

2023

What Cash Bail Left Behind: St. Louis' Bail System, Three Years After Reform

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Recommended Citation

Brianna Coppersmith, *What Cash Bail Left Behind: St. Louis' Bail System, Three Years After Reform*, 67 St. Louis U. L.J. (2023).

Available at: <https://scholarship.law.slu.edu/lj/vol67/iss4/8>

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WHAT CASH BAIL LEFT BEHIND: ST. LOUIS' BAIL SYSTEM, THREE YEARS AFTER REFORM

ABSTRACT

In the last ten years, the pernicious effects of cash bail—particularly as it relates to poor, Black people accused of crimes—have become increasingly publicized. Calls for reform have followed, and across the country the political branches have responded to public pressure to weaken, or entirely eliminate, cash bail's role in pretrial detention. In 2020, the Missouri Supreme Court promulgated a set of rules intended to de-emphasize cash bail. Shortly thereafter, Missouri's 22nd Judicial Circuit, situated in St. Louis City, initiated additional reforms to supplement the Missouri Supreme Court Rules.

Three years later, on the surface, these reforms have largely accomplished what they intended: cash bail is rarely used in the city of St. Louis. But, even after cash bail, significant issues with pretrial detention determinations persist. This Note suggests that, in the absence of cash bail, a new, equally pernicious, system is developing in the 22nd Circuit: where judges once used unaffordably high cash bail to detain pretrial arrestees, they now use "no bond" determinations to do the same. Additionally, this Note explores pre-reform practices in the 22nd Circuit that have remained or re-emerged in new forms. Attention to these concerns provides direction for future efforts to incrementally reform the criminal legal system. Ultimately, this Note asks how St. Louis' pretrial processes might fundamentally shift focus to supporting and reintegrating persons accused.

The New Curriculum

is all about showing off how different it will be from
the old curriculum. The old
books point us to the new

The New Curriculum, Sandra Simonds¹

INTRODUCTION

For one hundred years, the American bail system has been in a near-constant state of reform. A first wave of bail reform began in the 1920s, with calls to release pretrial arrestees so long as their appearance at future court dates could be ensured.² In a second wave, spanning the 1960s to 1980s, bail reformers reversed course. They emphasized the safety risks arrestees posed and called for increased pretrial detention.³ Now, the United States has entered a third wave of bail reform—one the National Institute of Corrections predicts “will be America’s last.”⁴ Third wave reformers have advanced a theory that has attracted national attention: we should simply eliminate cash bail, in part or in whole.⁵ This third wave differs markedly from the first two, as it maintains that money should mostly have no role in pretrial detention determinations, and not that its use should be limited (first wave) or expanded (second wave).

Recent calls for eliminating cash bail are legion. From California to Illinois to Maryland to New Jersey, state legislatures have prohibited judges from requiring cash bail for certain classes of crimes.⁶ A “Dear Colleague” letter from the Department of Justice’s Civil Rights Division unequivocally told state courts

1. Sandra Simonds, *The New Curriculum*, 42OPUS (Apr. 18, 2010), <http://42opus.com/v10n1/the-new-curriculum> [<https://perma.cc/KJ7Z-LTWF>].

2. SHIMA BARADARAN BAUGHMAN, *THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM* 21 (2018); Caitlin Hill, *A Brief History of Cash Bail*, ACLU OF OHIO (Dec. 12, 2017), <https://www.acluohio.org/en/news/brief-history-cash-bail> [<https://perma.cc/UYB6-53GQ>].

3. BAUGHMAN, *supra* note 2, at 25.

4. Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*, U.S. DEP’T OF JUST., NAT’L INST. OF CORR. (2014), http://www.clebp.org/images/2014-09-04_Fundamentals_of_Bail.pdf [<https://perma.cc/72LA-GYCC>].

5. *See* Hill, *supra* note 2.

6. *Prince George’s County: A Study of Bail*, COLOR OF CHANGE 3 (2018), https://static.colorofchange.org/static/v3/pg_report.pdf [<https://perma.cc/9ADZ-9ZVV>]; *SB 10: Pretrial Release and Detention*, CAL. CT., <https://www.courts.ca.gov/pretrial.htm> [<https://perma.cc/X4DP-3UA9>] (last visited Jan. 9, 2022); *Pretrial Justice Reform*, ACLU OF N.J., <https://www.aclu.org/press-releases/pretrial-justice-reform-nj-working-new-data-show> [<https://perma.cc/2R4W-HSKM>] (last visited Jan. 9, 2022); Emanuella Evans & Rita Ocegüera, *Illinois Criminal Justice Reform Ends Cash Bail, Challenges Felony Murder Rule*, INJUSTICE WATCH (Feb. 23, 2021), <https://www.injusticewatch.org/news/2021/illinois-criminal-justice-reform-cash-bail-felony-murder> [<https://perma.cc/L9P9-ACJV>].

that holding an arrestee pretrial simply because they cannot afford to pay cash bail violates the Fourteenth Amendment.⁷ Community bail funds have been established across the country, indicating that grassroots reform efforts are also gaining momentum.⁸ Though they differ in scope, these efforts share a common goal: to weaken cash bail's role in pretrial detention. This goal appears to rest on the assumption that cash bail reform is the panacea for many other pretrial detention issues.

The outcome of cash bail reform in St. Louis, Missouri, however, is not so conclusive. St. Louis's pursuit of cash bail reform has largely mirrored national trends. In 2018, a community bail fund, The Bail Project, opened and paid cash bail for roughly 200 arrestees a month.⁹ In 2019, a class action suit, *Dixon v. St. Louis*, challenged the city's cash bail practices.¹⁰ That same year, the Missouri Supreme Court promulgated new rules that curbed a judge's ability to rely on cash bail as a condition of pretrial release.¹¹

Three years later, if you squint, these local reforms have done what they were intended to do: cash bail is rarely used in the city of St. Louis.¹² In fact, The Bail Project shuttered its St. Louis City office in 2021 because its cash bail services were rarely utilized.¹³ The cash bail system that once pervaded pretrial detention in St. Louis is nearly obsolete. But to point *only* to this outcome and mark it as a victory for bail reform is short-sighted. In the absence of a cash bail system in St. Louis, a new system is developing in its place: where judges once used cash bail to detain pretrial arrestees, they now use "no bond" determinations to do the same. Moreover, some problematic practices from cash bail determinations remain or have re-emerged in new forms.

This Note is about the cash bail system that *Dixon* challenged, the rules the Missouri Supreme Court promulgated, and the "no bond" system that has seemingly replaced St. Louis's cash bail system. It proceeds in three parts: Part

7. Letter from Vanita Gupta, Principal Deputy Assistant, Att'y Gen., U.S. Dep't of Just. Civ. Rts. Div., & Lisa Foster, Director, U.S. Dep't of Just., Office for Access to Just., Joint "Dear Colleague" Letter (Mar. 14, 2016), <https://www.courts.wa.gov/subsite/mjc/docs/DOJDearColleague.pdf> [<https://perma.cc/3GVU-KBNA>].

8. Chelsey Sanchez, *As Donations Pour In, Bail Funds Organizers Want to Overhaul the System*, HARPER'S BAZAAR (June 8, 2020), <https://www.harpersbazaar.com/culture/politics/a32782804/bail-funds-george-floyd-protests-pretrial-detention> [<https://perma.cc/C5F4-8L79>].

9. Sarah Fenske, *The Bail Project Closes St. Louis Office As Cash Bail Use Sharply Declines*, ST. LOUIS PUB. RADIO (Sept. 27, 2021), <https://news.stlpublicradio.org/show/st-louis-on-the-air/2021-09-24/the-bail-project-closes-st-louis-office-as-cash-bail-use-sharply-declines> [<https://perma.cc/GG98-T4DJ>].

10. Class Action Complaint ¶ 49, *Dixon v. City of St. Louis*, No. 4:19-CV-0112-AGF, 2019 WL 2437026 (E.D. Mo. Jan. 28, 2019).

11. Order Dated December 18, 2018, re: Rules 21, 22, and 33 (Dec. 18, 2018), <https://www.courts.mo.gov/page.jsp?id=134633> [<https://perma.cc/B5NH-EARU>].

12. See discussion *infra* Section II.C.1.

13. Fenske, *supra* note 9.

I surveys the recent history of bail in the United States and in St. Louis, with a focus on *Dixon* and the recent Missouri Supreme Court Rules. Part II turns to implementation of the Missouri Supreme Court Rules in St. Louis City's 22nd Circuit, including how implementation both meets and falls short of the letter and spirit of the rules. The Note concludes in Part III with recommendations about the future of bail in St. Louis.

I. THE ROAD TO CASH BAIL REFORMS

Many distinct conditions of pretrial release are often loosely labeled as “bail,”¹⁴ so it is helpful to first clarify how variegated bail can be. This Part quickly surveys bail's permutations and its applications, then overviews how one particular form of bail, cash bail, became the center of national and local calls for reform.

A. *The Promise (But Not the Guarantee) of Bail*

The pretrial process begins with an arrest and continues until the charges are resolved, sometimes because charges are dropped, or because the defendant has gone to trial or, in most cases, because the defendant has entered a plea bargain.¹⁵ *Where* an arrestee spends that process—whether they are detained in the local jail or released and allowed to live within their community—turns on one question: what was the judge's bail determination? This is because bail determinations can, broadly speaking, take one of three shapes. First, and most restrictive, the judge may deny bail entirely by making a “no bond” determination; those held “no bond” remain detained throughout the pretrial process.¹⁶ Second, and least restrictive, the judge may release the arrestee on their “own recognizance;” the arrestee can leave jail on a promise to return for future court dates.¹⁷ Third, and somewhere between these extremes, the judge may set “cash bail” at a specific monetary amount; if the arrestee can afford to

14. Bryan Garner effectively captures the many applications of the term “bail” when he describes it as a “chameleon-hued legal term.” BRYAN A. GARNER, *DICTIONARY OF MODERN LEGAL USAGE* 96 (1995).

15. Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 *STAN. L. REV.* 711, 718 (2017). For those who spend the process detained, the wait is long. A 2018 report from The Hamilton Project and the Brookings Institute found that arrestees detained pretrial wait, on average, 50 to 200 days in pretrial detention. Patrick Liu, Ryan Nunn & Jay Shambaugh, *The Economics of Bail and Pretrial Detention*, HAMILTON PROJECT & BROOKINGS INST. 5 (2018), https://www.hamiltonproject.org/assets/files/BailFineReform_EA_121818_6PM.pdf [<https://perma.cc/PR74-P843>].

16. BAUGHMAN, *supra* note 2, at 132.

17. *Id.* at 43.

pay that amount, they will be released.¹⁸ If the arrestee attends all court hearings, the money is returned at the case's disposition; if not, the money is forfeited.¹⁹

Should the arrestee be released, either on recognizance or with cash bail, the judge may also impose conditions restricting what the arrestee can do during the pretrial process. Electronic monitoring, house arrest, "no contact" zones or people, and mandatory enrollment in mental health programs are common conditions.²⁰ Failing to meet these conditions can also lead to the forfeiting of any amount paid to bail out.²¹

With broad strokes, the Supreme Court has provided guidance about *what* bail determinations should accomplish and about *how* judges should calculate those determinations. As to the first inquiry, the "*what*" of bail: bail should reflect "the presumption of innocence" and "prevent the infliction of punishment prior to conviction."²² Although there is no constitutional guarantee to bail, decisions handed down from the Court suggest that bail should not conflict with the "traditional right to freedom before conviction."²³ As the Court proclaimed in 1987, "[L]iberty is the norm, and detention prior to trial or without trial is the carefully limited exception."²⁴

As to the second inquiry, the "*how*" of bail: bail determinations should be a function of two factors. First, the judge should consider whether the defendant poses a flight risk. If yes, bail should be set to assure that the arrestee will be present at future court appearances.²⁵ Second, the judge should consider whether the defendant poses any danger to the community.²⁶ If yes, bail should be set to assure that the risk is mitigated.²⁷ In both of these considerations, the Court instructs judges to make individualized, not broad, assessments; indeed, the factors are "applied in *each* case to *each* defendant."²⁸ A bail determination that is "excessive in light of the perceived evil" (that is, the risk of flight or the danger to the community) is violative of the Eighth Amendment's prohibition against excessive bail.²⁹

In theory, these two factors should provide the guardrails against which courts can render non-excessive bail determinations. But the application is less clear. The Court, for one, has yet to clearly define "excessive," leaving lower

18. *Id.* at 46.

19. *Id.* I leave aside here the many complicating factors involved when an arrestee gets a "corporate" or "surety" bond and a bail bondsperson becomes involved to post bail.

20. *Id.* at 52–58.

21. *See, e.g.*, MO. REV. STAT. § 374.770 (1983).

22. *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

23. *Id.*

24. *United States v. Salerno*, 481 U.S. 739, 755 (1987).

25. *Stack*, 342 U.S. at 9.

26. *Salerno*, 481 U.S. at 749.

27. *Id.*

28. *Stack*, 342 U.S. at 5 (emphasis added).

29. *Salerno*, 481 U.S. at 754 (quotation marks omitted).

judges with no clear constitutional ceiling for their determinations.³⁰ The discretion judges retain when assessing the factors, compounded by the limited information on which they base their decisions, further complicates bail determinations.³¹ This discretion inheres the process with an unmistakable arbitrariness. A report on New York City bail practices found that, depending on the judge presiding over the bail hearing, the chance that an arrestee would be assigned cash bail on a misdemeanor charge varied from 2% to 26%.³² The discrepancy was even greater for felony charges, ranging from 30% to 69% likelihood of being assigned cash bail.³³ As Professor Shima Baughman explains, “there is no guidance on release before trial[] and no reliance on evidence-based practices.”³⁴

B. *The Rise of Unaffordable Cash Bail*

In practice, bail badly fails to preserve liberty as the norm. As ACLU lawyers stated in 2019, “Indefinite detention without counsel is the norm. Liberty, sadly, is the arbitrarily denied exception.”³⁵ Recent studies reach the same consensus: in some jurisdictions, fewer than 10% of arrestees are released pretrial.³⁶ Nearly two-thirds of the U.S. jail population, an estimated half-million people, are in pretrial detention.³⁷

30. See, e.g., Jenny E. Carroll, *Beyond Bail*, 73 FLA. L. REV. 143, 155 (2021); Caleb Foote, *The Coming Constitutional Crisis in Bail: Part I*, 113 U. PA. L. REV. 959, 969 (1965) (describing the Excessive Bail Clause as “some of the most ambiguous language in the Bill of Rights”). In fact, the imprecision of the term “excessive” has been noted since the passage of the Eighth Amendment. 1 ANNALS OF CONG. 782 (1798) (quoting Mr. Livermore, who asked, “The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the term excessive bail? Who are to be the judges?”).

31. BAUGHMAN, *supra* note 2, at 3–4; Carroll, *supra* note 30, at 157.

32. Stephanie Wykstra, *Bail Reform, Which Could Save Millions of Unconvicted People from Jail, Explained*, VOX (Oct. 17, 2018), <https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice-inequality> [<https://perma.cc/CD2G-VKMH>].

33. *Id.*

34. BAUGHMAN, *supra* note 2, at 9.

35. *The Administration of Bail by State and Federal Courts: A Call for Reform: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Security of the H. Comm. on the Judiciary*, 116TH CONG. 2 (2019) (written statement of Brandon Buskey, Deputy Director for Smart Justice Litigation at the ACLU), available at <https://docs.house.gov/meetings/JU/JU08/20191114/110194/HHRG-116-JU08-Wstate-BuskeyB-20191114.pdf> [<https://perma.cc/4ABA-RH8U>] [hereinafter Subcommittee Hearing, ACLU].

36. BAUGHMAN, *supra* note 2, at 9.

37. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL’Y INITIATIVE (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html#slideshows/slide-show1/2> [<https://perma.cc/Ry6R-RCLJ>]; *Bail Reform*, VERA INST., <https://www.vera.org/ending-mass-incarceration/criminalization-racial-disparities/bail-reform> [<https://perma.cc/P6MC-LDdT>] (last visited Jan. 6, 2023).

For the majority of those detained, the judge has made a cash bail determination, but at a price that is unaffordable.³⁸ Cash bail, of course, works only for those who can afford it. But few can benefit from a system where the average bail price is higher than 80% of detainees' yearly salaries.³⁹ Cash bail, as Professor Sandra Mayson deftly stated, is often a de facto denial of bail: "Courts and legislatures should recognize that an order imposing unaffordable bail is an order of pretrial detention. It has precisely the same effect: the accused person sits in jail."⁴⁰

As in other areas of the criminal legal system, cash bail outcomes parallel the arrestee's wealth and race.⁴¹ Arrestees from wealthier zip codes can make their payments and leave, while those from poorer zip codes remain detained.⁴² White arrestees have far better outcomes at bail hearings than similarly situated Black and Latine arrestees.⁴³ The Vera Institute reports that Black arrestees are detained pretrial at a rate that is nearly three times higher than that of white arrestees.⁴⁴ Another national study found that cash bail amounts for Black and Latino men are set at prices 35% and 19% higher, respectively, than for similarly situated white men.⁴⁵

The consequences of being denied bail, either expressly or through unaffordable cash bail, are well-documented. First, there are the collateral, personal losses the arrestee incurs: of a job, of income, of housing, of child custody, of access to mental health and medical services.⁴⁶ Infectious diseases,

38. Heaton, Mayson & Stevenson, *supra* note 15, at 713.

39. *From Miranda to Gideon: A Call for Pretrial Reform: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Security of the H. Comm. on the Judiciary*, 117TH CONG. 2 (2021) (written statement of Sakira Cook, Director, Justice Reform Program at the Leadership Conference of Civil and Human Rights), available at <https://docs.house.gov/meetings/JU/JU08/20210326/111410/HHRG-117-JU08-20210326-SD004.pdf> [<https://perma.cc/RT72-V5N3>].

40. Sandra Mayson, *Detention by Any Other Name*, 69 DUKE L.J. 1643, 1645–46 (2020).

41. MICHELLE ALEXANDER, *THE NEW JIM CROW* 117 (2012).

42. Heaton, Mayson & Stevenson, *supra* note 15, at 737.

43. ALEXANDER, *supra* note 41, at 117.

44. *Incarceration Trends*, VERA INST., <https://trends.vera.org> [<https://perma.cc/NCZ2-G9TV>] (last updated Dec. 23, 2022).

45. *The Administration of Bail by State and Federal Courts: A Call for Reform: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Security of the H. Comm. on the Judiciary*, 116TH CONG. (2019) (statement of Rep. Karen Bass, Chairwoman, Subcomm. on Crime, Terrorism, & Homeland Security), available at <https://www.govinfo.gov/content/pkg/CHRG-116hrg45172/html/CHRG-116hrg45172.htm> [<https://perma.cc/W5NP-CECW>] [hereinafter Subcommittee Hearing, Bass Statement].

46. *E.g.*, *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) ("The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships."); *Why Pretrial Matters*, PRETRIAL JUST. INST., <https://www.pretrial.org/why-pretrial-matters> [<https://perma.cc/3T4N-R26B>] (last visited Jan. 6, 2023) (reporting that 80% of detained women

including COVID-19, spread rapidly in overcrowded jails, exposing pretrial detainees to additional health risks.⁴⁷ Then, there are the financial costs: pretrial detention costs taxpayers nearly fourteen billion dollars annually.⁴⁸ Most concerning, however, are the legal implications. Pretrial detention has a causal relationship with worse case outcomes.⁴⁹ Arrestees who are detained pretrial are 25% more likely to be convicted of their crimes than those who are not.⁵⁰ They are 43% more likely to be sentenced to jail time, and their sentences are longer.⁵¹ When an arrestee is detained pretrial, they lose bargaining power with prosecutors, face barriers to working with their attorneys and building their defense, and they are more likely to “plead out” and exchange a guilty plea for “credit for time served.”⁵²

C. *Third Generation Bail Reform*

As concerns with cash bail increased, calls for reform followed. In 2019, U.S. Congresswoman Karen Bass described the national relationship with bail as one at an “inflection point.”⁵³ The future of that relationship, she estimated, hinged on whether the country could “examine and pursue alternatives to money bail.”⁵⁴ Others agreed. In 2020, as both Senator Bernie Sanders and now-President Joe Biden competed for the Democratic candidacy, one of their shared platforms was a policy to end cash bail.⁵⁵ The ACLU also cited a need for reforms to combat “tremendous suffering and bad public policy embodied in our cash bail system.”⁵⁶ Cash bail funds appeared across the country.⁵⁷ Class action

are mothers); René Reyes, *Abolition Constitutionalism and Non-Reformist Reform: The Case for Ending Pretrial Detention*, 53 CONN. L. REV. 667, 672 (2021).

47. Reyes, *supra* note 46, at 673; *see also* Chad Flanders, *COVID-19, Courts, and the “Realities of Prison Administration.” Part II: The Realities of Litigation*, 14 ST. LOUIS U. J. HEALTH L. & POL’Y 495, 496 (2021).

48. PRETRIAL JUST. INST., *supra* note 46.

49. Heaton, Mayson & Stevenson, *supra* note 15, at 715.

50. *Id.* at 717.

51. *Id.*

52. BAUGHMAN, *supra* note 2, at 5–6; Nirej Sekhon, *Willing Suspects and Docile Defendants: The Contradictory Role of Consent in Criminal Procedure*, 46 HARV. C.R.-C.L. L. REV. 103, 122 (2011) (defining “pleading out” as a common practice when time spent in pretrial detention exceeds the sentence on a guilty plea).

53. Subcommittee Hearing, Bass Statement, *supra* note 45.

54. *Id.*

55. Andrea Woods, *Two Steps Forward, One Step Back: A Cautionary Tale About Bail “Reform” in Georgia*, ACLU (Sept. 24, 2020), <https://www.aclu.org/news/smart-justice/two-steps-forward-one-step-back-a-cautionary-tale-about-bail-reform-in-georgia> [<https://perma.cc/FQN6NKZ7>].

56. *Id.*

57. Alysia Santo, *Bail Reformers Aren’t Waiting for Bail Reform*, MARSHALL PROJECT (Aug. 23, 2016), <https://www.themarshallproject.org/2016/08/23/bail-reformers-aren-t-waiting-for-bail>

lawsuits challenged cash bail practices in Georgia,⁵⁸ Texas,⁵⁹ California,⁶⁰ and New York,⁶¹ and the courts found, again and again, that the local bail practices constituted Equal Protection violations.

In each of these efforts, the scope of the reform was coextensive only with *cash* bail reform. Throughout the 2010s, reforms hewed so closely to cash bail that it often appeared to be the only kink in the pretrial chain. The National Institute of Corrections seemingly embraced this position in their 2014 Resource Guide for Pretrial Practitioners: “Pretrial justice in America requires a complete cultural change from one in which we primarily associate bail with money to one in which we do not.”⁶²

D. *St. Louis: The State of Bail and Four Recent Reforms*

In St. Louis, Missouri, the road to reform paralleled changes occurring nationally: overreliance on cash bail, followed by calls for cash bail reform, followed by a class action lawsuit challenging the city’s cash bail practices. In 2018, 90% of St. Louis’s jail population was in pretrial detention.⁶³ Of all arrestees, only 5% were granted bail without any monetary conditions.⁶⁴ In contrast, 1,189 arrestees were assigned a cash bail amount they could not afford.⁶⁵ As in jurisdictions across the country, Black St. Louisans were

reform [<https://perma.cc/TU2E-TZL4>] (describing bail funds in Boston, Brooklyn, Nashville, Seattle, St. Louis, Miami, Cincinnati, Oakland, Philadelphia, and Austin).

58. *Walker v. City of Calhoun*, No. 4:15-CV-0170-HML, 2016 WL 361612, at *11 (N.D. Jan. 28, 2016), *vacated*, 682 Fed. Appx. 721, 725 (11th Cir. 2017).

59. As the court found in the case challenging bail practices in Harris County, Texas:

One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree.

O’Donnell v. Harris Cnty., 892 F.3d 147, 163 (5th Cir. 2018).

60. *In re Humphrey*, 11 Cal. 5th 135, 151 (2021).

61. *New York ex. rel. Kunkeli v. Anderson*, 59 Misc.3d 238, 243 (N.Y. Sup. Ct. 2018).

62. Schnacke, *supra* note 4.

63. *Incarceration Trends: St. Louis City*, VERA INST., https://trends.vera.org/state/MO/county/st_louis_city [<https://perma.cc/B3HA-E8BK>] (last updated Dec. 23, 2022) (noting that 1,189 people were detained pretrial in St. Louis in 2018) [hereinafter *Incarceration Trends: St. Louis City*]; ArchCity Defenders, *The Status of Bail, Courts, and Cages in St. Louis*, ST. LOUIS AM. (Nov. 16, 2021), www.stlamerican.com/news/local_news/the-status-of-bail-courts-and-cages-in-st-louis/article_9d21107c-472f-11ec-b29d-23a8ff9606e4.html [<https://perma.cc/L2MT-NHKE>] (noting that the jail population in St. Louis in 2018 was 1304).

64. Class Action Complaint, *supra* note 10, ¶ 36.

65. *Incarceration Trends: St. Louis City*, *supra* note 63. The complaint for the *Dixon* class action suit alleged the median cash bond was \$25,000—an amount far exceeding the average detainee’s ability to pay and, thus, resulting in de facto detention. Class Action Complaint, *supra* note 10, ¶ 25.

disproportionately represented among pretrial detainees. Although Black people comprise only 43% of the city's population, they made up 85% of the city's pretrial detention population.⁶⁶ A 2016 study in St. Louis assessed racial equity in the city's bail practices and found that Black residents were roughly three times more likely than white residents to be held in pretrial detention.⁶⁷

In the late 2010s, four local reforms aimed to address cash bail's stronghold in St. Louis city.

1. Opening of the St. Louis Bail Project

In 2018, a bail fund, The Bail Project, opened a chapter in St. Louis city.⁶⁸ Within its first month, it processed 200 applications for cash bail.⁶⁹ "Bail Disruptors" were hired to post cash bail—up to \$5,000 per arrestee.⁷⁰ After that arrestee's case concluded, the money returned to The Bail Project and could be applied to another arrestee.⁷¹ Supporters credited The Bail Project with reducing the population of St. Louis's Medium Security Institute, a jail more commonly called "the Workhouse," and for returning pretrial arrestees to their families and their jobs.⁷² Between January 2018 and October 2021, the organization paid cash bail on behalf of 3,000 St. Louisans.⁷³

2. The *Dixon* Class Action Suit

As in other jurisdictions, a class action lawsuit, *Dixon v. St. Louis*, challenged cash bail practices in St. Louis City's 22nd Judicial Circuit Court ("22nd Circuit").⁷⁴ Filed on January 28, 2019, in the District Court for the Eastern District of Missouri, *Dixon* was brought against the City of St. Louis, its the sheriff, the jail commissioner, and many judges on the 22nd Circuit's bench, on behalf "of all arrestees who are or will be detained in [St. Louis city jails]

66. *Incarceration Trends: St. Louis City*, *supra* note 63.

67. *Pretrial Detention*, ST. LOUIS-MO. GOV'T, <https://www.stlouis-mo.gov/government/departments/mayor/initiatives/resilience/equity/justice/court-reform/pretrial-detention.cfm> [<https://perma.cc/WK5Y-JL2R>] (last visited Jan. 23, 2022).

68. Fenske, *supra* note 9.

69. Danny Wicentowski, *Mike Milton Has a Question for St. Louis: Who Keeps Us Safe?*, RIVERFRONT TIMES (Nov. 10, 2021), <https://www.riverfronttimes.com/stlouis/mike-milton-has-a-question-for-st-louis-who-keeps-us-safe/Content?oid=36578778> [<https://perma.cc/H72J-QU57>].

70. Fenske, *supra* note 9.

71. *Id.*

72. Dana Rieck, *The Bail Project's City Office Closes, But the Work Continues*, ST. LOUIS AM. (Oct. 19, 2021), https://www.stlamerican.com/news/local_news/the-bail-project-s-city-office-closes-but-the-work-continues/article_ec9883ec-3140-11ec-8b5b-bf6891c036c6.html [<https://perma.cc/8PG6-SWWD>].

73. Fenske, *supra* note 9.

74. Class Action Complaint, *supra* note 10, ¶ 50.

post-arrest because they are unable to afford to pay the monetary release conditions.”⁷⁵

The complaint raised three claims about the 22nd Circuit’s bail practices. The first, an Equal Protection Claim, alleged that the city had a practice of setting cash bail without first inquiring into the arrestee’s ability to pay, resulting in a wealth-based detention system where “poor arrestees [are] detained when similarly situated wealthy arrestees are not.”⁷⁶ Second, the complaint alleged that plaintiffs’ substantive due process rights to liberty were violated when they were detained without a compelling state interest.⁷⁷ The third claim alleged that the 22nd Circuit provided “absolutely no process before detaining individuals for weeks on unaffordable monetary release conditions.”⁷⁸

Judge Audrey Fleissig granted a preliminary injunction and enjoined the existing bail practices.⁷⁹ Her order concluded:

[T]he collateral consequences of [pretrial] incarceration affect not only arrestees but also, by ripple effect, the stability of their entire families and thus the community. Defendants provide no support for the suggestion that arrestees released without bail are more likely to commit crimes or less likely to appear in court than those released upon payment. Further, as other courts have observed, there is no evidence that financial conditions of release are more effective than alternatives for ensuring court appearances and public safety.⁸⁰

After the injunction was granted, an attorney on the case, Thomas Harvey, stated the ruling sent “a clear message to the City of St. Louis, the judges in the 22nd Circuit court, and the jail commissioner: poor people cannot be held in jail because of their inability to make a cash payment to buy their freedom.”⁸¹

3. New Missouri Supreme Court Rules

Just two days after *Dixon* was filed, on January 30, 2019, then chief-justice of the Missouri Supreme Court, the Honorable Zel Fischer, delivered the State of the Judiciary to the Missouri General Assembly.⁸² Judge Fisher described a series of “*significant* changes” to court rules governing pretrial detention in

75. *Id.* ¶¶ 5–6, 44.

76. *Id.* ¶¶ 67, 71.

77. *Id.* ¶ 73.

78. *Id.* ¶ 78.

79. *Dixon v. City of St. Louis*, No. 4:19-cv-0112-AGF, 2019 WL 2437026, at *15 (E.D. Mo. June 11, 2019).

80. *Id.*

81. *Federal Judge: Cash Bail in St. Louis is Unconstitutional*, ADVANCEMENT PROJECT (June 11, 2019), <https://advancementproject.org/news/federal-judge-cash-bail-in-st-louis-is-unconstitutional> [<https://perma.cc/D3N3-YYLV>].

82. Zel M. Fischer, Chief Just., Sup. Ct. of Mo., State of the Judiciary at a Joint Session of the Missouri General Assembly (Jan. 30, 2019), <https://www.courts.mo.gov/page.jsp?id=136253> [<https://perma.cc/QGC3-52BM>].

Missouri.⁸³ The rules were promulgated with input from judges, defense attorneys and prosecutors, law professors, and court officials.⁸⁴ Judge Fischer explained the need for the revised rules:

Too many who are arrested cannot afford bail for low-level offenses and remain in jail awaiting a hearing. Though presumed innocent, they lose their jobs, cannot support their families, and are more likely to reoffend. We all share a responsibility to protect the public—but we also have a responsibility to ensure those accused of crime are fairly treated according to the *law*, and not their pocket books.⁸⁵

The specific changes were to Missouri Supreme Court Rules 33.01 and 33.05 (“the rules”). Taken together, the revised rules expressly de-prioritize the role of cash bail in pretrial detention determinations. The new Rule 33.01 directs the courts to consider a number of factors before making a bail determination: (1) the nature and circumstances of the alleged offense; (2) the weight of the evidence against the arrestee; (3) whether the arrestee is employed and his ability to pay; (4) the arrestee’s character and mental condition; (5) the arrestee’s ties to the community—including whether family is nearby and how long they have lived in the area; (6) the arrestee’s criminal record and whether they have appeared at prior court proceedings; (7) whether the arrestee was on parole or release pending trial at the time of the alleged offense.⁸⁶

Based on those factors, the courts are instructed to “first consider non-monetary conditions” and impose the “least restrictive condition or combination of conditions of release.”⁸⁷ The rules enumerate a number of non-monetary conditions that should be considered before requiring cash bail, including: placing the arrestee in the supervision of a designated person or organization (often called “sponsored recognizance”⁸⁸), house arrest, electronic monitoring, restricting where the arrestee can go or reside, mandating check-ins with a court official, requiring drug tests, installing an ignition interlock on the arrestee’s car, enforcing a curfew, requiring employment, prohibiting possession of a weapon, prohibiting alcohol or controlled substance use, and mandating medical or mental health treatments.⁸⁹

Then, and *only* if the court determines that non-monetary conditions cannot ensure the arrestee’s future appearance or the community’s safety, the court

83. *Id.*

84. *Id.*

85. *Id.*

86. MO. SUP. CT. R. 33.01(e).

87. MO. SUP. CT. R. 33.01(c).

88. Holly Honig, *Missouri’s Privatized Probation Services – Part 3*, EMPOWER MO., <https://empowermissouri.org/missouris-privatized-probation-services-part-3-what-can-we-do/#:~:text=Sponsored%20recognizance%20is%20for%20pretrial,communities%20in%20which%20the%20occur> [https://perma.cc/PL52-R6UG] (last visited Dec. 22, 2022).

89. MO. SUP. CT. R. 33.01(c)(1)–(16).

should consider cash bail.⁹⁰ Should the court require cash bail, the revised rules also cabin the court's discretion when setting the amount that the arrestee must post. The new Rule 33.01 requires that the court make an individualized assessment that contemplates the defendant's ability to pay; conditions fixed above that ability are unequivocally "impermissible."⁹¹ Additionally, the new rules provide for multiple bail hearings. If an arrestee is not released at their initial appearance, the revised Rule 33.05 guarantees them a right to have the decision reviewed seven days later.⁹²

The rules were implemented between July 1, 2019, and January 1, 2020.⁹³ Progressives worried about *how* the rules would be implemented, if at all. Thomas Harvey cautioned that "simply because the Missouri Supreme Court has rules that are supposed to govern the actions of judges, [it] doesn't mean we can solely rely on that in order to ensure people's constitutional rights are being protected."⁹⁴ Conservatives were less ambivalent. Eighty-two conservative state representatives joined in writing a letter to the Missouri Supreme Court, asking its members to reverse the rules.⁹⁵ The representatives mischaracterized the rules as granting "a free pass to those who are repeatedly breaking into our house[s], our businesses, stealing vehicles, or dealing drugs."⁹⁶ To those conservatives, the rules were "naïve at best," "surely dangerous," and written in "disregard[] [for] the welfare of the public."⁹⁷ Some representatives threatened to amend the rules in an upcoming legislative session.⁹⁸ So far, one such piece of legislation has been introduced in the Missouri House of Representatives, but it never went to the floor for a vote.⁹⁹

90. MO. SUP. CT. R. 33.01(c).

91. *Id.*

92. MO. SUP. CT. R. 33.05.

93. *Nichols v. McCarthy*, 638 S.W.3d 902, 908 (Mo. Ct. App. E.D. 2021).

94. Kaitlyn Shallhorn, *Missouri Supreme Court's New Bail Rules Go Into Effect*, MO. TIMES (July 1, 2019), <https://themissouritimes.com/missouri-supreme-courts-new-bail-rules-go-into-effect> [<https://perma.cc/4Q95-PHY4>].

95. Kaitlyn Shallhorn, *More Than 80 State Reps Ask Supreme Court to Reverse Course on Pre-trial Bail Rules*, MO. TIMES (Jan. 22, 2020), <https://themissouritimes.com/dozens-of-state-representatives-ask-supreme-court-to-reverse-course-on-pre-trial-bail-rules/> [<https://perma.cc/39JU-SQG3>].

96. Shallhorn, *supra* note 94.

97. Kaitlyn Shallhorn, *Missouri Lawmakers Warily Eye Pre-trial Bail Rules After Kansas City Mass Shooting*, MO. TIMES (Oct. 19, 2019), <https://themissouritimes.com/missouri-lawmakers-warily-eye-pre-trial-bail-rules-after-kansas-city-mass-shooting/> [<https://perma.cc/VSE4-TNVZ>].

98. *Id.*

99. H.B. 1937, 100th Gen. Assem., 2d Reg. Sess. (Mo. 2020). Among other changes, the bill proposed striking from Rule 33.01 language that required detention to be "the least restrictive condition[s]" and language that mandated judges to first consider nonmonetary conditions of release.

4. The Creation of 16B

Following the *Dixon* preliminary injunction, and as Rules 33.01 and 33.05 were implemented, the 22nd Circuit created a new division called 16B. Division 16B is the circuit's home for all bail hearings, including the initial appearance (the "48-Hour Hearing") and Rule 33.05's reconsideration hearing (the "Seven-Day Hearing").¹⁰⁰ While some of the new procedures in 16B reflect the revised rules, other changes were implemented "in direct response to . . . [the] concerns and briefing" in *Dixon*.¹⁰¹

Three significant changes accompanied the creation of 16B. First, the court installed new video technology that allows arrestees who join by video to see the judge, their attorney, and the courtroom.¹⁰² Second, the Circuit designated \$75,000 to pay contract attorneys to represent arrestees at the 48-Hour and Seven-Day Hearings.¹⁰³ Third, the court hired a Pretrial Services Coordinator to attend bail hearings, work with community partners, and oversee, in part, the electronic monitoring program.^{104*} The next Part analyzes how these changes, plus those dictated by the revised rules, (collectively "the reforms") have been implemented in the 22nd Circuit.

II. THREE YEARS OF 16B: THE STATE OF BAIL IN ST. LOUIS CITY

It is tempting, and probably not unreasonable, to imagine 16B as the place where *Dixon* and the Missouri Supreme Court rules converged, generating radically reformed bail procedures. Indeed, for some defendants, the procedures in 16B likely do provide a clearer path toward pretrial release. But, on the whole, the bail paradigm emerging in 16B suggests that even a reformed system can recreate the very harms it once sought to eliminate. This Part explores how the reforms have been implemented in 16B. Analysis is grounded in observations of 16B hearings—about 100 individual hearings, in total—in 2021 as well as data provided by the 22nd Circuit and local court watch groups.

A. *The 16B Process*

16B hearings begin at noon on Mondays, Wednesdays, and Fridays.¹⁰⁵ Each week, one judge oversees all three hearings; the following week, a new judge

100. *Monthly Pretrial Data Report: November 2021*, 22ND JUD. CIR. CT., CTY. OF ST. LOUIS (2021), [https://www.stlcitycircuitcourt.com/PreTrial/Data/Monthly%20Pretrial%20Data%20Report%20November%202021%20\(FINAL\).pdf](https://www.stlcitycircuitcourt.com/PreTrial/Data/Monthly%20Pretrial%20Data%20Report%20November%202021%20(FINAL).pdf) [<https://perma.cc/8PKM-PZQR>] [hereinafter November 2021 Bail Report].

101. *Dixon v. City of St. Louis*, No. 4:19-cv-0112-AGF, 2021 WL 4709749, at *8 n.12 (E.D. Mo. Oct. 8, 2021).

102. *Id.* at *3.

103. *Id.*

104. *Id.*; E-mail from Sarah Phillips, Pretrial Services Coordinator, 22nd Judicial Circuit Court, to author (Feb. 10, 2022, 10:19 CST) (*on file with author).

105. November 2021 Bail Report, *supra* note 100.

presides. Depending on the docket, the hearings last an hour or two or more. The judge and a court reporter sit at the front of the courtroom. Counsel from the city's Circuit Attorney's Office sits at a table on the left and defense counsel on the right. Behind the attorneys are benches, rarely full, for spectators: court observers, arrestees' families, staff from the Circuit Attorney's Victim Services unit, those giving victim impact statements, and the circuit's Pretrial Services Coordinator. At the center of the courtroom is a television screen where arrestees appear by videoconference—usually streaming in from a jail located in the same building.¹⁰⁶ Technical problems are common.

The 48-Hour and Seven-Day Hearings begin when the judge enters and calls the first arrestee. The arrestee videoconferences in from one of the city's two jails or the Juvenile Justice Center. If the arrestee is at the juvenile center, they're likely sitting at a table with their lawyer. If the arrestee is at one of the city's jails, they stand alone, handcuffed, in front of a gray wall. If the arrestee is there for a 48-Hour Hearing, they're likely still wearing the same clothes in which they were arrested. One woman, who had been arrested at work on a Sunday, was still wearing her work uniform at her Wednesday hearing.^{107*} If the arrestee is there for a Seven-Day Hearing, they appear in jail clothes. The circuit attorney speaks first, culling from the probable cause statement and sometimes from scholarly studies on risk assessment. Occasionally, the circuit attorney introduces a victim impact statement or, if the complaining witness is in the courtroom or has joined virtually, the circuit attorney may invite the complaining witness to speak.^{108*} The circuit attorney concludes by making a bail recommendation. Then, defense counsel presents their case and concludes with their own bail recommendation. Almost always, defense counsel's recommendation is less restrictive than the circuit attorney's. The judge proffers a final determination, then calls the next arrestee.

106. The harms of appearing by video conference instead of in person exceed the scope of this note, though research suggests they are not minimal. See discussion *infra* Section III.B.1.

107. 48-Hour Hearing, *State v. Clark*, No. 2122-CR01718 (Mo. Cir. Ct. Nov. 17, 2021) (*on file with author).

108. See MO. REV. STAT. § 595.209 (2016). Although victim impact statements are delivered under oath and often discuss facts related to the charged offense, they are not considered testimonial. Thus, these statements fall outside the Confrontation Clause's ambit and can evade some of the clause's most basic constitutional requirements. For instance, victim impact statements often contain ad hominem attacks on the arrestee or even cite past crimes the victim believes the arrestee has committed, yet there is no opportunity for cross examination. See, e.g., Seven-Day Hearing, *State v. Mueller*, No. 2122-CR01736 (Mo. Cir. Ct. Nov. 24, 2021) (*on file with author). Another constitutional requirement that victim impact statements need not incorporate is *how* the statement is delivered. In 2022, the Missouri Supreme Court found that two-way video testimony violates the Confrontation Clause. *Missouri v. Smith*, 636 S.W.3d 576, 587 (Mo. 2022). Yet, victim impact statements at bail hearings are often delivered over WebEx, recreating that same "two-way" dynamic.

If the arrestee is not released at their 48-Hour Hearing, Rule 33.05 guarantees their case can be reconsidered one week later at a Seven-Day Hearing.¹⁰⁹ Although the rules make no substantive distinction between the 48-Hour and Seven-Day Hearings, one judge explained that the 48-Hour Hearing is merely a “sniff test” and it is not until the Seven-Day Hearing that the judge reviews “a couple more variables” to “determine if what [the first judge] did was appropriate.”^{110*} Although “kick-the-can” judicial review is not expressed in the rules, it is baked into 16B’s structure; because judges rotate every week, each arrestee detained at the 48-Hour Hearing is guaranteed to have a different judge at the Seven-Day Hearing. Judges at Seven-Day Hearings, in turn, must decide to affirm or revise their colleagues’ decisions.

B. The New Bail Paradigm Under 16B

One could reasonably anticipate that these reforms would affect the population size of St. Louis’s jails. Since the reforms were implemented on July 1, 2019, the population of the jails has indeed decreased. On July 1 of 2019, the population was 1059.¹¹¹ From July 1 of 2020, to 2021, and 2022, respectively, the population decreased from 797 to 583 to 515.¹¹² As Sarah Phillips, Pretrial Services Coordinator for the 22nd Circuit, recently explained, it is difficult to know how much of the declining population is attributable to bail reform and how much should be attributed to other factors, such as people released due to COVID-19 or the city prosecutor’s decision to stop pursuing certain charges.¹¹³ Measuring the reforms’ success by jail population alone is therefore insufficient. Still, the 22nd Circuit has not publicly identified what other markers, if any, will indicate that the reforms are improving pretrial detention outcomes.¹¹⁴

Some scholars question whether *any* cash bail reform can improve pretrial detention. Paul Butler posits that reforms, like the ones implemented in St. Louis, do little more than cast a “pacification effect” over reformers, who may be assuaged by procedural safeguards that claim to make the system more equal,

109. MO. SUP. CT. R. 33.05. Some arrestees choose to continue this hearing until they have counsel appointed. Others decide to waive the hearing completely.

110. 48-Hour Hearing, *State v. Taylor*, No. 2122-CR01644 (Mo. Cir. Ct. Nov. 17, 2021) (*on file with author); 48-Hour Hearing, *State v. John Doe*, No. 2122-CR01693 (Mo. Cir. Ct. Nov. 17, 2021) (*on file with author; record now sealed).

111. *Inmate Population by Day*, ST. LOUIS GOV’T, <https://www.stlouis-mo.gov/data/dashboards/inmates/index.cfm> [<https://perma.cc/T7XF-RXG8>] (last visited Dec. 22, 2022). Publicly available data does not distinguish what percentage of detainees are pretrial.

112. *Id.*

113. Niara Savage, *St. Louis Judges Are Denying Defendants Bond More Under State Rules Limiting Cash Bail*, ST. LOUIS PUB. RADIO (Dec 15, 2021), <https://news.stlpublicradio.org/law-order/2021-12-15/st-louis-judges-are-denying-defendants-bond-more-under-state-rules-limiting-cash-bail> [<https://perma.cc/8FX8-TM5D>].

114. See discussion *infra* Section III.B.3.

fair, and neutral.¹¹⁵ Others have proposed that cash bail reform is simply too narrow to transform the pretrial system.¹¹⁶ Still, others caution that the system may be durable to the point that it is practically reform-resistant.¹¹⁷ In other words, the influence of cash bail reforms may be negated by the very system in which they are implemented.

System recalibration theory provides a helpful framework for understanding this ouroboric phenomenon. The theory anticipates that reforms inevitably “confront” preexisting systems, prompting an extensive period of recalibration.¹¹⁸ During recalibration, power structures are rearranged, government actors take-up new responsibilities, and individual rights reposition.¹¹⁹ Ultimately, the recalibration process “crystallize[s]” the degree of influence the reforms will have on the system.¹²⁰ Elements of “the old order” will always survive recalibration, and not all reforms will easily root within the existing system’s soil.¹²¹ Accordingly, the new system risks perpetuating the old harms, but under a new name.¹²²

16B is ending its third year. Now is a critical time to examine how the reforms have confronted the *Dixon*-era cash bail system. For select arrestees, the reforms have forged a narrow but viable path toward pretrial release. Most of the time, however, the reforms do not operate at full tilt. They have redistributed, but not removed, issues with pretrial detention—in part because of how they are implemented and in part because of how they interact with existing aspects of the pretrial system. Worse, the reforms have created *new* issues that, for some arrestees, can prevent pretrial release.

C. *Four Issues Arising Under 16B*

This section examines four major reforms that 16B ushered in: (1) diminished reliance on cash bail; (2) increased reliance on nonmonetary conditions of release; (3) appointment of contract attorneys; and (4) Rule

115. Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 2019 FREEDOM CTR. J., 75, 123 (2019).

116. See Subcommittee Hearing, ACLU, *supra* note 35 (“[I]t is critical that you understand this: ending money bail is not enough.”).

117. See Carroll, *supra* note 30, at 148–49 (“The reduction or eradication of money bail alone has not, and will not, ensure a fair and unbiased system of pretrial detention, nor will it ensure that poor and marginalized defendants will benefit from pretrial release.”).

118. Stuart Chinn, *Institutional Recalibration and Judicial Delimitation*, 37 L. & SOC. INQUIRY 535, 537 (2012).

119. *Id.* at 537–39.

120. *Id.* at 536.

121. See Stuart Chinn, *Race, the Supreme Court, and the Judicial-Institutional Interest in Stability*, 1 J.L. 95, 110 (2011).

122. For a discussion on liberal-led reforms that have entrenched old harms into the American carceral system, rendering it more durable, see NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* 11, 151 (2014).

33.01(e)’s list of factors that judges consider when determining bail. This section aims to explore where the reforms have benefitted arrestees and where the reforms have stymied broader transformation of the city’s pretrial system.

1. Diminished Reliance on Cash Bail

Summarizing Rules 33.01 and 33.05 in 2021, the Missouri Court of Appeals wrote, “It is undisputed that [the] rules . . . seek to protect defendants from confinement pending trial based solely on the defendant’s ability to pay.”¹²³ In this respect, the reforms have led to a marked change. From November 2021 to November 2022, cash bail was rarely a condition of release for arrestees in the 22nd Circuit. Reports out of the court’s Pretrial Services Office suggest that cash bond was required for only 96 arrestees, constituting only 7% of all bail determinations.¹²⁴ Although cash bail is still permitted by the Missouri Supreme

123. Nichols v. McCarthy, 638 S.W.3d 902, 908 (Mo. Ct. App. E.D. 2021).

124. November 2021 Bail Report, *supra* note 100; *Monthly Pretrial Data Report: December 2021*, 22ND JUD. CIR. CT., CITY. OF ST. LOUIS (2022), [https://www.stlcitycircuitcourt.com/PreTrial/Data/Monthly%20Pretrial%20Data%20Report%20December%202021%20\(FINAL\).pdf](https://www.stlcitycircuitcourt.com/PreTrial/Data/Monthly%20Pretrial%20Data%20Report%20December%202021%20(FINAL).pdf) [<https://perma.cc/27KH-BSUY>]; *Monthly Pretrial Data Report: January 2022*, 22ND JUD. CIR. CT., CITY. OF ST. LOUIS (2022), [https://www.stlcitycircuitcourt.com/PreTrial/Data/Monthly%20Pretrial%20Data%20Report%20January%202022%20\(FINAL\).pdf](https://www.stlcitycircuitcourt.com/PreTrial/Data/Monthly%20Pretrial%20Data%20Report%20January%202022%20(FINAL).pdf) [<https://perma.cc/T3MQ-845N>]; *Monthly Pretrial Data Report: February 2022*, 22ND JUD. CIR. CT., CITY. OF ST. LOUIS (2022), [https://www.stlcitycircuitcourt.com/PreTrial/Data/Monthly%20Pretrial%20Data%20Report%20\(February%202022\).pdf](https://www.stlcitycircuitcourt.com/PreTrial/Data/Monthly%20Pretrial%20Data%20Report%20(February%202022).pdf) [<https://perma.cc/JAP6-GYQQ>]; *Monthly Pretrial Data Report: March 2022*, 22ND JUD. CIR. CT., CITY. OF ST. LOUIS (2022), <https://www.stlcitycircuitcourt.com/PreTrial/Data/Monthly%20Pretrial%20Data%20Report%20March%202022.pdf> [<https://perma.cc/MESU-SQN5>]; *Monthly Pretrial Data Report: April 2022*, 22ND JUD. CIR. CT., CITY. OF ST. LOUIS (2022), <https://www.stlcitycircuitcourt.com/PreTrial/Data/Monthly%20Pretrial%20Data%20Report%20April%202022.pdf> [<https://perma.cc/L6FM-H5DZ>]; *Monthly Pretrial Data Report: May 2022*, 22ND JUD. CIR. CT., CITY. OF ST. LOUIS (2022), <https://www.stlcitycircuitcourt.com/PreTrial/Data/Monthly%20Pretrial%20Data%20Report%20May%202022.pdf> [<https://perma.cc/MV6P-5Z8S>]; *Monthly Pretrial Data Report: June 2022*, 22ND JUD. CIR. CT., CITY. OF ST. LOUIS (2022), <https://www.stlcitycircuitcourt.com/PreTrial/Data/Monthly%20Pretrial%20Data%20Report%20June%202022.pdf> [<https://perma.cc/3DB3-B2NJ>]; *Monthly Pretrial Data Report: July 2022*, 22ND JUD. CIR. CT., CITY. OF ST. LOUIS (2022), <https://www.stlcitycircuitcourt.com/PreTrial/Data/Monthly%20Pretrial%20Data%20Report%20July%202022.pdf> [<https://perma.cc/F2WE-6RPV>]; *Monthly Pretrial Data Report: August 2022*, 22ND JUD. CIR. CT., CITY. OF ST. LOUIS (2022), <https://www.stlcitycircuitcourt.com/PreTrial/Data/Monthly%20Pretrial%20Data%20Report%20August%202022.pdf> [<https://perma.cc/L322-Y2AA>]; *Monthly Pretrial Data Report: September 2022*, 22ND JUD. CIR. CT., CITY. OF ST. LOUIS (2022), <https://www.stlcitycircuitcourt.com/PreTrial/Data/Monthly%20Pretrial%20Data%20Report%20September%202022.pdf> [<https://perma.cc/UJU8-43RF>]; *Monthly Pretrial Data Report: October 2022*, 22ND JUD. CIR. CT., CITY. OF ST. LOUIS (2022), <https://www.stlcitycircuitcourt.com/PreTrial/Data/Monthly%20Pretrial%20Data%20Report%20October%202022.pdf> [<https://perma.cc/X7ZL-QEP5>]; *Monthly Pretrial Data Report: November 2022*, 22ND JUD. CIR. CT., CITY. OF ST. LOUIS (2022), <https://www.stlcitycircuitcourt.com/PreTrial/Data/Monthly%20Pretrial%20Data%20Report%20November%202022.pdf> [<https://perma.cc/5F23-GHG4>] [collectively and hereinafter 2021–2022 Bail Reports]. These figures are consistent with reports from a local nonprofit, Freedom Community Center (“FCC”),

Court Rules, one 22nd Circuit judge announced from the bench, “We don’t do [cash bail] anymore.”^{125*} The same money bail system that *Dixon* challenged and the Supreme Court Rules sought to address has been rendered nearly non-existent. In fact, as already mentioned, The Bail Project closed its St. Louis City office in fall of 2021 because its services were no longer being used.¹²⁶

Several bail reformers have called this progress.¹²⁷ But as cash bail determinations have decreased, “no bond” determinations are on the rise. At 48-Hour hearings between November 2021 and November 2022, judges ordered arrestees to be held “no bond” 61% of the time.¹²⁸ Outcomes were worse for arrestees who were not released at the 48-Hour Hearing and appeared at a Seven-Day Hearing; judges detained those arrestees on a “no bond” status 79% of the time.¹²⁹ The court itself acknowledges that its erstwhile reliance on “cash bail” has evolved to a reliance on “no bond.” As Ms. Phillips, Pretrial Service Coordinator, stated, “We now see [‘no bond’ determinations] applied . . . in cases where, before that rule change, we would have likely seen a very high cash bond.”¹³⁰

Unlike cash bail, however, “no bond” determinations offer arrestees zero options for release. Public defenders explain that the resources made available to their clients under the cash bail system, especially services provided by The Bail Project, are inapplicable in a “no bond” context.^{131*} When The Bail Project’s CEO, Robin Steinberg, was asked about the rise in “no bond” detentions, she suspected it might be due to growing awareness among judges that The Bail Project would pay an arrestee’s cash bail, thereby securing their release.¹³² Steinberg stated that the increase in “no bond” determinations illustrates how “the system will just adjust to some of the reforms.”¹³³ Her sentiment recalls Professor René Reyes’ fear that “as valuable as measures like community bail funds may be in supporting the abolitionist ethos, they are not sufficient to address the plight of those who have been deemed too dangerous to qualify for bail at all.”¹³⁴

that sends court observers to 48-Hour and Seven-Day hearings. *See A Year in 16B*, FREEDOM CMTY. CTR. (Oct. 25, 2022), <https://storymaps.arcgis.com/stories/35a924dbf6a0434fa4e229b9af55a54b> [perma.cc/AW4Q-MR8G].

125. 16B Division Hearings (Aug. 4, 2021) (*on file with author). This is not quite accurate; as the data establishes, judges in the 22nd Circuit still occasionally require cash bail.

126. Fenske, *supra* note 9.

127. *Id.*

128. *See* 2021–2022 Bail Reports, *supra* note 124.

129. *Id.*

130. Savage, *supra* note 113.

131. Interview with Mo. Pub. Def. (Jan. 27, 2022) (*on file with author).

132. Fenske, *supra* note 9.

133. *Id.*

134. Reyes, *supra* note 46, at 674.

These 33.01 and 33.05 reforms—the product of a year of planning and the “invest[ment of] considerable effort and resources”¹³⁵—generate a familiar outcome: detention, for many.¹³⁶ Yes, arrestees are far less likely to be detained on unaffordable cash bail. And, more arrestees are released pretrial, albeit with conditions.¹³⁷ But St. Louis’s “cash bail” system appears to be slouching toward a “no bond” system where, as before, arrestees are likely to sit in jail pretrial.¹³⁸ In November 2021, ArchCity Defenders bleakly described the phenomenon unfolding in 16B stating, “In many ways, this is a classic tale of the local legal system recalibrating to preserve elements of the status quo.”¹³⁹

2. Reliance on Nonmonetary Conditions of Release, Especially Electronic Monitoring

The revised Missouri Supreme Court Rule 33.01(c) enumerates over a dozen nonmonetary conditions of release a judge may impose on an arrestee who is granted pretrial release.¹⁴⁰ Any combination of these conditions is permissive, so long as it is not more restrictive than necessary.¹⁴¹ Since the creation of 16B, far more arrestees are released on recognizance than under the previous system. Previously, only 5% of arrestees were released without any monetary conditions.¹⁴² Between November 2021 and November 2022, in contrast, 39% of arrestees were released on recognizance at 48-Hour Hearings and 13% were released at Seven-Day Hearings.¹⁴³ Almost always, the release is conditioned on one or more of the items enumerated in Rule 33.01(c).¹⁴⁴ Electronic monitoring is among the most commonly required conditions of release. From November 2021 to November 2022, electronic monitoring was required for 62% of arrestees released pretrial.¹⁴⁵

135. Dixon v. City of St. Louis, 2021 WL 4709749, at *7 (E.D. Mo. Oct. 8, 2021).

136. See Savage, *supra* note 113.

137. See discussion *infra* Section II.C.2.

138. This mirrors outcomes in Prince George’s County, Maryland after similar cash bail reforms were implemented. There, judges held as many people *after* reform in pretrial detention as it did before, and increasingly relied on “no bond” determinations to do so. Prince George’s County: A Study of Bail, *supra* note 6, at 4.

139. ArchCity Defenders, *supra* note 63.

140. See discussion *supra* Section I.D.3.

141. MO. SUP. CT. R. 31.01(c).

142. Class Action Complaint, *supra* note 10, ¶ 36.

143. See 2021–2022 Bail Reports, *supra* note 124.

144. MO. SUP. CT. R. 31.01(c)(1)–(16).

145. See 2021–2022 Bail Reports, *supra* note 124. There is little data available about electronic monitoring prior to November 2021. However, these numbers are consistent with that released by FCC in October 2022, which report that 60% of arrestees were placed on monitoring. FREEDOM CMTY. CTR., *supra* note 124. Extensive judicial reliance on electronic monitoring reflects national trends. Between 2005 and 2015, national reliance on electronic monitoring doubled. Carolina Hidalgo, *Advocates Worry About a Growing Alternative to Pretrial Jailing*, NPR (July 1, 2019),

An electronic monitor is a chargeable device that an arrestee is required to wear at all times. Those on monitoring typically have rules about where they can and cannot go. An arrestee may be permitted to be at home, at work, in class, at their lawyer's office, and with their healthcare providers, but prohibited from going near the complaining witness's home or workplace.¹⁴⁶ The device has the capacity to store each of these permitted and prohibited locations, allowing for automatic, constant monitoring of the arrestee's travels.¹⁴⁷ If the arrestee goes "out-of-bounds," a third-party is notified and then alerts the 22nd Circuit's Pretrial Services Office.¹⁴⁸

Scholars who champion electronic monitoring contend that it allows arrestees to maintain normalcy during their pretrial release and that any privacy intrusions are relatively lesser, especially when compared to restrictions imposed by pretrial detention.¹⁴⁹ Samuel Wiseman, who writes extensively about bail reforms, describes electronic monitoring as a "nearly unalloyed good."¹⁵⁰ But concerns with electronic monitoring are well-documented. In St. Louis, as elsewhere, electronic monitoring comes at astonishing costs to arrestees, who may be required to pay up to \$450 a month for the device.¹⁵¹ That rate is nearly as expensive as the average monthly rent in seventeen different St. Louis neighborhoods.¹⁵² If an arrestee fails to make their requisite monthly payments, they violate their bond conditions and risk having the bond revoked.¹⁵³

There are numerous additional ways an arrestee could inadvertently violate the terms of their electronic monitoring. They could accidentally let the monitor's battery die.¹⁵⁴ Or they may accidentally leave their permitted travel

<https://www.npr.org/2019/07/01/737535456/advocates-worry-about-a-growing-alternative-to-pre-trial-jailing> [<https://perma.cc/J86W-8ZD7>].

146. See *Street-Level Surveillance: Electronic Monitoring*, EFF, <https://www.eff.org/pages/electronic-monitoring> [<https://perma.cc/Y6LP-EJZ6>] (last visited Feb. 23, 2022).

147. *Electronic Monitoring*, EMASS, <https://www.dwi-emass.com/electronic-monitoring.html> [<https://perma.cc/JRG4-A3L2>] (last visited Feb. 23, 2022).

148. Sarah Phillips, *supra* note 104.

149. Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1356–57, 1375 (2014).

150. *Id.* at 1348–49.

151. Hidalgo, *supra* note 145.

152. *St. Louis, MO Rent Prices*, ZUMPER, <https://www.zumper.com/rent-research/st-louis-mo> [<https://perma.cc/GQS8-LHTY>] (last updated Feb. 26, 2022) (listing the median monthly rent as \$650 or less in seventeen St. Louis neighborhoods: Dutchtown South, Carondelet, Bevo Mill, Mount Pleasant, Boulevard Heights, West End, Marina Villa, Visitation Park, Grand Center, Sherman Park, Kingshighway East, Wells-Goodfellow, O'Fallon Park, Penrose, Fairgrounds, Walnut Park East, Lewis Place, and Baden).

153. Hidalgo, *supra* note 145.

154. See Yazmine Nichols, *Jailed for a Faulty Battery and Left to Catch COVID-19*, ACLU HAW. (June 25, 2021), <https://www.acluhi.org/en/news/jailed-faulty-battery-and-left-catch-covid-19> [<https://perma.cc/CT6Y-777Z>].

areas if they change routes to avoid traffic or to complete an errand for work.¹⁵⁵ With every unintentional error, the arrestee risks punishment for violating conditions of their release.¹⁵⁶

In addition to the logistical concerns, electronic monitoring, by its very nature, places the arrestee under continuous court surveillance. The 22nd Circuit hires a third-party, Total Court Services, to administer its electronic monitoring program. Total Court Services advertises that it has monitored 2,478,600 days of movement across 3,372,996,000 different GPS locations.¹⁵⁷ Some federal courts have made their distaste for electronic monitoring very clear. A Senior District Judge in the Eastern District of New York, Jack Weinstein, wrote, “Required wearing of an electronic bracelet, every minute of every day, with the government capable of tracking a person not yet convicted as if he were a feral animal would be considered a serious limitation on freedom by most liberty-loving Americans.”¹⁵⁸

Nearly two-thirds of St. Louisans released pretrial are placed on electronic monitoring. Although the monitor is often considered a “nonmonetary condition of release,” the financial burden it imposes on arrestees is a vestige of the old system: the *sine qua non* of monitoring, as with cash bail, is the arrestee’s ability to make a payment. Additionally, monitoring’s extensive privacy intrusions keep released arrestees shackled, albeit electronically, to the very institution from which their release should have spared them.

3. Appointment of Contract Attorneys

The Supreme Court has declared that the Sixth Amendment’s right to counsel attaches only at “critical stages” of the criminal process.¹⁵⁹ Whether a stage is critical or not depends, according to the Court, on whether “potential substantial prejudice to defendant’s rights inheres” and whether “the guiding hand of counsel” is essential to protect the arrestee against improper prosecution.¹⁶⁰ Despite the well-documented harms that a “no bond” or unaffordable cash bail determination initiates, the Court has still not held that a right to counsel attaches to bail hearings.¹⁶¹ While jurisdictions may choose to appoint counsel, across the United States, only half do so.¹⁶²

155. See EFF, *supra* note 146.

156. Hidalgo, *supra* note 145.

157. See Interview with Mo. Pub. Def., *supra* note 131; *SCRAM GPS*, TOTAL CT. SERV., <https://totalcourtservices.com/scram-global-positioning-system-gps> [<https://perma.cc/8TKK-C8UY>] (last visited Feb. 26, 2022).

158. *United States v. Polouizzi*, 697 F. Supp. 2d 381, 389 (E.D.N.Y. 2010).

159. U.S. CONST. amend. VI; *Coleman v. Alabama*, 399 U.S. 1, 7 (1970).

160. *Coleman*, 399 U.S. at 9 (quoting *United States v. Wade*, 388 U.S. 218, 227 (1967)).

161. See *Rothgery v. Gillespie County*, 544 U.S. 191, 214 (2008) (Alito, J., concurring) (discussing when the constitutional right to counsel attaches).

162. BAUGHMAN, *supra* note 2, at 7.

When the 22nd Circuit created 16B, it allocated \$75,000 to pay for contract attorneys.¹⁶³ When an arrestee has not yet retained a private attorney or had a public defender appointed, the contract attorney represents them for the duration of the bail hearing.¹⁶⁴ Many are local criminal defense attorneys who work in small private firms.¹⁶⁵ A contract attorney can attend the hearings in person or over video conference. Regardless of how the attorney attends, they will meet their client for the very first time when the client appears on the television screen—in front of the judge, circuit attorney, and any complaining witnesses in attendance. Because the arrestee has no idea who their attorney is, the judge frequently cues the contract attorney to wave at the camera in order to be identified.

The contract attorney and client have no opportunity to talk off the record. The contract attorney has no opportunity to learn about the defendant or the facts of the case. At one hearing, the contract attorney's first words to their client were, "I don't know anything about your case other than what the prosecutor said."^{166*} Unarmed with *anything* in the way of background, the most the contract attorney can do is engage in a brief line of questioning (again, in front of the court reporter, judge, and prosecutor) and, based on that limited information, submit to the judge why the arrestee is neither a flight risk nor a danger to the community.

Of jurisdictions where arrestees have no counsel whatsoever at bail hearings, Professor Carroll writes, "[S]uch hearings often cannot, as a practical matter, result in any meaningful refutation of the allegations."¹⁶⁷ But even in St. Louis, where contract attorneys are hired and funded, the system is not designed to allow the attorney to meaningfully refute the allegations. These attorneys have not spoken with their clients, and the only facts they have in their possession are detailed in probable cause and victim impact statements.

163. Dixon v. City of St. Louis, No. 4:19-cv-0112-AGF, 2021 WL 4709749, at *3–4 (E.D. Mo. Oct. 8, 2021). It is unclear whether this budget will be renewed once the initial allocation depletes.

164. At the 48-Hour Hearing, even if arrestees have already applied for the public defender, it is extremely rare that one would already be appointed (though it may be possible if the defender represents that arrestee on a different case). More often—though not always—a public defender has been appointed by the Seven-Day Hearing. While judges consistently remind arrestees to apply to the public defender's office, arrestees' responses are just as consistent: "I've been trying." See Interview with Mo. Pub. Def., *supra* note 131.

165. Local criminal defense attorneys Eric Barnhart, Nikki Moody, and Guy Wold frequently serve as contract attorneys. LAW OFFICE OF ERIC V. BARNHART, L.L.C., <https://www.ericbarnhartlaw.com> [<https://perma.cc/R2MH-JBDU>] (last visited Feb. 24, 2022); NIKKI MOODY LAW, <https://www.nikkimoodylaw.com> [<https://perma.cc/X5B7-C7V8>] (last visited Feb. 24, 2022); William Guy Wold, MARTINDALE, <https://www.martindale.com/attorney/william-guy-wold-3246121/> [<https://perma.cc/28L4-UE2K>] (last visited Feb. 24, 2022).

166. 48-Hour Hearing, State v. Warden, No. 2122-CR01704 (Mo. Cir. Ct. Nov. 15, 2021) (*on file with author).

167. Carroll, *supra* note 30, at 60.

For these reasons, it is not surprising that arrestees often interrupt their contract attorneys and ask for an opportunity to relay the facts of the case.^{168*} Judges are quick to remind the arrestees that they should mind what they say because it could be used against them. Some judges threaten the arrestees for interrupting: “The less you talk the better,” one judge said.^{169*} When another arrestee asked, “There’s no type of way I can report my facts?” the judge replied, “This is certainly not the time for you to speak.”^{170*} Another time, a judge threatened to “pull the plug on this deal” when the arrestee tried to talk.^{171*}

In contrast, privately retained counsel often arrive with a defense already mounted. These attorneys have brought in photos of the crime scene; attempted to call eyewitnesses to explain that the arrestee acted in self-defense (the witness ultimately did not speak because the judge said he already knew enough to warrant release); re-enacted how two parties conducted themselves in an assault charge; and called character witnesses to advocate for the arrestee.^{172*} The rules do not require the judges to hear or consider any of these tools. Still, the attorneys were equipped to refute the charges, challenge the weight of the evidence, and advocate for the arrestee’s character and ties in the community.

Appointing contract attorneys is a step toward ensuring that an arrestee’s bail outcome does not depend on their ability to afford a lawyer. But implementation falls short. Although the court does not have any publicly available data on how outcomes differ among arrestees represented by contract attorney, public defender, or private counsel, observation suggests that the arrestees who can afford to retain private counsel have the upper hand at bail hearings.

168. At one hearing, a judge described the probable cause statement for a first-degree murder charge as “the most generic probable cause statement” he had seen in nearly two decades of practice. Such moments emphasize the need for attorneys familiar enough with the case to zealously advocate for their clients. Seven-Day Hearing, *State v. John Doe* (Mo. Cir. Ct. Nov. 17, 2021) (*on file with author; record now sealed).

169. 48-Hour Hearing, *State v. Cannon*, No. 2122-CR01698 (Mo. Cir. Ct. Nov. 15, 2021) (*on file with author); *see also How STL’S Unjust Bail System Fuels the Ongoing Crisis in the Jail*, ARCHCITY DEF. (Apr. 5, 2021), <https://www.archcitydefenders.org/how-stls-unjust-bail-system-fuels-the-ongoing-crisis-in-the-jails> [perma.cc.Q27Z-9PQ3].

170. 48-Hour Hearing, *State v. Goodin*, No. 2122-CR01639 (Mo. Cir. Ct. Nov. 8, 2021) (*on file with author).

171. 48-Hour Hearing, *State v. Jackson*, No. 2122-CR01340-01 (Mo. Cir. Ct. Nov. 24, 2021) (*on file with author).

172. 48-Hour Hearing, *State v. Fatima*, No. 2122-CR01664 (Mo. Cir. Ct. Nov. 10, 2021) (*on file with author); Seven-Day Hearing, *State v. McKinney*, 1922-CR03107-01 (Mo. Cir. Ct. Nov. 15, 2021) (*on file with author); Seven-Day Hearing, *State v. John Doe* (Mo. Cir. Ct. Nov. 17, 2021) (*on file with author; record now sealed).

4. Factors that Inform Bail Determinations

Under the revised Rule 33.01(e), courts must determine bail based on a number of factors.¹⁷³ While some of the factors relate to the specifics of the charged offense (for instance, the weight of evidence, the nature of the crime), others consider aspects of the arrestee's personal life: whether they have a job, the depth of their ties to the community, their relationship to family, how long they have resided in St. Louis, their mental health, and their "character."¹⁷⁴

At best, the personal factors operationalize Rule 33.01's requirement that the judge makes an "individual[ized]" assessment of each arrestee. Proper consideration of an arrestee's mental health, for instance, can allow a judge to set as a condition of pretrial release that they receive mental health care. The court maintains strong working relationships with nonprofits, such as Places for People and Mission: St. Louis, that can provide those services.¹⁷⁵

At worst, the factors double as proxies for the one factor they were intended to replace: wealth. Take, for instance, the "mental health" consideration. St. Louis has high rates of mental illnesses, including psychotic disorders, and individuals living in poverty are at higher risk for diagnosis.¹⁷⁶ Recent evidence shows that the risk of diagnoses for St. Louisans increases for individuals living in conditions of "toxic stress," which can arise from "economic inequality [and] racial segregation."¹⁷⁷ For those who live in the highest poverty zip codes, there are too few mental health care providers, if there are any at all.¹⁷⁸ Because distribution of mental health services "parallels" income and racial lines in the city, considering the status of an arrestee's mental health inevitably relates to whether the arrestee has the resources to gain access to care.¹⁷⁹

Often, circuit attorneys recommend that arrestees should remain in pretrial detention *because of* mental health issues. Judges cite the same in their final determinations. These recommendations extend to arrestees who are in mental health treatment, have only started treatment, or have had no treatment whatsoever.^{180*} In regards to one arrestee, the circuit attorney recommending

173. MO. SUP. CT. R. 33.01(e).

174. *Id.*

175. See Sarah Phillips, *supra* note 104. Occasionally, a representative from one of those nonprofits will attend the hearing.

176. Brown School at Washington University in St. Louis, *St. Louis Adult Behavioral Health Needs Assessment*, ST. LOUIS MENTAL HEALTH BD. 1, 10 (2015), available at <https://www.stlmhb.com/wp-content/uploads/2015-MHB-Adult-Behavioral-Needs-Assessment.pdf> [<https://perma.cc/B2A5-ZKNF>].

177. *Id.* at 3.

178. *Id.* at 29.

179. *Id.*

180. Seven-Day Hearing, *State v. Helms*, No. 2122-CR01604 (Mo. Cir. Ct. Nov. 8, 2021) (*on file with author).

bail stated, “I believe it’s fairly clear that he has mental health issues.”^{181*} Another judge held an arrestee with bipolar and Post Traumatic Stress Disorder (“PTSD”) stating, “The Court is very concerned about the defendant’s mental health issues.”^{182*} PTSD, bipolar disorder, and schizophrenia are regularly cited as reasons to keep arrestees detained. Public defenders, unsurprisingly, are quick to retort that their client is far more likely to receive mental health care in the community than in jail.^{183*}

The rules also ask the judge to consider the arrestee’s ties to the community.¹⁸⁴ The prevailing theory is that arrestees who have numerous personal and familial connections in the region are less likely to flee. Additionally, an arrestee with strong community ties will likely have a home to stay in if released on recognizance—often with a parent, grandparent, or sibling who is willing to house them, if not in a home of their own. But ties to the community can also tell the judge something about the arrestee’s wealth. A growing body of research demonstrates that “lower income and minority families are less likely to have the number, strength, and variety of social connections as higher income and white families.”¹⁸⁵

Conditioning bail on social connections creates especially high barriers for homeless arrestees. When a judge decides to place an arrestee on electronic monitoring—including house arrest—the monitoring system requires that an address is listed to serve as the arrestee’s “home base.” Additionally, the electronic device requires a steady source of electricity to stay charged.¹⁸⁶ At first blush, it seems innocuous, even obvious, that house arrest requires that the arrestee have some sort of house to stay in. In Professor Carroll’s words, “All of this in theory makes sense. All of this in theory imagines a pretrial release system that is measured, precise, and just. But the world of pretrial release operates outside of theory.”¹⁸⁷ In practice, making a home address a condition of release means that homeless arrestees are often incarcerated simply because they do not

181. Seven-Day Hearing, *State v. Hornbeak*, No. 2122-CR01618 (Mo. Cir. Ct. Nov. 12, 2021) (*on file with author).

182. Seven-Day Hearing, *State v. Corbin*, No. 2122-CR01646 (Mo. Cir. Ct. Nov. 8, 2021) (*on file with author).

183. Seven-Day Hearing, *State v. Hornbeak*, No. 2122-CR01618 (Mo. Cir. Ct. Nov. 12, 2021) (*on file with author). Research, too, suggests that the cruel conditions of incarceration only exacerbate existing mental health issues. Katie Rose Quandt & Alexi Jones, *Research Roundup: Incarceration Can Cause Lasting Damage to Mental Health*, PRISON POL’Y INITIATIVE (May 13, 2021), <https://www.prisonpolicy.org/blog/2021/05/13/mentalhealthimpacts/> [<https://perma.cc/2P8F-UMSF>].

184. MO. SUP. CT. R. 33.01(e).

185. Allison A. Parsons et. al., *Cultivating Social Relationships and Disrupting Social Isolation in Low-Income, High Disparity Neighbourhoods in Ohio, USA*, 29 HEALTH AND SOC. CARE IN THE CMTY. 1876, 1876 (2021).

186. See discussion *supra* Section II.C.2.

187. Carroll, *supra* note 30, at 147.

have a home address to give the judge. At one hearing, a judge refused to release a homeless man who had been charged with property damage. The arrestee did not have a family member or friend in the city who could house him. Conceding that “this is not the crime of the century,” the judge ultimately held the arrestee under a “no bond” status. The judge explained, “I can’t put him on [monitoring] because he’s homeless” and there was no alternative home plan.^{188*} That same week, the court detained a man because he was homeless and the judge was not sure he would have access to an electrical outlet to keep the monitoring device charged.^{189*} His lawyer argued that the arrestee’s ability to keep his cell phone charged was indicative that he could do the same with the monitoring device, but the judge refused, saying, “We’re not putting faith in hope or prayer.”¹⁹⁰

In contrast, the 33.01(e) factors can, for select arrestees, serve as currency to get out of jail. A white woman with a doctorate degree in education was brought in on property damage, domestic assault, and stalking charges.^{191*} Her attorney argued, “She’s not a flight risk because she’s an educator,” and referenced the arrestee’s steady salary.¹⁹² The arrestee was released on GPS monitoring with instructions to get a mental health screening through her employer (these instructions were ultimately rescinded).¹⁹³ For some, academic and professional pedigree are vehicles for release.

The social connections of an arrestee’s privately retained *attorney* may also benefit the arrestee. One arrestee, charged with murder in the first degree, retained a private attorney who argued that his client acted in self-defense.^{194*} The judge, though ultimately holding the arrestee on a “no bond” status, stated, “I’ve known [your attorney] for twenty years, and I know he doesn’t just say something he doesn’t agree with.”¹⁹⁵ As a concession, the judge bumped up the arrestee’s next trial date.¹⁹⁶

The 16B and Missouri Supreme Court rule reforms have created a bail system with some observable differences: less reliance on unaffordable cash bail, more arrestees released on recognizance, appointment of contract attorneys, and individualized assessments of arrestees’ circumstances. These changes are especially good for a specific type of arrestee, namely one that can afford a

188. Seven-Day Hearing, State v. Barnes, No. 2122-CR01609 (Mo. Cir. Ct. Nov. 12, 2021) (*on file with author).

189. 48-Hour Hearing, State v. Houston, No. 2122-CR01659 (Mo. Cir. Ct. Nov. 8, 2021) (*on file with author).

190. *Id.*

191. 48-Hour Hearing, State v. Pickett, No. 2122-CR01707 (Mo. Cir. Ct. Nov. 15, 2021) (*on file with author).

192. *Id.*

193. *Id.*

194. 48-Hour Hearing, State v. McKinney, No. 1922-CR03107-01 (Mo. Cir. Ct. Nov. 15, 2021) (*on file with author).

195. *Id.*

196. *Id.*

private attorney, has steady housing, has a good job, has access to mental health care, has family and social connections in the community, and—if they are released—can afford to make monthly payments for an electronic monitor. Still, the reforms are likely not as comprehensive as intended. In each reform’s shadow are harms reminiscent of the old system: continued detention; release with associated financial costs; limited support from counsel; and the way in which an arrestee’s financial status remains implicitly central to bail determinations. Considering the tremendous impact these deficiencies have on the pretrial process and case outcomes, there is still a long way to go. The final Part offers recommendations for the future of 16B.

III. RECOMMENDATIONS

We do not have to be long in the woods to experience the always rather anxious impression of ‘going deeper and deeper.’ . . . Soon, if we do not know where we are going, we no longer know where we are.

Gaston Bachelard¹⁹⁷

Despite the reforms’ efforts to charter a new path for bail in St. Louis, the outcomes are wending their way back to familiar territory. The city’s bail practices sit somewhere between where we were in the *Dixon* era and where we had hoped the reforms would take us. We exist in a new bail wilderness. The recommendations in this Part aim to reorient current 16B practices. Part III.A offers recommendations based on “where we are going,” and III.B offers recommendations for immediate changes grounded in “where we are.”

A. *Where We Are Going: Abolish the Pretrial Detention Period and Rebuild with a Period of Community Re-Integration*

Reforms to the criminal pretrial process, like the ones in St. Louis, are designed to adjust the legal system incrementally.¹⁹⁸ In abolitionist organizing, such piecemeal reforms are contrasted with “nonreformist reform[s].”¹⁹⁹ Where the former target specific issues, non-reformist reforms have vaster objectives: to “unravel rather than widen the net of social control through

197. GASTON BACHELARD, *THE POETICS OF SPACE* 185 (John R. Stilgoe ed., Maria Jolas trans., 1958).

198. See DERECKA PURNELL, *BECOMING ABOLITIONIST* 112 (1st ed. 2021) (“Tweaking the court with modest reforms focuses too narrowly on improving specific practices whereas building an abolitionist future ends these deep forms of violence that underlie our relationships to each other.”); Amna A. Akbar, *Demands for a Democratic Political Economy, Responding to Michael J. Klarman, The Degradation of American Democracy – And the Court*, 134 HARV. L. REV. F. 90, 101 (2020) (“[R]eform projects are contradictory gambits if the aim is transformation: they always have the possibility of reifying the status quo.”).

199. RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 242 (2007).

criminalization.”²⁰⁰ Because reformed systems may simply “trade[] one cruelty for another,”²⁰¹ a non-reformist reform seeks to critique and address the *entire* system *and* its root causes.²⁰² I submit that a non-reformist reform is the right step forward in St. Louis’s pretrial process. We should abolish the current pretrial detention system. In its place, we should build up a system where arrestees are intentionally re-integrated into their communities during the pretrial period.

Professor Ruth Wilson Gilmore famously said that abolition is about “presence, not absence.”²⁰³ Her abolitionist vision has called for increasing government investment in education, healthcare, housing, and jobs.²⁰⁴ These investments generate thriving communities and lay the foundation for safe and healthy lives. This vision can also inform a future without pretrial detention: increase mental and physical health services, allow for continued engagement in academic studies and job responsibilities, and provide stable housing with family or a community provider.

It strikes me that the new Missouri Supreme Court Rule 33.01(e) acknowledges the benefits of an arrestee who is surrounded by education, healthcare, housing, and employment.²⁰⁵ 22nd Circuit judges, too, are swayed toward releasing someone when their home plan, employment, and mental health is steady.²⁰⁶ Additionally, the circuit hired a pretrial services coordinator who collaborates with two non-profit organizations specializing in education, healthcare, housing, and employment. The first non-profit, Places for People, was founded on the premise of “deinstitutionalization” and creating pathways for people with even the “toughest” mental health disorders to integrate into families and communities.²⁰⁷ The second, Mission: St. Louis, focuses on how

200. *Id.* Professor Butler describes “reforms” as “civil rights interventions sought by liberals [and] intended to make the criminal justice system fairer” to “ensure that similarly situated people are treated the same, regardless of their race or ethnicity.” In contrast, he describes “non-reformist reforms” as marked by “radical[] . . . systemic critiques [that] argue for broader forms of relief.” Butler, *supra* note 115, at 93–94. *See also* Akbar, *supra* note 198, at 103 (“Reform is not the end goal [of non-reformist reforms]; transformation is.”).

201. Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html> [<https://perma.cc/C5XS-DH86>].

202. Butler, *supra* note 115, at 93.

203. Lola Olufemi, “*We Can Enact the Future We Want Now*”: *A Black Feminist History of Abolition*, GUARDIAN (Aug. 3, 2020), <https://www.theguardian.com/books/2020/aug/03/we-can-enact-the-future-we-want-now-a-black-feminist-history-of-abolition> [<https://perma.cc/BN68-APKS>].

204. Kushner, *supra* note 201. In turn, the “scale, power, tools, and legitimacy of the carceral state” is reduced. Akbar, *supra* note 198, at 101.

205. MO. SUP. CT. R. 33.01(e).

206. *See* discussion, *supra* Section II.C.4.

207. *About Us*, PLACES FOR PEOPLE, <https://www.placesforpeople.org/about-us> [<https://perma.cc/6J8U-4VSK>] (last visited Feb. 24, 2022).

education and employment can “empower individuals for social and economic growth.”²⁰⁸

Certainly, this does not suggest that the 22nd Circuit is approaching an abolitionist vision of the pretrial system. But it *does* suggest that many stakeholders in St. Louis’s bail determination process now acknowledge what abolitionists have long known: investment in community supports and services is not only vital, but it is also a viable alternative to incarceration.

This is where the 22nd Circuit’s practices converge with an abolitionist framework. Both recognize the importance of jobs, healthcare, education, and housing. Both recognize that these factors are “protective,” meaning that they create a safer environment for pretrial release.²⁰⁹ In this light, the circuit’s decision to hold more than 50% of its arrestees on a “no bond” status is paradoxical.²¹⁰ Pretrial detention—which isolates an arrestee from school, medical treaters, community, and employment—is antithetical to this recognition.²¹¹

Arrestees, too, consistently invoke education, healthcare, housing, and jobs at bail hearings. Arrestees make very few pleas to the judge during bail hearings. But, when they do, their requests typically concern their need to keep their jobs, get necessary medical treatment, care for their children and family, and attend classes.^{212*} Arrestees are almost singularly focused on maintaining community ties that safeguard their wellbeing and livelihood.

The Bail Project has recently announced its vision for a pretrial detention system *post* cash-bail, “Community Release with Support.”²¹³ It involves “meet[ing] basic needs” and “connecting people to resources based on their needs.”²¹⁴ This is the model that St. Louis—working with existing and new

208. *Our Vision*, MISSION: ST. LOUIS, <https://www.missionstl.org/ourvision> [<https://perma.cc/K8ZT-6MX5>] (last visited Feb. 24, 2022).

209. *See Risk and Protective Factors*, SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN., DEP’T OF HEALTH & HUM. SERV., available at <https://www.samhsa.gov/sites/default/files/20190718-samhsa-risk-protective-factors.pdf> [<https://perma.cc/M3GV-7NB7>] (last visited Feb. 26, 2022).

210. *See* discussion *supra* Section II.C.1.

211. Reyes, *supra* note 46, at 672.

212. When one arrestee asked about his job, the judge responded, “Whatever is an inconvenience to you, is on you.” One woman asked about caring for her daughter who has cerebral palsy, especially because her fiancé was going into surgery himself that week and couldn’t do the caretaking. One man asked how he would get treatment for his lymphoma. Another woman asked about attending her college classes. 48-Hour Hearing, *State v. Taylor*, No. 2122-CR01644 (Mo. Cir. Ct. Nov. 17, 2021) (*on file with author); 48-Hour Hearing, *State v. Clark*, No. 2122-CR01718 (Mo. Cir. Ct. Nov. 17, 2021) (*on file with author); 48-Hour Hearing, *State v. John Doe*, No. 2122-CR01745 (Mo. Cir. Ct. Nov. 24, 2021) (*on file with author; record now sealed); 48-Hour Hearing, *State v. Fatima*, No. 2122-CR01664 (Mo. Cir. Ct. Nov. 10, 2021) (*on file with author).

213. *Annual Report 2021*, BAIL PROJECT 31 (2021), https://bailproject.org/wp-content/uploads/2021/11/the_bail_project_annual_report_2021_web.pdf [<https://perma.cc/7DTN-D49M>].

214. *Id.*

community partners—should follow. Instead of isolating pretrial detainees from the very services that we acknowledge protect them, we should exchange pretrial detention for a period of community re-integration.

B. Where We Are: Immediate Changes to Make in 16B

The path toward abolition of the pretrial system may be long. In the meantime, three immediate changes should be made to pretrial practices in 16B.

1. Guaranteed Representation by a Public Defender at an In-Person Hearing

Professor Wiseman predicts that improving representation in the bail process would likely “expand release rates while also making individual decisions fairer.”²¹⁵ The 22nd Circuit should make indigency determinations and, if eligible, appoint a public defender as soon as the arrestee is brought into jail intake. To ease administrative barriers, one designated public defender could be assigned to this role; after 16B hearings, that client could be re-assigned to their next attorney. The public defender should meet with the client within 24-hours, or at least before the 48-Hour hearing, confidentially and in person.

Of course—stating the obvious—an attorney who can meet with the client and engage in confidential conversation is better equipped to advocate. But the benefits flow in two directions. That meeting will also allow the attorney to equip the client with important information about the 48-Hour Hearing, including what facts the attorney will raise. This may, in turn, reduce the arrestee’s desire to interrupt the hearing, which can often spark hostile conversations between the arrestee and the judge.²¹⁶ Additionally, the attorney could advise the client about the collateral risks of pretrial detention. Writing about the pleading system, Professor John D. King writes, “By overlaying increasingly serious indirect consequences on an adjudicative system that is characterized by informality and efficiency, we continue to tolerate a system that depends on defendants resolving their cases ignorant of the long-term effects on their lives or communities.”²¹⁷ So too with bail. The consequences ushered in by an adverse bail determination are numerous.²¹⁸ Both arrestees and their attorneys should enter bail hearings, to co-opt the Supreme Court’s phrase, with their “eyes open.”²¹⁹

The arrestees should appear in person rather than by video conference. This would allow attorneys to confidentially confer with their clients throughout the

215. Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 433 (2016).

216. See discussion, *supra* Section II.C.3.

217. John D. King, *Beyond “Life and Liberty”*: *The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 43 (2013).

218. See discussion, *supra* Section I.A.

219. *Faretta v. California*, 422 U.S. 806, 835 (1975).

hearings. Additionally, it may improve outcomes for arrestees. A 2010 study by Northwestern University found that, once arrestees began appearing in bail hearings by video, the average bail increased by over 50%.²²⁰ In contrast, arrestees whose hearings continued in person experienced no comparable change in costs.²²¹ 16B arrestees are typically detained at the CJC, a building connected by skyway to the courthouse. Bringing arrestees in person to hearings would require new, but not especially onerous, logistical processes. The clear advantages of arrestees meeting with their attorneys and appearing in person significantly outweigh the slight logistical burden placed on the court.

2. Have a Social Services Provider Participate in the Hearings

Unlike many other cities that have instituted bail reform, St. Louis does not rely on objective risk assessment tools.²²² These tools employ an algorithm that considers numerous variables about an arrestee. A score is generated to predict the likelihood that an arrestee will appear at future court dates or be re-arrested if released before trial.²²³ Proponents claim that risk assessment tools minimize the potential for judicial bias in bail determinations.²²⁴ Skeptics, on the other hand, believe algorithms utilize data that “reflect[] outdated bail practices” and may actually recreate the same racial disparities the tools seek to avoid.²²⁵ St. Louis wisely did not adopt a pretrial assessment tool. Under Rule 33.01(e), judges take a holistic look at each arrestee.²²⁶ Even if a risk assessment tool plays a small part of the judge’s overall analysis, it simply cannot account for the whole story.²²⁷

Currently, however, the hearings lack any meaningful way to make individualized determinations. As already mentioned, contract attorneys have not met their clients, and arrestees are discouraged from sharing information on the record. But an earlier practice in 16B presents a strong archetype for addressing this deficiency. In the first months of 16B, a professor from Saint Louis University, Lisa Jaegers, worked with the St. Louis Metropolitan Police Department to employ a team of graduate students that screened every arrestee

220. COLOR OF CHANGE, *supra* note 6, at 4.

221. Brian Jacobs, *Zooming in on the Flaws of Virtual Court*, FORBES (Sept. 15, 2020), <https://www.forbes.com/sites/insider/2020/09/15/zooming-in-on-the-flaws-of-virtual-court/?sh=168738da3fe2> [<https://perma.cc/JN96-RJR3>].

222. Brook Hopkins, Chiragg Bains & Colin Doyle, *Principles of Pretrial Release*, 108 J. CRIM. L. & CRIMINOLOGY 679, 685 (2018).

223. *Id.*

224. See John Logan Koepke & David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 WASH. L. REV. 1725, 1749 n.19 (2018).

225. *Id.* at 1730.

226. MO. SUP. CT. R. 33.01(e).

227. See Bryce Covert, *A Bail Reform Tool Intended to Curb Mass Incarceration Has Only Replicated Biases in the Criminal Justice System*, INTERCEPT (July 12, 2020), <https://theintercept.com/2020/07/12/risk-assessment-tools-bail-reform> [<https://perma.cc/ABY4-5D6K>].

before they appeared in 16B. The screeners assessed the level of community support resources that the arrestee would be able to draw upon after release. The students remained in the courtroom at the hearing and, at the judge's request, provided additional information about their assessment. Since contract attorneys do not have the opportunity to speak to their client, screeners filled critical knowledge gaps. COVID-19 disrupted this screening program. Although the hearings have since returned in person, the screeners have been unable to reinstate their process.^{228*}

The court should return to the practice Professor Jaegers implemented. It allows for more detailed and informed consideration of the Rule 33.01(e) factors. Importantly, it allows professionals who are trained in assessing individuals' social networks and resource needs—a skill which attorneys and judges simply are not trained to do—to make an informed recommendation. Of course, the judge will have the final say. But an informed opinion from a social service provider reduces the need for guesswork in bail determinations. Ideally, it will grant judges sufficient information so that they can avoid unnecessarily burdensome conditions of release, such as electronic monitoring.

3. Rigorous Data Collection and Publicly Available Reports

In February of 2022, the 22nd Circuit published its first reports on 16B outcomes. The office has committed to releasing reports every month.²²⁹ Access to any reports on pretrial practices is unusual. As Professor Mayson notes, “the state of pretrial release and detention data in state systems is exceedingly poor; the data mostly range from inaccessible to nonexistent.”²³⁰

Given the recent reports, I include this recommendation only to encourage the 22nd Circuit to continue releasing data and to include additional data on the reports. The reports should disaggregate information by the arrestee's race and indigency determination. Additionally, the reports should disaggregate outcomes by the presiding judge to gauge if judges are enforcing the rules consistently.^{231*} The reports should include outcomes based on *who* represented the arrestee (a contract attorney, a public defender, or private counsel). Finally, to account for the range of charges under a single class of crime, the reports

228. Interview with Lisa Jaegers, Ph.D, Assoc. Professor of Occupational Sci. and Occupational Therapy at St. Louis Univ. (Feb. 7, 2021) (*on file with author).

229. *Pre-Trial Monthly Data Reports*, 22ND JUD. CIR. CT., CITY OF ST. LOUIS, <https://www.stlcitycircuitcourt.com/index2.html?XMLFile=xml/PreTrialDataReports.xml> [<https://perma.cc/EEB4-R8YS?type=image>] (last visited Feb. 26, 2022).

230. Mayson, *supra* note 40, at 1653.

231. During one 16B Hearing, an attorney asked to continue his hearing but only by two days because he wanted to stay on a particular judge's docket. Among judges, the application of rules is less-than-uniform, and certain judges have reputations for being more inclined to grant pretrial release. 16B Division Hearings (Aug. 4, 2021) (*on file with author).

should disaggregate outcomes by charge and not class.²³² Finally, while the data is currently presented as a month-long snapshot, it should be presented in a format that tracks trends over time. Representing the data in this way would provide the circuit, attorneys, and the public with metrics of how (and whether) the reforms are having the consequences intended.

CONCLUSION

Cash bail reform is an incomplete solution to the problems pretrial detention poses. Even after the city of St. Louis committed to deprioritizing, and sometimes denouncing, cash bail, the vestiges of the pre-reform era remain or appear in new forms. Judges have increased the number of arrestees held “no bond,” exchanging cash bail’s de facto detention for true pretrial detention. For those that are released, judges keep them digitally shackled to the court through invasive and expensive electronic monitoring. Even when procedures are put in place to make the system “fairer,” the implementation inhibits progress. Considering factors about the arrestee’s community ties and mental health create new avenues to assess wealth. Appointing counsel, yet giving said counsel zero opportunity to meet with their client or even talk off-record creates a specious form of advocacy. In St. Louis, after three years of cash bail reforms, the pretrial detention system generally remains in the same place it was before: likely to detain poor, Black arrestees. The city’s pretrial detention system requires expansive transformation into a system that re-integrates arrestees into their communities with dignity, prioritizing mental health, physical health, and crucial local support.

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232. Class E felonies in Missouri, for instance, range from property damage, to domestic assault in the third degree, to child abduction, to sexual misconduct with a child under 15. MO. REV. STAT. §§ 569.100, 565.074, 565.156, 566.083.

* JD Candidate, 2023, Saint Louis University School of Law. I am grateful to Professor Chad Flanders for his guidance and generous feedback. Many attorneys, researchers, and social workers involved in 16B took time to talk with me, and I am thankful for all they shared. Special thanks to Alex Bursak, Jesse Smith-Appelson, and Jenny Coppersmith for feedback and support.

After this Note was written and accepted for publication, two notable changes were made to 16B processes. First, in 2023, arrestees begin appearing in person at both 48-Hour and Seven-Day Hearings. This enables arrestees to meet and talk with their appointed contract attorney in the courtroom before the hearing. Arrestees now sit at the counsel table, where they have private asides with the attorney throughout. Second, on February 6, 2023, a circuit judge in Cole County, Missouri found that a bail hearing is a “critical stage” and, under the Missouri Constitution, the right to counsel attaches. *David v. Missouri*, No. 20AC-CC00093, at *13 (Mo. Cir. Ct. Feb. 6, 2023). The order clarifies that “it is not enough for the State to furnish counsel at all critical stages;” rather, the standard is “adequate representation,” which generally means the attorney has “investigate[d] the facts” available. *Id.* The opinion may meaningfully shift the degree of representation to which arrestees are entitled as early as bail hearings.