and pretrial release, particularly the scale of the system and the truncated nature of bail hearings and rulings. I also briefly outline the landscape of commentary and literature that critiques existing bail and pretrial release regimes and situate my proposal in the category of reforms focusing on procedures of the bail determinations themselves.

Part II begins with a survey of existing writing requirements at the bail and pretrial release stage—many of which are limited, or which permit giving oral rulings instead. Some of these proposals, however, apply in a broader range of cases and may serve as partial models for the reforms I suggest. I then introduce my proposal that justifications for bail and release determinations be in writing in cases where defendants are not released on their own recognizance. Beyond this core proposal, I discuss several supplemental reforms that may enhance the effectiveness of requiring written justifications, including strict deadlines for written rulings, requiring particularized facts and engagement with the law in these determinations, and ensuring swift review of these determinations to better guarantee meaningful compliance.

Part III discusses the advantages of requiring written justifications, including the increased attention this requirement would draw to the often-complex law governing bail determinations, as well as the seriousness of the bail determination itself. Additionally, requiring courts to spend additional time and effort required to write out their justifications impresses on them, and the public, the significance of the proceedings. I further suggest that written bail justifications may be a boon to courts' legitimacy in an area that is a source of frequent criticism and outcry.

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[28] *See infra* Part IV.A.2.

[29] *See infra* Parts IV.B, IV.C.

Part IV then contemplates some disadvantages, beginning with concerns that written justifications are overly burdensome. I argue that these concerns derive their force from a system that is already overburdened and overextended, demonstrating how courts and prosecutors lack incentives to address these systemic flaws and are, in fact, encouraged to perpetuate overenforcement and expansive prosecution practices. Written bail justifications may prompt additional administrative costs that correct some of these flawed incentive structures. I also address concerns of delay and boilerplate justifications, suggesting how supplemental reform and bail review proceedings may mitigate these harms.

A few notes on terminology. Throughout this Article, I will refer to determinations by judges, magistrates, or other hearing officers on whether a defendant is required to post bail or comply with restrictive conditions of release as "bail determinations." This should not be taken to suggest that I am not concerned with restrictive release conditions—such as requirements not to associate with anyone who has been arrested, stay-away orders, or search-and-seizure compliance requirements. When I am referring to the proceeding that results in the imposition of bail or these conditions, I will generally refer to these as "bail hearings," and refer to the rulings reached in these hearings as "bail determinations." To be sure, there is nuance in distinguishing bail from pretrial release conditions—with certain reform proposals suggesting the elimination of cash bail in favor of more attention to conditions of release. While these distinctions are generally beyond the scope of this paper, my references to "bail determinations" should not be thought of as excluding these conditions, which can be restrictive and burdensome.

Additionally, I will sometimes refer to the diversity of actors tasked with making bail determinations. Requiring bail and setting the amount is a function that judges, magistrates,[30] clerk magistrates,[31] hearing officers,[32] county judges,[33] justices of the peace,[34] and other actors perform. While I will sometimes refer to multiple officers, I will often use the term "court," and sometimes, "judicial officers," to collectively refer to the actor making the bail determination.

Requiring written bail justifications is not a panacea. Much work remains to be done in reconsidering and reshaping systems of criminal enforcement and prosecution—including reckoning with the scope of these systems, their impacts on individuals and communities, and deeper

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[30] Sara Sternberg Greene & Kristen M. Renberg, *Judging Without a J.D.*, 122 COLUM. L. REV. 1287, 1350 (2022) (noting that Georgia magistrates have jurisdiction to set bail).

[31] *Id.* at 1360 (noting that Nebraska clerk magistrates have jurisdiction to set bail).

[32] ODonnell v. Harris Cnty., 251 F. Supp. 3d 1052, 1085 (S.D. Tex. 2017) (noting that "magistrates," whom Texas law permits to set bail, includes hearing officers).

[33] *Id.* (noting that "magistrates," whom Texas law permits to set bail, includes county judges).

[34] Greene & Renberg, *supra* note 30, at 1349 (noting that Delaware Justices of the Peace have jurisdiction to set bail).

incentives that give rise to these patterns of often oppressive enforcement. The reforms I discuss are by no means exclusive proposals for addressing these substantial issues. Written justifications for bail determinations are a step in the right direction and may be even more effective if implemented alongside other reforms, such as eliminating cash bail, thoughtful risk assessment measures, and beefing up presumptions that defendants be released rather than incarcerated pending the outcomes of their cases. Requiring written bail determinations may also be particularly appealing to states and courts who may wish to avoid recent, heightened federal scrutiny of alternate bail reform efforts.[35]

I. BAIL, PRETRIAL RELEASE, AND CALLS FOR REFORM

A. *Bail and Pretrial Release: The Status Quo*

People arrested for misdemeanor or felony offenses are frequently released pending further proceedings on the condition that they pay bail.[36] Their promise to return to court is secured through their payment of an amount the court specifies.[37] While the system operates on the assumption that people who post bail will be more likely to return to court and refrain from further criminal activity, many people post bail using bail bond agents, who guarantee the court that the bail will be paid while demanding a "nonrefundable fee (typically 10% of the bond amount)" from the defendant in exchange for this guarantee.[38]

The right to release on bail dates back to the common law, and is recognized in modern state and federal criminal procedure regimes.[39] Determinations over whether an individual should be required to pay bail, released on certain conditions, or released on their own recognizance are made by judges, magistrates, or hearing officers shortly after arrest.[40] These hearings are often brief—particularly in high-population jurisdictions—due to the large number of cases that courts must process.[41] In a matter of minutes, the judge or hearing officer is "presented with basic information about the case, the defendant's prior criminal history, and characteristics of

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[35] *See* Exec. Order No. 14,342, 90 Fed. Reg. 42129 (Aug. 25, 2025) (calling for the suspension or termination of federal funding for jurisdictions that have enacted "cashless bail" reforms).

[36] Alireza Nourani-Dargiri, *Bailing Out the Protester*, 14 COLUM. J. RACE & L. 977, 993 (2024).

[37] *See* Brandon L. Garrett, Sandra Guerra Thompson, Dottie Carmichael, David Shi & Songman Kang, *Liberty, Safety, and Misdemeanor Bail*, 76 FLA. L. REV. 321, 330 (2024) (explaining that a bond is "a promise" to return to court).

[38] *Id.* at 333–34.

[39] Shima Baradaran Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 957–58 (2020).

[40] *See, e.g.*, ODonnell v. Harris Cnty., 251 F. Supp. 3d 1052, 1088–104 (S.D. Tex. 2017) (detailing the process of arrest, booking, and bail determinations in Harris County, Texas).

[41] *See* Yang, *supra* note 13, at 1452–53 (discussing the briefness of bail hearings in larger jurisdictions).

the defendant such as employment status and ties to the community."[42] The court then issues its ruling, which is often given orally and, where bail is set, often consists of an amount derived from a pre-set schedule that corresponds certain bail amounts with certain offenses.[43]

Many people who are ordered to pay bail remain incarcerated because they are unable to pay the required bail amount.[44] This remains the case even when bail is set at a relatively low amount.[45] Those without personal or family resources are hit the hardest—and despite statutes and constitutions setting out a vision of bail in which "pretrial liberty [is] assured and expansive[,] . . . [t]he facts on the ground tell a very different story."[46] Bail determinations also disproportionately affect defendants of color, including determinations over whether to order defendants' release on their own recognizance.[47]

Those who are detained pending trial—particularly those charged with misdemeanors and other low-level offenses—are more likely to plead guilty than those who are released.[48] The prospect of remaining incarcerated for "an indefinite period" as the case proceeds may prompt defendants to plead guilty.[49] The offer of a "time [already] served" plea, in which defendants plead guilty and are immediately released (having been deemed to have already served their time through their pretrial detention), is an offer that often "cannot be refused."[50] Sara Zampierin describes the resulting progression:

> A person living in poverty is more likely to spend time in jail before trial because she cannot afford bail and thus ends up taking a plea deal with a longer sentence, is unable to access diversion or other programs that would help her avoid criminal charges because of the fees that are required, gets appointed counsel who is overworked and underfunded (and is then

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[42] Yang, *supra* note 13, 1452–53.

[43] *See* James A. Allen, Note, *"Making Bail": Limiting the Use of Bail Schedules and Defining the Elusive Meaning of "Excessive Bail"*, 25 J.L. & POL'Y 637, 641–42 (2017) (describing bail schedules); *see also* ODonnell v. Harris Cnty., 251 F. Supp. 3d 1052, 1088, 1092, 1097, 1099–100, 1102, 1104 (S.D. Tex. 2017) (describing bail set at prescheduled amounts).

[44] NATAPOFF, *supra* note 27, at 22, 64.

[45] *See* Yang, *supra* note 13, at 1401 (noting that forty-six percent of misdemeanor defendants in New York in 2013 were "detained because they were unable to post bail of $500 or less").

[46] Alexa Van Brunt & Locke E. Bowman, *Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next*, 108 J. CRIM. L. & CRIMINOLOGY 701, 716 (2018).

[47] Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1360 (2012); Olivia M. Hagel, Comment, *My Cash Is My Bond: Recognizing Rights to Cash Bail Forfeiture Exoneration in Washington*, 96 WASH. L. REV. 209, 220 (2021).

[48] Heaton, Mayson & Stevenson, *supra* note 12, at 743–45.

[49] Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 444 (1971).

[50] Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2146 (1998).

> assessed additional fees to pay for that representation), faces additional monitoring and financial punishments because of her inability to pay the fines immediately, and ultimately ends up in jail for failure to pay.[51]

Beyond case outcomes, bail determinations have profound implications for people who are being prosecuted. To start, there is the substantial intrusion on personal liberty that arises from being incarcerated in jail pending trial.[52] Then there are the collateral consequences of pretrial detention—missing work and losing a job, the inability to provide for one's family, and the risks to health and safety that people face when they are in jail.[53]

Paul Heaton, Sandra Mayson, and Megan Stevenson, examining Harris County, Texas's bail practices, conclude that those detained pretrial are twenty-five percent more likely to plead guilty than those released pending trial.[54] This increased conviction rate, which results from "no reason relevant to guilt," leads the authors to include that "approximately 17% of the detained misdemeanor defendants in the Harris County dataset who pleaded guilty would not have been convicted at all had they been released pretrial. They pleaded guilty because they were detained."[55] The authors further note that recidivism rates in Harris County suggest that detaining people pretrial is "criminogenic," resulting in hundreds of additional misdemeanors and felonies.[56] Multiple studies demonstrate that people detained pretrial tend to be more likely to recidivate in the future.[57]

B. *Calls for Reform*

Critiques of bail and pretrial release procedures date back decades.[58] In his 1979 survey of low-level criminal offenses in Connecticut courts, Malcolm Feeley noted that despite Connecticut's "liberal pretrial release statute," which required courts to consider defendants' "ties to the community," courts routinely set bail pursuant to a pre-set scale based on

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[51] Sara Zampierin, *Foreword: Innocent Until Proven Poor*, 21 MICH. J. RACE & L. 183, 183–84 (2016).

[52] RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 58 (2019).

[53] *See* Jenny E. Carroll, *Beyond Bail*, 73 FLA. L. REV. 143, 184 (2021) ("Even a short period of detention can cost a defendant her home, child custody, or her job."); Brandon Hasbrouck, *The Just Prosecutor*, 99 WASH. U. L. REV. 627, 690 (2021) (highlighting examples of people who died or spent years in jail while detained pretrial).

[54] Heaton, Mayson & Stevenson, *supra* note 12, at 747.

[55] *Id.* at 771.

[56] *Id.* at 761–68.

[57] BARKOW, *supra* note 52, at 58.

[58] *See* Samuel R. Wiseman, *Bail and Mass Incarceration*, 52 GA. L. REV. 235, 247–50 (2018) (surveying historical studies demonstrating patterns of incarceration on the basis of inability to make bail from the 1920s forward).

the crimes charged.[59] These amounts were frequently disconnected from the actual practice of the courts, as "[p]rosecutors and judges see no incongruity in setting bond at $500 for cases in which the defendant is likely to receive a suspended sentence or a fine of $25 or $50."[60] Studies from the preceding decades confirmed Feeley's account of defendants being jailed pending trial due only to their inability to make bail.[61]

Modern calls for criminal reform frequently refer to the phenomenon of mass incarceration—arguing that the United States arrests, prosecutes, and imprisons too many people.[62] These arguments often highlight the disproportionate burdens of mass incarceration, noting that people of color tend to bear the brunt of harsh criminal enforcement.[63] Reform proposals are myriad, and include calls to change sentencing practices,[64] increasing the role of public schools in addressing causes of mass incarceration,[65] restoring voting rights for those who are convicted or incarcerated,[66] and abolition,[67] among others.

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[59] MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 10 (1979).

[60] *Id.* at 105.

[61] *See* SUSAN WEISBERG, U.S. DEP'T OF JUST., COST ANALYSIS OF CORRECTIONAL STANDARDS: PRETRIAL PROGRAMS 9 (1978), https://www.ojp.gov/pdffiles1/Digitization/40248NCJRS.pdf ("In a 1972 sample of 179 incarcerated defendants in Connecticut, 33 (18 percent) specifically attributed their continued detention to the inability to provide collateral. A 1957 sample of defendants in New York City showed that 17 out of 89 incarcerated (19 percent) remained in jail for the same reason.").

[62] *See* Eric Petterson, *Mass Incarceration, Violent Crimes, and Lengthy Sentences: Using the Race-Class Narrative as a Messaging Framework for Shortening Prison Sentences*, 55 ST. MARY'S L.J. 475, 477 (2024) ("The need for criminal justice reform to address mass incarceration has grown in popularity; however, many people focus on the War on Drugs to the exclusion of other issues in the criminal legal system, even though only twenty percent of the incarcerated population is incarcerated on drug charges."); Ariana K. Connelly & Nadin R. Linthorst, *The Constitutionality of Setting Bail Without Regard to Income: Securing Justice or Social Injustice?*, 10 ALA. C.R. & C.L. L. REV. 115, 141–42 (2019) ("Democrats [in California] have been driving support of reform in the criminal justice system related to curing racial discrimination and mass incarceration of minorities.").

[63] *See* Jessica M. Eaglin, *Racializing Algorithms*, 111 CAL. L. REV. 753, 763 (2023) ("Among scholars adhering to this conceptualization of mass incarceration, racial inequality is an important reason to implement criminal legal reform."); *see also, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 8 (10th ed. 2020) (describing and critiquing the disproportionate impact that mass incarceration has on communities of color).

[64] *See* Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 425 (2013) (arguing for more attention to sentencing reform in pursuit of reducing mass incarceration); *see also* Katie Kronick, *Left Behind, Again: Intellectual Disability and the Resentencing Movement*, 101 N.C. L. REV. 959, 967 (2023) (highlighting resentencing trends and arguing for greater attention to individuals with intellectual disabilities to ensure that they can seek resentencing).

[65] *See* Fanna Gamal, *The Miseducation of Carceral Reform*, 69 UCLA L. REV. 928, 932 (2022) (analyzing the relationship between public education and mass incarceration).

[66] *See* Amy Fettig, *Can COVID-19 Teach Us How to End Mass Incarceration?*, 76 U. MIA. L. REV. 419, 443–46 (2022) (arguing for the necessity of voting rights regardless of incarceration or felony conviction status).

[67] *See generally* Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 19–48 (2019) (providing an overview of prison abolition theory).

Critiques of mass incarceration motivate calls for bail reform as well.[68] In addition to changing conviction and sentencing practices, reforms targeting the early stages of the criminal process play a role in reducing the number of those ultimately incarcerated.[69] Should changes to bail and pretrial release policies reduce the number of those incarcerated pending trial, this would also reduce mass incarceration.[70] Alexander Shalom argues that bail reform is an effective tool for combatting mass incarceration because of the scope of pretrial incarceration:

> Let us just focus on New Jersey. There are almost eleven thousand pretrial detainees in New Jersey. Imagine if the Committee's recommendations could result in a 20 percent reduction in the population of pretrial detainees. That would result in 2,200 fewer people in jail. Such a reduction would represent a nearly 6 percent reduction in the total incarcerated population in the state. A 30 percent reduction in pretrial detainees would result in a nearly 10 percent reduction in the number of New Jerseyans in prison or jail. Indeed, if the only pretrial detainees in our jails were those charged with violent crimes, weapons offenses, or sex offenses, the total corrections population would be reduced by 16.5 percent. These reductions represent serious dents in the absolute number of people incarcerated in New Jersey and, as such, are worthy pursuits if the benefits ended there.[71]

As with criminal reform efforts, proposals for changing or eliminating bail practices are numerous and varied. At the popular and political level, calls for the abolition of cash bail tend to get the most attention.[72] And these

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[68] Prithika Balakrishnan, *Mass Surveillance as Racialized Control*, 71 UCLA L. REV. 478, 488 (2024) ("In response to changing public opinion and outcry over mass incarceration, . . . state legislatures and class-action lawsuits have sought to reform their bail laws and courts have pursued other alternatives to meet the public safety goals previously expressed by the bail system.").

[69] *See* MARTA NELSON, SAMUEL FEINEH & MARIS MAPOLSKI, VERA INST. OF JUST., A NEW PARADIGM FOR SENTENCING IN THE UNITED STATES 12 (2023), https://vera-institute.files.svdcdn.com/production/downloads/publications/Vera-Sentencing-Report-2023.pdf (recognizing the need to "disrupt[] the 'front door' to the system" through measures including bail reform).

[70] *See* Cait Barrett, Note, *"Liberty and Justice for All": Equalizing Pretrial Detention for Wealthy and Indigent Defendants*, 53 CONN. L. REV. 473, 475 (2021) (arguing that "pretrial detention and bail reform play an important role" in mass incarceration because most people in jail are there because they are being detained pending trial).

[71] Alexander Shalom, *Bail Reform as a Mass Incarceration Reduction Technique*, 66 RUTGERS L. REV. 921, 927–28 (2014) (footnotes omitted).

[72] *See* Editorial Board, *End Money Bail. Now.*, WASH. POST (Sept. 2, 2018), https://www.washingtonpost.com/opinions/end-money-bail-now/2018/09/02/fe90f788-ac90-11e8-a8d7-0f63ab8b1370_story.html (arguing for the nationwide abolition of money bail systems); Editorial Board, *Chief Moore and Other Bail Reform Critics Are Wrong. Cash Bail Should Not Be a Form of Punishment*, L.A. TIMES (Sept. 25, 2023, 3:13 PM), https://www.latimes.com/opinion/story/2023-09-25/bail-pretrial-punishment (advocating for the end of cash bail and pretrial detention).

campaigns get results, with Washington, D.C., and Illinois abolishing cash bail in favor of alternative models relying on risk assessment and alternate release conditions.[73]

In legal scholarship, bail reform discussions are more nuanced and complex. Brandon Garrett describes six models of bail reform, ranging from the "Procedural Due Process Model," which "focuses on the hearing conducted by a judicial officer, at which a decision is made whether to impose pretrial conditions," to a "Categorical Model," which designates certain types of offenses as warranting "presumptive release," to a "Risk Assessment Model," which uses "actuarial data to prioritize release for individuals who pose a lower risk of nonappearance and recidivism."[74] Garrett himself urges a "composite approach" that combines multiple models of reform, along with more fundamental rethinking of dangerousness, the role of pretrial services, and the need for affordable housing that underlie existing failures of the pretrial release system.[75]

Because my proposal falls comfortably in the "Procedural Due Process" camp, some elaboration on that approach to reform is warranted. Garrett characterizes the model's goal as "to permit a robust pretrial hearing with representation by defense counsel, discovery, and full consideration by the judge of the person's case under a rigorous evidentiary standard."[76] Garrett notes the Constitution's role in these reform efforts, with the due process clauses of the Fifth and Fourteenth Amendments playing key roles in challenges to pretrial release regimes.[77] But these reform efforts need not be constitutional, as "local jurisdictions can build upon the constitutional floor and err on the side of providing robust procedural protections."[78] Examples of procedural reforms that build on such constitutional floors include calls for increased involvement of defense counsel in bail proceedings,[79] compensating defendants who are detained pretrial,[80] more rigorous and

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[73] *See* JEFFREY BELLIN, MASS INCARCERATION NATION: HOW THE UNITED STATES BECAME ADDICTED TO PRISONS AND JAILS AND HOW IT CAN RECOVER 160–61 (2023) (noting the defects of cash bail and describing the abolition of the cash bail system in Washington, D.C.); John O'Connor, *Illinois is First State to Eliminate Cash Bail, a Penalty Affecting Low-Income Communities Most*, ASSOCIATED PRESS (July 18, 2023, 10:42 AM), https://apnews.com/article/cash-bail-criminal-justice-supreme-court-pretrial-jail-poverty-55f1d3e71714151eb19cc2fbc10677d5 (reporting that Illinois became the first state to eliminate cash bail).

[74] Brandon L. Garrett, *Models of Bail Reform*, 74 FLA. L. REV. 879, 883–84 (2022).

[75] *Id.* at 922–24, 926–30.

[76] *Id.* at 891–92.

[77] *Id.* at 892–93.

[78] *Id.* at 894.

[79] *See* Henry F. Fradella & Christine S. Scott-Hayward, *Advancing Bail and Pretrial Justice Reform in Arizona*, 52 ARIZ. ST. L.J. 845, 877–78 (2020) ("Dozens of other advocacy groups and scholars agree with the American Bar Association's long-standing recommendation that counsel be 'provided to the accused as soon as feasible and, in any event, after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs earliest.'").

[80] *See* Kimberly Kessler Ferzan, *The Trouble with Time Served*, 48 BYU L. REV. 2001, 2065 (2023) ("We pay material witnesses. We pay jurors. We should pay pretrial detainees.") (footnotes omitted).

universal procedures for appealing bail determinations,[81] and calls for increased data transparency surrounding jail practices.[82]

II. THE PROPOSAL: REQUIRING WRITTEN JUSTIFICATIONS FOR BAIL AND PRETRIAL RELEASE CONDITIONS

In the face of existing bail and pretrial release practices and calls for reform, I propose a procedural change to bail hearings that may address some of the systems' shortcomings. The remainder of this Article introduces and explores my proposal that judges, magistrates, and hearing officers making bail determinations should be required to provide a written justification for their rulings.

This Section first addresses the state of the law of bail determinations, focusing on statutes and rules that require at least some degree of writing. From there, I introduce the proposal and its elements—including supplemental reforms that encourage meaningful compliance such as level-of-detail requirements, and timeliness rules for the justification and the review of the determination.

A. *Writing Requirements in Existing Bail and Pretrial Release Schemes*

Justifications for bail determinations are rare—and almost never committed to writing.[83] This is unsurprising considering the sheer number of criminal cases courts typically process[84] and the brevity of bail hearings.[85] Despite this trend, several jurisdictions require written justifications in certain situations, while others have broader writing requirements.

1. *Written or Oral Justifications*

Some laws require a statement of the basis for a court's bail or release determination—though permitting these statements to be made orally

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[81] *See* Dorothy Weldon, Note, *More Appealing: Reforming Bail Review in State Courts*, 118 COLUM. L. REV. 2401, 2405 (2018) (arguing for appellate review of bail determinations).

[82] *See* William E. Crozier, Brandon L. Garrett, & Arvind Krishnamurthy, *The Transparency of Jail Data*, 55 WAKE FOREST L. REV. 821, 851–52 (2020) ("To fully assess the impact of policy changes, and not just whether policy changed pretrial condition setting, one would need to measure outcomes in criminal cases, in recidivism, in court appearances, or other measures of social welfare in the community, in order to better assess costs and benefits.").

[83] *See* Stephanie Holmes Didwania, *Discretion and Disparity in Federal Detention*, 115 NW. U. L. REV. 1261, 1302 (2021) (noting that, in federal cases, "detention decisions are rarely appealed, usually do not produce a written decision, and do not need to be explained in detail by the judge.").

[84] *See* ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 41 (2018) (estimating that "over 13 million misdemeanor cases were filed in the United States in 2015.").

[85] *See* Jenny E. Carroll, *Beyond Bail*, 73 FLA. L. REV. 143, 181 (2021) ("[S]tudies suggest that bail hearings remain one- to five-minute events."); Muhammad B. Sardar, Note, *Give Me Liberty or Give Me . . . Alternatives? Ending Cash Bail and Its Impact on Pretrial Incarceration*, 84 BROOK. L. REV. 1421, 1455 (2019) ("Bail hearings in most jurisdictions are extremely short, and in some cases, these can be as short as a couple of minutes per defendant.").

enables the summary processing of numerous cases. Federal Rule of Appellate Procedure, Rule 9, for example, provides:

> The district court must state *in writing, or orally* on the record, the reasons for an order regarding the release or detention of a defendant in a criminal case. A party appealing from the order must file with the court of appeals a copy of the district court's order and the court's statement of reasons as soon as practicable after filing the notice of appeal. An appellant who questions the factual basis for the district court's order must file a transcript of the release proceedings or an explanation of why a transcript was not obtained.[86]

For states that require statements of justifications for bail determinations, this "in writing, or orally" language pervades the statutes and rules containing this requirement.[87] While written justifications for determinations are mentioned, permitting oral rulings on bail allows informal, truncated proceedings to persist.

2. *Situation-Specific Writing Requirements*

Other states require written justifications for bail determinations in specific instances. New Hampshire, for example, requires that modifications to bail or release conditions based on findings that "the person poses a danger to another," must be supported with "written findings supporting any modifications and reasons for new conditions or changes from the district court order."[88] In New York, courts that refuse to approve bail after it is

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[86] FED. R. APP. P. 9(a)(1) (emphasis added).

[87] *See, e.g.*, ALASKA STAT. ANN. § 12.30.006(f) (West 2025) ("The judicial officer shall issue written or oral findings that explain the reasons the officer imposed the particular conditions of release or modifications or additions to conditions previously imposed."); FLA. R. CRIM. P. 3.132(l)(2) ("The order may be based solely on hearsay but must be based solely upon evidence introduced at the hearing and must be supported by findings of facts and conclusions of law. The order must be made either in writing or orally on the record within 24 hours of the conclusion of the hearing."); MASS. GEN. LAWS ANN. ch. 276, § 58 (West 2025) ("If bail is set at an amount that is likely to result in the person's long-term pretrial detention because he or she lacks the financial resources to post said amount, an authorized person setting bail must provide *written or orally* recorded findings of fact and a statement of reasons as to why, under the relevant circumstances, neither alternative nonfinancial conditions nor a bail amount that the person can afford will reasonably assure his or her appearance before the court, and further, must explain how the bail amount was calculated after taking the person's financial resources into account and why the commonwealth's interest in bail or a financial obligation outweighs the potential adverse impact on the person, their immediate family or dependents resulting from pretrial detention.") (emphasis added); MO. SUP. CT. R. 33.01(f) (requiring courts conducting "release hearing[s]" for defendants unable to make bail or comply with release conditions to "make written or oral findings on the record supporting the reasons for detention or conditions set and imposed."); VT. STAT. ANN. tit. 13, § 7554(d)(1) (West 2025) (in instances where a party seeks review of conditions of release, requiring that "the judge shall set forth in writing or orally on the record a reasonable basis for continuing the conditions imposed" should the judge refuse to amend the conditions as requested).

[88] N.H. REV. STAT. ANN. § 597:6-e (2025).

posed must "explain promptly in writing the reasons therefor."[89] Texas law provides that defendants who are unable to pay ordered bail amounts are entitled to file a form seeking adjustment of bail to "an appropriate" amount, and that magistrates refusing to set bail at an amount below the court's bail schedule or order must "issue written findings of fact supporting the bail decision."[90]

These preceding examples require written justifications where bail or pretrial release terms are set in a manner that is harsher than a statutory default. But other states are less discriminating. Kentucky, for example, authorizes the state supreme court to "prescribe a uniform schedule of amounts of bail" for certain offenses, which lower courts are then required to accept.[91] While courts may "exercise . . . reasonable discretion" and depart from this schedule, any such departure must be accompanied by written reasons.[92] As a more limited example, in California, defendants who are eligible to use medicinal cannabis may request that their conditions of release permit them to use medicinal cannabis.[93] Any determination the court reaches regarding this request "shall be stated on the record and an entry stating those reasons shall be made in the minutes of the court."[94]

Still other jurisdictions have writing requirements for bail or pretrial release determinations that are more lenient than default conditions. The rules governing Florida's Twentieth Judicial Circuit presumes that those who are determined to be "high-risk sex offenders" are ineligible for release pending trial.[95] Courts may not release these individuals pending trial "unless or until a determination is made by the court, on the record and in writing, that the person is not a danger to the public, and unless or until the court sets bail or other conditions of release."[96]

3. *Broader Writing Requirements*

Some states have more expansive writing requirements for courts whose bail or pretrial release determinations are likely to result in incarceration pending trial. North Carolina law gives judicial officers the option to release defendants on unsecured bond into the custody of "a designated person or organization agreeing to supervise him[,]" on a cash-secured bond, or on house arrest.[97] Until recently, judicial officers were required to release defendants on a written promise to appear, on an unsecured appearance

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[89] N.Y. CRIM. PROC. LAW § 510.40(2) (McKinney 2025).
[90] TEX. CODE CRIM. PROC. ANN. art. 17.028(f), (h) (West 2025).
[91] KY. REV. STAT. ANN. § 431.540 (West 2025).
[92] KY. REV. STAT. ANN. § 431.540(2) (West 2025).
[93] CAL. HEALTH & SAFETY CODE § 11362.795(a)(1) (West 2025).
[94] CAL. HEALTH & SAFETY CODE § 11362.795(a)(2) (West 2025).
[95] FLA. 20TH CIR. R. 3.23(II)(B).
[96] *Id.*
[97] N.C. GEN. STAT. ANN. § 15A-534(a) (West 2025).

bond, or into the custody a designated person or organization unless the officer:

> determines that such release will not reasonably assure the appearance of the defendant as required; will pose a danger of injury to any person; or is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses.[98]

Such a determination would require the imposition of requiring cash bond or house arrest conditions with electronic monitoring, and the reasons for this were to be recorded "in writing to the extent provided in the policies or requirements issued by the senior resident superior court judge pursuant to G.S. 15A-535(a)."[99]

North Carolina recently passed a series of reforms to its criminal law, which included amendments to its bail and pretrial release statute prohibiting judges from releasing defendants on their own recognizance and imposing a presumption against release for defendants charged with violent offenses.[100] The writing requirement remains for nonviolent offenders.[101] But defendants charged with violent offenses now face a "rebuttable presumption that no condition of release will reasonably assure [their] appearance . . . as required and the safety of the community."[102] In instances where this presumption is overcome, North Carolina law still requires that judges require a posted bond or house arrest conditions for first-time offenders, and only house arrest for those previously convicted of a violent offense.[103]

While the writing requirement remains for those charged with nonviolent offenses, its practical implications are limited. In *State v. O'Neal*, the Court of Appeals of North Carolina acknowledged that the trial judge had not made a written record of the reasons for imposing a secured bond requirement that resulted in the defendant's incarceration pending trial.[104] The court, however, noted that the writing requirement only required written reasons "to the extent provided" in rules issued by the "senior resident superior court judge" who, in turn, was not mandated to require written reasons from other judges in the court.[105] Because there were no issued

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[98] N.C. GEN. STAT. ANN. § 15A-534(b) (West 2025).

[99] N.C. GEN. STAT. ANN. § 15A-534(a), (b) (West 2025).

[100] 2025 N.C. Sess. Laws 2025-93; *see also* Hayley Bedard, *North Carolina Legislature Passes Sweeping Criminal Law Legislation in Effort to Restart Executions*, DEATH PENALTY INFO. CTR. (Oct. 1, 2025) https://deathpenaltyinfo.org/news/north-carolina-legislature-passes-sweeping-criminal-law-legislation-in-effort-to-restart-executions (detailing the changes set forth in House Bill 307, including changes to bail and pretrial release schemes).

[101] 2025 N.C. Sess. Laws 2025-93 (to be codified at N.C. GEN. STAT. § 15A-534(a), (b)).

[102] 2025 N.C. Sess. Laws 2025-93 (to be codified at N.C. GEN. STAT. § 15A-534(b1)).

[103] 2025 N.C. Sess. Laws 2025-93 (to be codified at N.C. GEN. STAT. § 15A-534(b1)(1)–(2)).

[104] State v. O'Neal, 424 S.E.2d 680, 682 (N.C. Ct. App. 1993).

[105] *Id*.

policies requiring written reasons applicable to the trial judge, the writing requirement was not violated, and the court of appeals refused to find that the trial court had failed to consider "all required statutory factors when ruling on the defendant's motions to reduce his bond."[106] Subsequent appellate case law follows this theme, with the court of appeals later ruling that even where there is a "technical statutory violation" due to failure to provide written reasons, this does not warrant action on appeal absent a showing that the determination was prejudicial to the defendant.[107]

Other jurisdictions have stronger writing requirements. Kentucky, for example, requires that in instances where a defendant is detained for twenty-four hours without an arraignment, the defendant's bail and release conditions are subject to review by a judge.[108] If the judge "declines to modify" the conditions of release, the judge "shall record in writing the reasons for that decision."[109] While this may seem effective on paper, courts' written justifications are sometimes so minimal that they provide virtually no insight into the court's decision-making process.[110] Despite reforms to Kentucky's bail and pretrial release regime, the impacts have been limited and short-lived.[111]

Illinois has abolished cash bail, and in its place has extensive requirements for what courts must do when determining whether to detain or release defendants.[112] If a court orders that a defendant be detained pending trial, the court must:

> make a written finding summarizing the court's reasons for concluding that the defendant should be denied pretrial release, including why less restrictive conditions would not avoid a real and present threat to the safety of any person or persons or the community, based on the specific articulable facts of the case, or prevent the defendant's willful flight from prosecution.[113]

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[106] *Id.*

[107] State v. Townsend, 762 S.E.2d 898, 904 (N.C. Ct. App. 2014).

[108] KY. R. CRIM. P. 4.38 (2025).

[109] *Id.*

[110] *See* Alysia Santo, *Kentucky's Protracted Struggle to Get Rid of Bail*, THE MARSHALL PROJECT (Nov. 12, 2015, 7:15 AM), https://www.themarshallproject.org/2015/11/12/kentucky-s-protracted-struggle-to-get-rid-of-bail (providing that judges in Kentucky must explain bail decisions but do not necessarily provide insightful explanations).

[111] *See* Megan Stevenson, *Assessing Risk Assessment In Action*, 103 MINN. L. REV. 303, 355–59 (2018) (describing the limited impacts of Kentucky's bail reform and proposing explanations for these results); *see also* Robert Veldman, Note, *Pretrial Detention in Kentucky: An Analysis of the Impact of House Bill 463 During the First Two Years of Its Implementation*, 102 KY. L.J. 777, 802–03 (2014) (noting how exceptions in Kentucky's bail reform laws permit continued findings of dangerousness and restrictive bail practices).

[112] *See* 725 ILL. COMP. STAT. 5/110-6.1 (2025) (providing the requirements courts in Illinois follow in place of cash bail).

[113] *Id.* § 110-6.1(h)(1).

In the wake of Illinois' pretrial release reforms, hearings tend to take far longer than they used to (from a median length of four minutes to sixteen minutes), and judges "have begun providing more specific, detailed explanations for their decisions about whether to hold a defendant or place conditions on their release."[114] Jail populations have declined—though not by a substantial amount.[115] The lower-than-expected decline may be attributable to more people being detained pretrial who might otherwise have been able to make bail prior to the reform.[116]

Dauphin County, Pennsylvania requires courts ordering pretrial detention or setting monetary bail to "contemporaneously provide reasons for the bail amount or the denial of bail."[117] Courts are required to provide these reasons even when defendants are able to make bail.[118] The local rule includes, as an appendix, a form that courts are required to use when recording their reasons for bail and release determinations.[119]

B. *Elements of the Proposal*

1. *The Written Justification Requirement*

At its core, this Article's proposal is simple: judges, magistrates, and hearing officers making bail determinations should provide written justifications for these determinations to the extent they are not orders releasing defendants on their own recognizance.[120] These written justifications should include the court's reasoning regarding any determination that requires bail or other release conditions. When bail is set, there must also be a written justification for the amount of bail required. While straightforward, this requirement stands in stark contrast to the overwhelming tendency of bail determinations to be conclusory, oral, and unrecorded.

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[114] Peter Hancock, *A Year After End of Cash Bail, Early Research Shows Impact Less Than Many Hoped or Feared*, CAPITOL NEWS ILLINOIS (Sept. 13, 2024), https://capitolnewsillinois.com/news/a-year-after-end-of-cash-bail-early-research-shows-impact-less-than-many-hoped-or-feared.

[115] *Id*.

[116] *See* Bryce Covert, *Illinois Has Put an End to the Injustice of Cash Bail*, THE NATION (Dec. 2, 2024), https://www.thenation.com/article/society/cash-bail-reform-illinois (noting that some counties have experienced substantial reductions in jail populations, while others have seen increases, and suggesting that an inability to "pay their way out of jail," may explain the observed increases).

[117] PA. R. DAUPHIN CNTY. R. CRIM. P. 523(1).

[118] *Id.*

[119] *Id.* 523(2).

[120] Release on one's own recognizance generally means that the person being released promises to appear for future proceedings, but is not required to post bail, agree to pay any specified amount, or be subject to restrictions beyond agreeing to reappear and to not violate any laws. *See, e.g.*, MICHELE MEYER MCCARTHY, ILL. LAW & PRACTICE BAIL, § 25 (2025) ("The words 'personal recognizance,' or release on his or her own recognizance, denote the pretrial release of a defendant based on the defendant's own promise that he or she will appear for trial. The terms indicate a species of release in which no bond is required, and the defendant acknowledges personally, without surety, the obligation to appear in court at the next hearing or trial date of the defendant's cause.").

The written justification requirement contemplates existing statutory and rule schemes that list factors to be considered when setting bail amounts. In setting forth their justifications, courts would be required to engage with these schemes and explain their decisions by reference to these factors as applied to the facts of the cases before them. To the extent that existing statutes or court rules contain presumptions for release on one's own recognizance, these presumptions would need to be addressed in these written justifications as well.

The written justification would need to be provided in a timely manner, ideally with teeth built into the statute or rule requiring the justification. Requirements that a written justification be prepared "contemporaneously" with the bail determination, or within a short time period, are necessary to ensure that defendants aren't detained indefinitely as courts work through preparing their justifications.[121] Even better are requirements with time limits that provide for the automatic release of defendants on their own recognizance should the court fail to prepare its justification by the imposed deadline.

One might question why written justifications are not to be required for instances in which people are released on their own recognizance. If bail or release conditions are changed at a later stage of the proceedings, having a written record for the initial determination not to impose these conditions may be helpful. While this may be the case, the choice to exempt recognizance determinations from the writing requirement is a deliberate one. Reducing the cost in time and effort for this outcome makes it more appealing to time-pressured courts, particularly when alternative bail and release conditions are more burdensome due to written bail justification requirements.[122]

This proposal, on paper, represents a substantial change in bail determination practices. But there's a strong probability that it may make little to no difference, should courts simply ignore it. This concern isn't far-fetched. Courts frequently resist or fail to comply with procedural rules, including jury regulations,[123] constitutional rulings restricting search and

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[121] *See, e.g.*, PA. R. DAUPHIN CNTY. R. CRIM. P. 523(1) (requiring that the authority ordering that a defendant be detained or that a defendant pay bail "must contemporaneously provide written reasons for the bail amount or the denial of bail").

[122] *See infra*, Part IV.A (discussing the potential burdens courts may face from this proposal).

[123] *See* Paula L. Hannaford-Agor, *Judicial Nullification? Judicial Compliance and Non-Compliance with Jury Improvement Efforts*, 28 N. ILL. U. L. REV. 407, 419–20 (2008) (detailing failures of courts to follow prohibitions on permitting jurors to take notes during trial, discuss evidence before final deliberations, and submit questions to witnesses).

seizure practices,[124] discovery rules,[125] requirements that courts issue findings in compliance with certain rules of civil procedure,[126] and law governing placement of neglected and abandoned children with out-of-state family members.[127] The probability of noncompliance may be enhanced in jurisdictions that do not require judges to possess law degrees.[128] Matthew Tokson surveys examples of judicial "resistance to legal change" and attributes this resistance to a number of sources, including the time and effort required to adjust, preferences for the status quo, and the increased difficulty of decision-making that change to the law creates.[129]

The prospect of noncompliance or half-hearted compliance with the written justification reform warrants discussion of additional safeguards that increase the likelihood that courts will comply and that the written justification reform will have meaningful impacts. To that end, I turn to some of these additional, related reforms.

2. *Supplemental Reforms*

With the possibility of courts refusing to comply or finding ways of working around the written justification requirement in mind, I suggest several supplemental reforms.[130] Each of these additional proposals enhances the likelihood of courts meaningfully complying with the written justification proposal. These are not part of my core proposal. Jurisdictions may adopt the written justification requirement, with only a few or none of these supplemental proposals, and the consequences this Article discusses

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[124] *See* Matthew Tokson, *The Aftermath of* Carpenter*: An Empirical Study of Fourth Amendment Law, 2018-2021*, 135 HARV. L. REV. 1790, 1836–37 (2022) (describing judicial "[i]ndirect noncompliance" with the Supreme Court's decision in *Carpenter v. United States*).

[125] *See* Diego A. Zambrano, *Judicial Mistakes in Discovery*, 112 NW. U. L. REV. ONLINE 217, 222 (2018) (describing instances of noncompliance with amendments to rules governing discovery procedures).

[126] *See* M. Todd Henderson & William H.J. Hubbard, *Judicial Noncompliance with Mandatory Procedural Rules Under the Private Securities Litigation Reform Act*, 44 J. LEGAL STUD. S87, S90–92 (2015) (observing compliance with a requirement that judges list findings of compliance with Federal Rule of Civil Procedure 11 in cases brought under the Private Securities Litigation Reform Act stands at approximately 13.5%).

[127] *See* John C. Lore III, *Protecting Abused, Neglected, and Abandoned Children: A Proposal for Provisional Out-of-State Kinship Placements Pursuant to the Interstate Compact on the Placement of Children*, 40 U. MICH. J.L. REFORM 57, 75 (2006) ("The Interstate Compact [on the Placement of Children] is a victim, perhaps deservedly, of judicial non-compliance.").

[128] *See* Sara Sternberg Greene & Kristen M. Renberg, *Judging Without a J.D.*, 122 COLUM. L. REV. 1287, 1294–95 (2022) (describing courtrooms in which "no one has in-depth knowledge of the law or, often even more problematic, sometimes only one attorney for one party, the more powerful and resourced party, has such knowledge").

[129] *See generally* Matthew Tokson, *Judicial Resistance and Legal Change*, 82 U. CHI. L. REV. 901 (2015) (arguing that judicial compliance with established doctrine is motivated by bias and incentives to prefer what is familiar and simple over developing newer, complex doctrine).

[130] *Cf.* Ethan Lowens, *Resource Attacks on the Criminal Legal System*, 47 N.Y.U. REV. L. & SOC. CHANGE 479, 528–30 (2025) (addressing how reform efforts designed to restrict or overtax the resources of institutions furthering criminal prosecutions might be enhanced through complementary reform proposals, particularly those that internalize the costs of prosecution in the targeted institution).

may still be realized.[131] But the probability of the written justification reform making a meaningful difference in practice falls should jurisdictions refuse to adopt these supplemental reforms.

One such supplemental proposal is a requirement for specificity in written justifications. One likely workaround or obstacle to the success of this reform is the possibility that courts may list opaque or minimal justifications for their bail determinations.[132] Requirements for written justifications may address this concern through requirements that judges engage with existing statutes and rules setting forth factors to consider when setting bail. But it may also be worth including language in these reforms requiring individualized determinations and a minimal level of detail—including prohibitions on boilerplate, references to the facts of each defendant's case, and specific analysis regarding the factors to be considered when setting bail. Such a requirement would be far from unprecedented. Federal sentencing law requires district courts departing from sentencing guideline ranges to "state[] with specificity in a statement of reasons" their basis for doing so.[133] In the civil context, rules regarding the specificity of allegations supporting claims of fraud may provide further guidance for how to draft and enforce these specificity requirements.[134]

Rules requiring timely review of initial bail determinations are also likely to enhance the effectiveness of written justification requirements. The judicial officer tasked with making the initial bail determination may fail to account for required factors when ruling on bail, write a justification that is overly brief or boilerplate, or refuse to include a written justification in the first place. To check this potential for abuse and mistake, initial determinations should be subject to a prompt review by a judge—just as many bail determinations already are under existing systems.[135] These

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[131] *See infra*, Parts III, IV (addressing the potential benefits and disadvantages of written justification requirements).

[132] *See infra*, Part IV.C (discussing the potential disadvantages to the proposed reform).

[133] 18 U.S.C. § 3553(c)(2) (2025). To be sure, these specificity requirements are only effective to the extent that reviewing courts apply consistent, substantive standards to trial courts' sentencing proceedings. *See* Judy Ann Clausen, "Your Honor, May I Have That in Writing?" *A Proposed Response to Violations of the Federal Sentencing Written Reasons Requirement*, 42 U. TOL. L. REV. 705, 723–24 (2011) (describing "lax standards of specificity for the oral explanation necessary to support an out-of-range sentence unaccompanied by a written statement of reasons" imposed by certain federal courts of appeals).

[134] *See, e.g.*, FED. R. CIV. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."); Lazar v. Superior Ct., 909 P.2d 981, 989 (Cal. 1996) ("In California, fraud must be pled specifically; general and conclusory allegations do not suffice."); Campbell v. Campbell, 124 S.E.2d 345, 353 (W. Va. 1962) ("This Court has consistently held in many cases that fraud is never presumed and when alleged it must be established by clear and distinct proof.").

[135] *See, e.g.*, Booth v. Galveston County, No. 3:18-CV-00104, 2019 WL 3714455, at *5 (S.D. Tex., Aug. 7, 2019) (noting that Galveston County, Texas requires that defendants who are unable to post bail be given a bail review hearing within forty-eight hours of the initial determination—with these hearings typically taking place within twelve hours); Torgerson v. State, 444 P.3d 235, 238 (Alaska Ct. App. 2019)

hearings would be even more effective if they treat the initial written justification for the bail or release conditions as the entire basis for the government's basis for seeking bail or other restrictions. This would incentivize the initial magistrate or hearing officer making the determination to put a meaningful effort into the justification—lest it be altered on review due to its lack of substance or specificity.

Rules or statutes that enable auditing and review of final bail determinations may also be needed to enhance the effectiveness of this proposal. Courts that refuse to comply with written justification requirements may be able to avoid appellate scrutiny by ensuring that those who plead guilty waive their right to appeal the bail determination when doing so. Defendants frequently waive their right to appeal when pleading guilty.[136] Other plea-bargaining practices include waiver of specified claims on appeal, such as waiving the right to raise an ineffectiveness of counsel argument.[137] Alternatively, courts that fail to comply with written justification requirements are unlikely to face review of their actions in low-level cases due to the general lack of any appeals at all in these cases.[138]

Another supplemental reform that might enhance the effectiveness of written bail justifications includes prohibiting the waiver of one's right to appeal a court's failure to justify a bail determination in writing.[139] Additionally, rules providing that a failure to provide a written justification is grounds for a successful appeal may incentivize defendants to exercise their rights and foreclose appellate court limitation of the effectiveness of written justification requirements.[140] Or, as a less dramatic option, jurisdictions adopting written justification requirements may adopt auditing practices that review judges' rulings to ensure that judges are complying

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(finding that the superior court's failure to "conduct the required independent assessment" of the defendant's bail conditions warranted remand for reconsideration of those conditions).

[136] *See* Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2029 (2000) (describing the waiver of the right to appeal as "particularly widespread" in guilty pleas).

[137] *See* Nancy J. King, *Plea Bargains that Waive Claims of Ineffective Assistance - Waiving* Padilla *and* Frye, 51 DUQ. L. REV. 647, 648–50 (2013) (providing that certain waiver provisions on appeal may require the defendant to waive any claim of ineffective assistance of counsel known and not raised to the court at the time of sentencing).

[138] *See* Nancy J. King & Michael Heise, *Misdemeanor Appeals*, 99 B.U. L. REV. 1933, 1980 (2019) (concluding that for every ten thousand misdemeanor convictions, eight are appealed and one is reversed on appeal).

[139] *See* Andrew Dean, Comment, *Challenging Appeal Waivers*, 61 BUFF. L. REV. 1191, 1227–29 (2013) (arguing that "district court judges should reject most plea agreements that contain an appeal waiver," noting that the Federal Rules of Criminal Procedure require the rejection of plea agreements that are unknowing or involuntary, and referring to examples of courts rejecting appeal waivers on that ground).

[140] *Cf.* State v. Townsend, 762 S.E.2d 898, 904 (N.C. Ct. App. 2014) (rejecting argument on appeal that the court failed to include written justification for pretrial release determination in absence of the defendant showing prejudice resulting from that determination).

with the requirement and that their rulings are meaningful, case-specific, and sufficiently detailed.[141]

Some final thoughts on the written justification proposal and these supplemental reforms are in order before evaluating their potential consequences. Laws or rules are likely necessary to accomplish these reforms, rather than legal challenges. It is unlikely that courts will conclude that written determinations are required to ensure that defendants' constitutional rights are protected, given the burden such a requirement would impose on the courts and the fact that hearings already take place.[142] Additionally, in light of the nuances required to increase the probability that this reform will be effective, the relative "blunt instrument" of constitutional litigation is unlikely to result in the detailed writing, speedy review, and auditing supplemental reforms that would increase the probability of meaningful compliance.[143]

While the written justification proposal is the focus of this Article, there is no reason why it should be the sole focus of those who wish to reform bail and pretrial release laws and procedures. Brandon Garrett emphasizes the possibility of "[c]omposite bail reforms," which combine multiple approaches to reforming bail—including procedural reforms (like this Article's) and others, such as categorical rules presuming release and increasing reliance on risk assessments in the place of cash bail.[144]

III. ADVANTAGES OF WRITTEN JUSTIFICATIONS

A. *Aligning Bail Practices with Legal Requirements*

Judges are often required to consider multiple factors when making bail determinations. These factors often have something to do with the underlying purposes of bail, including ensuring the reappearance of defendants and the safety of the public. And yet, it's hard to see how these factors can be the subject of careful consideration in bail hearings that last a minute or less. Requiring written justifications for bail determinations draws attention to these considerations, bringing bail practices in line with what the law requires.

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[141] *See, e.g.*, HAW. REV. STAT. § 614-3(a), (b)(3) (requiring Hawaii's Criminal Justice Institute to collect and maintain records regarding state court bail practices).

[142] *See* ODonnell v. Harris Cnty., 892 F.3d 147, 160 (5th Cir. 2018) (overruling district court requirement that factfinders issue a "written statement of their reasons" for requiring bail in certain situations, reasoning that "such a drastic increase in the burden imposed upon Hearing Officers will do more harm than good" and would require the production of "50,000 written opinions per year to satisfy due process").

[143] *See* David Huitema, Miranda: *Legitimate Response to Contingent Requirements of the Fifth Amendment*, 18 YALE L. & POL'Y REV. 261, 270 (2000) (arguing that the "remedies for contingent constitutional violations are necessarily pragmatic in nature, and they may have to be blunt instruments").

[144] Brandon L. Garrett, *Models of Bail Reform*, 74 FLA. L. REV. 879, 922–23 (2022).

Many states require that courts setting bail consider various factors in doing so. This leads to the appearance that the bail determination is a multifaceted inquiry into the defendant's alleged conduct, past, and finances. For example, Texas Code of Criminal Procedure, Article 17.15 requires that those setting bail must follow these rules:

> 1. Bail and any conditions of bail shall be sufficient to give reasonable assurance that the undertaking will be complied with.
> 2. The power to require bail is not to be used to make bail an instrument of oppression.
> 3. The nature of the offense and the circumstances under which the offense was committed are to be considered, including whether the offense:
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> (A) is an offense involving violence as defined by Article 17.03; or
>
> (B) involves violence directed against a peace officer.
>
> 4. The ability to make bail shall be considered, and proof may be taken on this point.
> 5. The future safety of a victim of the alleged offense, law enforcement, and the community shall be considered.
> 6. The criminal history record information for the defendant . . . shall be considered, including any acts of family violence, other pending criminal charges, and any instances in which the defendant failed to appear in court following release on bail.
> 7. The citizenship status of the defendant shall be considered.[145]

Other states have similar requirements that courts consider a diverse array of factors when setting bail.[146] Others do not require that courts

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[145] TEX. CODE CRIM. PROC. ANN. art. 17.15 (West 2025).

[146] *See, e.g.*, GA. CODE ANN. § 17-6-1(e)(2) (West 2025) (requiring courts to consider the accused's financial resources, earnings, and the "purpose of bail" when setting bail amounts); MINN. R. CRIM. P. 6.02(2) (West 2025) (requiring courts setting conditions of release to consider thirteen factors, including conviction history, community and victim safety, employment, "the weight of the evidence," "length of residence in the community," "character and mental condition," and the defendant's financial resources); PA. R. CRIM. P. 523(A) (West 2025) (requiring consideration of "all available information as that information is relevant to the defendant's appearance or nonappearance at subsequent proceedings" including ten types of evidence, including criminal history, prior use of false identification, family relationships, employment status, and "the defendant's age, character, reputation, mental condition, and whether [they are] addicted to alcohol or drugs").

consider particular factors, but indicate that courts must consider at least one, or may take them into account.[147]

Lists of factors for courts to consider when setting bail and release conditions are often elaborate. Massachusetts, for example, requires a wide-ranging assessment—mandating that courts setting bail consider:

> [1] the nature and circumstances of the offense charged, [2] the potential penalty the person faces, [3] the person's family ties, [4] employment record and [5] history of mental illness, [6] the person's reputation, [7] the risk that the person will obstruct or attempt to obstruct justice or threaten, injure or intimidate or attempt to threaten, injure or intimidate a prospective witness or juror, [8] the person's record of convictions, if any, [9] any illegal drug distribution or present drug dependency, [10] whether the person is on bail pending adjudication of a prior charge, [11] whether the acts alleged involve abuse, as defined in said section 1 of said chapter 209A, [12] a violation of a temporary or permanent order issued pursuant to said sections 18 or 34B of said chapter 208, said section 32 of said chapter 209, said sections 3, 4 or 5 of said chapter 209A or said sections 15 or 20 of said chapter 209C, [13] whether the person has any history of issuance of such orders pursuant to the aforesaid sections, [14] whether the person is on probation, parole or other release pending completion of sentence for any conviction and [15] whether the person is on release pending sentence or appeal for any conviction.[148]

On paper, these detailed requirements look promising. If courts were to truly consider all these factors—particularly defendants' ability to pay—courts might be less likely to incarcerate defendants who simply lack the financial resources to ensure their freedom. But courts often lack time to consider these factors due to heavy caseloads and brief bail setting hearings.[149] In the few instances where defense attorneys are involved, the brevity of the hearings and the limited time they have to meet with their

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[147] *See, e.g.*, ALA. R. CRIM. P. 7.2(a)(3) (West 2025) (permitting the court to consider fourteen factors, including the defendant's reputation and character, the defendant's age and relationships, the defendant's criminal history, the type of weapon used in the alleged offense, and—if the defendant is charged with a drug offense—"evidence of selling or pusher activity should indicate a substantial increase in the amount of bond"); IDAHO CRIM. R. 46(c) (West 2025) (requiring consideration of "any" of eleven factors, including the defendant's "character and reputation" and "family relationships," as well as the defendant's employment status and financial condition, criminal record, pretrial risk assessment, and who might "agree to assist the defendant in attending court at the proper time").

[148] MASS. GEN. LAWS ANN. ch. 276, § 42A (West 2025).

[149] *See* Cynthia E. Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 933 (2013) (describing the rushed approach to bail determinations due to crowded dockets).

clients result in little development and consideration of relevant bail factors.[150] This, along with concerns of the political consequences of releasing defendants who might go on to commit further crimes, results in a tendency to err on the side of requiring bail or incarceration rather than releasing people pretrial.[151]

Requiring written justifications for bail determinations forces judges to reckon with these factors rather than glossing over them or ignoring them as they might otherwise when making truncated oral determinations of bail and pretrial release.[152] Forcing oneself to write can prompt increased deliberation and critical thinking.[153] Susan Ehrenberg emphasizes that much of the American legal system revolves around written submissions and proceedings rather than oral proceedings.[154] This, Ehrenberg argues, ought to be embraced because of the benefits writing can have on the legal system's functions and outputs:

> When a lawyer is required to commit a legal argument, or a judge is required to commit a judicial opinion to writing, she becomes capable of a level of both creative and critical thinking that is not possible when legal analysis is expressed only in an oral form. "Writing, commitment of the word to space, enlarges the potentiality of language almost beyond measure [and] restructures thought . . . ."[155]

The writing process frequently promotes critical thinking by requiring writers to stand outside of themselves and reflect on what, precisely, they are saying and whether their arguments and conclusions are sound.[156] The process of writing is more effective at fostering this reflection and avoiding

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[150] *See* Matthew Bender, *Unmuted: Solutions to Safeguard Constitutional Rights in Virtual Courtrooms and How Technology Can Expand Access to Quality Counsel and Transparency in the Criminal Justice System*, 66 VILL. L. REV. 1, 18 (2021) (noting that public defenders often face challenges during bail hearings due to a lack of resources and inadequate time to prepare bail arguments).

[151] *See* Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 422–23 (2016) (noting that the political and legitimacy costs of people committing crimes upon release tend to overshadow the costs of detaining people pretrial—the nature and extent of which judges themselves fail to recognize).

[152] *See* Mitali Nagrecha, Sharon Brett & Colin Doyle, *Court Culture and Criminal Law Reform*, 69 DUKE L.J. ONLINE 84, 103 (2020) ("Municipal court and misdemeanor dockets are long, and hearings tend to move quickly to get through the large volume of cases. Judges are frequently influenced by a desire to decide cases quickly and efficiently, which in turn may result in decisions being made without having to provide much support or insight into what was considered.").

[153] *See* Kirsten K. Davis, *"The Reports of My Death are Greatly Exaggerated": Reading and Writing Objective Legal Memoranda in a Mobile Computing Age*, 92 OR. L. REV. 471, 487 (2013) (noting that, in the context of giving legal advice, "memo writing provides a structure that can force improved deliberative decision making").

[154] *See* Ehrenberg, *supra* note 23, at 1161, 1164 (noting that writing is the preferred method of communication in the U.S. legal system since accountability depends on being able to read, rather than see, the reasons behind a judge's decision).

[155] *Id.* at 1186–87 (alteration in original).

[156] *Id.* at 1187–88.

emotional influences than the comparatively hasty process of oral communication.[157]

In a legal regime in which courts are expected to consider a myriad of distinct factors when setting bail, this deliberative approach that writing affords is desirable.[158] An oral opinion may not account for everything a court ought to consider when setting bail—particularly in jurisdictions that list a dozen or more factors to be considered.[159] Factors that might jump to the top of mind and dominate the opinion in a quick oral ruling might be overshadowed once a court puts pen to paper and recalls that there are other factors to be considered. The need to account for these factors may also enhance the effectiveness of the bail hearing itself, as courts will be incentivized to gather information relevant to the factors they will eventually need to account for in their written determinations.

Committing courts' justifications to writing also ensures a record of what the court considered in reaching its determination. The importance of committing relevant communications to writing is recognized elsewhere in judicial proceedings—take, for example, the established process of requiring jury questions or requests to be in writing so that they may become part of the record and properly debated by counsel.[160] This is the case with many judicial rulings as well—with courts, lawyers, and parties often expecting "to know not only what decision a court has reached but how the court has reached that decision."[161] Given the importance of bail and pretrial release determinations for defendants, it seems sensible to render these justifications to writing as well.

B. *Acknowledging the Seriousness of Determinations*

Despite their high volume and brevity, bail determinations are of profound importance to criminal defendants. To start, rulings that result in a defendant's pretrial detention—whether the court orders a defendant

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[157] *Id.* at 1189–90; *see also* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 36–37 (2007) ("Rather than serving merely to describe an allegedly deliberative process that has already occurred (as the formalists might argue) or to rationalize an intuitive decision already made (as the realists might argue), the discipline of opinion writing might enable well-meaning judges to overcome their intuitive, impressionistic reactions.").

[158] *See* Jonathan Hafen, *Hon. David Nuffer Chief Judge, U.S. District Court for the District of Utah*, 62 FED. LAW. 39, 40 (2015) (recounting concerns from Chief Judge David Nuffer of the United States District Court for the District of Utah about the elimination of paper in judicial proceedings and the loss of deliberation that might result).

[159] *See, e.g.*, MASS. GEN. LAWS ANN. ch. 276, § 42A (West 2024) (detailing at least fifteen factors for courts to consider when setting bail).

[160] *See* United States v. Pagán-Romero, 894 F.3d 441, 447 (1st Cir. 2018) (recognizing the "deeply engraved authority" setting forth the process for jury communications during deliberation—including the requirement of written requests, marking the writing as an exhibit, and giving counsel the opportunity to respond to the written request).

[161] Ehrenberg, *supra* note 23, at 1194.

detained or sets bail at an amount the defendant is unable to pay—are likely to affect the outcome of that defendant's case. These effects begin with the defendant's ability to navigate the adversarial process of criminal proceedings. A defendant detained pretrial will have a harder time preparing a defense, due to the difficulty of gathering evidence, finding witnesses, and meeting with counsel.[162] Those detained pretrial may be "incarcerated . . . far away from the district in which they are tried," leading to further inconvenience, exhaustion, and difficulty in meeting with their attorney.[163]

Indeed, defendants facing the prospect of indefinite pretrial detention are likely to plead guilty outright.[164] This includes defendants who would not have been convicted had they been released.[165] This is particularly true in instances where defendants are given offers of "time served," in which the time they have already spent detained constitutes the entirety of their jail sentence—an appealing prospect for those who might otherwise face indefinite further detention for an uncertain outcome following trial.[166] This phenomenon has been enough to prompt some courts into concluding that bail determinations are an "outcome-influencing" stage of criminal proceedings, triggering the right to counsel.[167]

The United States District Court for the Southern District of Texas acknowledged this pattern of guilty pleas in *ODonnell v. Harris County*.[168] There, the court noted that for misdemeanor arrestees who were unable to make bail, their cases were resolved in a median of 3.2 days.[169] Of these defendants, "72 percent resolved their cases within 7 days; 90 percent resolved their cases within 30 days" with 84 percent of detained misdemeanor arrestees pleading guilty.[170] For those released pretrial, their median time to disposition was 120 days, and 49 percent of them pled

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[162] *See* Gieffels v. State, 552 P.2d 661, 670 (Alaska 1976) ("Inability to meet bail requirements could cause incarceration interfering with a defendant's preparation of his defense.") (disapproved of on other grounds in Miller v. State, 617 P.2d 516, 518 (Alaska 1980)); Yang, *supra* note 13, at 1419 (discussing how the "[d]ifficulty in preparing a defense can increase the probability of conviction and incarceration").

[163] Douglas J. Klein, *The Pretrial Detention "Crisis": The Causes and the Cure*, 52 WASH. U. J. URB. & CONTEMP. L. 281, 294 (1997).

[164] Heaton, Mayson & Stevenson, *supra* note 12, at 771 (concluding that pretrial "detention increases the likelihood of pleading guilty by [twenty-five percent] for no reason relevant to guilt").

[165] *Id.* at 776 (concluding that of the misdemeanor defendants included in the analyzed data, seventeen percent of those "who pleaded guilty would not have been convicted at all but for their detention").

[166] *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2492–93 (2004) (explaining that pre-trial detention can approach or exceed the after-trial punishment, making time-served the best outcome).

[167] *See* Farella v. Anglin, 734 F. Supp. 3d 863, 881–84 (W.D. Ark. 2024) (finding that "bail hearings are an outcome-influencing stage because counsel's absence at the bail determination derogates from the defendant[']s Sixth Amendment trial rights by increasing the likelihood that defendants will plead guilty before trial.").

[168] ODonnell v. Harris Cnty., 251 F. Supp. 3d 1052, 1057–60 (S.D. Tex. 2017).

[169] *Id.* at 1105.

[170] *Id.*

guilty.[171] The court acknowledged that this evidence was consistent with a "system that pressures misdemeanor defendants to plead guilty at or near their first appearances because that is the only way to secure timely release from detention."[172]

Beyond the implications for defendants' cases, pretrial detention carries a host of other negative burdens. This process—ostensibly meant to ensure that defendants' return for future proceedings—severely curtails defendants' liberty,[173] threatens their livelihoods,[174] and results in psychological harm.[175] These harms are more acute for vulnerable defendants, such as those suffering from mental illness.[176] Defendants are not the only ones affected—their families may suffer as well should they rely on the incarcerated person for income, transportation, and other necessities.[177]

Requiring courts to engage more thoroughly with the facts of each case and the applicable law in bail determinations impresses the seriousness of the proceeding upon those making the decisions. Writing out a justification that considers the applicable law, including any factors required for consideration, involves a more involved process than simply reaching a

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[171] *Id.*

[172] *Id.*

[173] *See* Mayson, *supra* note 14, at 1655–56 (recognizing the deprivation of liberty that occurs when people are unable to pay bail); Cydney Clark, Note, *Bailing on Cash Bail: A Proposal to Restore Indigent Defendants' Right to Due Process and Innocence Until Proven Guilty*, 29 WASH. & LEE J. C.R. & SOC. JUST. 111, 136 (2023) (describing pretrial detention as "a significant deprivation of a person's liberty, encompassing the principle of having fundamental liberty from bodily restraint"); *see also* Comment, *Pretrial Detention of Witnesses*, 117 U. PA. L. REV. 700, 724 (1969) ("The detention of a witness who cannot meet bail is much more serious a deprivation of liberty than the limited intrusion involved in the stop-and-frisk cases.").

[174] *See* Harris, *supra* note 14, at 80 ("For indigent misdemeanor offenders, bail operates as an unconstitutional excessive fine because it punishes poverty and deprives individuals of their livelihood."); Andrea Coppola, Note, *Re: The Pretrial Risk Assessment—How New Jersey's Bail Overhaul is Shaping Bail Reform Across the Country*, 27 CARDOZO J. EQUAL RTS. & SOC. JUST. 87, 104 (2020) ("Cash bail is exceedingly dangerous in that it threatens the livelihood of so many low-income and minority individuals, not to mention the enormous cost it puts on states still using it.").

[175] *See* Anita H. S. Hurlburt, *Building Constructive Prison Reform on Norway's Five Pillars, Cemented with Aloha*, 19 ASIAN-PAC. L. & POL'Y J. 194, 207–08 (2018) (stating multiple harms of incarceration, including deprivation of personal integrity); Baughman, *supra* note 14, at 842 n.33 ("Studies have shown that being denied bail or being unable to pay bail substantially impacts an individual's personal life and has been linked with 'decreased employment rates, lower wages, physical and psychological conditions, damaged familial bonds, and higher rates of recidivism.'") (quoting Meghan Sacks & Alissa R. Ackerman, *Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment?*, 25 CRIM. JUST. POL'Y REV. 59, 63 (2014)).

[176] *See* Samuel R. Wiseman, *Bail and Mental Illness*, 64 B.C. L. REV. 1931, 1967–68 (2023) (noting that mentally ill defendants are detained for longer periods than traditional defendants, despite that pretrial detention limits their access to treatment).

[177] *See* Samuel R. Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L.J. 1344, 1356–57 (2014) (explaining how a detainee's family not only faces stigma of having a family member in jail, but are also deprived of the detainee's financial support); *see also* Mel Gonzalez, Note, *Consumer Protection for Criminal Defendants: Regulating Commercial Bail in California*, 106 CALIF. L. REV. 1379, 1396 (2018) ("Mounting commercial bail debt results in well-documented psychological distress in defendants that spreads to friends, families, and communities.").

knee-jerk conclusion after a hearing lasting little more than a minute or two.[178] The time that the writing itself takes may also impress upon the court and the prosecutor the seriousness of the proceeding, as they will have additional time to reflect on the case before them and the potential implications of the bail determination.[179]

Those seeking to make pretrial criminal proceedings less oppressive may be concerned that a writing requirement might backfire. Judges who think hard about the cases before them may become concerned with the danger defendants may pose to the public and order harsher bail and release conditions. In these instances, though, harsher treatment may better accomplish the functions of bail regimes. While minimal and near-automatic bail proceedings may incarcerate those who should be released but simply cannot pay, they may also enable those able to make bail who pose a genuine flight risk or threat to others to flee or cause harm by simply paying the scheduled bail amount.[180] To the extent that deeper consideration required by writing requirements lead judges to spot instances of genuine danger or flight risk that might otherwise be overlooked, the more stringent bail and release conditions that result are an improvement.[181]

Written justification requirements also signal to actors in the criminal system and the broader public that bail determinations are serious proceedings. Scholars have long acknowledged the expressive role that punishment may play to condemn wrongdoing, signal the relative seriousness of crimes, and establish conventions and norms of proper and improper conduct.[182] Although bail determinations are not punishment, bail plays a similar expressive role. Bail may express views regarding the seriousness of certain charged crimes or how dangerous a defendant is believed to be.[183] Those who oppose cash bail do so in expressive terms as

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[178] Ehrenberg, *supra* note 23, at 1186–88.

[179] *See* Appleman, *supra* note 47, at 1368 (arguing that requiring a specialized jury to rule on bail determinations could "[r]educ[e] the haste of the process" and "ensure that both the court and prosecutor take the process more seriously").

[180] *See* Curtis E.A. Karnow, *Setting Bail for Public Safety*, 13 BERKELEY J. CRIM. L. 1, 13–15 (2008) (warning that the seriousness of criminal charges and bail schedules that correspond with offense seriousness are often unrelated to defendants' risk of further criminal activity or flight).

[181] An alternate concern may be that judges engage in performative harshness in written justifications by issuing determinations that are overly punitive so that the judge can build a reputation of being tough on crime. While such behavior would be inconsistent with reform goals and good faith enforcement of bail and pretrial release laws, it is questionable whether the writing requirement itself would exacerbate the harshness of judges already inclined toward such performative behavior.

[182] *See* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 594–601 (1996) (giving examples of supporters of expressive theories of punishment and explaining the expressive functions of punishment); *see also* Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 422–23 (1965) (arguing that the "condemnatory aspect" of punishment must suit the crime in order to satisfy justice).

[183] *See* Michael Abramowicz, *The Law-and-Markets Movement*, 49 AM. U. L. REV. 327, 428–29 (1999) ("Arguably, judicial assessment of bail has an expressive component, providing an initial useful

well. Advocates of funds assisting those who are unable to pay bail argue that their funding of bail payments constitutes expressive protest against the cash bail system or expression regarding the importance of liberty for those charged with crimes.[184]

Applying this expressive framework to bail regimes themselves reveals the values and priorities of states and jurisdictions. On paper, states are often eager to express support for rigorous bail proceedings by listing out numerous factors to be considered by courts setting bail.[185] Some of these states accompany these lists with abstract proclamations against oppressive bail practices.[186] And yet, these laws' assurances ring hollow in jurisdictions that fail to live up to their ideals in practice.[187]

Requiring written justification for bail determinations fits with these expressive functions of bail and pretrial release regimes. A written justification requirement signals that a state or jurisdiction is willing to take bail determinations seriously by requiring courts to take the time to write out the basis for these rulings. Additionally, should written justifications accomplish the goal of bringing practice more in line with the letter of the law and the factors that courts must consider when setting bail, this reduces the inconsistency between what the law proclaims courts to do and how bail functions in practice.

C. *Enhanced Legitimacy*

The transparency of written bail justifications may enhance the perceived legitimacy of criminal courts. The perception that a court's

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statement from the court that an individual is or is not dangerous or a threat to flee."); Wiseman, *supra* note 151, at 447 ("[S]ome judges admit to using bail as a sort of 'expressive' tool to send a message about the seriousness of the alleged crime despite the defendants' presumed innocence.").

[184] *See* Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 619 (2017) ("When a bail fund pays a defendant's bail or bond, the group is expressing its views that there are some members of the community who, although they do not have close ties to the defendant, value the liberty of their fellow community members over the remote possibility of violence in their community."); Casey Mosley, *Legislative Response to the Rapid Growth of Charitable Bail Organizations*, 16 TENN. J. L. & POL'Y 68, 75 (2023) (recounting arguments from The Bail Project that "its ability to pay bail for members of the community constitutes 'expressive advocacy work'").

[185] *See, e.g.*, MINN. R. CRIM. P. 6.02(2) (2016) (requiring courts setting conditions of release to consider thirteen factors, including conviction history, community and victim safety, employment, "the weight of the evidence," "length of residence in the community," "character and mental condition," and the defendant's "financial resources"); PA. R. CRIM. P. 523(A) (2016) (requiring consideration of "all available information as that information is relevant to the defendant's appearance or nonappearance at subsequent proceedings" including ten types of evidence, including criminal history, prior use of false identification, family relationships, employment status, and the defendant's "age, character, reputation, mental condition, and whether [they are] addicted to alcohol or drugs").

[186] *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 17.15(a)(2) (West 2021) ("The power to require bail is not to be used to make bail an instrument of oppression.").

[187] *See, e.g.*, ODonnell v. Harris Cnty., 251 F. Supp. 3d 1052, 1059–60 (S.D. Tex. 2017) (finding widespread constitutional violations resulting from detaining defendants pretrial without regard to their ability to pay).

procedure is fair makes it more likely that those subject to its rulings will follow those rulings—even if they disagree with the outcome.[188] This is particularly salient in the criminal context, where perceptions of procedural fairness may enhance the ability to control or prevent criminal conduct.[189] A failure to maintain legitimacy and consistency may erode the law's authority and undermine the authority of criminal courts.[190]

To start, written bail justifications may enhance legitimacy by restructuring criminal proceedings—particularly those of misdemeanors and other low-level offenses. Courts handling these low-level offenses often operate with high-volume caseloads, leading to quick decisions with little stated bases.[191] Failures to render written opinions on rulings and orders gives ready ammunition to those critiquing the court's legitimacy, as it reduces judicial accountability, detracts from the growth and development of the law, and increases the likelihood of shoddy reasoning.[192] Martha Dragich raises this point in the context of the debate over whether federal courts of appeals should be expected to publish their opinions in all or most of their cases:

> Because the courts of appeals are, in over ninety-nine percent of the cases that reach them, courts of last resort, they in particular have a special obligation to oversee the development of a coherent body of law and to safeguard the legitimacy of the judiciary. These obligations far outweigh the caseload pressures that cause the courts of appeals to employ selective publication, summary disposition, and vacatur upon settlement with increasing frequency. When the courts of appeals change their opinion writing and publishing practices, they imperil the development of a coherent body of law, threaten the

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[188] *See* Tom Tyler, *Governing Pluralistic Societies*, 72 L. & CONTEMP. PROBS. 187, 187–88 (2009) (stating that justice is less linked to the outcome and more to the process that informed that outcome).

[189] *See* Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 214 (2012) ("People come to obey the law and cooperate with legal authorities because they perceive their institutions to operate fairly. In this way, perceptions of procedural fairness facilitate a kind of normative, as opposed to purely instrumental, crime control.").

[190] *See* David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1090–91 (1999) (describing how perceptions of double standards by police "corrode the law's legitimacy, particularly among minorities and the poor" and how this "impedes law enforcement" as a result).

[191] Nagrecha, Brett & Doyle, *supra* note 152, at 103.

[192] *See* Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1338–39 (2008) (arguing that written opinions rather than oral opinions are more likely to enhance the legitimacy of courts—though they may not be necessary in all circumstances); Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1483–85 (2004) (noting and developing these critiques in the context of unpublished federal court opinions); *see also* Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1254 (1984) ("The [U.S. Supreme] Court can establish its legitimacy by writing persuasive opinions that justify its conclusions.").

> legitimacy of the federal courts and their acceptance in society, and frustrate the daily work of judges and lawyers.[193]

Dragich's argument applies to low-level criminal courts as well—as these courts, too, are the court of last resort in the vast majority of cases they oversee.[194]

Modern critiques of bail frequently emphasize its disproportionate impacts—both on the poor and on communities of color.[195] Such disproportionate treatment is likely to undermine the perceived legitimacy and fairness of the criminal legal system.[196] Lauryn Gouldin notes how increased transparency in the bail process may further legitimacy and effectiveness:

> A system that is known to have so much pretextual decision-making is not one that will be viewed as legitimate by the

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[193] Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 800–01 (1995) (footnote omitted).

[194] *See* King & Heise, *supra* note 138, at 1980 (concluding that for every 10,000 misdemeanor cases, eight are appealed and one is reversed on appeal).

[195] *See, e.g.*, Hafsa S. Mansoor, *Guilty Until Proven Guilty: Effective Bail Reform as a Human Rights Imperative*, 70 DEPAUL L. REV. 15, 38–39 (2020) ("[E]vidence suggests defendants detained pretrial are incarcerated due to their poverty, rather than due to flight or public safety concerns; and existing Supreme Court jurisprudence—although theoretically promising a system of equal justice regardless of wealth status—in fact permits not only pretrial detention of the poor on cash bail, but also allows this larger system of 'cash register justice' to flourish, all of which disproportionately penalizes the poor."); Simonson, *supra* note 184, at 595 ("[H]undreds of thousands of defendants across America, disproportionately people of color, wait in local jails for dispositions of their cases, often held on $500 bail or less.") (footnote omitted); Veronikah Warms, Note, *The Cost of Injustice: How Texas's "Bail Reform" Keeps Low-Income People & People of Color Behind Bars*, 27 TEX. J. C.L. & C.R. 273, 290 (2022) ("[R]equiring the judiciary to consider criminal history and citizenship status when setting bail amounts has drawn sharp criticism from advocates, who argue that both of these provisions will disproportionately impact accused low-income people and people of color."); Thea Sebastian, Danielle Lang & Caren E. Short, *Democracy, If You Can Afford It: How Financial Conditions Are Undermining the Right to Vote*, 4 UCLA CRIM. JUST. L. REV. 79, 93 (2020) ("Over the last forty years, our jail population has grown substantially because people are too poor to afford money-bail, are serving jail time because they could not pay a financial obligation, or are swept into a misdemeanor system that disproportionately punishes crimes of poverty."); Christine S. Scott-Hayward & Sarah Ottone, *Punishing Poverty: California's Unconstitutional Bail System*, 70 STAN. L. REV. ONLINE 167, 172–73, 175, 178 (2018) (noting the author's observations of almost no consideration of defendants' ability to pay in bail-setting hearings and arguing that this may violate the Eighth and Fourteenth Amendments); Alireza Nourani-Dargiri, Note, *Guilty? Or Just Poor? Potential International Human Rights Violations in the U.S. Bail System*, 54 CASE W. RSRV. J. INT'L L. 509, 513–14 (2022) (arguing that the United States bail system "disproportionately impacts racial minorities" and results in the incarceration of innocent people "solely because they cannot pay high bail fees").

[196] *See* William J. Stuntz*, Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1826 (1998) ("The perception that the system is enforcing the norms differently with different groups is bound to have significant consequences for how those groups view the norms, and how those groups view the law."); *see also* Matt Haven, Comment, *Reaching* Batson's *Challenge Twenty-Five Years Later: Eliminating the Peremptory Challenge and Loosening the Challenge for Cause Standard*, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 97, 97–98 (2011) (noting that the racially discriminatory use of peremptory challenges harms the perceived legitimacy of the judicial system).

> community. Clarity about the purposes of the law and the intentions of system actors has immediate potential value in enhancing the perceived legitimacy of the system. Of course, transparency may also force much-needed conversations about the problematic and troubling mismatch between our intentions or purposes in the bail context, and the oppressive processes of the pretrial system.[197]

There's a lot of work to be done if courts wish to improve the perceived legitimacy of how they handle bail and pretrial release determinations. Simply committing their justifications to writing likely won't be enough to overcome the sustained criticism of the system's disproportionate impacts and related failures. Yet writing out these justifications may at least make progress toward enhanced perceived legitimacy by laying out the justifications for bail determinations and tying them to factors set forth in applicable laws and court rules. Making explicit how these bail decisions are based in these factors may dispel inferences of courts' racial and class prejudices absent this written record. Those involved in bail and pretrial release arguments may review these determinations to ensure consistency in how courts consider and review statutory factors and may call out discrepancies that arise. For even greater accountability, making these written justifications publicly accessible ensures a wider audience who may review and, if needed, critique courts' pretrial release determinations. If courts genuinely engage with these factors when preparing their justifications, there's a possibility that this focus may replace kneejerk evaluations based on implicit biases.[198] Making the courts' determinations more accessible to the parties involved in the case and, ideally, the broader public, may incentivize this more rigorous behavior.

IV. DISADVANTAGES OF WRITTEN JUSTIFICATIONS

A. *Writing Requirements Are Impractical or Impossible*

One of the most likely responses to my proposal is that written justifications for bail determinations are impractical and will pose too great a burden for criminal courts. High caseloads and the need to move people quickly through the system to avoid backlog and delays resulting in further incarceration necessitate efficient practices—even if those practices are at the expense of recording justifications for steps as important as bail and

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[197] Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. REV. 837, 893 (2016).

[198] *See* L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1169–70 (2012) ("Studies demonstrate that gathering more individuating information about people can reduce the activation of nonconscious racial stereotypes."); Kathleen Nalty, *Strategies for Confronting Unconscious Bias*, 64 FED. LAW. 26, 30 (2017) (noting that avoiding snap judgments and being attentive to one's own thought processes are strategies that might help overcome unconscious biases).

pretrial release. Written justifications take time and may lead to increased backlogs and delays in handling criminal cases.[199] This Section begins by describing instances in which courts have emphasized the impracticality of requiring bail determination justifications—written or otherwise—before arguing that the objection draws its force from unsustainable practices of overenforcement rather than any problem with the written justification proposal itself.

1. *Bail Justifications as Impractical: Some Courts' Perspective*

In *ODonnell v. Harris County*, several defendants arrested for misdemeanors brought civil rights lawsuits, alleging that Harris County, Texas' bail proceedings violated their equal protection and due process rights.[200] The court noted that Harris County's bail hearings "typically last about one to two minutes per arrestee," as up to forty-five arrestees proceed through teleconferences with the hearing officer and district attorney.[201] After finding that the plaintiffs were likely to prevail in demonstrating that Harris County's procedures insufficiently protected people from being incarcerated simply for an inability to pay,[202] the district court ordered a number of reforms aimed at preventing indigent misdemeanor defendants from being held pretrial due to their inability to make bail.[203] These included a requirement that—when requiring a defendant to pay bail—Harris County provide "a written statement by the factfinder as to the evidence relied on to find that a secured financial condition is the only reasonable way to assure the arrestee's appearance at hearings and law-abiding behavior before trial."[204]

On appeal, while the Fifth Circuit did not overrule the district court's findings of constitutional violations, it did modify the district court's requirement for written statements.[205] The Fifth Circuit noted that "[t]he sheer number of bail hearings in Harris County each year—according to the court, over 50,000 people were arrested on misdemeanor charges in 2015—is a significant factor militating against overcorrection."[206] To put it in plainer language: whatever reforms are ordered to correct the constitutional

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[199] *See* Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 522–25 (2015) (describing considerations of efficiency in the face of high caseloads as a reason to avoid committing judicial opinions and rulings to writing).

[200] *See* ODonnell v. Harris Cnty., 251 F. Supp. 3d 1052, 1060–61 (S.D. Tex. 2017) (arguing the pretrial bail and detention system violated the plaintiff's constitutional rights).

[201] *Id.* at 1092.

[202] *Id.* at 1156–57.

[203] *Id.* at 1145, 1161–65.

[204] *Id.* at 1145.

[205] *See* ODonnell v. Harris Cnty., 892 F.3d 147, 159–60 (5th Cir. 2018) (finding that the "liberty interest of the arrestees here are particularly important," but making "modifications to the district court's conclusions").

[206] *Id.* at 159.

violations, they shouldn't be too dramatic, given the need for efficiency in light of the number of defendants involved.

Out of this concern for "overcorrection," the Fifth Circuit modified the district court's ruling to the extent it required writing justifications for bail determinations.[207] Such a requirement was too burdensome:

> While we acknowledge "the provision for a written record helps to insure that [such officials], faced with possible scrutiny by state officials . . . [and] the courts . . . will act fairly," such a drastic increase in the burden imposed upon Hearing Officers will do more harm than good. We decline to hold that the Constitution requires the County to produce 50,000 written opinions per year to satisfy due process. Moreover, since the constitutional defect in the process afforded was the *automatic* imposition of pretrial detention on indigent misdemeanor arrestees, requiring magistrates to specifically enunciate their individualized, case-specific reasons for so doing is a sufficient remedy.[208]

Under the Fifth Circuit's view of things, written opinions are too much of a burden for such an extensive caseload—particularly if courts are providing enunciated reasons in some other fashion.

In *Schultz v. Alabama*, the Eleventh Circuit also emphasized concerns over procedural difficulties to reject proposed reforms to bail proceedings.[209] In finding that Cullman County, Alabama's bail hearings were sufficient to meet procedural due process requirements, the Court noted that the judges conducting the hearings were "guided by fourteen statutorily enumerated factors in making [their] decision[s] on bail."[210] Judges conducting the hearings are presented with a form listing these factors, along with a fifteenth category, "Other," in which they can "enumerate any case-specific consideration that was not adequately represented in the enumerated factors."[211]

The district court had taken issue with this approach, reasoning that "Cullman County judges do not actually make 'findings'" and instead "merely check[] a box for any of fourteen factors [they] 'considered.'"[212] "Checking boxes for factors 'considered,'" was inadequate because:

> As a matter of state law, every judge presumably considers these factors when setting a bond amount or imposing other

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[207] *Id.* at 160.

[208] *Id.* (internal citations omitted).

[209] *See* Schultz v. Alabama, 42 F.4th 1298, 1333 & n.10 (11th Cir. 2022) (finding that reforms ordered by the district court "would inject unnecessary procedural complication into the [bail] process").

[210] *Id.* at 1333.

[211] *Id.*

[212] Schultz v. State, 330 F. Supp. 3d 1344, 1372 (N.D. Ala. 2018).

> conditions for pretrial release. Aside from the "Other" check-box and the corresponding two blank lines, which a judge does not have to use, no check-box provides individualized information or suggests that the judge actually made a finding with respect to a particular factor. For example, when a judge sets secured bail and checks "[t]he age, background and family ties, relationships and circumstances of the defendant" or "the defendant's reputation, character, and health," the check communicates no individualized reason for the judge's decision, and a checked box does not indicate whether a factor worked in the defendant's favor or worked against her.[213]

For defendants who sought review of bail determinations, these forms would afford defense counsel "no information regarding the rationale for her client's bond, making the task of identifying error and challenging the bail amount unreasonably—and potentially insurmountably—difficult."[214]

The Eleventh Circuit was unconvinced. It reasoned that "most of the factors Alabama requires judges to consider refer to binary propositions that either are or are not present in the arrestee's case."[215] As for requiring judges to "make oral findings, which would require the ordering of a transcript before review, [this] would inject unnecessary procedural complication into the process."[216] In reaching this conclusion, the court referenced the Fifth Circuit's refusal to require written findings in *ODonnell*.[217]

Courts, including those willing to recognize other courts' failures in bail and pretrial release regimes, are reluctant to require those courts to justify their determinations, particularly in writing. The administrative burden is simply too much to demand. Some of these claims are doubtful given recent technological developments. For example, concerns over obtaining a transcript for review may be alleviated through advancements in voice-to-text technology, which permit highly accurate transcripts to be developed in real time.[218] While not without potential flaws, these transcripts may be employed in the time-sensitive bail review proceedings, even if official transcripts prepared by reporters are employed in other motion or appellate contexts.[219]

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[213] *Id.* at 1372–73.

[214] *Id.* at 1373.

[215] Schultz v. Alabama, 42 F.4th 1298, 1333 n.10 (11th Cir. 2022).

[216] *Id.*

[217] *Id.*

[218] *See* Keith A. Gorgos, Comment, *Lost in Transcription: Why the Video Record Is Actually Verbatim*, 57 BUFF. L. REV. 1057, 1067 (2009) (describing, as of 2009, real-time transcription technology in which computers can record voices and "create a rough-draft text file of the transcript as soon as the words are spoken").

[219] *See* Joseph A. Blass, *Observing the Effects of Automating the Judicial System with Behavioral Equivalence*, 73 S.C. L. REV. 825, 873 (2022) (discussing potential inaccuracies that could result if "court

Even if technological developments may alleviate some of the costs, the prospect of preparing dozens or hundreds of written bail justifications in busy jurisdictions remains daunting. Yet it is not apparent that the written bail requirement is to blame for this challenge. This leads to a separate question—why would requiring written bail justifications be so burdensome to courts subject to the requirement?

2. *The Source of Judicial Burden*

Courts and critics who object to written bail justifications as impractical aren't entirely incorrect. Requiring written justifications—particularly meaningful ones that grapple with factors courts are to consider when setting bail and which wrestle with the facts of each case—are going to take time. Jurisdictions adopting written justification requirements have seen notable increases in the time it takes to process cases.[220]

Yet impractical demands on those in the criminal legal system are nothing new. The system is vast—with approximately 13.2 million misdemeanors filed in 2016—three times the number of felonies filed.[221] Public defenders have long labored under unreasonably high caseloads, with accounts of yearly caseloads in the hundreds dating back to the 1970s.[222] Despite this, the system staggers on.

Why might this be? While the scope and costs of the misdemeanor system are substantial, courts bear a disproportionately low share of these costs. Through fine and fee mechanisms, courts shift the costs of financing criminal proceedings and criminal enforcement onto defendants.[223] The system keeps running at the expense of a population "that is already

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stenographers were replaced by voice-to-text transcription software," and the resulting "incomplete explanations of judges' rulings").

[220] *See* Patrick Griffin, Branden DuPont, Don Stemen, Dave Olson & Amanda Ward, *The First Year of the Pretrial Fairness Act*, LOY. CHI. CTR. FOR CRIM. JUST. (Sept. 24, 2024), https://pfa-1yr.loyolaccj.org (finding that the median length of Illinois bond hearings the authors observed increased from four to six minutes to ten to thirty minutes, partially due to judge's concern for "establish[ing] an adequate record for subsequent appellate review"); Peter Hancock, *A Year After End of Cash Bail, Early Research Shows Impact Less than Many Hoped or Feared*, CAPITOL NEWS ILL. (Sept. 13, 2024), https://capitolnewsillinois.com/news/a-year-after-end-of-cash-bail-early-research-shows-impact-less-than-many-hoped-or-feared (noting that bail hearings in certain Illinois jurisdictions have risen from a median of four minutes to a median of sixteen minutes after the adoption of bail reforms requiring, in part, written justifications for certain decisions).

[221] Megan Stevenson & Sandra Mayson*, The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 763–64 (2018). Megan Stevenson and Sandra Mayson note that even this substantial number evidences a "shrinking" misdemeanor system in which caseloads have fallen over the past decade. *Id.* at 764–65.

[222] *See* Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 469–70 (2007) (describing data showing caseloads in excess of several hundred for defenders in the 1970s and 1990s).

[223] *See* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 286 (2014) (describing how the "costs of administering the court system . . . are increasingly borne by the indigent"); *see also* Puja Upadhyay, Comment, *Health-Harming Effects of Court Fines and Fees: Modern Day Debtors' Prisons as a Public Health Threat*, 94 TEMP. L. REV. 677, 680–81 (2022) (recognizing the fee shifting nature of fines and fees and how fees frequently "bear no relation to the offense").

disproportionately poor, vulnerable, and marginalized."[224] Indeed, criminal courts are incentivized to maintain higher caseloads, as each defendant convicted represents revenue for the court "through booking fees at the time of arrest, bail administrative fees, dismissal fees, public defender application fees, court fees, disability and translation fees, jail and administrative fees, and postconviction fees."[225] Judges face little cost or risk for rulings that result in detention, though they risk "considerable adverse attention if defendants commit[] further offenses while free before trial," which "encourage[s] unaffordable bail requirements."[226]

In such a system of cost-avoidance and perverse incentives, the additional burden that written justification requirements impose upon courts may be a welcome development.[227] Courts and other government agencies that derive funds from each defendant are incentivized to process more cases, increase the harshness of fines and fees, and maximize the efficiency of this system of prosecution and conviction.[228] The written justification requirement adds an administrative cost to these practices through the additional time and effort required to prepare written reasons for bail determinations—offsetting incentives to raise caseloads and harsh penalties in the name of revenue generation.[229]

To be sure, courts are only one player in the system. One might object that those more directly responsible for the filing and pursuit of criminal charges—namely, prosecutors—are a better subject for reform efforts.[230] While this is a fair point, it risks overlooking judges' role in the process and their ability to unilaterally decrease the burdens they face at the bail and pretrial release stage by releasing more defendants on their own

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[224] Louis Fisher, *Criminal Justice User Fees and the Procedural Aspect of Equal Justice*, 133 HARV. L. REV. F. 112, 115–16 (2020).

[225] Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1381, 1404–05 (2018).

[226] Deborah L. Rhode, *Character in Criminal Justice Proceedings: Rethinking Its Role in Rules Governing Evidence, Punishment, Prosecutors, and Parole*, 45 AM. J. CRIM. L. 353, 367 (2019).

[227] *See* Ethan Lowens, *Resource Attacks on the Criminal Legal System*, 47 N.Y.U. REV. L. & SOC. CHANGE 479, 529 (2025) (encouraging "resource attacks" on institutions furthering criminal prosecutions that "force criminal system institutions to internalize the costs of their most harmful practices").

[228] *See* Ariel Jurow Kleiman, *Nonmarket Criminal Justice Fees*, 72 HASTINGS L.J. 517, 546–47 (2021) (describing the "fee-chasing behavior" exhibited by public officials involved in the criminal legal system, including increasing fees and mandatory length of deferred prosecution supervision); JADE CHOWNING, ERIN KEITH & GEOFFREY LEONARD, HIGHWAY ROBBERY: HOW METRO DETROIT COPS & COURTS STEER SEGREGATION AND DRIVE INCARCERATION 28 (2020) (describing how a court in Eastpointe, Michigan worked with local prosecutors to charge people with civil infractions in order to capture revenue).

[229] *Cf.* Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 90–91 (1986) (proposing a "due process tax" on instances of eminent domain in cases that result in certain inefficiencies or the taking of property with high subjective value, which would "discourage[e] the use of eminent domain in these . . . situations but not prohibit[] it altogether").

[230] *See* JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 127 (2017) (noting prosecutors' immense power, yet general absence in debates over criminal reform).

recognizance. Additionally, reforms that place greater costs on the courts may prompt judges to exploit their close relationships with prosecutors to urge them to alter their charging and bail practices.[231] Finally, this proposal isn't meant to preempt or substitute alternate reforms that target prosecutors, which may be pursued in parallel with the writing requirements and supplemental reforms presented here.

3. *Welcoming Disruption*

As a closing point on the issue of burden and cost, disruption to the system may be welcome in its own right. Consider Michelle Alexander's proposal that defense counsel "crash" the misdemeanor system by refusing to plead guilty and demanding their clients' right to trial.[232] By demanding the recognition of their constitutional rights and sharply increasing the number of criminal trials, prosecutors, judges, and jails would be unable to handle the wave of cases that would otherwise be resolved through quick and simple pleas—resulting in "chaos."[233]

This chaos, Alexander argues, "would force mass incarceration to the top of the agenda for politicians and policy makers, leaving them only two viable options: sharply scale back the number of criminal cases filed (for drug possession, for example) or amend the Constitution (or eviscerate it by judicial 'emergency' fiat)."[234] Others elaborate on Alexander's proposal, suggesting that defense counsel disrupt otherwise routine and expansive procedures of conviction and incarceration by demanding trials in "'petty,' quality-of-life misdemeanors that flood the system and result in disproportionately harsh, permanent criminal records."[235]

Written justification requirements may impose increased burdens on courts handling criminal cases. Disruption may result in the form of substantial backlogs and the inability to process the sheer number of cases that courts typically handle. In response, courts and prosecutors may face no

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[231] *See* Roberta K. Flowers, *An Unholy Alliance: The Ex Parte Relationship Between the Judge and the Prosecutor*, 79 NEB. L. REV. 251, 265–66 (2000) (describing the "interdependent and cooperative relationship" between judges and prosecutors); Edward Adams, *Uneven Scales: How the Symbiotic Relationship Between Prosecutors and Judges Results in Unfair Criminal Proceedings*, 43 LAW & INEQ. 105, 139–44 (2025) (describing and critiquing the close relationship between the prosecutor and the judge, including the "[j]udicial [f]avors" that judges may bestow on prosecutors appearing before them at cases plea and motion stages).

[232] Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES (March 10, 2012), https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html.

[233] *Id.*

[234] *Id.*

[235] *See* Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1097 (2013) (positing the litigation of misdemeanors as a palliative to the "current, harmful" system "depriving individuals charged with misdemeanors of effective means of fighting the charges against them"); *see also* Andrew Manuel Crespo, *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*, 90 FORDHAM L. REV. 1999, 2011 (2022) (suggesting that a collective plea strike by defendants might "start with low-level misdemeanor cases, which are both the largest in number and the most likely to garner public sympathy").

other choice but to reduce the number of cases prosecuted or to substantially alter their bail and pretrial release determinations to permit release on one's own recognizance in more cases.[236] Doing so may be a step forward in reducing mass incarceration practices, and the accompanying harms and burdens on society these practices entail. Disruption—frequently the primary argument against written justification requirements—may end up being one of its most appealing features.

Finally, throughout this discussion of costs and who bears the burden of processing criminal cases, it should not be ignored that the present system has its own costs. These costs are monetary. Jails, and the salaries of those who run and maintain them, are not free.[237] Costs are also nonmonetary, in the form of impositions on individual liberty absent findings of guilt and the ripple effects of such incarceration felt by the families and dependents of those detained pending trial.[238] What might appear to be additional costs to courts and counsel may be more accurately framed as a shift in the allocation of existing costs.

B. *Delays in Bail Determinations*

While the burden of written justification requirements may originate in overloaded criminal dockets, courts' responses to these burdens may manifest in ways that perpetuate the harms the reform is supposed to address. One such possibility is that courts attempting to comply with written justification requirements will take too long to do so, resulting in delayed proceedings and lengthier incarceration periods for defendants awaiting rulings.

Delay is a real concern. Pamela Metzger and Janet Hoeffel warn that thousands of defendants "languish behind bars for days, weeks, or months without ever seeing a judge or an attorney."[239] Some states require initial appearances within twenty-four or forty-eight hours, but "many states permit lengthier detentions without judicial process."[240] Courts in rural locations may not convene every day, which leads to delays in getting before

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[236] Roberts, *supra* note 235, at 1130–31 (arguing that if defense counsel succeeded in crashing the misdemeanor system by demanding trials of low-level offenses, prosecutors might reduce the volume of cases they file, while police "would be encouraged to maintain order without making unnecessary arrests").

[237] *See* Aaron Littman, *Jails, Sheriffs, and Carceral Policymaking*, 74 VAND. L. REV. 861, 884–93 (2021) (describing the significant cost of jail construction and common means of financing such projects).

[238] *See* RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 58 (2019) (detailing the costs to liberty and public safety that result from pretrial incarceration); SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM 88–89 (2018) (describing costs to defendants and their families).

[239] Pamela R. Metzger & Janet C. Hoeffel, *Criminal (Dis)Appearance*, 88 GEO. WASH. L. REV. 392, 394 (2020).

[240] *Id.* at 402.

a judge or magistrate to have one's bail determined or reviewed.[241] There is little these defendants can do, as "[b]y definition, an arrestee's access to court is blocked."[242] One may worry that requiring written bail justifications might exacerbate these delays. After all, as discussed above, the steps required to write out justifications for bail determinations is a more involved, time-intensive process than issuing a quick oral ruling.[243] This time-intensiveness may backfire to the detriment of all defendants who are forced to remain in a detention limbo until the court is able to issue its ruling. Additionally, permitting courts to issue belated written justifications may result in these justifications amounting to little more than post-hoc justifications for determinations already reached.[244]

A possible response to this objection is to propose that defendants file challenges or appeals should their bail proceedings be delayed. At first, this seems appealing. In *County of Riverside v. McLaughlin*, the United States Supreme Court held that people cannot be held without an independent probable cause determination for more than forty-eight hours.[245] Delays beyond that time require the government to demonstrate "a bona fide emergency or other extraordinary circumstance," not including the time needed to "consolidate pretrial proceedings" or "intervening weekends."[246]

Despite suggestions by some commentators,[247] however, the Court did not explicitly rule that bail determinations must occur within forty-eight hours, though it did suggest that probable cause determinations may be combined with those hearings so long as "every effort [is] made to expedite the combined proceedings."[248] And the Court rejected the position of four dissenting Justices who argued that probable cause determinations were required "immediately upon completion of the 'administrative steps incident

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[241] *See, e.g.*, Margaret Elizabeth Sparks, Note, *Bailing on Bail: The Unconstitutionality of Fixed, Monetary Bail Systems and Their Continued Use Throughout the United States*, 52 GA. L. REV. 983, 1003 & n.127 (2018) (describing delays of up to seven days before an arrestee's first court appearance resulting from the court in Calhoun, Georgia convening once per week).

[242] Metzger & Hoeffel, *supra* note 239, at 412.

[243] *See supra* Part IV.A.

[244] *See* Jerome Frank, *What Courts Do in Fact*, 26 ILL. L. REV. 645, 653 (1932) ("[T]alks with candid judges have begun to disclose that, whatever is said in opinions, the judge often arrives at his decision before he tries to explain it.")

[245] Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

[246] *Id.* at 57.

[247] *See, e.g.*, Jordan Gross, *Devil Take the Hindmost: Reform Considerations for States with a Constitutional Right to Bail*, 52 AKRON L. REV. 1043, 1096 n.225 (2018) (stating that "*McLaughlin* explicitly included bail hearings in the determinations that must be made within [forty-eight] hours").

[248] *McLaughlin*, 500 U.S. at 58.

to arrest.'"[249] Accordingly, defendants may be held for up to forty-eight hours should the need to hold the bail hearing require such a delay.[250]

Challenges to expedite bail justifications are unlikely to result in much success. First, if bail determinations are delayed because of case backlogs, these same backlogs would likely affect the timing of hearings on defendants' challenges. If the goal is for defendants to make it out of custody in a timely manner, this further postponement defeats that purpose. Second, courts may circumvent these challenges by simply rendering them moot by prioritizing bail determinations for those defendants who take the time and effort to lodge these challenges. Courts may allow backlogs to persist through triage—prioritizing any defendants who take the effort to lodge a challenge.[251] Third, there is a danger that courts or prosecutors might retaliate against defendants who are bold enough to file such challenges, similar to "trial tax" practices of imposing harsher punishments on defendants who choose to exercise their constitutional right to trial.[252]

Even if a challenge were to be heard in a meaningful time without retaliation, the chances of any success are low. Courts routinely toss aside claims arising from delayed bail hearings on a variety of grounds. Courts might strike down claims of unreasonable delay where statutes permit such a delay.[253] Failure to immediately object to a delay may result in waiver of such a claim in future proceedings.[254] Claims of prejudice resulting from

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[249] *See id.* at 59 (Marshall, J., dissenting) (quoting Gerstein v. Pugh, 420 U.S. 103, 114 (1975)); *id.* at 63 (Scalia, J., dissenting) (quoting *Gerstein*, 420 U.S. at 114).

[250] *See* Daniel A. Horwitz, *The First 48: Ending the Use of Categorically Unconstitutional Investigative Holds in Violation of* County of Riverside v. McLaughlin, 45 U. MEMPHIS L. REV. 519, 536–37 (2015) (describing forty-eight-hour delay allowed under *McLaughlin* following valid arrest for government's bail hearing preparation).

[251] *See* State *ex rel.* Missouri Pub. Def. Comm'n v. Waters, 370 S.W.3d 592, 611 (Mo. 2012) ("[A] trial court can use its inherent authority over its docket to 'triage' cases so that those alleging the most serious offenses, those in which defendants are unable to seek or obtain bail, and those that for other reasons need to be given priority in their resolution *are* given priority in appointing the public defender and scheduling trials, even if it means that other categories of cases are continued or delayed, either formally or effectively, as a result of the failure to appoint counsel for those unable to afford private counsel.") (emphasis original); *see also* Annette J. Scieszinski, *A Matter of Trust: A Judge's Fiduciary Responsibility*, 49 JUDGES' J. 19, 20 (2010) ("Pressures inherent in a judge handling too many cases in too little time tend to breed an attitude of expedience leading some judges to eliminate or shortchange consideration of unique and material case issues. Triage-inspired practices on busy days can infect an entire approach to a docket. Impose a standard: it is never okay to pretend a judge is making an informed decision about the merits of a case.").

[252] *See* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1156–58 (2008) (describing the penalties faced by criminal defendants who proceed to trial rather than plead out); Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491, 535–36 (2008) (same).

[253] *See, e.g.*, State v. Durham, No. 2021-160, 2021 WL 3509562, at *2 (Vt. Aug. 10, 2021) (dismissing a claim of delay in bail hearing because the statutory deadline of sixty days for such a hearing had not yet passed).

[254] *See* State v. Bickel, 698 A.2d 243, 244 (Vt. 1997) (ruling that defendant's failure to object to a week-long delay in bail determination at the arraignment stage precluded argument on appeal that the delay was unreasonable).

delayed bail hearings may be deemed waived if defendants don't immediately challenge the hearing or request the exercise of rights that the delay might frustrate.[255] Magistrate decisions to delay bail determinations may be afforded deference or be reviewed using malleable standards.[256] Courts find ways around constitutional challenges to delayed bail determinations.[257]

Instead, a better response to this objection is to ensure that written justification requirements are supplemented with both deadlines for those justifications, along with automatic remedies for what will occur should those deadlines be met. For example, a rule requiring written justifications for bail determinations may require that the written justification be issued no later than forty-eight hours after the arrest.[258] Should the court issue no such justification by that deadline, the defendant shall be automatically released upon his or her own recognizance. These supplemental provisions would clarify the need for expeditious rulings, set a clear deadline for the determination, and mandate release without the need for further argument or motion by the defendant, should that deadline be missed.

There are, of course, alternative provisions that might similarly accomplish these goals. The time required for issuance of the justifications, for instance, may be shortened given the burden of remaining in custody without a ruling on release.[259] Dauphin County, Pennsylvania, for instance, requires that written justifications be issued contemporaneous with rulings on bail and pretrial release conditions, which would likely avoid concerns

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[255] *See* Commonwealth v. Falco, 682 N.E.2d 900, 902 (Mass. App. Ct. 1997) (ruling that magistrate's decision to delay defendant's bail hearing did not violate his right to independent medical examination because defendant did not request such an examination).

[256] *See* Commonwealth v. Finelli, 666 N.E.2d 144, 147 (Mass. 1996) (ruling that bail hearing was held with "reasonable promptness" when magistrate delayed bail hearing based on police report that defendant was intoxicated and provided a breathalyzer reading).

[257] *See* Mitchell v. Doherty, 530 F. Supp. 3d 744, 757 (N.D. Ill. 2021) (finding that Supreme Court precedent requiring probable cause determinations within forty-eight hours did not apply to bail determinations); Commonwealth v. Chistolini, 665 N.E.2d 994, 997–98 (Mass. 1996) (rejecting argument that delayed bail hearing interfered with defendant's right to obtain an independent medical examination, concluding that due process challenge required finding of bad-faith police conduct to succeed); Farrow v. Lipetzky, No. 12-CV-06495-JCS, 2013 WL 1915700, at *22 (N.D. Cal. May 8, 2013) (dismissing claim that five to thirteen day delay in bail hearing violated the Fourteenth Amendment and stating that plaintiffs failed to cite authority demonstrating such a delay was unconstitutional).

[258] *See, e.g.*, HARRIS CNTY., TEX., CRIM. RULE 4.3.1 (2025) (requiring bail review hearings by the next business day following the booking date); *see also* 725 ILL. COMP. STAT. ANN. 5/110-5(e) (West 2025) (requiring hearings for those ordered released with pretrial conditions who remain detained forty-eight hours after the initial release order).

[259] *See, e.g.*, KY. R. CRIM. P. 4.38 (setting a mandatory review of a defendant's release conditions if defendants are detained within 24 hours of the initial imposition of those conditions, and requiring the pretrial release officer to inform the judge of defendants who qualify for this review).

about undue delay.[260] These clear, strict rules may push back against tendencies toward delay that alternate statutory schemes may enable.[261]

At the same time, rules requiring timely issuance of written bail justifications may prompt a separate problem: courts issuing determinations that are overly brief, boilerplate, or inattentive to the circumstances of individual defendants. I turn to this concern next.

C. *Boilerplate and Automation: The Persistence of Assembly-Line-Style Proceedings*

Requiring courts to issue written justifications for bail determinations shortly after conducting a bail hearing may prompt courts to work around the requirement with overly brief or boilerplate justifications. A rule requiring a "written" justification, without further elaboration or definition, may be complied with by courts that simply write a conclusory phrase in their order relating to statutory bail considerations and nothing else. For example, courts might state, "Defendant poses a flight risk," or "Defendant poses a danger to the community," or "Criminal history."[262] Alternatively, courts might use boilerplate language that purports to comply with requisite laws and bail considerations—which requires no effort to copy and paste into rulings applicable to hundreds of defendants. For example, courts might state, "After careful consideration of the factors required by [the relevant bail statute], I have determined that bail is required in the amount of $1,000."

This concern isn't hypothetical. In Kentucky, legislation enacted in 2011 required judges to consider pretrial risk assessments provided to them during the bail determination process.[263] Certain defendants were to be presumptively released on their own recognizance, and those "charged with certain misdemeanors and given money bail were presumed to have the amount of their bail limited by the maximum fine and costs."[264] In instances where judges overrode these presumptions "upon a subjective finding of dangerousness or risk of flight, [they] would have to provide written documentation supporting [their] decision[s]."[265] Judges, however, would "simply write or say 'flight risk' or 'danger'" in their written explanations—

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[260] *See* DAUPHIN CNTY., PA., CRIM. RULE 523(1) (2025) (mandating that any monetary bail decision or denial of bail be supported by written reasons provided at the time of the decision).

[261] *See, e.g.*, Fla. 9th Jud. Cir., Admin. Order No. 07-98-47-20 (Jan. 2, 2024) (requiring that applications to set or modify bail be heard "promptly" and that courts hold these hearings within three business days) (internal quotation marks omitted).

[262] *See* Alysia Santo, *Kentucky's Protracted Struggle to Get Rid of Bail*, THE MARSHALL PROJECT (Nov. 12, 2015, 7:15 AM), https://www.themarshallproject.org/2015/11/12/kentucky-s-protracted-struggle-to-get-rid-of-bail (describing the use of statewide risk assessments and judge-considered risk scores in setting bail).

[263] Robert Veldman, *Pretrial Detention in Kentucky: An Analysis of the Impact of House Bill 463 During the First Two Years of Its Implementation*, 102 KY. L.J. 777, 783 (2014).

[264] *Id.*

[265] *Id.* at 784.

hardly a meaningful justification for their departure from the statutory presumptions.[266]

Tendencies toward boilerplate writings plague criminal proceedings beyond the bail and pretrial release context. Criminal complaints often consist of conclusory statements alleging violations of the statutory provision, with little in the way of fact beyond the defendant's name and, perhaps, the location of the alleged offense.[267] Boilerplate language occurs in plea agreements as well,[268] from requiring admissions of all other crimes,[269] to waivers of constitutional claims arising from failures to disclose exculpatory evidence.[270] Standardized language regarding conclusions based on "training and experience" perpetuate police officers' testimony[271] and warrants.[272] Courts have attempted to avoid reversal on appeal by giving defendants "broad, nonspecific, boilerplate immigration warnings" in criminal cases.[273] And parole boards have employed boilerplate language to routinely deny probation to people convicted of certain crimes despite requirements that they consider a variety of factors in reaching their determinations.[274]

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[266] *See* Alysia Santo, *Kentucky's Protracted Struggle to Get Rid of Bail*, THE MARSHALL PROJECT (Nov. 12, 2015, 7:15 AM), https://www.themarshallproject.org/2015/11/12/kentucky-s-protracted-struggle-to-get-rid-of-bail (noting that judges sometimes rely on bare assertions rather than substantive explanations when deviating from risk assessment results).

[267] *See* M. Chris Fabricant, *Rethinking Criminal Defense Clinics in "Zero-Tolerance" Policing Regimes*, 36 N.Y.U. REV. L. & SOC. CHANGE 351, 363 (2012) ("In New York City, the factual allegations contained within the accusatory instruments charging criminal trespass are essentially boilerplates, copied and reused over and over, with only defendants' names and building locations changed.").

[268] *See* Susan R. Klein, Aleza S. Remis & Donna Lee Elm, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 75 (2015) ("Plea agreements are boilerplate, and, for the most part, defendants cannot negotiate individual terms, or else they run the risk of rejecting the deal and going to trial.").

[269] *See* Tom Galbraith, *Murder in the Temple, Coercion in the Constabulary*, ARIZ. ATT'Y., Oct. 2010, at 38 (noting that Garcia's plea agreement required him to admit all other crimes he had committed as a condition of validity).

[270] *See* David M. Jaros & Adam S. Zimmerman, *Judging Aggregate Settlement*, 94 WASH. U. L. REV. 545, 568 (2017) ("In the Western District of Texas, federal prosecutors have standardized their plea agreements to include boilerplate language requiring every defendant, regardless of the nature of the crime or the circumstances of the charges, to waive any and all constitutional claims that might arise from a failure of the prosecution to satisfy their obligation to disclose exculpatory evidence to the defense.").

[271] *See* Caleb Mason, *Jay-Z's* 99 Problems*, Verse 2: A Close Reading with Fourth Amendment Guidance for Cops and Perps*, 56 ST. LOUIS U. L.J. 567, 577–78 (2012) (noting the use of "training and experience" boilerplate language in establishing reasonable suspicion for searches and seizures).

[272] *See* Haley Amster & Brett Diehl, *Against Geofences*, 74 STAN. L. REV. 385, 421 (2022) (describing boilerplate language regarding officer training and experience concerning the use of cell phones in the commission of crimes).

[273] Abril Valdes Siwert & Mani Knavajian, *Banishment from the Kingdom: Criminal Pleas, Convictions, and Immigration*, 102 MICH. BAR J. 24, 25 (2023).

[274] *See* Barbara R. Levine, *Too Many Prisoners: Undoing the Legacy of Getting Too Tough*, 96 MICH. BAR J. 32, 35 (2017) (explaining that despite guidelines favoring release in high-probability cases, the parole board often relies on generic justifications tied to the original crime to deny parole).

Courts and other actors involved in the criminal legal system are well-versed in avoiding careful thought and argument by using canned phrasing. So, the question becomes: is there anything that can be done about this to ensure meaningful compliance with written bail requirements?

Fortunately, there are several ways this concern might be headed off. One approach is the meaningful consideration of written justifications in bail review hearings. Many jurisdictions permit review of prior bail determinations, including review by motion or automatic review proceedings.[275] In jurisdictions that adopt a written justification requirement for bail determinations, defendants seeking review of these initial determinations will have a written record of the basis for their release conditions and bail amounts. Reviewing courts should consider whether these justifications are boilerplate or shoddy.

Alternatively, and more dramatically, the reviewing court may be required to consider only the reasons set forth in the initial bail determination in deciding whether the release conditions are justified. If that record of the justification is too brief or boilerplate, the reviewing court will be required to conclude that there is an insufficient basis for the conditions of release and order the defendant released on his or her own recognizance. Courts that find themselves overruled frequently on review may then be incentivized to include more specific facts and argumentation in their justifications to avoid frequent overruling.[276]

Alternatively, or additionally, written justification requirements may include built-in supplemental requirements that courts making bail determinations include a certain level of detail in their rulings. For example, the rule requiring written justifications may also require courts to engage

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[275] *See* 18 U.S.C. § 3145(b) (2025) (permitting review of detention orders issued by magistrate judges and certain other courts, and requiring that the motion be determined "promptly"); ALASKA STAT. ANN. § 12.30.006(c) (West 2025) (entitling defendants who are unable to meet their release conditions to a bail review hearing within forty-eight hours of the initial setting of those conditions); VT. STAT. ANN. tit. 13, § 7554(d) (West 2025) (entitling people detained pretrial to a review of release conditions within forty-eight hours of their application for review, and entitling people for whom release conditions are imposed to review of those conditions within five business days of their application); CLARK CNTY., WASH., SUPER. CT. LOC. RULE 3.2.1 (2025) (permitting review of previously set bail by the arraigning court "in the event that new information is made known to the court, or in the event that material circumstances have changed since the original bail setting," and permitting reconsideration of bail by written motion under other circumstances).

[276] *See* RICHARD A. POSNER, HOW JUDGES THINK 141 (2008) (suggesting that judges may be embarrassed if their rulings are frequently reversed); Brian Galle, *The Justice of Administration: Judicial Responses to Executive Claims of Independent Authority to Interpret the Constitution*, 33 FLA. ST. U. L. REV. 157, 206 (2005) (suggesting that superior courts can "use shame to make lower courts' desire to avoid reversal more intense—for example, by not only reversing but also castigating the lower court for being unprincipled or failing to follow clear precedent."). *But see* Brent T. White, *Putting Aside the Rule of Law Myth: Corruption and the Case for Juries in Emerging Democracies*, 43 CORNELL INT'L L.J. 307, 341 (2010) (noting, in the context of federal district courts, that "approximately 80% of appealed district court decisions are overturned, and there is little shame in reversal"—though also noting that "only 3% of district court cases are appealed").

with all relevant factors that state law identifies for consideration in bail determinations, or that the court refer to the specific facts of each individual case when setting forth its rulings.

Jurisdictions can draw on multiple inspirations when setting forth these supplemental detail requirements. Many bail statutes require "individualized" determinations of bail—though the use of this term, without more, may be unlikely to prompt meaningful review of the facts of a specific case.[277] But there are ways to beef up the requirement. Illinois, for example, requires the individualization of pretrial release determinations by providing that:

> Decisions regarding release, conditions of release, and detention prior to trial must be individualized, and no single factor or standard may be used exclusively to order detention. Risk assessment tools may not be used as the sole basis to deny pretrial release.[278]

Other areas of law may guide requirements for detailed bail justifications. Courts may draw inspiration from federal law relating to criminal sentencing, which requires courts to state their reasons for imposing particular sentences, and to "state[] with specificity," and in writing their reasons for the departure.[279] Some federal appellate courts take a tough stance on this requirement, holding that "a district court's sentences are procedurally unreasonable if sentencing judges' consideration of Section 3553(a) factors and reasoning for imposing the sentence are unclear from the context and record."[280] Other courts, however, are less stringent and uphold "conclusory sentencing opinions."[281]

Alternatively, states may adopt measures requiring or encouraging courts to complete checklists confirming which factors go into their release determinations. In October 2025, Oklahoma's Court of Criminal Appeals approved an optional form for state district court judges "as a form,

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[277] *See, e.g.*, OKLA. STAT. ANN. tit. 20, § 55 (West 2025) ("It is the intent of the Oklahoma Legislature that a criminal defendant shall be entitled to an individualized determination of bail as guaranteed by the Oklahoma Constitution."); WASH. REV. CODE ANN. § 10.19.055 (West 2025) ("Bail for the release of a person arrested and detained for a class A or B felony offense must be determined on an individualized basis by a judicial officer.").

[278] 725 ILL. COMP. STAT. ANN. 5/110-6.1(f)(7) (West 2025).

[279] 18 U.S.C. § 3553(c)(2) (2025).

[280] Sherod Thaxton, *Determining "Reasonableness" Without a Reason? Federal Appellate Review Post*-Rita v. United States, 75 U. CHI. L. REV. 1885, 1898 (2008).

[281] *Id.*; *see also* Steven L. Chanenson, *Write On!*, 115 YALE L.J. POCKET PART 146, 146–47 (2006) (critiquing the level of detail typically contained in district courts' sentencing opinions); Rosemary Barkett, *Judicial Discretion and Judicious Deliberation*, 59 FLA. L. REV. 905, 924 n.59 (2007) (noting the rarity of departures from sentencing guidelines and that the requirement for specific written justifications applies only to the basis for departing from the guidelines rather than to justifying the overall sentence imposed).

checklist, or guide" for initial bail determinations.[282] This "Court's Findings for Purposes of Initial Bail Determination" form contains a checklist of factors that the court considered, which include "Apparent likelihood of conviction," "Is unemployed," "Receives public benefits," "Threat to self or others/safety risk," "Has financial resources available to post bond imposed," and "Does not have financial resources available to post bond imposed," among others.[283] The form also includes a section for the court to check whether or not the defendant poses a flight risk and whether or not the defendant poses a safety risk.[284]

A checklist like this is a step in the direction of the reforms I discuss. Adopting a form like that approved by the Oklahoma Court of Criminal Appeals may remind courts of the variety of factors they must consider when imposing bail.[285] Should courts adopt the form, its repeated use may also create a useful record for auditing courts' pretrial release behavior, including information on what amounts of bail are imposed for what offenses, how often courts are able to make a determination of a defendant's ability to pay, whether and how much bail is imposed in instances where a defendant cannot pay, and whether courts are consistent in setting bail in situations involving similar factors. This final point may be of particular importance in Oklahoma—where bail amounts for similar offenses may vary widely across jurisdictions.[286] Even so, a checklist like Oklahoma's does not require the work and deliberation required for the court to actively list out the basis for its determinations, and therefore may be less effective than a writing

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[282] *See* Notification of New Form for Purposes of Initial Bail, No. CCAD-2025-3 (Okla. Crim. App. Oct. 14, 2025), https://okcourtsandmore.org/wp-content/uploads/2025/10/NOTIFICATION-OF-NEW-FORM-FOR-PURPOSES-OF-INITIAL-BAIL.pdf (announcing the approval of the "Court's Findings for Purposes of Initial Bail Determination" form).

[283] *Id.*; *see also* Okla. Dist. Ct., Court's Findings for Purposes of Initial Bail Determination (October 2025), https://www.oscn.net/datafiles/forms/okcca/initial-bail-determination-form.pdf (including the same substance, with alternate formatting so that the document fits on a single page).

[284] Okla. Dist. Ct., Court's Findings for Purposes of Initial Bail Determination (October 2025), https://www.oscn.net/datafiles/forms/okcca/initial-bail-determination-form.pdf.

[285] Oklahoma requires the consideration of eleven enumerated factors, including the defendant's history of violent actions, their mental health, whether they pose a threat to another person, and other factors. OKLA. STAT. ANN. tit. 22, § 1105(B)(1)–(11) (West 2025). Notably, the statute does not list the defendant's financial condition and ability to make bail, employment status, or ties to the community, all of which are included in the recently approved checklist. *Compare* § 1105(B)(1)–(11) (West), *with* Okla. Dist. Ct., Court's Findings for Purposes of Initial Bail Determination, https://www.oscn.net/datafiles/forms/okcca/initial-bail-determination-form.pdf (listing additional factors absent from the statute).

[286] *See* Cameron Pipe, *Cash Bail Doesn't Keep Oklahoma Safe. It Just Keeps People Down.*, OKLAHOMA VOICE (July 3, 2025, 5:30 AM), https://oklahomavoice.com/2025/07/03/cash-bail-doesnt-keep-oklahoma-safe-it-just-keeps-people-down ("In counties across Oklahoma, pretrial detention decisions are made based not on risk but on resources, and depending on your county, two people charged with the same offense can have vastly different outcomes. Nonviolent felony bond amounts ranged from $5,000 in Rogers County to $10,000 in Logan, Ellis, and Pushmataha counties.").

requirement at achieving goals of reflective adjudication of bail proceedings and awareness of the stakes and complexity of these determinations.[287]

Rules governing the allegation of fraud claims in the civil context may also be instructive. The Federal Rules of Civil Procedure require that those alleging fraud or mistake to "state with particularity the circumstances constituting fraud or mistake."[288] Other states follow suit.[289] California's case law on the subject, which holds that "general and conclusory allegations do not suffice" for proving fraud claims, may be worth incorporating into written justifications for bail determination. A similar requirement that "general and conclusory allegations do not suffice," particularly when coupled with a robust and timely review process, may counter the temptation of courts to resort to boilerplate rulings on issues of bail.[290]

In addition to all of this, rules or statutes requiring auditing and review of pretrial release decisions may prevent boilerplate opinions and other forms of noncompliance or abuse of the bail determination process. Several states already have laws in place requiring the reporting of information regarding bail and pretrial release patterns. Hawaii, for example, requires that its Criminal Justice Research Institute "maintain a centralized statewide criminal pretrial justice data reporting and collection system," and identifies information regarding bail amounts, bail reports, and bail hearings as information that may be "required for a robust assessment of criminal pretrial justice matters."[291] Hawaii further requires its Department of Corrections and Rehabilitation to "develop key performance indicators," including indicators related to the number of people held on bail, bail amounts, and "the average amount of time required to complete and verify pretrial risk assessment[s]".[292] Other states require the reporting and collection of information related to bail determinations and related data.[293]

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[287] *See supra* Part IV.C (discussing the challenges presented by the requirements in Oklahoma's checklist).

[288] FED. R. CIV. P. 9(b).

[289] *See e.g.*, Wolford v. Household Finance Corp., 435 N.E.2d 528, 530 (Ill. App. Ct. 1982) ("To properly allege a cause of action for fraud, the pleadings must contain specific allegations of facts from which fraud is the necessary or probable inference."); Dworman v. Lee, 441 N.Y.S.2d 90, 91 (N.Y. App. Div. 1981) (ruling that "conclusory allegations of fraud" are insufficient to transform a complaint alleging negligent conduct into one alleging fraud); Campbell v. Campbell, 124 S.E.2d 345, 353 (W. Va. 1962) ("This Court has consistently held in many cases that fraud is never presumed and when alleged it must be established by clear and distinct proof.").

[290] *See* Lazar v. Superior Ct., 909 P.2d 981, 989 (Cal. 1996) ("In California, fraud must be pled specifically; general and conclusory allegations do not suffice.").

[291] *See* HAW. REV. STAT. ANN. § 614-3(a), (b)(3) (West 2025) (establishing a statewide pretrial justice data system and obligating the institute to locate deficiencies in current data collection).

[292] *See* HAW. REV. STAT. ANN. § 353H-8(b) (West 2025) (describing key performance indicators the department must track).

[293] *See, e.g.*, ARK. CODE ANN. § 16-84-118 (West 2025) (requiring the compilation and submission of data on bail amounts, length of pretrial detention for defendants, and bail modifications, among other data); FLA. STAT. ANN. § 900.05(3)(a)(14) (West 2025) (requiring the collection of data related to pretrial

Rules and statutes that facilitate the review and auditing of bail and pretrial release determinations are helpful whatever the regime, as they lay the groundwork for reviewing pretrial release practices and evaluating whether they are functioning properly.[294] In those jurisdictions that adopt written justification requirements, auditing regimes should be put in place to evaluate courts' bail justifications as well. Ongoing review helps ensure that courts are engaging in good faith efforts to justify their bail determinations and may help catch instances of repeated language and phrasing that may be indicative of boilerplate. And the written justification reform enhances the effectiveness of ongoing auditing by creating far more of a written record for those reviewing bail determination practices to consider when gauging the system's effectiveness and impact.

D. *Danger to the Public*

Finally, some may object that a requirement that bail determinations be made in writing may result in decreased public safety, especially if it results in the release of additional defendants. Incarcerating defendants pending trial effectively guarantees that they won't commit crimes that harm the broader public and therefore may be appealing to those seeking to control or reduce crime.[295] More specifically, critics may object that increasing the costs of imposing bail and pretrial release conditions may lead courts to release truly dangerous individuals who might have otherwise been detained pending trial, particularly in instances where high volumes of cases make it impractical for the court to issue written justifications.

My treatment of this objection is, admittedly, brief. Public safety concerns over heightened rates of pretrial release may be issued against nearly any bail reform and are not necessarily unique to the writing and review proposals I raise here.[296] The relationship between broader public safety and criminal procedure and how other societal factors might impact

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release determinations—including "any monetary and nonmonetary conditions of release," as well as information on subsequent modifications and whether and how the bail was posted).

[294] *See* Jonathan Simon, *Prisoners of Myth*, 56 NEW ENG. L. REV. 23, 39 (2021) ("[S]erious efforts to audit the racial justice impact of new, algorithm-based pretrial release mechanisms should be considered an essential component of 'bail' reform."); Shima Baradaran Baughman, *Eliminating Pretrial Detention*, 104 B.U. L. REV. 1669, 1698 (2024) ("Maryland requires a pretrial risk assessment audit every five years, which is a prudent approach to tracking the effects of bail reforms.").

[295] *See* FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME 156–57 (1995) (describing the constraining effect of incapacitation, both in the treatment of suspected and convicted criminal defendants, including the justification that restraint "controls rather than merely influences the behavior of potential offenders," by ensuring that they "cannot commit crimes even if they want to") (emphasis omitted).

[296] *See, e.g.*, Jule Pattison-Gordon, *Is 'Cashless Bail' a Public Safety Risk?*, GOVERNING (Sept. 15, 2025), https://www.governing.com/policy/is-cashless-bail-a-public-safety-risk (summarizing debates over cash bail, and noting that defenders of cash bail "say that it's a valuable tool for judges to protect the public and ensure people show up for court," and that an inability to set bail means "they too often have to release dangerous people who go on to reoffend").

this relationship is a complex question that cannot be addressed in full here. Still, some attention to the objection is warranted.

To start, it is not at all apparent that maintaining high rates of pretrial incarceration benefit public safety. Indeed, aggressive pretrial incarceration practices may exacerbate crime due to the disruptive effects that pretrial incarceration has on defendants' family relationships and employment.[297] Additionally, it is unclear whether bail reforms that increase release rates impact crime rates. In the early wake of the consent order issued following *Odonnell v. Harris County*, rates of re-arrest declined. While those violations that continued to occur were "more severe," this development "mirror[ed] broader national trends" of heightened violent crime occurring during the COVID-19 pandemic—raising doubts over whether bail reform was to blame.[298]

A written bail requirement is also unlikely to impact the cases that those concerned with public safety tend to have in mind when making their objections. Serious, violent offenses that likely raise the most public safety concern tend to be treated with greater thoroughness than lower-level offenses, including heightened attention to procedural safeguards and requirements.[299] Additionally, the severity of the charged offense is frequently an important factor to consider in setting bail, meaning that writing bail will be a less burdensome task for courts in more severe cases.[300] Written justifications in lower level cases, however, will likely be harder to write, as courts will be unable to pin their determinations to the crime's severity. Accordingly, requiring written bail reforms accounts for these critics' concerns by having more of a bite in cases that aren't violent or involve significant criminal penalties.

To be sure, even those released for low-level offenses may go on to cause harm. Rare, high-profile instances of these occurrences continue to fuel calls for harsher punishment and pretrial detention schemes.[301] Yet concern over these instances does not warrant abandoning attempts at reform. Those who are able to pay bail may well go on to commit further offenses while pending trial—diluting the force that public-safety-oriented critics' arguments hold against reforms targeting those unable to pay. More fundamentally, critics concerned with public safety are only considering a

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[297] *See* Brandon L. Garrett, Sandra Guerra Thompson, Dottie Carmichael, David Shi & Songman Kang, *Liberty, Safety, and Misdemeanor Bail*, 76 FLA. L. REV. 321, 396 (2024) (arguing that pretrial detention disrupts stabilizing relationships and increases downstream criminal justice harms).

[298] *Id.* at 397–98.

[299] *See* ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 7 (2018) (describing how criminal defendants with wealth and resources occupy the top of the pyramid and are able to get enhanced attention for serious and non-serious offenses alike).

[300] Curtis E.A. Karnow, *Setting Bail for Public Safety*, 13 BERKELEY J. CRIM. L. 1, 13 (2008) (noting that "severity of the offense" is "often used as the sole factor in setting bail") (emphasis omitted).

[301] RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 67–68 (2019).

small part of the story. Lost in concerns over crimes that those released may commit is the necessary harm to liberty those incarcerated suffer. Judges who may face public backlash for crimes committed by those out on bail do not face accountability for the harm caused by pretrial incarceration.[302]

Reforming bail and pretrial release is a complex endeavor with implications for public safety. Requiring written bail and pretrial release justifications accommodates concerns for public safety by implicating lower-level proceedings where safety concerns are less acute, while posing less of a comparative burden in cases involving serious offenses. Those who are concerned with more far-reaching reforms, such as the elimination of cash bail, might therefore give more thought to the more nuanced reforms I suggest.

CONCLUSION

Bail determinations are profoundly important. But they are, too often, brief, informal, and unreasoned affairs. As a result, defendants are frequently incarcerated solely due to an inability to pay. This, in turn, pressures them to plead guilty, as they otherwise face the prospect of indefinite detention and the harms such detention entails.[303]

Requiring written justifications for bail and pretrial release determinations forces courts to reckon with the facts of the cases before them, the complex legal regimes that purport to govern bail proceedings, and the seriousness of the pretrial release determination. It isn't easy. It isn't efficient. But this inefficiency is, in large measure, the point of the reform. The process of writing forces critical thinking and engagement with the relevant law.[304] This promotes outcomes that are more in line with what bail regimes appear to be on paper. And, to the extent that this reform disrupts overextended systems that seek to prosecute numbers of defendants far beyond the capacity of courts and prosecutors, written justification requirements may force the choice: align existing practices with what the law requires or decrease the criminal caseload to a level at which courts and prosecutors are able to give meaningful attention and deliberation to each defendant's case.[305]

As mentioned throughout this Article, written justification requirements are not a panacea, nor is there a one-size-fits-all approach to this reform. A few jurisdictions have rules requiring written determinations—and more should impose similar requirements. Variations on detail requirements,

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[302] *Id.* at 68.

[303] *See supra* Part III.B (arguing that defendants facing pre-trial detention are more likely to plead guilty).

[304] *See supra* Part III.A (emphasizing that writing compels lawyers and judges to engage in deeper critical and creative thinking than oral analysis allows).

[305] *See supra* Part IV.B (noting that courts' efforts to comply with written justification requirements may slow bail determinations as written explanations require more judicial time than oral rulings).

review procedures, and ruling deadlines may reveal what approach works to best achieve the level of attention and engagement needed to make involved decisions about bail and pretrial release. And, in conjunction with other reforms, including statutory presumptions of release, cash bail elimination, risk assessment development, and increased auditing and accountability of pretrial detention practices, written justification requirements may serve as one step toward meaningful reform of a flawed process.[306]

[306] *See* Brandon L. Garrett, *Models of Bail Reform*, 74 FLA. L. REV. 879, 922–23, 925 (2022) (urging a "composite" approach that combines multiple models of bail reform).