SAFE-T FOR WHOM?

HOW LEGISLATIVE OVERREACH TRANSFORMED CRIMINALS INTO VICTIMS[†]

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Abstract:

This Article asserts that the Safety, Accountability, Fairness, and Equity-Today (SAFE-T) Act, specifically the Pretrial Fairness Act, should be amended to strike a balance between the rights of the accused and the rights of crime victims without abolishing cash bail. By hastily passing a sweeping reform of the Illinois criminal justice system, Illinois lawmakers defied the state constitution, usurped the people's will, and denied crime victims' rights.

This Article further contends that the Illinois state legislature invalidly amended the Illinois State Constitution, thereby sacrificing public safety and the rights of crime victims for the rights of criminals. The pretrial release provisions of Public Acts (P.A.) 101-652 and 102-1104 violate the Illinois Constitution, specifically Article I, Section 9 ("Bail and Habeas Corpus") and Article I, Section 8.1 ("Crime Victims' Rights") by abolishing monetary bail and thereby completely barring the ability of a judge to set an "amount of bail."

This Article discusses the historical underpinnings of cash bail and pretrial detainment from English common law to modern American jurisprudence, bail reform in Illinois, and the Illinois Supreme Court decision in Rowe v. Raoul, in which the Court held the SAFE-T Act constitutional. This Article will also present the imminent consequences of abolishing cash bail and evaluate the merits of the most common arguments opposing cash bail.

Finally, this Article addresses the history of the Illinois Constitution and proposes a solution to the recent legislative abolishment of cash bail. To revive cash bail in Illinois, the Constitution should be amended. This Article presents two valid amendments to the Illinois Constitution that clearly and unambiguously include "monetary bail" in Article I, Sections 8.1 and 9, as well as defining the judiciary's sole authority found in Article I, Section 9 of the Constitution in setting monetary bail.

[†] The views and opinions expressed in this Article are solely those of the Author and do not reflect the views or opinions of Southern Illinois University School of Law or any of its faculty members.

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CONTENTS

INTRODUCTION

[The Illinois SAFE-T Act] will allow known criminals back on the streets to commit more crimes. It is truly a sad day when our state Supreme Court upholds a criminal justice system that prioritizes criminals over victims.[1]

Geneseo, IL (Sept. 20, 2023):[2] *Illinois State Police made one of the largest drug busts in its 100-year history, seizing . . . a total of 5,231 pounds of marijuana (valuing between $6.3 million and $14.7 million).*[3] *After police took the suspects to Henry County Jail, the State's Attorney petitioned the judge for their detention, per the pretrial prelease provisions of the SAFE-T Act.*[4] *Following the pretrial release hearing, both men were released back onto the streets and into the community without having to pay a cent.*[5]

Hinsdale, IL (Sept. 23, 2023): A gang of six men shattered a window of a local boutique with a sledgehammer and proceeded to steal $60,000 worth of merchandise. One defendant left blood at the scene, and DNA testing matched the DNA to a man on parole for convictions of armed robbery and aggravated battery. Before a DuPage County judge, DuPage County State's Attorney Robert Berlin argued that the defendant posed a threat to the community. Nevertheless, the defendant walked free without posting cash bond.[6]

Troy, IL (Sept. 2023): A 52-year-old man walks free after being charged with fatally shooting his girlfriend in their home. A Madison County Circuit Court judge denied a state petition to have him returned to custody on the first-degree murder charges.[7]

Chicago, IL (Oct. 8, 2023): In a mass shooting early Sunday morning, eight people were shot in the River North neighborhood of Chicago. Police made no arrests.[8]

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[1] Illinois Senator Sally Turner (R-Beason), *State Republican Senators React to Illinois Supreme Court SAFE-T Act Ruling* (2003), https://ilsenategop.org/2023/07/18/state-senators-react-to-illinois-supreme-court-safe-t-act-ruling/

[2] Two days after the pretrial release provision of SAFE-T Act abolishing cash bail went into effect; *See generally Darren O'Brien, Guide to Sentencing Hearings, Bond Hearings, and Pretrial Release in Illinois (Mar. 29, 2022)* (detailing changes made by the SAFE-T Act, including the new pretrial release provisions that take effect on September 18, 2023, with the abolition of cash bail*)*.

[3] Simmy Wood & Bradley Zimmerman, *IL State Police Seize 5,200 lbs. of Marijuana, One of Largest ISP Busts Ever,* CENTRAL ILLINOIS NEWS (Sept. 22, 2023), https://www.wcia.com/news/state-news/il-state-police-seize-5200-lbs-of-marijuana-one-of-largest-isp-busts-ever/.

[4] ILCS CH. 725, ACT 5, T. III, ART. 110 (Pretrial Release); *see also* O'Brien*, supra* note 2.

[5] *See* Kevin Bessler, *Former Prosecutor says Illinois' SAFE-T Act an Experiment,* THE CENTER SQUARE (October 5, 2023), https://www.thecentersquare.com/illinois/article_1357898c-63bd-11ee-a8db-5f952ce5fcb9.html

[6] John Garcia, *Illinois No Cash Bail: After Safe-T Act takes Effect, States Attorney Voice Concern,* ABC CHICAGO (September 23, 2023), https://abc7chicago.com/illinois-no-cash-bail-safe-t-act-2023-law-hinsdale-break-in/13816593/; *see also* Bessler, *supra* note 5.

[7] Glenn Minnis, *Madison County Murder Case has SAFE-T Act Critics Concerned,* THE CENTER SQUARE ILLINOIS (Oct. 26, 2023), https://www.thecentersquare.com/illinois/article_b08beb62-71b9-11ee-bf92-1b9532b932e5.html (*quoting* State Rep. Dan Caulkins, R-Decatur: "If somebody commits a murder and you've got enough evidence to charge them with the murder, I would certainly think that you'd be able to hold them as a threat to the community.").

[8] Jeramie Bizzle, *8 Shot, 4 Critically During Fight, Exchange of Gunfire on Chicago's Near North Side,* CBS CHICAGO (Oct. 2023), https://www.cbsnews.com/chicago/news/investigation-underway-after-shooting-river-north/

In 2018, the California legislature passed a law dismantling the state's cash bail system. The California experiment was "designed to produce a more equitable system of pretrial detention."[9] Jerry Brown, California's governor who signed the legislation, proclaimed, "[t]oday California reforms its bail system so that rich and poor can be treated alike."[10] The legislature and the governor, however, never witnessed their experiment come to fruition because a referendum effectively put the reform on hold until California voters weighed in on the question: in the 2020 general election, voters rejected Proposition 25—the plan to eliminate cash bail.[11] Despite the outcome in California, Illinois remained poised to pursue its own deconstructive legislation to abolish cash bail.[12]

Although the principles of Federalism do, in theory, allow "a single courageous State may, *if its citizens choose*, serve as a laboratory and try novel social . . . experiments," the people of Illinois had no choice but to accept the will of a vocal political supermajority.[13] With violent crime on the rise in Illinois, "smash and grab" robberies going unpunished, and growing fears for public safety, Illinois citizens should not be the nation's guinea pigs for experimenting with abolishing cash bail.[14] If criminals know they can get away with their crimes, they will view arrest as nothing more than an inconvenience rather than a deterrent to avoid the criminal impulse in the future.[15]

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[9] JOSHUA DRESSLER, DANIEL S. MEDWED, & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES, AND PERSPECTIVES, WEST ACADEMICS, 848 (8th ed. 2023).

[10] Thomas Fuller, *California is the First State to Scrap Cash Bail,* N.Y. Times (Aug. 28, 2018), https://www.nytimes.com/2018/08/28/us/california-cash-bail.html.

[11] Patrick McGreevy, *Prop. 25, Which Would Have Abolished Cash Bail, Rejected by Voters,* L.A. TIMES (Nov. 3, 2020), https://www.latimes.com/california/story/2020-11-03/2020-california-election-prop-25-results (Groups opposing Proposition 25 included the American Civil Liberties Union of Southern California, as well as Human Rights Watch, which has pressed for bail reform but said the law "exchanges money bail for a system that uses racially biased risk assessment tools [and] gives judges nearly unlimited discretion to incarcerate . . . Proposition 25 was also opposed by more than two dozen sheriffs in California, including Orange County Sheriff Don Barnes, who said ending cash bail removes an "important mechanism" for ensuring defendants appear in court").

[12] Transcript of Debates, HB 3653, Illinois House of Rep. 101st Gen. Assemb., Reg. Sess., (Jan 13, 2021) at 9, https://www.ilga.gov/house/transcripts/htrans101/10100104.pdf (*quoting* Rep. Slaughter: "We are not concerned with how it differs from other states. What we are prioritizing and concerned with is how we're going to be more fair [sic] here, in the state of Illinois, to underserved communities and to communities of color.").

[13] *New State Ice Co. v. Lieman,* 285 U.S. 262, 311 (1932) (Brandeis, J., *dissenting*) (emphasis added); *see* Danny Connolly*, Illinois Democrats Celebrate Keeping Supermajority in Statehouse,* WCIA (Nov. 9, 2022), https://www.wcia.com/news/illinois-democrats-celebrate-keeping-supermajority-in-statehouse/ ("After the 2022 election, Democrats in the Illinois legislature still contains supermajorities in both chambers . . . The Illinois Constitution deems a supermajority is necessary for voting on bills after May 31st and passing bills that the governor vetos [sic].").

[14] *See* Patrick Andriesen, *Chicago Hits Record High Car Thefts, Record Low Arrests in 2023*, ILLINOIS POLICY (Jan.22, 2024), https://www.illinoispolicy.org/chicago-hits-record-high-car-thefts-record-low-arrests-in-2023/ ("Chicagoans reported 29,063 motor vehicle thefts in 2023, the most car thefts in 23 years. But as the record crime wave surged last year, city efforts to catch car thieves also reached historic lows. The arrest rate for car theft fell to 2.6% – its lowest level since the city started tracking the crime in 2001 . . ."); *see generally* Bessler*, supra* note 5.

[15] *See, e.g., United States v. Perez*, 86 F.4th 1311, 1315 (11th Cir. 2023) (Shortly after being charged and released for possession of a stolen firearm, the defendant faked his own kidnapping. Police began searching for defendant; police found him; defendant pulled a previously stolen firearm out of his waistband and shot a police officer three times. Those shots proved fatal.); *State v. Cassius*, 110 Ariz. 485, 486 (1974) (While free on his own recognizance on a burglary charge, the defendant was caught burglarizing a building less than three weeks after his release); *People ex rel. Litma v. Spano*, 151 N.Y.S.3d 623 (App. Div. 2021) (Defendant was charged with felony offenses that "arose from conduct occurring" while he was released on his own recognizance on a separate felony charge.); *People v. Disimile*, 142 N.Y.S.3d 319, 320 (Cnty. Ct. 2021) (After pleading guilty to a Class B felony drug possession, the defendant was released on his own recognizance pending sentencing when he was charged again with possession of

Illinois House Bill 3653 began as a seven-page bill amending one statutory section in February 2019, but by January 2021, the bill grew to 764 pages, affecting over 260 statutes. The legislation passed both houses of the General Assembly on the same day and was signed into law by Governor J.B. Pritzker a month later.[16] By hastily passing a sweeping reform of the Illinois criminal justice system, Illinois lawmakers have flouted the state constitution, usurped the people's will, and denied crime victims' rights.

The Safety, Accountability, Fairness, and Equity-Today Act [hereinafter "SAFE-T Act"], specifically the Pretrial Fairness Act, should be amended to strike a balance between the rights of the accused and the rights of crime victims without abolishing cash bail. This Article contends that the Illinois state legislature invalidly amended the Illinois State Constitution [hereinafter "the Constitution"], thereby sacrificing public safety and crime victims' rights for the rights of criminals. By abolishing monetary bail and thereby completely barring the ability of a judge to set an amount of bail, the pretrial release provisions of Public Acts (P.A.) 101-652 and 102-1104 violate the Illinois Constitution, specifically Article I, Section 9 ("Bail and Habeas Corpus") and Article I, Section 8.1 ("Crime Victims' Rights").

The Article proceeds in four Parts. Part I examines the historical underpinnings of cash bail and pretrial detainment from English common law to modern American jurisprudence, including historical reform efforts. Part II discusses bail reform in Illinois, focusing specifically on the partisan evolution of the SAFE-T Act from its ideological inception to the Pretrial Fairness Act's current enforcement following the Illinois Supreme Court decision in *Rowe v. Raoul* holding the SAFE-T Act constitutional in its entirety.[17] Part III presents the present and imminent consequences of abolishing cash bail and evaluates the merits of the most common arguments opposing cash bail. Finally, Part IV proposes a solution to the unconstitutional and antidemocratic SAFE-T Act: two valid amendments to the Illinois Bill of Rights that (1) clearly and unambiguously include "monetary bail," and (2) codify in the Constitution's text the judiciary's sole authority and discretion in setting monetary bail.[18]

narcotics, including both cocaine and fentanyl, with the intent to distribute.); *People v. Lee*, 178 N.Y.S.3d 900 (Crim. Ct. 2022) (The defendant committed five counts of burglary while released on his own recognizance for three prior burglary charges.).

[16] *See* Transcript of Debates, *supra* note 12, at 8 (*quoting* Rep. Slaughter: "For black communities all across the State of Illinois . . . the time is now. The time is now to go from protest to progress. Criminal justice reform cannot wait").

[17] *See Rowe v. Raoul,* 224 N.E.3d 1010 (Ill 2023).

[18] *See* Appendix I: PROPOSED CONSTITUTIONAL AMENDMENT TO ART. I, SEC. 8.1(A)(9), *infra,* at 39; Appendix II: PROPOSED CONSTITUTIONAL AMENDMENT TO ART. I, SEC. 9, *infra*, at p 42.

PART I: A BRIEF HISTORY OF CASH BAIL AND REFORM EFFORTS

[T]he legislature did indeed infringe upon the rights and responsibilities of the judicial branch of government when they stripped away judges' abilities to set cash bail . . . Crime victims and Illinois families will continue to feel less safe, and the State of Illinois will continue to grab national headlines for its growing crime rates.[19]

A. ENGLISH ROOTS OF CASH BAIL

Like so many aspects of the American criminal justice system, cash bail traces its roots to early English common law.[20] In the late seventh century, Anglo-Saxon kings created rudimentary court systems to displace barbaric blood feuds in lieu of more civilized and systematic forms of dispute resolution.[21] Here, the accused gave *borh* (surety), which assured the accused would appear for judicial proceedings and pay applicable fines.[22] By the early 900s, the Anglo-Saxon surety system permitted family, friends, and acquaintances to act as *borh*.[23] If the accused had neither property nor other forms of *borh*, the law of England permitted pretrial detention until judgment.[24] Like modern bail systems, the Anglo-Saxon surety system linked the amount of pretrial *borh* pledged to the seriousness of the crime, thereby tying bail to the potential penalty.[25] Thus, from its conception, English common law found prudence in attaching sureties of monetary value to the criminally accused before any formal judgments of guilt or innocence were made.

Following the Norman Conquest of England in 1066, however, the administration of English law changed dramatically.[26] The concept of monetary sureties faded into obscurity while more severe punishment ascended to the forefront.[27] During the Norman Conquest, the state began to govern private disputes, imposing capital and corporal punishment instead of monetary fines as

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[19] Senator Andrew Chesney (R-Freeport), *State Republican Senators React to Illinois Supreme Court SAFE-T Act Ruling* (2023), https://ilsenategop.org/2023/07/18/state-senators-react-to-illinois-supreme-court-safe-t-act-ruling/.

[20] *See* James F. Stephen, A HISTORY OF THE CRIMINAL LAW OF ENGLAND, 233 (1883); *see also* LESLIE W. ABRAMSON, *CRIMINAL PROCEDURE,* WEST ACADEMICS, (2nd ed. 2012) ("Bail is the Anglo-American criminal justice system's answer to the issue of what is to be done with an accuse, whose guilt has not been proven, during the time period between arrest and trial."); *see generally* Shima Baradaran Baughman, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM, (2018).

[21] *See generally* Christine S. Scott-Hayward & Henry F. Fradella, PUNISHING POVERTY: HOW BAIL AND PRETRIAL DETENTION FUEL INEQUALITIES IN THE CRIMINAL JUSTICE SYSTEM, (2019).

[22] *Id.* at 11-12 (explaining that *borh* is synonymous with bail: "In the same way that bail is supposed to act as a surety today, *borh* was designed to ensure that the accused appeared before a political officer to participate in the judicial process").

[23] *Id.* at 12 (stating that "property could also be pledged in satisfaction of surety").

[24] W.F. Duker, *The Right to Bail: A Historical Inquiry,* ALBANY L. REV. (1977).

[25] See 4 BLACKSTONE, COMMENTARIES 380 (Hammond ed. 1890); *See also* Pollock & Maitland, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, 584, 589-90 (1899):

> "English, Norman and French tradition seem all to point to an ancient and extremely rigorous form of suretyship or hostageship [sic] which would have rendered the surety liable to suffer the punishment that was hanging over the head of the released prisoner."

[26] Scott-Hayward & Fradella, *supra* note 21.

[27] June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail,* 34 SYRACUSE L. REV. 517, 521 (1983) ("The simplicity-and certainty-of Anglo-Saxon bail law disappeared as reliance on corporal punishment grew following the Norman conquest.").

a sentence.[28] This shift in punishment incentivized criminal defendants to flee out of fear of physical harm; in response, judges set bail and incarcerated the accused to ensure their presence at trial.[29]

Furthermore, infrequent visits of itinerant justices led to trial delays, and many accused died while detained in unsanitary prisons.[30] Whether motivated by a concern for their prisoners' well-being or by a desire for financial gain, sheriffs commonly released prisoners either on their recognizance "with or without requiring the posting of some bond, or on the promise of a third party to assume personal responsibility for the accused's appearance at trial."[31] These ad hoc arrangements between the sheriff and accused were systemized and codified into the English legal framework with the Statute of Westminster.

B. ENGLISH REFORM EFFORTS

The English Parliament enacted the Statute of Westminster in 1275 to define bailable and nonbailable offenses, marking England's first reform period.[32] The Statute specified conditions under which pretrial release was permissible. It limited the sheriff's power to determine sufficient security in each case, subsequently transferring power to justices of the peace.[33] To ensure that the accused would reappear on the date set for trial, a third party, or surety, had to assume personal responsibility for the accused on penalty of forfeiture of their property.[34] Pursuant to the Statute, bail was not an absolute and enumerated right of arrestees but was only available to arrestees charged with noncapital offenses "for which a Man shall not lo[s]e Life or Member[.]"[35] Judges exercised discretionary authority first to decide if bail would be granted and second to set the amount of bail not only by what the arrestee could pay but also by "the severity of the alleged offense, the arrestee's prior criminal history, and the weight and reliability of the evidence produced against the arrestee."[36] Thus, under the Statute, judges decided whether to grant or deny bail.[37]

The second reform period addressed the circumvention of the bail process to detain individuals in disfavor with the Crown.[38] Although earlier reforms imposed royal control over local justices, seventeenth-century reforms addressed the excesses of the higher courts. To facilitate a determination of bailability, the Petition of Right prohibited detention by any court without charge.[39] The Habeas Corpus Act[40] of 1679 established procedures to prevent extensive

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[28] Nicholas P. Johnson, *Cash Rules Everything Around the Money Bail System: The Effect of Cash-Only Bail on Indigent Defendants in America' s Money Bail System*, 36 BUFF. ENVTL. L.J. 29, 38 (2019).
[29] *Id.*
[30] *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966, 967 (1961).
[31] *Id.*
[32] *See* Carbone, *supra* note 27, at 528.
[33] *See Bail, supra* note 30, at 966.
[34] *Id.* (Local landowners were preferred as sureties and were given the powers of a jailer to prevent the accused's flight).
[35] Carbone, *supra* note 27, at *525.*
[36] *Id.*
[37] *See Bail, supra* note 30, at 967 ("[T]he granting or denying of bail in England became almost completely a discretionary function of the judiciary[] and remains so today.").
[38] *See* Carbone, *supra* note 27, at 528.
[39] 3 Car., ch. 1 (1628).
[40] *Habeas Corpus,* BLACK'S LAW DICTIONARY (10th ed. 2014) (Habeas corpus is meant to ensure that a person's imprisonment or detention is not illegal. While habeas corpus provides defendants with the right to be heard and to be released from unlawful detention, the Constitution does not say when such detention is unlawful).

delays before holding a bail hearing.[41] A decade later, Parliament added the Bill of Rights[42] prohibiting excessive bail.[43] These statutes and the Statute of Westminster defined English bail law at the time of American independence. The advent of severe penalties caused pretrial detention to become more frequent and bail to become more critical. English law "took great pains to define who should [be bailable] and who should be detained, and to insure, for the protection of the community as well as the defendant, that the system was not abused."[44]

C. CASH BAIL ACROSS THE ATLANTIC

English settlers to the Thirteen Colonies adopted, in part or in whole, the English bail system.[45] The early colonies also relied heavily on English criminal law in their colonial charters.[46] Massachusetts, and later Pennsylvania, were the first colonies to break with the English bail tradition by guaranteeing bail in all cases except those for capital offenses and by removing burglary, larceny, and robbery from the list of capital offenses, thereby allowing arrestees accused of such charges a chance before the judge to obtain pretrial release.[47] Soon after declaring independence in 1776, the other colonies relied heavily on the bail codes of Massachusetts and Pennsylvania in drafting their constitutions.[48] With the eventual ratification of the United States Constitution and the adoption of the Bill of Rights, the prohibition against "excessive bail" already adopted by many of the former colonies applied to the federal government.[49]

The Framers of the United States Constitution adopted many essential bail rights from the English Parliament but left out explicit language regarding an absolute right to bail in noncapital cases.[50] Instead, citizens were left without a federal right to bail, making the right to bail a decision by Congress and the states.[51] Following the ratification of the United States Constitution, Congress passed the Judiciary Act of 1789, which worked in concert with the Eighth Amendment, creating three distinctive features: bail should not be excessive, the court should decide the defendants' right to bail in noncapital cases, and bail was a means to ensure the appearance of the accused at trial. [52, 53]

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[41] *See* Darnel's Case, 3 Cobbett's State Trials (T. Howell ed. 1810) 1 (1627).
[42] 1 W. & M., ch. 2 (1689).
[43] *See* Matthew Hegreness, *America's Fundamental and Vanishing Right to Bail, 55* ARIZ. L. REV. 909, 917 (2013) ("For all offenses that were bailable, officers of the crown had no power to deny bail: persons accused of bailable offenses 'shall from henceforth be let out by sufficient Surety, whereof the Sheriff will be answerable and that without giving ought of their Goods") (*quoting* Statute of Westminster 1275, 3 Edw. 1c. 15 (Eng.))).
[44] Carbone, *supra* note 27, at 525.
[45] Devin Taseff, *The Illinois Bail Reform Act of 2017: Roadmap to Reform, or Reform in Name Only*, 38 N. ILL. U. L. REV. 528, 533 (2018).
[46] Carbone*, supra* note 27, at 525.
[47] Taseff, *supra* note 45, at 534.
[48] Carbone*, supra* note 27, at 532.
[49] Johnson, *supra* note 28, at 40.
[50] Caleb Foote, *The Coming Constitutional Crisis in Bail: I,* 113 U. PA. L. REV. 959, 967 (1965).
[51] Carbone*, supra* note 27, at 533.
[52] U.S. Const. amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."
[53] *See* Timothy R. Schnacke et al*., The History of Bail and Pretrial Release,* PRETRIAL JUSTICE INST. 1, 21 (2010).

D. JUDICIAL POWER TO SET BAIL

In 1813, Chief Justice Marshall asserted, "the power which the courts of common law exercised over recognizances in England, may, in the United States, be exercised by this court."[54] Marshall then described power as "not [unreasonable]" which the courts possessed "upon authority" and "entirely independent of the statute," resembling the courts' power to determine the dollar amount of cash bail in modern systems.[55] The Court's objective, too, resembles rationales for cash or monetary bail because this system "combine[s] the administration of criminal justice with the convenience of a person accused, but not proved to be guilty."[56]

Furthermore, like modern cash bail systems, "if the accused has . . . forfeited his recognizance, but repairs the default . . . and submit[s] himself to the law," Marshall recognized, then "the real intention and object of the recognizance are effected, and no injury is done."[57] Just as "judges of oyer and terminer[58] are the proper judges whether recognizances ought to be estreated or spared,"[59] there is "[n]o instance . . . [that] can be produced, of a certiorari to remove a recognizance for appearance from a court of oyer and terminer [because it] would be to take away a jurisdiction that properly belongs to them."[60] Supreme Court opinions dating back to the early 19th century acknowledge the power of setting bail lies within the judiciary's purview.[61]

E. AMERICAN BAIL REFORM EFFORTS

After the Judiciary Act of 1789, no significant bail reform emerged until the 1950s with the Supreme Court decision *Stack v. Boyle.*[62] Here, the Court reaffirmed the "right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial . . . [T]he modern practice of requiring a bail bond or the deposit of a *sum of money* . . . serves as additional assurance."[63] The Federal Bail Reform Act of 1966 served as an essential model for state reform legislation.[64] After the number of pretrial detainees began to rise, Congress worked to ensure that bail and pretrial release were more accessible to the accused.[65] However, when President Nixon declared the "war on crime," the idea of bail again changed: bail became less accessible for the accused.[66]

The last significant bail reform effort culminated with the 1984 Bail Reform Act, which the Supreme Court upheld as constitutional in *United States v. Salerno.*[67] The Federal Bail Reform

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[54] U.S. v. Feely, 25 F. Cas. 1055, 1056 (C.C.D. Va. 1813).
[55] *Id.* at 1057.
[56] *Id.*
[57] *Id*.
[58] *Oyer and Terminer,* BALLENTINE'S LAW DICTIONARY (3rd ed. 1969) (A special or extraordinary commission which the king sometimes issued upon urgent occasions to try those criminal cases which stood in need of immediate prosecution.); *see also Oyer*, BALLENTINE'S LAW DICTIONARY (3rd ed. 1969) (A hearing at common law on a bail bond).
[59] *See Feely, supra* note 54, at 1056 (*quoting Rex v. Tomb*, 10 Mod. 278).
[60] *Id*.
[61] *See, e.g., Davidson v. Taylor*, 25 U.S. 604 (1827).
[62] 342 U.S. 1, 4-5 (1951) (emphasis added).
[63] *Id.* at 4-5 (emphasis added).
[64] *See* Carbone, *supra* note 27, at 554-55 ("The Bail Reform Act [of 1966] . . . permit[ted] greater pretrial release of those unlikely to face harsh sanctions after trial."); *see generally* WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE, WEST* HORNBOOK SERIES (5th ed., 2009).
[65] *See* Bail Reform Act of 1966, 18 U.S.C. §§ 3146-3152 (repealed 1983).
[66] *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat.1837.
[67] 481 U.S. 739, 741 (1987) (holding that the interest in crime prevention may constitutionally be considered in the bail determination process; upholding the 1984 Bail Reform Act as constitutional against due process claims).

Act presumed release on personal recognizance "unless the judicial officer determine[d] that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community."[68] Since then, the decision to grant or deny bail remained mainly within the judiciary's discretion, who may effectively deny bail if they find the accused dangerous to the community.[69] In federal courts, the provisions of 18 U.S.C. §3143 govern release pending sentencing or appeal.[70]

By supporting sweeping changes in both how federal courts consider bail applications and the circumstances under which bail is granted, Congress hoped the Bail Reform Act of 1984 would "give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released."[71] Part II shows how the Illinois legislature commandeered the judiciary's discretionary power through an invalid amendment of the Constitution and effectively usurped the constitutional rights guaranteed to crime victims.

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[68] 18 U.S.C. § 3142(b).

[69] 18 U.S.C. § 3142(b):

> "The judicial officer shall order the pretrial release of the [accused] ... unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community."

[70] 18 U.S.C § 3142(c)(1):

> "If the judicial officer determines that the release described in subsection (b) of this section will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person."

18 U.S.C § 3142(c)(1)(B)(xii):

> "[S]ubject to the least restrictive further condition, or combination of conditions, that such judicial officer reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person . . . subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person . . . execute a bail bond with solvent sureties; who will execute an agreement to forfeit in such amount as is reasonably necessary to assure appearance of the person as required and shall provide the court with information regarding the value of the assets and liabilities of the surety if other than an approved surety and the nature and extent of encumbrances against the surety's property; such surety shall have a net worth which shall have sufficient unencumbered value to pay the amount of the bail bond."

See also Fed. R. Crim. P. 46(c), which provides that "the burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant."

[71] *U.S. v. Salerno,* 481 U.S. 739, 742 (1987) (quoting S.Rep. No. 98–225, at 3, U.S. Code Cong. & Admin.News 1984, p. 3185).

PART II: ILLINOIS STATE BAIL REFORM

The will of the people, as declared in the [state's] Constitution, is the final law; and the will of the [state] legislature is only law when it is in harmony with, or at least is not opposed to, that controlling instrument which the will of the people, as declared in the [state's] Constitution, is the final law; and the will of the [state's] legislature is only law when it is in harmony with, or at least is not opposed to, that controlling instrument which governs the legislative body equally with the private citizen.[72]

A. ILLINOIS BAIL PRIOR TO THE SAFE-T ACT

Historically, the Illinois Supreme Court [hereinafter "the Court"] sought to strike a balance between the amount of bail judges set and the financial ability of the accused, holding that the authority of "the constitutional right to bail must be qualified by the authority of the courts."[73] Before the SAFE-T Act became law, the terms and conditions of an arrestee's pretrial release fell within the discretionary power of judges.[74] Rather than simply releasing the accused unconditionally, arrestees often secured their pretrial release by depositing cash or property with the court.[75] Since bail was subject to forfeiture if the accused failed to return for any subsequent court appearances, bail incentivized the accused to appear for their court dates.[76] Bail also assured the integrity of future legal proceedings.[77] In *People ex rel. Hemingway v. Elrod,* the Court held that courts could deny bail in other cases if necessary to prevent defendants from interfering with witnesses or jurors, or carrying out threats.[78] The Court recognized "matters concerning court administration" fall within the judiciary's inherent power, and the legislature is "without power to specify how the judicial power shall be exercised under a given circumstance."[79]

Prior to 1964, the professional bail bondsman system, "with all its abuses," was "in full and odorous bloom in Illinois."[80] Under that system, the bail bondsman customarily collected the maximum fee (10% of the bond amount) permitted by statute and retained the entire amount even though the accused fully satisfied the bond conditions.[81] The origins of article 110 of the Illinois Code of Criminal Procedure [hereinafter "the Code"] derive from legislation passed in 1963 in wherein the legislature revised Illinois' bail system to "restrict the activities of professional bail

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[72] *See* Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union, (1868)*.

[73] *People ex rel. Hemingway v. Elrod*, 60 Ill.2d 74, 79 (1975); *see also* Ill. Rev. Stat. 1965, ch. 38, § 110-5(a) ([C]ourts shall determine an "*amount of bail*" that is (1) sufficient to assure the accused's compliance with the conditions set forth in the bail bond, (2) not oppressive, (3) commensurate with the nature of the offense charged, (4) considerate of past criminal acts and conduct of the defendant, and (5) considerate of the *financial ability of the accused*) (emphasis added).

[74] *See* JOSHUA DRESSLER & ALAN C. MICHAELS, *UNDERSTANDING CRIMINAL PROCEDURE: VOL. 2: ADJUDICATION,* 95 (5th ed. 2006)

[75] *Id.*

[76] *See* DRESSLER, *supra* note 74 ("The money deposited, or the bond posted, [was] called bail.").

[77] *Id.* (emphasizing that judges set bail "necessary and sufficient to reasonably ensure future appearance").

[78] 60 Ill.2d 74 (1975), *supra* note 73.

[79] *Rowe v. Raoul,* No. 22-CH-16 (Cir. Ct. Kankakee County, Dec. 28, 2022) (*quoting People v. Joseph*, 113 Ill.2d 36, 42-43 (1986)).

[80] *Schilb v. Kuebel*, 404 U.S. 357, 359 (1971); *see also* D. Freed & P. Wald, *Bail in the United States: 1964,* (1964).

[81] *Schilb, supra* note 79, at 359-360.

bondsmen and to reduce the cost of liberty to arrested persons awaiting trial."[82] Among its comprehensive provisions are those of Article 10 relative to bail in criminal cases.[83] With section 110-7(a) added to the Code, the legislature eliminated the use of professional "bail bondsmen" by requiring courts to release defendants upon a deposit of 10% of monetary bail.[84] Furthermore, the Code "expressly referred to setting an 'amount' of monetary bail as the primary means for a defendant to secure pretrial release in this state."[85] In short, the Code made no ambiguities in equating bail with monetary payment—a contentious view, as this section demonstrates.[86]

B. THE PARTISAN EVOLUTION OF THE SAFE-T ACT

1. ORIGINS OF THE SAFE-T ACT

Like the United States Federal government, Illinois divides its state power into three separate governmental branches: executive, legislative, and judicial.[87] The Constitution expressly provides "[n]o branch shall exercise powers properly belonging to another."[88] Accordingly, the Court has struck down statutes involving legislative encroachment on judicial power.[89] In *People v. Joseph*,[90] for example, the Court specifically struck down a statute that "encroached upon a fundamental judicial prerogative."[91] The twenty-first century, however, has ushered in an era of constitutional relativism in which the founding document of the state is an afterthought rather than the supreme document for the governance and structure of the state government.[92] Actively working to undermine the rule of law, relativists advocate for radical change: institutional

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[82] Ill. Ann. Stat., Ch. 38, art. 110, Committee Comments-1963, at 273 (Smith-Hurd 1980).
[83] *Schilb v. Kuebel*, 46 Ill. 2d 538, 542 (1970).
[84] Ill. Rev. Stat., Ch. 38, para. 100-7 (1963); *see also Schilb*, *supra* note 79, at 360 (noting that the bail bondsman abruptly disappeared in Illinois due primarily to the success of the 10% bail deposit provision).
[85] *See Rowe, supra* note 78, at ¶ 119.
[86] 725 ILCS 5/110-1(a) ("Security" is . . . pledged to insure the *payment of bail*.); 725 ILCS 5/110-1(b) ("Sureties" encompasses the *monetary* and nonmonetary requirements set by the court) (emphasis added).
[87] Ill. Const. art. II § 1.
[88] *Id.; see also* Alicia Bannon, *Rethinking Judicial Selection in State Courts,* BRENNAN CENTER FOR JUSTICE, 21, (June 2016):

> "Yet a belief in the rule of law means a belief that judging is—or should be—constrained by legal principles and interpretative norms in a way that makes it different than the exercise of raw political power. This is particularly important because judges are often a counter-majoritarian force protecting the rights of minorities and pushing back against illegal actions by the government's political branches."

[89] *See, e.g.*, *People v. Warren*, 173 Ill.2d 348 (1996) (striking a statute in which the legislature invalidly attempted to restrict a judicial branch power); *see also Best v. Taylor Mach. Works*, 179 Ill.2d 367 (1997) (striking statute mandating extensive discovery processes, actions that were "uniquely judicial functions" according to the court).
[90] 113 Ill.2d 36, 41-45 (1986).
[91] *People v. Joseph*, *supra* note 89, at 41-45 (further holding that legislature lacks "power to specify how the judicial power shall be exercised under a given circumstance" and is "prohibited from limiting or handicapping a judge in the performance of his duties".).
[92] Maria Baghramian & J. Adam Carter, *Relativism*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Spring 2022 Edition) (Relativism is the view that truth and falsity, right and wrong, standards of reasoning, and procedures of justification are products of differing conventions and frameworks of assessment and that their authority is confined to the context giving rise to them).

deconstruction, prison abolition, and police defunding.[93] This assertion requires no conspiracy theories—the Illinois State Bar Association says the quiet part out loud.[94]

The SAFE-T Act and the Pretrial Fairness Act represent the culmination of unfettered constitutional relativism, legislative overreach, and apparent collusion between the three *independent* and *separate* branches to enact legislation at the behest and pressure of social activists, special interest groups, and political advisory committees.[95] In 2017, the Court created the Commission on Pretrial Practices [hereinafter "Commission"], charging it with "conducting a comprehensive review of the State's pretrial detention system" and with making recommendations on systemic reforms.[96] The Commission urged the legislature to draft legislation that, if enacted, codifies pretrial release conditions as "non-monetary, least restrictive, and considerate of the financial ability of the accused."[97] The Commission left the Overton Window wide open for partisan activists to shift public sentiments while advancing their own social policy agenda.[98]

In the Fall of 2020, the ISBA Steering Committee on Racial Inequality [hereinafter "Steering Committee"][99] collaborated with Chicago Democrat Senator Elgie Sims Jr. to discuss the Illinois Legislature's Black Caucus's proposed "Criminal Justice, Violence Reduction, and Police Accountability" bill.[100] The Steering Committee demanded "advancement of social justice and equity in the legal system."[101] On January 13, 2021, 104th Legislative Day, the outgoing 101st Illinois General Assembly adjourned its "lame duck" session, "one of the more volatile and fast-moving legislative sessions in recent memory."[102]

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[93] *See, e.g.*, Jessica M. Eaglin, *To "Defund" the Police*, 73 Stan. L. REV. ONLINE 120, 124, 127 (2020-2021) ("Abolitionists challenge the idea that imprisonment and policing are a solution for social, political, and economic problems in the United States. . . .from the abolitionist perspective, defunding the police is a first step toward abolishing the police."); *see also* Insha Rahman et al*., Black and Grassroots Advocates Help Illinois Make History with Bill to End Money Bail,* VERA (Jan. 29, 2021).

[94] *See Criminal Justice and Police Reform in Illinois CLE.* (In February 2021, the ISBA Human Rights Section sponsored a CLE that emphasized "the election of progressive prosecutors, bail reform, decriminalization of marijuana, and other political and legislative innovations . . . and a greater focus on . . . racial justice . . . to make systemic changes . . .").

[95] *See* Sam Rosen, *Bail Fund Co-Optation and the Purpose of Cash Bail,* 36 CRIM. Just. 28 (2021) (detailing how "the protest movement sparked by the killing of George Floyd has, among many other things, turned public attention and policy focus to the struggle to end cash bail").

[96] *See Rowe v. Raoul, supra* note 17*,* at ¶ 3 (*quoting* Ill. S. Ct. Comm'n on Pretrial Practices, Preliminary Report 4 (2018))

[97] *Id.* (*quoting* Ill. S. Ct. Comm'n on Pretrial Practices, Final Report 69 (2020)).

[98] *See Overton Window*, WIKIPEDIA (2023):

> The Overton window is an approach to identifying the ideas that define the spectrum of acceptability of governmental policies. It says politicians can act only within the acceptable range. Shifting the Overton window involves proponents of policies outside the window persuading the public to expand the window.

[99] *See* Dr. Mary L. Milano & Kenya A. Jenkins-Wright, *Because We Believe: Law, Justice, and Changemaking,* ILLINOIS BAR FOUNDATION, (Feb. 16, 2022) (explaining how the death of George Floyd catalyzed the formation of the Steering Committee and an Association wide project which "joins contemporaneous efforts to address racism . . . and to examine the ways in which the ISBA . . . pursues the transformative energy of diversity and inclusion").

[100] Kenya Jenkins-Wright & Dr. Mary L. Milano, *Toward A More Just Illinois*, 109 Ill. B.J. 36, 28 (2021).

[101] *See generally* Dr. Mary L. Milano & Kenya A. Jenkins-Wright*, supra* note 97 (discussing the inception of the ISBA Steering Committee on Racial Injustice).

[102] *See* Timothy Jackson, *2021 Illinois Lame Duck Legislative Session Wrap Up,* AIDS FOUNDATION CHICAGO (January 19, 2001) ("With the reckoning of historic racial injustices . . . gripping the state . . . as a backdrop, the Illinois General Assembly gaveled into a lame duck session beginning Friday, January 8, 2021 and ending minutes before the members of the 102nd Illinois General Assembly took their oath of office on Wednesday, January 13, 2021).

Instead of allowing proponents and opponents to be heard and allowing the members of the General Assembly to discuss the proposed law's purpose and the precise statutory language of the 764-page bill, the Illinois Senate passed it in the pre-dawn hours of this "lame duck" legislative session.[103] Within one hour, the Illinois Legislature effectively circumvented the democratic process and fundamentally altered Illinois' criminal justice system.[104] Only weeks later, Democrat Governor JB Pritzker signed the bill into law.[105] At a press conference regarding the new legislation, Pritzker proclaimed: "Today we advance our values . . . because of the passion and push of the Legislative Black Caucus, activists, [and] advocates."[106] It remains unclear which values Governor Pritzker was referring to, and as the following subsections reveal, many Illinoisans and their values fall outside the "we" Pritzker emphasized.

2. Illinois State's Attorneys Push Back

In October of 2022, before the SAFE-T Act took effect, a bi-partisan group of 62 Illinois state's attorneys sued Governor Pritzker, his Attorney General Kwame Raoul, House Speaker Emanuel Welch, and Senate President Donald Harmon to challenge the SAFE-T Act.[107] This lawsuit effectively threw a wrench into this sweeping legislation as circuit court Judge Thomas Cunnington ruled in the plaintiffs' favor, declaring parts of the SAFE-T Act unconstitutional.[108] The circuit court accurately described the relationship between the Illinois judicial branch and the legislature: "[The] administration of the justice system is an inherent power of the courts upon which *the legislature may not infringe.*"[109]

Since the setting of bail falls within the administrative power of the judiciary, bail determinations "rest with the authority of the court and may not be determined by legislative fiat."[110] At trial, the court agreed with the state's attorneys-plaintiffs that the "SAFE-T Act strips courts of the authority to ever consider monetary bail as a condition of pretrial release in every case."[111] The judge also noted that only one trial court has ruled on whether the elimination of cash bail withstands a separation of powers inquiry.[112] The defendant in *Johnston,* charged with minor traffic offenses, had a "long and incorrigible record of refusing to come back to court."[113] Since a

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[103] *See generally* Transcript of Debates, *supra* note 12 for a transcript of the final session of the 101st General Assembly on the 104th Legislative Day.

[104] Daniel M. Locallo, Daniel Kirk, & Alan Spellberg, *The SAFE-T Act Should be Appealed or Amended*, Chicago Sun Times, (October 17, 2022), https://chicago.suntimes.com/2022/10/17/23400610/safe-t-act-legislature-criminal-justice-illinois-constitution ("[T]he 764-page SAFE-T Act was introduced in the Illinois Senate at 4 a.m., and it passed at 5 a.m. Hours later, the SAFE-T Act was introduced in the Illinois House for the first time. It passed at 11 a.m.").

[105] There are two key pieces of legislation that compose the SAFE-T Act: 1) Public Act 101-0652, the criminal justice omnibus bill passed by the Illinois General Assembly and signed by the Governor in February 2021; and 2) Public Act 102-1104, a trailer bill that amended certain portions of Public Act 101-0652.

[106] *See Kenzie Dillow, Gov. JB Pritzker Signs Criminal Justice Reform Bill*, WSILTV (Feb 22, 2021), https://www.wsiltv.com/news/crime/illinois-gov-jb-pritzker-signs-criminal-justice-reform-bill/article_101ac104-120f-5dcc-9f4b-4d65dc3f69c9.html.

[107] Amelia Buragas, *Pending Bail*, 111 Ill. B.J. 10 (2023) (emphasizing that state's attorneys in 64 of Illinois' 102 counties filed substantially identical civil actions challenging SAFE-T Act's constitutionality).

[108] *See Rowe, supra* note 78, at 24.

[109] Id. at 32 (emphasis added).

[110] *Id.*

[111] *See* Donald B. Verrilli, Jr., The Eighth Amendment and the Right to Bail: Historical Perspectives 82 Colum. L. Rev. 328, 329-30 (1982) ("Bail, the pretrial release of a criminal defendant after security has been taken for the defendant's future appearance at trial, has for centuries been the answer of the Anglo-American system . . .").

[112] *Rowe, supra* note 78, at 27-28; *see People v. Johnston,* 67 Misc.3d. 267 *(N.Y. City Ct. Cohoes 2020).*

[113] *Johnston, supra* note 111, at 270.

novel New York statute eliminating cash bail prohibited the *Johnston* court from setting monetary bail,[114] the court concluded electronic monitoring was the "least restrictive set of conditions" to assure the defendant's appearance.[115]

However, the court found that placing the defendant on electronic monitoring for a misdemeanor offense "would be quite the intrusion on defendant's liberty." [116] Therefore, the court held the prohibition on cash bail was unconstitutional. In doing so, the court concluded that the "categorical" nature of the cash bail prohibition eliminated court discretion.[117] Finding that "history counsels that bail is ultimately a judicial function," the court deduced that bail historically "broke the way of the courts" because it was not a punishment.[118] Instead, its purpose was "to ensure an orderly process for the courts and that defendants answer" on the charge.[119] While the legislature may "alter and regulate the proceedings in law," the court held, it may not seize "from courts . . . final discretion" in determining "the least onerous conditions to ensure that a defendant answers the charges."[120]

Furthermore, the *Rowe* court held that the pretrial release provisions "restricts the ability of the court to detain a defendant where the court finds that the defendant will interfere with jurors or witnesses, fulfill threats, or not appear for trial."[121] The court also noted that these provisions would likely lead to delays in cases, increased workloads, expenditures of additional funds, and an inability to obtain the defendant's appearance in court."[122]Also, the SAFE-T Act attempts to rewrite history and the Constitution by effectively erasing the term "bail" wherever it previously existed in multitudinous Illinois Codes.[123]

The ruling came less than a month before Gov. Pritzker signed HB1095, which included a series of amendments and changes to the pretrial release provisions of the SAFE-T Act.[124] HB1096, as proposed, only "amend[ed] the Criminal Code of 2012 and [made] a technical change

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[114] Beginning in 2020, New York implemented reforms aimed at drastically reducing or eliminating cash bail. The law was "charge-based" and prohibited judges from ordering cash bail for most misdemeanors and nonviolent felonies. New York's existing laws that prohibit judges from considering dangerousness of the accused or public safety remained in place, resulting in a system in which 90 percent of statewide arrests were subject to release without bail, and judges there had no authority to assess or even consider the potential danger to the community in doing so.

[115] *Johnston, supra* note 111, at 271.

[116] *Id.* at 271-77.

[117] *Id.* at 274.

[118] *Id.* at 275-6.

[119] *Id.*

[120] *Id.* at 277.

[121] *See Rowe, supra* note 76, at 17-18.

[122] Id. at 18.

[123] *Rowe, supra* note 78, at 25; *see also* 5 ILCS 70/1.43 (Whenever there is a reference in any Act to "bail", "bail bond", or "conditions of bond", or "conditions of bail", these terms shall be construed as "pretrial release" or "conditions of pretrial release"); *see e.g.,* 5 ILCS 140/2.15(a)(v) (amended "Freedom of Information Act"); 5 ILCS 160/4(a)(5) (amended "State Records Act"); 50 ILCS 205/3b(a)(5) (amended "Local Records Act"); 110 ILCS 12/15(a)(5) (amended "Campus Security Enhancement Act of 2008"); 215 ILCS 5/143.19(f)(5) (amended "Illinois Insurance Code"); 230 ILCS 10/5.1(a)(4) (amended "Illinois Gambling Act").

[124] H.B. 1095 (Makes changes to various provisions amended by Public Act 101-652, concerning pretrial release); *see Ben Singson, State Supreme Court Upholds Controversial Ending of Cash Bail,* MY JOURNAL COURIER, (July 19, 2023), https://www.myjournalcourier.com/news/article/cash-free-bail-rule-illinois-september-court-18206538.php:

> "The Pretrial Fairness Act is full of contradictions, ambiguities and is very poorly drafted. The act is so badly written that no two people read it the same way. Lawyers across the state are all scratching their heads, wondering how the new system is going to work and keep people safe." **(**Chris Southwood, the Illinois Fraternal Order of Police State Lodge President)

in a Section concerning presumption of innocence and proof of guilt."[125] After House Floor amendments No. 1-3 and Senate Floor amendments No. 1-2, however, the final enrolled bill was signed into law as Pub. Act 101-1104, spanning over 300 pages and amending, adding, or abolishing subsections in over 90 sections of the Illinois Compiled Statutes.[126] Meanwhile, Governor Pritzker and his co-defendants appealed the ruling, and the case made its way to the Court for review.

3. SUPREME PARTISANSHIP

In cities like Chicago, the judiciary has historically been responsive to the amount of influence wielded by the dominant political factions and forces in the community.[127] Therefore, the pretrial release system of the twentieth century in Chicago was closely linked to the policy initiatives of the dominant political party—the Democrats.[128] In Chicago and its surrounding suburbs, the Democrat Party has historically exerted unchecked political strength and influence, with no significant changes arising in the twenty-first century to shift this political power imbalance. In fact, with the exception of Governor Bruce Rauner (2015-2019), the Democrats have controlled the governor's mansion and both houses of the legislature since January 2003—staying in power even after their two-time governor was impeached following one of the biggest corruption scandals in Illinois history.[129] It comes as no surprise, then, that Chicago was named the most corrupt city in America in 2015.[130] Still, Illinois is considered the "most Democrat-dominated state" in the union, "measured by the party's control over state government and its votes for U.S. Senate and president."[131]

The growing politicization of judicial elections lies at the heart of the most severe threats to equal justice—including evidence that campaign spending impacts judges' decisions on the bench.[132] Justice requires judges "put aside their political preferences and loyalties when deciding cases, and rule based on their understanding of the law and the facts at issue . . . .[W]hen judges look no different than other politicians during the election season; it creates the appearance—and perhaps also the reality—that they will [be unable] to avoid political biases when they sit in the courtroom."[133] Keep in mind that Illinois is one of the few states in which partisan elections decide

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[125] The proposed HB1096 was a single page and made a minor amendment to the 2012 Criminal code, *see* 720 ILCS 5/3-1, Laws 1961, p. 1983; *but c.f.* Pub. Act 102-1104

[126] *See* Bill Status of HB1095 *102nd General Assembly,* https://ilga.gov/legislation/billstatus.asp?DocNum=1095&GAID=16&GA=102&DocTypeID=HB&LegID=129767&SessionID=110&SpecSess=.

[127] PAUL B. WICE, *FREEDOM FOR SALE: A NATIONAL STUDY OF PRETRIAL RELEASE* 32 (1974) (noting that this "responsiveness could be defined as a judiciary whose members owe their nomination and ultimate election to office to the dominant political party.").

[128] *See id.* (remarking that "Chicago is the most obvious example of a city where the judiciary is highly responsive" to the dominant political party, and that "[e]ach judge in the Chicago system clearly understands his allegiance and the party's desires, which definitely overrides any other factor in his judicial performance.").

[129] *Illinois: The Most Democratic State*, NBC CHICAGO (Aug. 4, 2011), https://www.nbcchicago.com/news/local/illinois-the-most-democratic-state/1907744/.

[130] *Report Names Chicago "Corruption Capital of America"– Again,* NBC CHICAGO (June 23, 2015), https://www.nbcchicago.com/news/local/report-names-chicago-corruption-capital-of-america-again/53547/ (noting that "the judicial district, which includes Chicago, Cook and 17 other counties across the northern tier of Illinois, reported 45 public corruption convictions for 2013 and a total of 1,642 convictions for the 38 years since 1976 when the U.S. Department of Justice began compiling the statistics, the report states.").

[131] *Illinois: The Most Democratic State, supra* note 129.

[132] Bannon, *supra* note 86, at 6.

[133] *Id*. at 10.

who presides over the state's Supreme Court.[134] Generally, partisan judicial elections, especially partisan cash campaign donations, undermine public confidence in the justice system.[135]

Prior to the November 2022 election, the Court consisted of a 4-3 Democrat majority—an even balance considering the Court has seven total seats. With two vacancies arising out of Illinois' Second and Third Districts, Governor Pritzker donated one million dollars to each Democrat seeking election on the November ballot.[136] After securing slim majorities of the popular vote, both candidates ascended to the Supreme Court bench, shifting the Court's composition dramatically (5-2) in favor of Democrats.[137] Whether by mere coincidence or by coordinated partisanship, *Rowe v. Raoul* was the first case of consequence reviewed by the newly minted justices and the Democrat-dominated Court.[138] The Court stood as the final hurdle for Illinois in becoming the first state in the union to abolish cash bail.[139]

In July 2023, the Court released its opinion, including Justice Overstreet's compelling dissent, wherein he argued against judicial activism and legislative overreach when they suppress the people's will or infringe on their constitutionally vested rights.[140] The expectation that judges will act impartially lies at the core of the rules outlining judicial ethics and permissible conduct.[141] When a state supreme court votes in partisan lockstep, however, impartiality per se cannot possibly

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[134] *See* Michael H. LeRoy, *Open for Business: Illinois Courts and Party Politics*, 2 U. PA. J.L. & PUB. AFF. 185 (2017) (detailing Illinois' partisan elections for judges; concluding that by campaigning so much like elected politicians, some judges exercise influence-tinged power that makes them campaign like legislators, and colors their rulings as usurpations of legislative power).

[135] *See, e.g., March 2004 Survey Highlights,* Justice at Stake, 1 (Mar. 2004) (A 2004 survey found that 71 percent of voters believe that campaign contributions from interest groups have at least some influence on judges' decisions in the courtroom); *see also* Sherrilyn A. Ifill*, Judicial Diversity*, 13 GREEN BAG 45, 48, (2009) ("The importance of public confidence to the legitimacy of our courts cannot be overstated. Judges possess neither armies nor battalions. What courts rely on is the public's acquiescence, the public's sense that when a court issues a decision that decision is to be obeyed").

[136] Gov. Pritzker gave $500,000 each to the candidates from his campaign fund — and another $500,000 to each from a personal trust fund. *See* Bannon, *supra* note 86, at 6:

> "Since 2000, special interests have increasingly turned their attention — and wallets — toward supreme court races. Money should not be able to buy justice, but there is evidence that big spending is affecting outcomes on the bench in at least two ways: First, judges face pressure to decide cases in a way that will please donors and avoid politicized attacks, rather than based on their understanding of the facts and the law. And second, wealthy interests are able to shape the ideological direction of the courts by spending large amounts of money on judicial candidates who share their worldview."

See also id. at 9 ("The concern that money may buy outcomes is exacerbated by inadequate safeguards against special interest influence").

[137] Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. Times (Oct. 1, 2006), http://www.nytimes.com/2006/10/01/us/01judges.html?pagewanted=all (*quoting* Ohio Supreme Court Justice Paul Pfeifer: "Everyone interested in contributing has very specific interests....They mean to be buying a vote."); *see id.* (*quoting* Richard Neely, a retired chief justice of the West Virginia Supreme Court of Appeals: "It's pretty hard in big-money races not to take care of your friends. It's very hard not to dance with the one who brung [sic] you".).

[138] *See* Bannon, *supra* note 84, at 7 ("The importance of campaign dollars puts pressure on judges to favor campaign supporters when they appear before them in court.).

[139] *See* Amelia Buragas, *Cash Out*, 111 Ill. B.J. 10 (2023) ("Illinois . . . becomes the first state in the nation to eliminate cash bail as a condition of pretrial release"); *see generally Rowe v. Raoul*, *supra* note 17 (reversing the circuit court ruling in favor of Gov. Pritzker and SAFE-T Act);

[140] *See Rowe v. Raoul, supra* note 17*,* at ¶ 115 ("The individual rights vested in the Illinois Constitution's bill of rights are not subordinate to legislative power; the opposite is true.") (Overstreet, J., *dissenting*).

[141] *See* Madeline M. Carter*, The Emergence of Collaboration as the Preferred Approach in Criminal Justice*, STATE JUSTICE INSTITUTE CENTER FOR EFFECTIVE PUBLIC POLICY , 1-10 (June 2005).

exist.[142] Hence, in a predictably partisan 5-2 decision, the majority reversed the circuit court's ruling and held the SAFE-T Act constitutional.[143]

Like Justice Overstreet today, the Court once wrote confidently and cogently in deference to its state's constitution, which is "the supreme law . . . every court is bound to enforce its provisions. It is a most extraordinary doctrine that the court has the discretion to enforce or not enforce a provision of the constitution according to its judgment as to its wisdom or whether the public good will be subserved by disregarding it."[144] Ambiguous and amorphous opinions, shaped through circular arguments and crafted to undermine the Constitution, will persist if partisan elections and political loyalty taint the independent and supreme lens through which the Court views and interprets the text of the Constitution.[145]

4. WORDS MATTER: DEFINING SUFFICIENT SURETIES

As the late Supreme Court Justice Antonin Scalia once noted, "[m]odern deconstructionists. . . insist that words *have* no *inherent* meaning."[146] Indeed, judges themselves may believe their own rhetoric—and consider cases based on political loyalty or expediency rather than what is required by law.[147] The Court itself has emphasized that it is "constrained by the expressed intent of the framers of [its] constitution to review the propriety of only the specific provisions in the proposal before it . . . [they] must first and foremost look to the plain language adopted by the framers[,] . . . the most certain route to determining the framers' intent."[148] The legislature's attempt to impress novel meanings to constitutional terms intrudes into an arena reserved for the Court, which may not "alter or ignore the plain language of [the] [C]onstitution as set out by the citizens, no matter how strongly the [C]ourt agrees with the public policy underlying the abolishment of monetary bail."[149]

Oftentimes, laypeople and legal professionals alike confuse the term *bail.*[150] The United States Supreme Court has shed light on the monetary connotation of the term and its application. In *Ex Parte Milburn*, for example, the Supreme Court held that "bail . . . is taken to secure the due attendance of the party accused to answer the indictment . . . [and] not designed as a satisfaction for the offense when it is *forfeited and paid*, but as a means of compelling the party to submit to

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[142] *See, e.g., Bannon, supra* note 84, at 8 *(*A 2006 study by *The New York Times* found that on the Ohio Supreme Court, justices voted in favor of contributors 70 percent of the time.); *see also* SCOTT GREYTAK, ALICIA BANNON, ALLYSE FALCE, & LINDA CASEY, *BANKROLLING THE BENCH: THE NEW POLITICS OF JUDICIAL ELECTIONS 2013-14,* at 31 (Laurie Kinney, ed. 2015) ("Judges regularly hear cases involving campaign supporters — including lawyers and litigants with cases pending at the very time they are spending on a judge's campaign.").

[143] *See* Joanne R. Driscoll, Forde & O'Meara, *Quick Takes on Illinois Supreme Court Opinions Issued Tuesday, July 18, 2023,* Illinois State Bar Association (July 18, 2023), (providing an overview of the Supreme Court decision to reverse the district court); *see generally Rowe v. Raoul*, *supra note 17*;

[144] *People ex rel. Miller v. Hotz*, 327 Ill. 433, 436 (1927).

[145] *See* Carter, *supra* note 135, at 3.

[146] Antonin Scalia, *THE ESSENTIAL SCALIA: ON THE CONSTITUTION, THE COURTS, AND THE RULE OF LAW,* 19, (2020).

[147] Bannon, *supra* note 84, at 11.

[148] *Hooker v. Illinois State Board of Elections*, 2016 IL 121077 at ¶ 47.

[149] *Rowe v. Raoul, supra note 17,* at ¶ 115.

[150] *Bail,* BLACK'S LAW DICTIONARY (11th ed. 2019) ((bail n. (15c) A security such as cash, a bond, or property; esp., security required by a court for the release of a criminal defendant who must appear in court at a future time); *see also Bail*, BALLENTINE'S LAW DICTIONARY (3rd ed. 1969) (Noun: The means of procuring the release from custody of a person charged with a criminal offense or with debt by assuring his future appearance in court and compelling him to remain within the jurisdiction. The security given for a defendant's appearance in court in cash, bond, or undertaking.).

the trial."[151] In 1912, Justice Oliver Windell Holmes opined that "[t]he distinction between bail and suretyship is pretty nearly forgotten. The interest to produce the body of the principal in court is impersonal and wholly pecuniary."[152]

Counterintuitively, the *Rowe* Court majority then criticizes the circuit court's interpretation of "sufficient sureties" as necessarily involving or referring to money or something of monetary value.[153] The majority rejects the notion that "sufficient sureties does, [in fact], involve monetary bail."[154] To defend its holding, the majority unironically asserts that "the trial court ignored the plain language of the constitution['s] bail clause [which] does not include the term' monetary.'"[155] The majority revisits and re-emphasizes the term "sufficient sureties" many times throughout its opinion but fails on every occasion to define sureties or what precisely constitutes a "sufficient" surety.[156] The majority then contradicts itself when it concedes that "sufficient sureties is *not limited* to sufficient monetary sureties," which necessarily implies that sufficient sureties did, in fact, include money.[157]

The majority's opinion is nothing more than a rigorous exercise in obfuscation. In no case prior to *Rowe* has the Illinois Court defined bail or sureties as involving anything other than money or property,[158] making the majority's assertion that "monetary bail was all but unknown at the time the 1818 Constitution was drafted"[159] both ahistorical and misleading.[160] Undoubtedly, at the time

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[151] 34 U.S. 704, 710 (1835) (emphasis added); *see also Stack v. Boyle*, *supra* note 59, at 4-5. ("The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand . . .").

[152] *Leary v. United States*, 224 U.S. 567, 575 (1912).

[153] *See Rowe v. Raoul, supra* note 17, at ¶ 26 (according to the circuit court, "SAFE-T Act eradicates monetary bail as a judicial consideration in every Illinois case . . . under SAFE-T Act, persons are no longer bailable by sufficient sureties pursuant to the pretrial release provision of SAFE-T Act because *'sufficient sureties' does involve monetary bail* as one the conditions of bail which is abolished with SAFE-T Act") (emphasis added); *but c.f. Sufficient Sureties*, BALLENTINE'S LAW DICTIONARY (3rd ed. 1969) (Sureties on a bail bond of financial ability to respond in payment of the amount of the bond and of sufficient vigilance to secure the appearance and prevent the absconding of the accused.

[154] *Id.*

[155] *Id.* at ¶ 28

[156] *See Rowe v. Raoul, supra* note 17, at ¶ 28 for the majority's argument that "[t]he word 'amount' connotes quantity and does not only mean a quantity of money but rather, consonant with the bail clause, a quantity of sufficient sureties."

[157] Nor does the General Assembly clarify this enigmatic phraseology:

Compare 2010 Illinois Code 725 ILCS 5/110-1:

> (a) "Security" is . . . pledged to insure the *payment of bail*. (b) "Sureties" encompasses the *monetary* and nonmonetary requirements . . .") (emphasis added)

with 2022 Illinois Code 725 ILCS 5/110-1:

> (a) *(Blank).*
>
> (b) "Sureties" encompasses the *nonmonetary requirements* set by the court as conditions for release either before or after conviction) (emphasis added).

[158] *But c.f.* 725 ILCS 5/110-1(defining a surety as "one who executes a bail bond and binds himself to pay the bail if the person in custody fails to comply with all conditions of the bail bond"). This definition, however, was stricken entirely from the with P.A. 101-652.

[159] *See* Rowe v. Raoul, *supra* note 17, at ¶ 32 (citing a dictionary published that year defining bail as "the freeing or setting at liberty one arrested or imprisoned under security taken for his appearance" but did not mention money as the sole or even primary means of providing that security.)

[160] *See* Part I: A Brief History of Bail, *supra*, at 4-10; *see also Cnty. of Rock Island v. Cnty. of Mercer,* 24 Ill. 35, 37 (1860) (Illinois case decided over 160 years ago in which "bail was fixed by the court at $ 1,500" for each of the defendants).

of the 1970 Constitution's adoption, "the right to be "bailable by sufficient sureties" included monetary bail."[161]

C. Illinois Crime Victims' Rights — Usurped

Historically, the rationale for cash bail was to protect the integrity of the judicial process—"to safeguard the courts' role in adjudicating the guilt or innocence of defendants."[162] In *United States v. Salerno,* the Supreme Court rejected the proposition that "the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release."[163] The *Salerno* holding expanded the purpose of bail to include public protection from arrestees who "pose a threat to the safety of individuals or the community."[164] Hence, cash bail now serves two discrete and indispensable functions: (1) it increases the likelihood that people will reappear in court, and (2) it prevents danger to the community.[165]

Securing more rights for the criminally accused has defined the bail reform crusade of the twenty-first century, even at the risk of diminishing and outright violating the rights of crime victims. As the legal relationship between criminals and crime victims is adversarial, it stands to reason that an inverse relationship exists between the rights of criminals and the rights of crime victims. Therefore, a reasonable person would logically conclude that proponents of the SAFE-T Act and the Pretrial Fairness Act value equity and fairness over justice; they champion equality of outcome for the criminally accused and crime victims. By focusing attention on the inequities of the criminal justice system, however, the Illinois legislature disregarded the safety of Illinois communities and placed the rights of alleged criminals above the rights of crime victims. The SAFE-T Act, therefore, undermines one of the modern functions of bail: preventing danger to the community. Specifically, the SAFE-T Act countermands portions of the Illinois Crime Victims' Bill of Rights.

1. Illinois Votes in Favor of Crime Victims

Prior to 1992, Illinois crime victims had no express constitutional protections. Victim advocacy organizations played a crucial role in shaping victims' rights laws in Illinois through legislative advocacy and involvement in critical court cases.[166] Finally, Illinois amended its Constitution in 1992 to add Article I, Section 8.1, which sets out specific rights for crime victims in Illinois.[167] This amendment came about due to advocacy from organizations supporting victims' rights.[168] The Rights of Crime Victims and Witnesses Act was also passed to provide procedures for enforcing victims' constitutional rights.[169] The purpose of the Rights of Crime Victims and

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[161] *See* Marc Martin, *Drastic Changes in Illinois Pretrial Release Procedures: The Pretrial Fairness Act and Potential State Law*, 36 CBA Record 24; *see also People ex rel. Daley v. Joyce*, 126 Ill.2d 209, 219 (1988); *People v. Jackson*, 69 Ill.2d 252, 260 (1977).
[162] *Salerno, supra* note 71*, at* 753.
[163] *Id.*
[164] *Id*. at 755 ("There is no doubt that preventing danger to the community is a legitimate regulatory goal.") (*dictum*).
[165] *See* Baughman*, supra* note 20, at 27.
[166] *See, e.g.,* 750 Ill. Comp. Stat. Ann. 60/101 (Illinois Domestic Violence Act of 1986); *see also, Taylor v. City of Chicago*, 2024 IL App (1st) 221232 (case involving fourteen legal aid, social services, and legal advocacy organizations that represent, serve, and advocate on behalf of victims of domestic violence, including Legal Aid Chicago, Ascend Justice, Chicago Alliance Against Sexual Exploitation, and Chicago Council of Lawyers).
[167] *See generally Rowe v. Raoul, supra* note 17.
[168] *See generally People v. Chatman,* 2016 IL App (1st) 152395 for the Court's detailed analysis of 725 ILCS 120.
[169] *Id.*

Witnesses Act was to implement, preserve, protect, and enforce the rights guaranteed to crime victims by Article I, Section 8.1 of the Illinois Constitution.[170]

Illinois Marsy's Law Crime Victims' Bill of Rights Amendment was on the November 4, 2014, ballot in Illinois as a legislatively referred constitutional amendment. Illinoisans voted overwhelming in favor of the amendment, which was designed to strengthen the Crime Victims' Bill of Rights and ensure that crime victims are treated with fairness and respect for their dignity and privacy throughout the criminal justice system."[171] These rights included "the right to be free from harassment, intimidation, and abuse" and "the right to have the safety of the victim and the victim's family considered in *denying or fixing the amount of bail . . .*"[172]

2. The SAFE-T Act Usurps the Rights of Crime Victims

The Constitution's Bill of Rights enumerates specific rights for crime victims.[173] Among the Crime Victims' Rights is the "right to have the safety of the victim and the victim's family considered in denying or fixing *the amount of bail*."[174] However, with the ratification of the SAFE-T Act, all references to "bail," "bail bond," or "conditions of bail" were replaced with "pretrial release" or "conditions of pretrial release."[175] At issue in *Rowe v. Raoul* was whether the SAFE-T Act violated the Crime Victims' Rights found in Article 1, Sec. 8.1(a)(9). The circuit court held that "P.A. 101-652 and P.A. 102-1104, the provision eliminating monetary bail in all situations in Illinois, prevents the court from effectuating the constitutionally mandated safety of the victims and their families."[176]

Although the prerogative to interpret the Constitution clearly belongs to the judiciary,[177] the General Assembly's legislation "substantially ignored and altered some of the meaningful reforms" required for public safety and ensuring the defendant's appearance in court.[178] The 2023 *Rowe* Court rubberstamped the SAFE-T Act, thereby overturning centuries of legal precedent of statutory interpretation, opining that "the 'crime victims' rights clause' mentions the 'amount of

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[170] 725 Ill. Comp. Stat. Ann. 120.

> Purpose: to ensure that crime victims are treated with fairness and respect for their dignity and privacy throughout the criminal justice system, to ensure that crime victims are informed of their rights and have standing to assert their rights in the trial and appellate courts, to establish procedures for enforcement of those rights, and to increase the effectiveness of the criminal justice system by affording certain basic rights and considerations to the witnesses of crime who are essential to prosecution.

[171] 725 ILCS 120/2

[172] *Id.* (emphasis added); *see also Fixing Bail,* Ballentine's Law Dictionary (3rd ed. 1969) (The *determination by the court or judge* of the amount of bail or a bond which a prisoner must furnish to effect his release from custody) (emphasis added).

[173] Ill. Const., art. I, § 8.1.

[174] *Id.* 8.1(a)(9) (emphasis added).

[175] IL LEGIS 101-652 (2020), 2020 Ill. Legis. Serv. P.A. 101-652 (H.B. 3653); "Pretrial Release, which SAFE-T Act defines as exclusively non-monetary, replaces "Bail" in all instances, where previously "Bail" was defined as "the amount of money set by the court which is required to be obligated and secured as provided by law for the release of a person in custody in order that he will appear before the court in which his appearance may be required and that he will comply with such conditions as set forth in the bail bond").

[176] *See* 2023 IL 129248, *supra* note 76*,* at 20 (further holding that "had the Legislature wanted to change the provisions in the Constitution regarding eliminating monetary bail as a surety, they should have submitted the question on the ballot to the electorate at a general election and otherwise complied with the requirements of Art. XIV, Sec. 2").

[177] *See, e.g.*, *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (holding that "an act of the Legislature repugnant to the Constitution is void . . .[and that] the Courts must decide").

[178] *See Rowe v. Raoul, supra* note 17.

bail,' not the amount of monetary bail."[179] The Court found nothing unconstitutional about striking the phrase "denying or fixing the amount of bail" from the Rights of Crime Victims and Witnesses Act, which is directly derived from the Illinois Constitution's Bill of Rights.[180] Under the Constitution, the legislature may not lawfully abolish power reserved to the judiciary.[181]

The SAFE-T Act provisions abolishing cash bail in all situations in Illinois prevent the court from effectuating the constitutionally mandated safety of the victims and their families. Article 1, Sec. 8.1(a)(9) of the Illinois Constitution is intended to serve "as a shield to protect the rights of victims."[182] As one Illinois senator noted, "[T]he legislature did indeed infringe upon the rights and responsibilities of the judicial branch of government when they stripped away judges' abilities to set cash bail . . . Crime victims and Illinois families will continue to feel less safe, and the State of Illinois will continue to grab national headlines for its growing crime rates."[183] Nevertheless, legislative overreach prevailed over the Constitution, the instrument intended to be the final law.[184] Part III summarizes the present and imminent consequences of cash bail abolition by acknowledging and rebutting the most common arguments in favor of eliminating cash bail.

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[179] *Id. supra* note 17*,* at n. 3 (according to the majority, "to the extent that 'amount' may imply an amount of money, the 'crime victims' rights' clause simply reflected the reality of Illinois's bail system at the time it was adopted. *That reality has changed*.") (emphasis added).

[180] *Id.* at ¶ 134 (Overstreet, J., *dissenting*); *see* 725 ILCS 120/4(a)(7.5); 4.5(c-5)(16); *see also Rowe, supra* note 76, at 21:

> "The plain reading of "fixing the amount of bail", the court finds, clearly refers to the requirement that the court consider the victims' rights in setting the amount of monetary bail as the court does and has done since the passage of this amendment. In eliminating monetary bail, the discretion constitutionally vested to the courts to protect victims and their families by this method is gone."

[181] *See Murneigh v. Gainer*, 177 Ill.2d 287, 307 (1997) (affirming circuit court's order invalidating "regulations [which] vitiate the court's discretion in exercising its . . . power."); *see also O'Connell v. St. Francis Hospital,* 112 Ill.2d 273, 283 (1986) ("The court's discretion in determining what sanction is appropriate will not be disturbed.").

[182] *People v. Richardson*, 196 Ill.2d 225, 237 (2001) (discussing Ill. Const. Art. I, § 8.1. Section 8.1(a)(9) of the Illinois Constitution explicitly provides that "the safety of the victim and the victim's family" must be considered "in denying or fixing the amount of bail, determining whether to release the defendant, and setting conditions of release after arrest and upon conviction.").

[183] Senator Andrew Chesney (R-Freeport), *State Republican Senators React to Illinois Supreme Court SAFE-T Act Ruling* (2023), https://ilsenategop.org/2023/07/18/state-senators-react-to-illinois-supreme-court-safe-t-act-ruling/.

[184] *See* Thomas Cooley*, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union,* (1868).

PART III: CASH BAIL'S ZEALOUS OPPOSITION

Understand, our police officers put their lives on the line for us every single day. They [have] got a tough job to do--to maintain public safety and hold accountable those who break the law . . .. We have made enormous progress in race relations over the course of the past several decades. I've witnessed that in my own life. And to deny that progress I think is to deny America's capacity for change.[185]

The Pretrial Fairness Act is grounded in the belief that the criminal justice system is fundamentally biased. Advocates of the SAFE-T Act, however, fail to appreciate the positive role of cash bail in maintaining public safety and ensuring court appearances. Instead, they portray monetary bail negatively, suggesting it is *necessary* to *coerce* defendants to attend court and prevent further crime.[186] The reality, however, is cash bail has a long-established history in Illinois, imposed consistently to deter flight and protect communities. Although cash bail alone is insufficient to achieve these compelling state interests, it proved to be a *necessary* tool among several available to the judiciary in making pretrial decisions.[187] Defenders of cash bail—including over sixty state's attorneys, law enforcement officers, legislators, district court judges, mayors, prosecutors, and even public defenders—share the general sentiment that "eliminating cash bail without providing judges with broad discretion to hold dangerous individuals pretrial decrease[s] public safety and make[s] it harder for law enforcement to [detain] violent criminals off the streets and out of our communities."[188] Chris Southwood, the Illinois Fraternal Order of Police State Lodge President, lambasted the Court's decision to uphold the constitutionality of the SAFE-T Act, saying it cemented Illinois' status as "the state of lawlessness and disorder."[189] Nevertheless, advocates of the Pretrial Fairness Act argue that cash bail criminalizes poverty, violates the Eighth Amendment's excessive bail clause, contravenes the Fifth and Fourteenth Amendments' Due Process Clauses, and disproportionately affects minority populations.

[185] President Barack Obama, *Remarks by the President After Announcement of the Decision by the Grand Jury in Ferguson, Missouri*, The White House Office of the Press Secretary (Nov. 24, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/11/24/remarks-president-after-announcement-decision-grand-jury-ferguson-missou.

[186] *See Criminalizing Poverty,* "The use of money bail to guarantee that released defendants will show up at trial and not commit new offenses assumes both that the threat of losing money is necessary to get defendants to come back to court for hearings and that money bail prevents crime."[186]

[187] 725 ILCS 5, Art. 109, Preliminary Examination:

> "A person arrested with or without a warrant for an offense for which pretrial release may be denied . . . shall be taken without unnecessary delay before the nearest and most accessible judge in that county, *except when such county is a participant in a regional jail authority*, in which event such person may be taken to the nearest and most accessible judge, irrespective of the county where such judge presides, within 48 hours, and a charge shall be filed" (emphasis added).

[188] State Senator Tom Bennett (R-Gibson City), https://ilsenategop.org/2023/07/18/state-senators-react-to-illinois-supreme-court-safe-t-act-ruling/

[189] *See* Singson*, supra* note 107.

A. "PUNISHING POVERTY": A RECURRING ATTACK ON CASH BAIL

The belief that monetary bail punishes poverty undergirds most arguments opposing cash bail.[190] Opponents of cash bail argue that "[people] with financial means can pay for their own freedom, while others remain incarcerated regardless of their guilt or innocence."[191] Proponents of the SAFE-T Act and the Pretrial Fairness Act believe cash bail systematically targets the indigent, arguing that "where a right to cash bail still exists . . . the poor may still be detained due to poverty."[192] Furthermore, cash bail abolitionists assert "cash-only bail disproportionately affects those of a low socioeconomic status [and that] setting cash-only bail for low-income defendants who ultimately cannot afford it punishes these individuals . . .".[193]

The purpose of bail, however, is not to punish poverty, nor is its purpose to punish crime per se.[194] Instead, cash bail effectively serves legitimate government purposes: ensuring individuals accused of a crime appear in court as scheduled.[195] By attaching a financial interest to their release, cash bail incentivizes defendants to fulfill their court obligations, thereby contributing to the proper functioning of the criminal justice system. As the United States Supreme Court made clear in *Stack v. Boyle,* "Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused."[196]

While opponents to cash bail concede "cash-only bail may be a 'sufficient surety' for some," they still contend "it is not 'sufficient' for low-income people who do not have the financial resources to post bail."[197] Again, this argument is flawed as it advocates for differential treatment of criminal defendants—including those charged with the exact same crime—based on their socioeconomic status. The "punishing poverty" argument is rooted in the idea that cash bail discriminates against low-income defendants; the solution most opponents of bail propose is merely an adoption of discrimination of a different kind. While it is acknowledged that cash bail can have a disproportionate impact on low-income individuals, bail amounts are set according to the severity of the offense. Additionally, mechanisms, such as bail reduction hearings, are available to address cases where the initial bail amount is deemed excessive."

B. BANKRUPT CONSTITUTIONAL ARGUMENTS AGAINST CASH BAIL

Many proponents of the Pretrial Fairness Act argue cash bail is facially unconstitutional. However, as the United States Supreme Court has made clear, "a facial challenge . . . is the most difficult challenge to mount successfully [because] the challenger must establish that no set of

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[190] *See* Scott-Hayward & Fradella, *supra* note 21.
[191] Natasha Brown, *Innocent Until Proven Guilty: Unless You're Poor. Right a Systemic Wrong Under the Pretrial Fairness Act.*, 57 UIC L. REV. 291, 301-302 (2024).
[192] Brandon L. Garrett, *Models of Bail Reform*, 74 FLLR 879, 902-903 (2022).
[193] Johnson, supra note 28, at 33.
[194] *See, e.g., Ex Parte Milburn,* 34 U.S. 704, 710 (1835) (holding that bail is "not designed as a satisfaction for the offense when it is forfeited and paid, but as a means of compelling the party to submit to the trial and punishment which the law ordains for his offense. And *a fortiori* it cannot be deemed to apply to a case . . . of a penitentiary offense, for that would be to suppose that the law allowed the party to purge away the offense and the corporeal punishment by a pecuniary compensation").
[195] *Stack v. Boyle*, *supra* note 62, at 5 ("Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant").
[196] *Id.* at 4.
[197] *See* Johnson, *supra* note 28*,* at 77.

circumstances exists under which [cash bail] would be valid."[198] Pretrial Fairness Act proponents who make constitutional arguments cannot shoulder the heavy burden of demonstrating that cash bail "facially" violates the Constitution's Fifth, Eighth, or Fourteenth Amendments. Abolishing cash bail incentivizes crime, increases the prevalence of recidivists, undermines the authority and professional duty of police officers, and trivializes the social contract in communities across Illinois.[199]

1. Eighth Amendment Bail Clause

The United States Supreme Court has held that most provisions of the Bill of Rights apply to the states.[200] The incorporation doctrine provides that parts of the Bill of Rights apply to the states through the Fourteenth Amendment Due Process Clause to the United States Constitution.[201] The Eighth Amendment, in particular, is fully incorporated.[202] Constitutional concerns about pretrial release concentrate on whether there is a right to release and, if so, whether the conditions of release are excessive.[203] Proponents of the SAFE-T Act assert cash bail violates the Eighth Amendment of the United States Constitution because the accused often cannot afford to pay.[204] Although this assertion is true insofar as detainees often cannot afford the amount of bail set by the court, it is a substantial leap to conclude then that "an amount of bail a defendant cannot meet because of his poverty is thereby 'excessive' under the Eighth Amendment . . . [C]ourts have refused to take that leap."[205] Bail is "not excessive merely because the defendant is unable to pay it."[206] Therefore, while some detainees may struggle to pay bail, it is not necessarily excessive under the Eighth Amendment.[207]

The United States Supreme Court has held that bail, which is "basic to our system of law,"[208] is "excessive" in violation of the Eighth Amendment when it is set at a figure higher than an amount reasonably calculated to ensure the asserted governmental interest.[209] In other words,

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[198] *Salerno, supra* note 71 ("The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid").

[199] *See Social contract,* Merriam-Webster.com Dictionary (n.d.):

> The social contract is an actual or hypothetical agreement among the members of an organized society or between a community and its ruler that defines and limits the rights and duties of each.

[200] *See, e.g., Malloy v. Hogan*, 378 U.S. 1, 10 (1964) ("We have held that the guarantees of the First Amendment, the prohibition of unreasonable searches and seizures of the Fourth Amendment, and the right to counsel guaranteed by the Sixth Amendment, are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.").

[201] U.S. Const. Amend. XIV:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, *without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws." (emphasis added).

[202] *See Schilb v. Kuebel*, supra note 195 (incorporation of the excessive bail clause); *see* U.S. Const. Amend. VIII: "*Excessive bail shall not be required*, nor excessive fines imposed, nor cruel and unusual punishments inflicted." (emphasis added)

[203] Leslie W. Abramson, *Quick Review: Criminal Procedure*, West Academics (2nd ed. 2013).

[204] *See generally* LaFave et al., *supra* note 64 ("Courts continue to adhere to the proposition that bail is not excessive merely because the defendant is unable to pay.").

[205] *Id.*

[206] *See Hodgdon v. United States*, 365 F.2d 679 (8th Cir. 1966).

[207] See *Carlson v. London*, 342 U.S. 524 (1952) (holding that "bail shall not be excessive in those cases where it is proper to grant bail.").

[208] *See Schilb v. Kuebel*, *supra* note 195, at 484.

[209] *Stack v. Boyle, supra* note 62*,* at 5 (holding that "the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.").

the conditions of confinement do not constitute punishment for due process purposes.[210] In other words, the mere fact "that such detention interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement" does not itself make the confinement conditions "punishment" for due process purposes.[211] The Supreme Court has construed the Fourteenth Amendment's Due Process Clause to impose the same due process limitations on the states as the Fifth Amendment does on the federal government.[212]

2. FOURTEENTH AND FIFTH AMENDMENT - DUE PROCESS AND EQUAL PROTECTION

Proponents of the SAFE-T Act argue that cash bail criminalizes poverty because an "indigent defendant . . . is being denied the fundamental fairness guaranteed by the due process of law [and] is being punished by imprisonment before he has been tried."[213] However, it cannot be said that there is a constitutional "presumption of innocence" entitling all defendants to pretrial release,[214] nor is there an absolute constitutional right to bail.[215]

Furthermore, the presumption of innocence so inherent to our criminal justice system does, in fact, remain intact throughout the legal process, and the courts consider the defendant's constitutional liberties at each step in the process.[216] It is crucial to note that cash bail is not a determination of guilt but a tool to ensure court appearance. Individuals are presumed innocent until proven guilty, and bail conditions are set in consideration of this principle.[217] Furthermore, equal protection is not violated "so long as the determination of bail is not irrational and the individual circumstances of each case are assessed."[218] Therefore, the constitutional arguments against cash bail lack merit, as cash bail does not offend or violate any constitutional amendments most often cited by those in favor of abolishing cash bail.

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[210] *See, e.g., United States v. Salerno,* 481 U.S. 739 (1987) (the U.S. Supreme Court rejected the idea that pretrial detention was "punishment" under substantiative due process; detention is regulatory, not).

[211] *See Bell v. Wolfish,* Note 127, *supra,* at 138.

[212] *See Heiner v. Donnan,* 285 U.S. 312, 326 (1932); U.S. Const. Amend. V:

> *No person shall be* held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation. (emphasis added).

[213] LAFAVE ET AL., *supra* note 64.

[214] *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 533 (1979) (holding that "the presumption of innocence . . . has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun").

[215] *See Hudson v. Parker*, 156 U.S. 277, 753 (1895).

[216] *See Stack v. Boyle, supra* note 62, at 6 ("If bail in an amount greater than that usually fixed for serious charges of crimes is required in the case of any of the petitioners, that is a matter to which evidence should be directed in a hearing so that the *constitutional rights of each petitioner may be preserved*") (emphasis added).

[217] *Id.* at 7 (holding that "petitioners may move for reduction of bail in the criminal proceeding so that a hearing may be held for the purpose of fixing reasonable bail for each petitioner").

[218] *See* MARY M. CHEH, *EXAM PRO: CRIMINAL PROCEDURE*, WEST ACADEMICS (3RD ED. 2013).

C. THE "DISPROPORTIONATE EFFECTS" ARGUMENT

Opponents of cash bail invariably argue that racial inequalities and systemic injustice lead to disproportionate outcomes for racial minorities. These arguments take various forms, but the general sentiment is the same: the criminal justice system, especially the cash bail system, is inherently discriminatory; therefore, the institution must be deconstructed and reimagined to atone for perceived historic and present injustices.[219] For example, in the wake of the Ferguson, Missouri grand jury's decision in the case of Michael Brown's death, former United States President and Illinois Senator Barack Obama acknowledged "the law too often feels as if it is being applied in a discriminatory fashion."[220] However, the former president also emphasized that racial discrimination is not the norm or "true for the majority of communities or the vast majority of law enforcement officials."[221]

So, why does it feel as if the laws were applied in a "discriminatory fashion"? The answer fulfills Ockham's razor—the simplest answer is usually the correct one.[222] The criminal justice system, by definition, discriminates—it objectively distinguishes by discerning or exposing differences between lawful and unlawful conduct.[223] In 2024, those who claim cash bail is part of a systemically racial system are engaging in either conjecture or conflation. The statistics show that a disproportionate number of Black people are incarcerated compared to non-Hispanic Whites.[224] Correlation does not equal causation, and it would be conjecture—a feelings-based opinion-driven conclusion—to attribute the unfortunate statistics to racial discrimination. Furthermore, to view crime and prison population statistical disparities and attribute those inequities to systemic racial bias in the criminal justice system invalidly conflates objective statistical data with subjective perceptions of racial discrimination. The simplest explanation is gleaned by comparing the tables in Appendix III: there is an undeniable correlative and causative relationship between criminal offenses and incarcerated individuals.[225]

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[219] Milano & Jenkins-Wright, *supra* note 118. The ISBA Steering Committee proclaimed the "most tangible efforts" came together in support of the agenda for bail reform "advanced by the Black Caucus of the State of Illinois Legislature, which crafted . . . reforms in areas of the criminal justice system which have . . a disproportionate and unjust impact on those from communities of color."

[220] *See* Obama, *supra* note 169.

[221] *Id.*

[222] *Ockham's Razor,* BOUVIER LAW DICTIONARY (Desk ed., 2012) (The simplest explanation is the most likely. Ockham's razor is technically stated, "plurality ought not be posited unnecessarily," which is to say that the argument with the least steps is best. Derivation: This principle—that the simplest explanation is the most likely explanation—is generally referred to as Occam's razor attributed to the 14th century English logician and Franciscan friar William of Ockham)

[223] *Discrimination*, BURTON'S LEGAL THESAURUS (6th ed. 2021), ((Good judgment), noun; acumen, acuteness, circumspection, discernment, discreetness, discretion, good sense, insight, intelligence, intuition, judiciousness, knowledge, perception, perspicacity, perspicuity, prudence, rationality, reason, sagacity, shrewdness, sound reasoning, thoughtfulness, understanding); *see also Discrimination,* MERRIAM-WEBSTER.COM DICTIONARY (n.d.), https://www.merriam-webster.com/dictionary/discrimination, (The act of making or perceiving a difference; the act of discriminating"; i.e., "to distinguish by discerning or exposing differences").

[224] *Fiscal Year 2023 Annual Report*, The Illinois Dept. of Corrections (Dec. 2023), https://idoc.illinois.gov/content/dam/soi/en/web/idoc/reportsandstatistics/documents/annualreports/FY23-Annual-Report.pdf; *Illinois*, U.S. Census Bureau (2023), https://data.census.gov/profile/Illinois?g=040XX00US17_-populations-and-people; *see also* Appendix III, Table 4, *infra,* at p. 47 for a fuller statistical analysis of Illinois prison populations.

[225] See *Illinois Uniform Crime Reporting*, Illinois State Police (2022), https://ilucr.nibrs.com/CrimeData/CrimeDataTables; *see also* Appendix III, Table 3, *infra,* at p. 45 for a fuller statistical analysis of crime data.

A study published in 2013 examined over 100,000 pretrial defendants between 1988 and 2006 and surveyed whether judges released them, considering their record.[226] The authors of this study considered "the defendant's likelihood to commit a violent crime while released in determining whether a judged released or detained the individual."[227] According to the study, when judges determine whether to offer a suspect the option of release, "rather than looking at race, judges primarily focus on whether the suspect is accused of a violent crime and how likely he is to commit another violent crime if released."[228] The study showed judges "actually hold whites in pretrial detention more often than blacks when their threat to society is equal for both drug crimes and violent crimes."[229] "Essentially," the researchers concede, "judges release more black defendants than they should."[230] Unlike other studies, this study "took into account how at-risk defendants were to commit violent crimes if released," and as a result, "the racial disparities in pretrial detention disappeared."[231] The researchers concluded that "as far as pretrial detention is concerned, once pretrial risk for violent crime is accounted for, the racial disparity between black and white defendants is reversed."[232]

Even if racial bias, whether conscious or unconscious, injects disparity into the system of cash bail, entirely abolishing the system will not have the desired effect for which its advocates hope.[233] Without cash bail, the courts must rely on more robust risk assessment tools, but even these increasingly sophisticated tools fail to satisfy those who make the "disproportionate effects" argument and claim "risk assessment tools . . . can build in or perpetuate racial or socioeconomic bias."[234] They insist "an evaluation of racial bias should be conducted each year to make sure that the risk instrument does not perpetuate bias on the basis of race."[235] However, even those who attack "the racial disparities that accompany existing [cash bail] practices," if they are arguing in good faith, admit disproportionate effects are "not necessarily indicative of racism within pretrial proceedings specifically, or the criminal legal system more generally."[236] Furthermore, algorithm-based risk assessments "cannot be designed to achieve 'total fairness'" because all prediction "looks to the past to make guesses about future events."[237] Statisticians and legal scholars understand "any method of prediction will project the inequalities of the past into the future."[238] Therefore, even

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[226] Shima Baradaran, *Race, Prediction, and Pretrial Detention,* 81 GEO. WASH. L. REV. 157 (2012).
[227] Baughman, *supra* note 20, at 106.
[228] *Id.*
[229] *Id.*
[230] *Id.* at 107.
[231] *Id.*
[232] *See* Frank McIntyre & Shima Baradaran, *Race, Prediction, and Pretrial Detention,* JOURNAL OF EMPIRICAL LEGAL STUDIES 10 (2013), at 741-770 for a fuller empirical analysis of this issue.
[233] *See, e.g., Stack v. Boyle, supra* note 62, at 5 ("Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning").
[234] *See* Shima Baradaran Baughman, Lauren Boone, & Nathan Jackson, *Reforming State Bail Reform,* 74 SMU L. Rev. 447, 462 (2021) (warning that "risk assessments and pretrial reports should pay careful attention not to include racially inequitable factors . . . [which] may include the defendant's zip code, education level, job history, income, marriage status, and whether the defendant owns a home or cell phone.").
[235] *Id.* at 463.
[236] Sean Allan II Hill, *Bail Reform and the (False) Racial Promise of Algorithmic Risk Assessment*, 68 UCLA L. REV. 910, 922 (2021).
[237] Sandra G. Mayson, *Bias In, Bias Out,* 128 YALE L.J. 2218, 2219 (2019) (discussing three strategies of resisting racial bias in algorithmic risk assessment tools: "(1) the exclusion of input factors that correlate closely with race; (2) adjustments to algorithmic design to equalize predictions across racial lines; and (3) rejection of algorithmic methods altogether" and claiming that these strategies are "at best superficial and at worst counter-productive.")..
[238] *Id.*

the most sophisticated algorithmic risk assessment tools produce results substantially similar to the subjective predictions judges have historically made.

Despite the SAFE-T Act's reliance on technologically advanced risk assessment tools, communities of color will have less protection. Instead, the SAFE-T Act will decrease safety and destabilize the communities it was intended to protect. For example, the Act "modifies the definition of habitual criminal to entail and require higher level offenses."[239] In redefining "habitual criminal," state legislators not only shifted the burden to prove by *clear and convincing* evidence that any condition of release is necessary but also significantly increased the weight of that burden. This means people with much more common, lower-level charges like burglary and drug possession might slip through the cracks. Thus, rather than deter and prevent crime, legislators have further emboldened criminals, regardless of race, who, prior to the SAFE-T Act, were considered habitual criminals—the type of person public safety advocates ideally want removed from their communities. Opponents of cash bail who champion the SAFE-T Act on racial-equity grounds overlook the fact that Black people are disproportionately represented in the total number of Illinois crime victims.[240] As this Article aims to show, the SAFE-T Act is a contradiction in terms: this sweeping omnibus legislation does little to improve public safety.

The worldview of certain opponents of cash bail—the true deconstructionists/abolitionists—would take the SAFE-T Act further and advocate for the release of as many convicted persons as possible and the abolishment of the police and the prison system altogether.[241] By some estimations, these "reforms" would be "first steps . . . in the right direction" toward racial fairness and equity in the criminal justice system.[242] Those falling on this end of the ideological spectrum champion the idea of "transformative justice."[243] Furthermore, they reject the notion that "[o]ur Constitution is *color-blind*, and neither knows nor tolerates classes among citizens . . . *all citizens are equal before the law*. . . .The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved."[244] In theory, if the presumption of innocence is to be given full effect, all prisoners ought to be unconditionally released before trial.[245] To suggest an "absolute exemption from imprisonment under all circumstances," however, "would be incongruent with every notion of law and political society, and in the end would be destructive of all civil

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[239] Transcript of Debates, *supra* note 12, at 7.

[240] *Illinois Uniform Crime Reporting*, Illinois State Police (2022), https://ilucr.nibrs.com/CrimeData/CrimeDataTables; *see also* Appendix III, Table 2, *infra*, at p. 45 (in 2022, Black people living in Illinois were the victims of 1,877 assaults, 642 homicides, 1,889 sexual assaults, 529 kidnappings, 25,866 larcenies/thefts, 13,465 automobile thefts, and 5,401 burglaries.)

[241] *See, e.g.*, Jessica M. Eaglin, *To "Defund" the Police*, 73 Stan. L. REV. ONLINE 120, 124-127 (2020-2021).

[242] *See* Mariame Kaba, *Yes, We Mean Literally Abolish the Police,* N.Y. TIMES (June 12, 2020), ("We want to make [police departments] obsolete").

[243] Walidah Imarisha, Alexis Gumbs, Leah Lakshmi Piepzna-Samarasinha, Adrienne Maree Brown, & Mia Mingus, *The Fictions and Futures of Transformative Justice,* THE NEW INQUIRY, (2017):

> Transformative justice is "any way of creating safety, justice, and healing for survivors of violence that does not rely on the state (by which I mean the prison industrial complex, the criminal legal system, foster care, children's aid, the psychiatric and disability prison industrial complex—e.g., psych hospitals, nursing homes, and extended care—Immigration, the TSA, and more) . . . A movement created by Black, Indigenous, and People of Color feminist revolutionaries to free our people."

[244] *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., *dissenting*) (emphasis added).

[245] *Bail: An Ancient Practice Reexamined*, *supra* note 30, at 970.

liberties."[246] Given the current trend in Illinois criminal justice reform, these more unorthodox reform efforts do not sound as unimaginable as they were only a decade ago.

Furthermore, arguments against cash bail often involve anecdotal narratives or hyperfocus on a small sample size to prove their "disproportionate effects" claim. For example, one activist argued "racial inequities in bail/bond decisions in Harris County are symptomatic of substantial bias against African Americans in bail setting throughout the United States."[247] Like many racially charged arguments, the claim that inequities in a single county can be extrapolated to apply to an entire country is a hasty generalization, one of many logical fallacies typically accompanying the "disproportionate effects" argument. While acknowledging disparities exist in the criminal justice system, the focus of reformers and activists should be on addressing systemic issues within the criminal justice system rather than solely blaming cash bail and encouraging reverse discrimination in criminal justice procedure to create "fairness" and "equity".[248] Reforming bail practices can be part of a broader effort to tackle racial and ethnic inequalities.[249]

D. THE MOST OPTIMISTIC VIEW: CONCEDING GROUND TO COMPROMISE

To be sure, the crux of this Article hinges on the assertion that specific provisions of the SAFE-T Act effectively amend, albeit unconstitutionally, the Bill of Rights of the Illinois state Constitution.[250] The legislature overreached, commandeered, and effectively abolished a judicial power enumerated in the Constitution. Similarly, the legislation effectively stripped a constitutional right from crime victims. Nevertheless, it would be brash and intellectually dishonest to claim no promising ideas or good intentions lie within that 764-page document Illinois has come to know as the SAFE-T Act.[251] The opposite is true. For example, the SAFE-T Act

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[246] Duker, Note 24, *supra,* at 33.

[247] Marcia Johnson & Luckett Anthony Johnson, *Bail: Reforming Policies to Address Overcrowded Jails, the Impact of Race on Detention, and Community Revival in Harris County, Texas*, 7 NW. J. L. & SOC. POL'Y. 42, (2012).

[248] *Reverse Discrimination*, THE LAW DICTIONARY (7th ed. 2003) (unfair treatment or bias exercised against a person or class for the purpose of correcting a pattern of discrimination against another person or class; majority groups are discriminated against in an effort to equalize minority group).

[249] *See* Transcript of Debates, *supra* note 12*,* at 22:

> Rep. Chesney: "Let's talk about public safety, because that's what this Bill is about. You've had a Member of the Legislative Black Caucus arrested for problems with FOID cards and Concealed Carry . . . In less than an hour, we are going to do something very historic . . . You guys are going to do something where you're not on the right side of history. You are going to pass a flawed Bill. A Bill that is not supported by labor, is not supported by the Sheriff's association, is not supported by the police chiefs . . . Everybody that we tasked to keep us safe, they all say this makes you less safe. That it makes my family less safe. That makes you and your communities less safe. So, I ask you to reconsider and pull this Bill and let us work on a Bill that makes us all safe . . . I'm asking for a 'no' vote."

[250] David R. Miller et al., *1970 Illinois Constitution Annotated for Legislators*, ILL. GEN. ASSEMB. LEGISLATIVE RESEARCH UNIT (5th ed. 2018), at 9 ("The Illinois Bill of Rights is significant because a few of those federal protections do not apply to state governments, and some of the Illinois protections go beyond the scope of federal ones that do apply.")

[251] *People v. Spruill*, 2024 Ill. App. 5th 231184, 2 n.1 (Ill. App. Ct. 2024); *see* Public Act 101-652 (eff. Jan. 1, 2023), commonly known as the Safety, Accountability, Fairness and Equity-Today (SAFE-T) Act (Act), as codified in article 110 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/art. 110 (West 2022)); *see* Pub. Act 102-1104, § 70 (eff. Jan. 1, 2023) (amending various provisions of the Code); *Rowe v. Raoul*, 2023 IL 129248, ¶ 52 (lifting stay and setting effective date as September 18, 2023). The Act has also "sometimes been referred to in the press as the Pretrial Fairness Act. *Neither name is official*, as *neither appears in the Illinois Compiled or public act*." *Rowe v. Raoul*, 2023 IL 129248, ¶ 4 n.1 (emphasis added).

expands the list of detainable offenses[252] and adds several new offenses related to aggravated driving under the influence and animal cruelty.[253]

Despite being an effective judicial instrument for making pretrial decisions, cash bail should not be used in all cases because "*each defendant* stands before the bar of justice *as an individual* . . . [and] do not lose their separateness or identity. [254] Furthermore, "while it might be possible that these defendants are identical in financial ability, character, and relation to the charges—elements Congress has directed to be regarded in fixing bail—it violates the law of probabilities. *Each accused is entitled to any benefits due to his good record, and misdeeds or a bad record should prejudice only those [guilty].* The question when [bail application] is made relates to each one's trustworthiness to appear for trial and what security will supply reasonable assurance of his appearance."[255] Another prudent SAFE-T Act amendment, therefore, provides that pretrial decisions must be individualized, and the court cannot exclusively use only one factor or standard to make a condition or detention decision.[256]

Moving away from pretrial procedural changes, the SAFE-T Act provides much-needed reform in policing and law enforcement. The SAFE-T Act imposes more accountability and transparency on police officers. For example, it creates the Reporting of Deaths in Custody Act, which creates a process and procedures for investigating and reporting deaths that occur in the custody of any law enforcement agency or correctional facility as a result of a peace officer's use of force.[257] The Act also amends the Uniform Crime Reporting Act to include monthly reports required from each law enforcement agency to be made available by the Department of State Police, in addition to compilations of annual crime statistics.[258] In addition, the Act amends the Illinois Police Training Act by adding to the powers and duties of the Illinois Law Enforcement Training Standards Board the authority to establish statewide standards regarding regular mental health screenings for probationary and permanent police officers, ensuring counseling sessions and screenings remain confidential.[259] Finally, the Act amends the Law Enforcement Officer-Worn Body Camera Act to require all law enforcement agencies to use officer-worn body cameras.[260] These amendments are the SAFE-T Act's most redeeming points of legislation. Frankly, however, the amount of unconstitutional, wasteful, dangerous, or otherwise deleterious provisions of the SAFE-T Act far outweigh the positives.

Therefore, Part IV proposes two constitutional amendments to the Illinois Bill of Rights to (1) expressly define the judiciary's role in setting bail and (2) specify bail includes, but is not

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[252] *See* 725 ILCS 5/110-6,1(a)(6) (expanding the list of detainable offenses to include reckless homicide, involuntary manslaughter, residential burglary, child abduction, child endangerment, hate crimes, aggravated unlawful restraint, threatening a public official, and aggravated battery with a deadly weapon other than by discharge by a firearm).
[253] 725 ILCS 5/110-6.1(a) (6.5).
[254] *Stack v. Boyle*, *supra* note 62, at 9 (Jackson, J., *concurring)* (emphasis added).
[255] *Id.*
[256] 725 ILCS 5/110-6.1(f)(7) (e.g., risk assessment tools cannot be used as the sole basis to deny pretrial release)*; see generally* Hill, *supra* note 220; Mayson, *supra* note 221 (both sources focus on the potential foreseeable problems with technologically advanced, algorithmic risk assessment tools).
[257] *Summary of Provisions in Illinois House Bill 3653: Criminal Justice Omnibus Bill*, The Civic Federation, (2021), https://www.civicfed.org/iifs/blog/summary-provisions-illinois-house-bill-3653-criminal-justice-omnibus-bill
[258] *Id.*
[259] *Id.*
[260] *Id.*

limited to, monetary bail.[261] These amendments are reasonable solutions to effectively undo many of the multitudinous statutory modifications included in the SAFE-T Act. If these amendments were placed on an Illinois general election ballot, they would undoubtedly find favor with a substantial number of voters—ideally, a majority of voters in Illinois would find the proposed amendments favorable.

PART IV: PROPOSING A CONSTITUTIONAL AMENDMENT

> The will of the people . . . can only be expressed in the legitimate modes by which such a body politic can act, and which must either be prescribed by the constitution whose revision or amendment is sought, or by an act of the legislative department of the State, which alone would be authorized to speak for the people upon this subject.[262]

Though it is essential to recognize cash bail is not a panacea for ensuring court appearances or preventing crime, it consistently proved a reliable tool for judges to protect their communities and deter criminal defendants from flight. These compelling interests are embedded in Illinois' legal system—safeguarding the defendant's constitutional rights while ensuring justice is served, communities are safe, and crime victims are protected. The SAFE-T Act, however, swings the pendulum too far in favor of criminal defendants, effectively diminishing the rights and safety of crime victims, law enforcement officers, and communities throughout the state.

The amended Illinois Criminal Code [hereinafter "the Code"] illustrates the miscalculation and overcorrection the Illinois General Assembly made in forcing an omnibus bill upon Illinois residents without first asking for their input or approval. The Code outlines the new procedures for preliminary examination and a defendant's initial court appearance.[263] Among other approved amendments buried in the text of 764 pages of Illinois House Bill 3653, the Code now mandates police officers escort arrestees before the nearest and most accessible judge in the county without undue delay, except when the county participates in a regional jail authority.[264]

Unfortunately, this statute places undue burdens on police officers, who must process defendants within a specific time frame, even when unnecessary. The statute places more importance on the necessity of protecting criminal defendants from a moment's incarceration than protecting crime victims' rights and community's safety. For instance, if a police officer is in a county that may be more likely to hold criminals accountable, they are authorized to delay the process per the statute, but not beyond 48 hours before the defendant appears before a judge.[265] The state tacitly reveals what it deems a *necessary delay* for police officers: the threat to the arrestee posed by counties that house correctional facilities.[266]

Few people involved in the preparation, legislation, and application of the SAFE-T Act and the Pretrial Fairness Act deny the obvious: chaos will ensue at the outset of implementing the new system, and unfortunately, proponents can only speculate and hope "it will eventually work itself

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[261] *See* Appendix I & II, *infra,* at pp. 40-43. This Article does not propose new amendments to the Constitution; it does, however, propose amendments to the constitutional diction related to crime victims (Art. I, Sec. 8.1(a)(9)) and the judiciary's role in setting bail (Art. I, Sec. 9).
[262] 1 Cooley's Constitutional Limitations, 84-85 (8th ed. 1927).
[263] 725 ILCS 5, Art. 109, § 109-1.
[264] *See* 725 ILCS 5, Art. 109, § 109-1(a).
[265] *Id.*
[266] *Id.*

out."[267] Nevertheless, immediate concerns over the fairness of the Illinois bail system prevailed over prudence and forethought.[268]

A. THE PRETRIAL FAIRNESS ACT: A UNILATERAL REVOCATION OF RIGHTS

One consequence of the new system few advocates care to admit is the possibility that more people will be detained without the possibility of bonding out as the Act removes a centuries-old right from the accused.[269] One need not be a historian to understand that individual liberties freely relinquished to the State are not easily, if ever, returned. Consider the innocent person accused of a violent crime: under the Act, if the prosecution meets its burden, it can now imprison the misidentified, the framed, or the otherwise innocent before any trial.[270] For that reason alone, proponents of the Pretrial Fairness Act should be concerned that the State may inevitably detain *more* individuals as the accused can no longer secure their pretrial release by posting a refundable cash bond.

Opponents of cash bail consider its abolishment as a right gained; however, they fail to consider the rights potentially relinquished in return. For example, despite the abolition of cash bail, courts can still deny the pretrial release of the accused.[271] While new pretrial procedures shift the high burden of proof onto the prosecution to show "why less restrictive conditions [than pretrial detention] would not avoid a real and present threat to the safety of any . . . persons or the community . . . or prevent the defendant's willful flight from prosecution," certain offenses may nonetheless trigger encumbering release conditions or unbailable pretrial detainment.[272] The Pretrial Fairness Act expands the number of offenses that qualify for pretrial detention. However, without additional instructions from the General Assembly, law enforcement officers have broad discretion in interpreting what is a threat or risk to anyone's safety.[273]

Furthermore, circuit court judges *can and will* still revoke the defendants' pretrial release pursuant to article 110 of the Code as amended by Public Act 101-652.[274] If the circuit court judge decides to grant pretrial release, the release-on-recognizance defendant may assume he is off the hook—justice and equality at last. The problem with that mind state is twofold: (1) the accused receive very little negative reinforcement, no consequences for their actions, and therefore, no reason to change their behavior, and (2) the State can appeal the circuit court's ruling, and appellate court judges, too, *can and will reverse* in favor of the State.[275] In *People v. Spruill*, for example, the State argued the circuit court "abused its discretion by denying the State's verified petition . . . request[ing] that defendant be detained pending trial."[276]

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[267] *See* Buragas, *supra* note 105, at 3 (*quoting* Macon County chief public defender: "[T]he only thing left is to take a deep breath and watch how it all plays out in reality".).
[268] *See* Chloé G. Pedersen & Jessica Schneider, *Let's Get Real About the Safe-T Act*, 110 Ill. B.J. 46, 47 (2022).
[269] The former cash bail system held a person in custody based on their ability to pay bail.
[270] *See* 725 ILCS 5/110-6.1(h) (providing the court "make a written finding summarizing the [its] reasons for the decision to deny the defendant pretrial release . . .").
[271] *See* Emily L. Fitch & Brenda M. Mathis, *To Release or Not to Release,* 110 Ill. B.J. 38, 40 (2022).
[272] 725 ILCS 5/110-6.1(h).
[273] *See* Fitch & Mathis, Note 209, *supra*.
[274] Pub. Act 101-652, § 10-255 (eff. Jan. 1, 2023); *see also* Pub. Act 102-1104, § 70 (eff. Jan. 1, 2023) (amending various provisions of the Act); *Rowe v. Raoul, supra* note 17, at ¶ 52 (lifting stay and setting effective date as September 18, 2023).
[275] *See, e.g., People v. Spruill,* 2024 Ill. App. 5th 231184 (Ill. App. Ct. 2024) (reversing the circuit court's order granting defendant pretrial release and remanding the matter for further proceedings in the circuit court)
[276] 2024 Ill. App. 5th 231184 (Ill. App. Ct. 2024).

B. PRESSURIZED SYSTEM

The Pretrial Fairness Act will strain the criminal justice system, require an exorbitant amount of added funding for pretrial release protocols, and adversely affect court officers, average Illinois citizens, and the criminally accused. The new pretrial procedures will be "lengthier and far more detailed," and preparation for these appearances "will be more intensive and time-consuming."[277] Under the SAFE-T Act, trial courts must hold hearings to determine whether defendants should be detained or released and, if so, whether any conditions should be placed on release.[278]

The Act amended the Code by abolishing traditional monetary bail in favor of pretrial release on personal recognizance or with conditions of release.[279] All persons charged with an offense are eligible for pretrial release in Illinois.[280] Under the Code, as amended, a defendant's pretrial release may only be denied in certain statutorily limited situations (qualifying offenses).[281] For most of the qualifying offenses, upon filing a verified petition requesting denial of pretrial release, the State has the burden to prove by clear and convincing evidence the proof is evident or the presumption great that the defendant has committed a qualifying offense,[282] and the defendant's pretrial release poses a real and present threat to the safety of any person or persons or the community[283] or a high likelihood of willful flight to avoid prosecution,[284] and no condition or combination of conditions can mitigate the real and present threat to the safety of any person or the community or the risk of defendant's willful flight from prosecution.[285]

The SAFE-T Act also tightens time requirements for hearings that now must be held within 48 hours of arrest, and if a defendant is detained, prosecutors and defense attorneys have only 90 days to prepare for trial.[286] An additional burden in the short term is that the hearing requirements apply not just to newly arrested individuals but to all individuals who currently are awaiting trial on criminal charges—"9,000 individuals statewide [are currently being] held and are eligible for hearings . . . which will add to the circuit courts' burden ."[287] Therefore, an unavoidable result of

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[277] Buragas, *supra* note 105*,* at 11.
[278] Amelia Buragas, *SAFE-T Plans*, 111 Ill. B.J. 10, 11 (2023).
[279] 725 ILCS 5/110-1.5, 110-2(a) (West 2022).
[280] 725 ILCS 5/110-2(a), 110-6.1(e) (West 2022).
[281] 725 ILCS 5/110-2(a), 110-6.1 (West 2022).
[282] 725 ILCS 5/110-6.1(e)(1) (West 2022).
[283] 725 ILCS 5/110-6.1(a)(1)-(7), (e)(2) (West 2022).
[284] 725 ILCS 5/110-6.1(a)(8), (e)(3) (West 2022).
[285] 725 ILCS 5/110-6.1(e)(3) (West 2022); 725 ILCS 5, § 110-6.1(e)-(f); *see also People v. Hernandez*, 2023 Ill. App. 2d 230361, 7-8 (Ill. App. Ct. 2023) ("Evidence is clear and convincing if it leaves no reasonable doubt in the mind of the trier of fact as to the truth of the proposition in question." (*quoting Chaudhary v. Department of Human Services*, 2023 IL 127712); *People v. Taylor*, 2024 Ill. App. 5th 230859, at 6 (Ill. App. Ct. 2024) (holding that "[i]f the circuit court finds that the State proved a valid threat to the safety of any person or the community and/or the defendant's likely willful flight to avoid prosecution, or the defendant's failure to abide by previously issued conditions of pretrial release, the court must determine which pretrial release conditions, 'if any, will reasonably ensure the appearance of a defendant as required or the safety of any other person or the community and the likelihood of compliance by the defendant with all the conditions of pretrial release.' If the circuit court determines that the defendant should be denied pretrial release, the court must make written findings summarizing the reasons for denying pretrial release, including why less restrictive conditions would not avoid a real and present threat to the safety of any person or the community, based on the specific articulable facts of the case, or prevent the defendant's willful flight from prosecution").
[286] Buragas, *supra* note 120.
[287] *Id.* ("9,000 individuals statewide [are currently being] held and are eligible for hearings . . . which will add to the circuit courts' burden".).

the Pretrial Fairness Act procedures is further clogging of court dockets and increased pressure on the criminal justice system.[288]

Furthermore, defendants can no longer access bail/bond assignments to hire private counsel.[289] A foreseeable consequence for the accused, therefore, will be less access to private counsel and an increased reliance on public defenders juggling grossly excessive caseloads in an already overburdened system.[290] Prior to the Pretrial Fairness Act, the law allowed defendants to use bond funds to pay attorney fees through a bond assignment. However, this method of retaining private counsel no longer exists—another individual right proponents of the Pretrial Fairness Act willfully surrendered.[291]

The SAFE-T Act found much of its support in places like Cook County, a historic Democrat stronghold that includes Chicago, where the Pretrial Fairness Act essentially extends reforms already in place.[292] However, officials in smaller, downstate counties are stretched thin by the requirements imposed by the SAFE-T Act.[293] For example, Macoupin County State's Attorney Jordan Garrison heads an office of just four staffers tasked with monitoring people released pretrial, which includes at least 20 people per month since cash bail was eliminated.[294] Macoupin County, Illinois' 30th largest county by population and the 11th largest in land mass is part of Illinois' Fourth Judicial District and includes 41 counties in central Illinois.[295] With their limited resources, counties like Macoupin must focus on tracking serious offenders, so criminal defendants with much more common, lower-level charges like burglary and drug possession slip through the cracks.

Furthermore, even if underfunded counties receive more money from the state, they still face a shortage of attorneys to hire.[296] In the Fourth District, only 55 new attorneys were sworn in this year—fewer than one-and-a-half attorneys per county.[297] Even proponents of the SAFE-T Act cannot deny the inevitable: the SAFE-T Act and the Pretrial Fairness Act will create an overly pressurized system at risk of rupture.

C. AMENDING THE ILLINOIS STATE CONSTITUTION

Although Illinois is not the first state to bail on cash bail, it *is* the *first* state to abolish cash bail entirely without *validly amending* its Constitution or putting the SAFE-T Act or the Pretrial Fairness Act to a vote.[298] Before Illinois ended cash bail, New Jersey already experimented with supplanting its cash bail system.[299] Unlike Illinois, New Jersey still allows cash bail if there is a

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[288] *See* Buragas, *supra* note 120.
[289] *See* Buragas, *supra* note 105, at 11.
[290] *Id.* at 10.
[291] *Id.*
[292] Mawa Iqbal, *Illinois Became the First State to Fully Eliminate Cash Bail. Here's How It's Working,* WBEZ CHICAGO (Dec. 29, 2023), https://www.wbez.org/stories/illinois-end-of-cash-bail-how-its-working/394638cb-eb04-42eb-bf2e-2b83bb788cb7.
[293] *Id.*
[294] Zeta Cross, *Macoupin County State's Attorney Sees Mixed Bag from End of Cash Bail*, THE CENTER SQUARE (Jan. 8, 2024), https://www.thecentersquare.com/illinois/article_0e0c4096-ae43-11ee-8d36-9b188d0382a4.html.
[295] *Id.*
[296] Iqbal, *supra* note 287.
[297] *Id.*
[298] *See, e.g., State v. Robinson*, 229 N.J. 44, 51 (2017) (N.J. Supreme Court upheld a statute that "marked a shift away from heavy reliance on monetary bail").
[299] *See No More Cash Bail in Illinois? Here's What We Know About the Changes Coming Soon*, NBC CHICAGO, (September 16, 2022), https://www.nbcchicago.com/news/local/no-more-cash-bail-in-illinois-heres-what-we-know-

credible chance a defendant will not appear in court.[300] New Jersey had long relied on "monetary bail to ensure the presence of an accused person at trial . . . [b]ut in 2017, *following an amendment to its Constitution*, the New Jersey Criminal Justice Reform Act took effect."[301]

In contrast to New Jersey, however, Illinois never amended its Constitution prior to passing the SAFE-T Act. New Jersey's bill, which allows cash bail in limited circumstances, could have been a model for Illinois to follow rather than a full-scale dissolution of the bail system without the consent of the governed—a process neither fair nor equitable for law-abiding citizens.[302] The New Jersey Superior Court emphasized the following dictum: "[T]he remedy for legislation that is simply pernicious in its character is with the people."[303]

"[T]he people of Illinois give voice to their sovereign authority through the Illinois Constitution. [Through] the Illinois Constitution, [the] people have decreed how their sovereign power may be exercised, by whom and under what conditions or restrictions."[304] Thus, "[t]he will of the people . . . can only be expressed in the legitimate modes by which such a body politic can act, and which must either be prescribed by the constitution whose revision or amendment is sought, or by an act of the legislative department of the State, which alone would be authorized to speak for the people upon this subject."[305]

1. Historical Overview of the Illinois Constitution

On April 18, 1818, President James Monroe signed legislation known as the Enabling Act, which laid out the requirements for Illinois to become a state.[306] One of these requirements was that Illinois must draft and pass a state constitution. Thirty-three delegates met in the territorial capital of Kaskaskia on Monday, August 3, 1818, to begin drafting a state constitution.[307] It took less than a month for delegates to approve the new Constitution on August 26, 1818.[308]

Illinois' first constitution, ratified in 1818, could be amended only by a convention called by a majority of all citizens voting for representatives.[309] The 1848 Constitution provided a complex alternative amending process, permitting proposals by the General Assembly.[310] Illinois' third constitution, to some extent, liberalized the legislative process, but the amendment process became even more restrictive.[311] Illinois' fifth constitutional convention, which met between 1920 and 1922, tried to remedy the ineffective amending process and eliminate the detailed restrictions of the 1870 Constitution.[312]

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about-the-changes-coming-soon/2939008/ (New Jersey replaced its cash bail system in 2014 with a risk assessment approach - measuring a defendant's chance of being a threat if released before trial).

[300] *Id.*

[301] *Holland v. Rosen*, 895 F.3d 272, 278 (emphasis added).

[302] *See No More Cash Bail in Illinois?*, *supra* note 293.

[303] *Morris v. Wrightson*, 28 A. 56, 58 (N.J. Sup. Ct. 1893).

[304] *Heaton v. Quinn* (*In re Pension Reform Litig.*), 32 N.E.3d 1, 25 (2015).

[305] 1 Cooley's Constitutional Limitations, 84-85 (8th ed. 1927).

[306] *See* Office of the Illinois Secretary of State, *100 Most Valuable Documents at the Illinois State Archives - Illinois Constitution (1818).*

[307] *Id.*

[308] *Id.*

[309] Samuel W. Witwer, *Introduction to the 1970 Illinois Constitution, .*

[310] Illinois has a bicameral legislature consisting of two houses. The Illinois state legislature, known as the General Assembly, consists of a 59-member Senate and a 118-member House of Representatives (i.e., the General Assembly of Illinois is analogous to the Congress of the United States of America).

[311] *See Introduction to the 1970 Illinois Constitution*, Note 229, *supra.*

[312] *Id.*

The 1970 Illinois Constitution, adopted by the Sixth Illinois Constitutional Convention on September 3, 1970, was ratified by the people on December 15, 1970.[313] Delegates at the Constitutional Convention precipitating the 1970 Illinois Constitution accepted posting money constituted a routine bail bond condition.[314] They debated the equities of monetary bail, only to leave the substance of the bail clause from previous constitutions intact.[315] The SAFE-T Act, which is the latest bail reform codified into law, abolishes cash bail entirely, providing "all persons charged with an offense shall be eligible for pretrial release on personal recognizance."[316]

By abolishing cash bail, however, the legislature also abolished certain crime victims' constitutional rights—all without input or vote from the people of Illinois. The Court has affirmed that the "ultimate sovereign authority of [the state of Illinois], its people, can define constitutional rights as they choose and limit government powers in doing so."[317] Article XIV describes three methods for amending the Constitution,[318] and the Court affirmed "[t]he Illinois Constitution . . . may be amended by . . . (1) constitutional ballot initiatives; (2) amendments by General Assembly; and (3) constitutional conventions."[319]

2. Constitutional Ballot Initiatives

An initiated constitutional amendment is a citizen-initiated ballot measure that amends a state's constitution, and Illinois is currently one of the 18 states that allow citizens to initiate constitutional amendments.[320] However, Article XIV of the Constitution limits direct ballot initiatives to structural and procedural subjects under Article IV.[321] By contrast, other state ballot initiatives give citizens much greater discretion in executing direct democracy.[322]

Article XIV of the Constitution should be amended to expand the scope of constitutional initiatives and broaden what qualifies as "valid and sufficient" for proposed amendment petitions—*no* justifiable reason exists to defend ratifying sweeping legislation without the consent of the governed.[323] However, this proposal presents an unfortunate paradox: an amendment of this type could not be proposed through an initiative because it is not a structural or procedural subject within Article IV.[324]

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[313] *See* Frank Kopecky & Mary Sherman Harris, *Understanding the Illinois Constitution*, Illinois State Bar Association, (2010).

[314] Record of Proceedings, Sixth Illinois Constitutional Convention, Vol. III, pp. 1654-59.

[315] *Id.*; *see also* *People v. Woodard*, 175 Ill. 2d 435, 445 (1997) ("[W]hen enacting article 110 . . . [the legislature] was concerned with inequities posed by the administration of bail in criminal cases.").

[316] 725 ILCS 5/110-1.5 ("[T]he requirement of posting monetary bail is abolished").

[317] *Rowe v. Raoul*, *supra* note 17, at ¶126 (*quoting* *Hawthorn v. People*, 109 Ill. 302, 305-06 (1883)).

[318] *See* Ill. Const. 1970, art. XIV, § 1-3.

[319] *See* *Hooker v. Illinois State Board of Elections*, 2016 IL 121077 at ¶ 3:1-3.

[320] *See* *Types of Ballot Measures in Illinois,* Ballotpedia, (2023),

[321] *See* Ill. Const. 1970, art. XIV, § 3.

[322] *See, e.g.,* Fla. Const. 1972, art. XI, § 3 ("The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people . . . ").

[323] *See* Ill. Const. 1970, art. XIV, § 3:

> The procedure for determining the validity and sufficiency of a petition shall be provided by law. If the petition is valid and sufficient, the proposed amendment shall be submitted to the electors at that general election and shall become effective if approved by either three-fifths of those voting on the amendment or a majority of those voting in the election.

[324] *Id.:*

> Amendments to Article IV of this Constitution may be proposed by a petition signed by a number of electors equal in number to at least eight percent of the total votes cast for candidates for Governor in the

3. Amendment by General Assembly

The second method for amending the Constitution also presents its own challenges, relating more to the General Assembly's composition than to the Constitutional constraints that limit amendment initiatives.[325] The SAFE-T Act emanates from and is still strongly favored by Democrats, who have conserved political strongholds over both houses of the Illinois General Assembly.[326] Considering the tireless and relentless push to pass and ratify the SAFE-T Act, an amendment by the General Assembly seems improbable, especially if the legislature's composition remains disproportionally skewed in favor of those responsible for passing the SAFE-T Act.

4. Constitutional Convention

Since 1918, whether to hold a constitutional convention appears on the Illinois election ballot; this constitutional provision provides that the question must occur every 20 years.[327] Constitutional conventions occur when the legislature approves—and the people ratify—the calling of a convention to review the entire document and consider thorough revision. Proposed constitutional changes must be approved by a majority of the delegates and submitted to the voters at an election not less than two months nor more than six months following the convention's adjournment.[328] The vote must be on a separate ballot and receive a simple majority of those voting on the question.[329]

The last convention call appeared in the 2008 general election, and the next will appear on the 2028 ballot. Therefore, Illinois citizens soon enjoy an opportunity to exercise their constitutional right to amend the Constitution. The proposed revisions or amendments become law upon approval by a majority of Illinois voters.[330] Although the SAFE-T Act has the potential to cause immeasurable problems for the criminal justice system and communities throughout Illinois—many of which struggled with rampant and rising crime rates when the SAFE-T Act

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preceding gubernatorial election. Amendments shall be limited to structural and procedural subjects contained in Article IV . . .

[325] Ill. Const., Art. XIV, § 2(a):

> Amendments approved by the vote of three-fifths of the members elected to each house shall be submitted to the electors at the general election next occurring at least six months after such legislative approval, unless withdrawn by a vote of a majority of the members elected to each house.

Ill. Const., Art. XIV, § 2(b):

> Amendments proposed by the General Assembly shall be published with explanations, as provided by law, at least one month preceding the vote thereon by the electors. The vote on the proposed amendment or amendments shall be on a separate ballot. A proposed amendment shall become effective as the amendment provides if approved by either three-fifths of those voting on the question or a majority of those voting in the election.

[326] Ill. Senate (40-19); Ill. House (78-40) Democrat majorities.

[327] Kopecky & Harris, Note 246, *supra*; *see* Ill. Const., Art. XIV, § 1(f):

> The Convention shall prepare such revision of or amendments to the Constitution as it deems necessary. Any proposed revision or amendments approved by a majority of the delegates elected shall be submitted to the electors in such manner as the Convention determines, at an election designated or called by the Convention occurring not less than two nor more than six months after the Convention's adjournment. Any revision or amendments proposed by the Convention shall be published with explanations, as the Convention provides, at least one month preceding the election.

[328] *Id.*

[329] *See* Ill. Const., Art. XIV, § 1(c)

[330] Ill. Const., Art. XIV, § 1(g):

> The vote on the proposed revision or amendments shall be on a separate ballot. Any proposed revision or amendments shall become effective, as the Convention provides, if approved by a majority of those voting on the question.

became law—only time will tell the success or failure of the SAFE-T Act's proposed aims. Surely the Act is protecting criminals, but public safety remains at risk.

Opponents of the SAFE-T Act—those who agree with this Article's general assertions and favor the use of cash bail as an important pretrial tool for judges—must make clear and convincing arguments based on logic, reason, statistical analysis, and common sense in drafting the most operative and precise legislation to address the SAFE-T Act's multitudinous problems. Policymakers must track crime statistics, document issues arising from the SAFE-T Act's pretrial procedural requirements, and speak with law enforcement officers, local politicians, district and appellate court judges, prosecutors, defense attorneys, community organizers, activists, and most importantly, the people of Illinois.

CONCLUSION

In Illinois, to abolish monetary bail and the corresponding judicial determination of the amount of bail, the legislature must first ask the citizens of this state to reconsider the constitutional mandate that the safety of crime victims and their families be considered in setting the amount of bail.[331]

The Illinois legislature has no power to impair or infringe upon rights vested in the Illinois state constitution.[332] The legislature must keep within the legislative powers granted to it and observe the directions of the constitution.[333] The individual rights vested in the Illinois Constitution's bill of rights are "not subordinate to legislative power; the opposite is true."[334] Therefore, in exercising judicial power, the Illinois Supreme Court may not "alter or ignore the plain language of our constitution as set out by the citizens, no matter how strongly the court agrees with the public policy underlying the abolishment of monetary bail."[335] Whether a statute like the SAFE-T Act is wise or desirable is not a judicial concern.[336] As such, the Court cannot sustain or strike down a law with a want of power to do either, merely because it is wise in policy or just in its provisions.[337]

Illinois faces a crime and safety problem.[338] When politicians, policy makers, and the media that tout them for their legislation leading to "a decade low in crime," they fail to mention violence is at all-time highs or "crime rates are down" because only 12% of crimes resulted in

[331] *Rowe v. Raoul, supra* note 17, at ¶ 143 (Overstreet, J., *dissenting*).
[332] *Id.* at ¶ 116
[333] *People ex rel. Mooney v. Hutchinson*, 50 N.E. 599, 601 (Ill. 1898).
[334] *Rowe,* at ¶ 115.
[335] *Id.*
[336] *People v. Warren,* 173 Ill.2d 348, 355-56 (1996).
[337] *Mooney v. Hutchinson, supra* note 327*,* at 600.
[338] Mickey Horstrom, *Chicago Crime Declines, but Become More Violent Over the Years*, ILLINOIS POLICY INSTITUTE, (Oct. 12, 2023), https://www.illinoispolicy.org/press-releases/chicago-crime-declines-but-becomes-more-violent-over-10-years/#:~:text=A%20report%20from%20the%20Illinois,10%2Dyear%20low%20in%202022.&text=over%2010%20years-,A%20report%20from%20the%20Illinois%20Policy%20Inst (quoting Paul Vallas: "Chicago's growing crime problem needs more resources, not sluggish leadership. Understaffed and overworked police officers are one of the largest contributors to the plummeting arrest rate. Crime will continue to rise in frequency and severity if we can't provide our brave police the resources they need to combat it.").

arrest in 2022.[339] A cursory review of historical violent crime data clearly shows Illinois has struggled to combat a persistent and pervasive crime problem: violent crime rates in Illinois surpassed the national average every year from 1979 to 2018.[340] Notably, Illinois ranks within the top 10 states for violent crimes, where violent crime statistics are composed of four offenses: murder/homicide and non-negligent manslaughter, rape, robbery, and aggravated assault.[341]

The Pretrial Fairness Act limits local courts' ability to detain dangerous defendants or impose meaningful pretrial release conditions to ensure public safety.[342] Abolishing cash bail and presuming pretrial release for all alleged offenders will embolden criminals, create more victims, decrease public safety, and hold criminals less accountable. Criminals are not victims; neither the legislature nor the courts should treat them as such. Pending a special session, serious policymakers and legislators must prepare for the call to vote for a Constitutional Convention in the November 2028 election. Five years will have passed since the *Rowe* decision, meaning policymakers will have updated crime data to compare to historical crime statistics. Only time will tell how history will write about Illinois' departure from a deeply held tradition of the American criminal justice system. It begs the question—with politicians claiming victories for legislation like the SAFE-T Act while violent crime sweeps through cities like Chicago—SAFE-T for Whom?

[339] Horstrom, *supra* note 334.
[340] *Illinois Crime Rate 1979-2018* (In the FBI's Uniform Crime Reporting (UCR) Program, violent crime statistics are composed of four offenses: murder/homicide and nonnegligent manslaughter, rape, robbery, and aggravated assault); *see* Appendix III, CHART 1, *infra,* at p. 44.
[341] FBI's Uniform Crime Reporting (UCR) Program defines violent crimes as those offenses which involve force or threats of force.
[342] *See Tracking the Pretrial Fairness Act in Illinois,* Loyola University of Chicago Center for Criminal Justice (2023).

ADDENDUM:
PRELIMINARY UPDATES

We knew all along the fearmongering associated with the Pre-Trial Fairness Act would not bear itself out.[343]

Ford Heights, IL (Jan. 12, 2024): Prosecutors have charged a University Park man with shooting a woman in the suburbs last month while on felony pretrial release for an aggravated fleeing case. Officers found a 27-year-old woman in the 1300 block of East Lincoln Highway with multiple gunshot wounds.[344]

*Chicago, IL (Feb. 1, 2024): A woman who showed up to sell her phone to a buyer she met through Facebook Marketplace received a rude welcome: the buyer's accomplice pulled out a gun, took her phone, and ordered her to "Get the f*** out of Chicago." Police officers identified the two suspects and found the stolen cell phone, along with five baggies and five vials containing crack cocaine and six baggies containing heroin in their vehicle. Both suspects were charged with armed robbery with a firearm and possession of a controlled substance. Judge Ortiz denied the state's detention request and released [both suspects] on electronic monitoring.*[345]

Chicago, IL (Feb. 14, 2024): A man on electronic monitoring while awaiting trial for attempted murder and robbery charges is facing more felony charges after sheriff's office investigators found a loaded 9-millimeter handgun with a defaced serial number inside a bag . . . accompanied by a fully loaded 30-round extended magazine and two fully loaded 15-round magazines. The other bedroom contained the charger for [the man's] ankle monitor and nine .22-caliber bullets in a pill bottle.[346]

Chicago, IL (Feb 17, 2024): A man was charged with seven felonies, including attempted murder, for . . . stabbing and hitting a stranger with a hammer on Christmas Day . . . [and] failed to show up for his arraignment on January 31. Instead, prosecutors say, he was on the street that morning, stabbing a woman and threatening her boyfriend with a hammer.[347]

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[343] Ben Bradley & Andrew Schroedter, *Has the Move to Cashless Bond Impacted Safety?*. WGN CHICAGO (Feb. 13, 2024), https://wgntv.com/news/wgn-investigates/has-the-move-to-cashless-bond-impacted-safety (quote attributed to Cook County State's Attorney Kim Foxx).

[344] Tim Hecke, *Suburban Man Shot Woman While on Felony Pretrial Release, Prosecutors Say,* CWB CHICAGO (FEB. 15, 2024), https://cwbchicago.com/2024/02/suburban-chicago-man-shot-woman-on-felony-pretrial-release.html.

[345] Tim Heck, *Armed Robbers Advised Their Victim to 'Get the f*** out of Chicago,' Prosecutors Say*, CWB CHICAGO (Feb. 13, 2024), https://cwbchicago.com/2024/02/gtfo-chicago-armed-robbery-facebook-marketplace.html.

[346] Tim Hecke, *Man on Electronic Monitoring for Allegedly Shooting a Robbery Victim had a Loaded Gun in His Home, Officials Say,* CWB CHICAGO (Feb. 17, 2024), https://cwbchicago.com/2024/02/chicago-attempted-murder-defendant-electronic-monitoring-gun-in-house.html.

[347] Tim Hecke*, Man who Stabbed Woman, Threatened Her Boyfriend with a Hammer was Supposed to be in Court Facing Charges of Attacking Another Victim with a Knife and Hammer, Officials Say,* CWB CHICAGO (Feb. 17, 2024), https://cwbchicago.com/2024/02/chicago-hammer-stabbing-robbery-suspect-skipped-court.html.

APPENDIX I
PROPOSED CONSTITUTIONAL AMENDMENT TO ART. I, SEC. 8.1(A)(9)

Synopsis as Introduced:

ILCON Art. I, Sec. 8.1(a)(9) amended.

Proposes to amend the Bill of Rights Article of the Illinois Constitution. Provides that the safety of crime victims and their families be considered in fixing the amount of bail, where bail shall include monetary bail and the determination shall fall solely within the judiciary's discretion. No law shall be passed that interferes with, negates, or diminishes the ability of judges to deny or set bail, including any law or ordinance that prohibits a judge's determination of monetary bail after carefully considering the safety of the victim and the victim's family. Provides that these provisions are controlling over the Illinois Safety, Accountability, Fairness, and Equity-Today Act and the Pretrial Fairness Act (Public Acts 101-652 and 102-1104). Provides that the term "bail" be restored wherever it previously existed in multitudinous Illinois Codes. Effective upon being declared adopted.

SENATE JOINT RESOLUTION
CONSTITUTIONAL AMENDMENT

RESOLVED, BY THE SENATE OF THE ONE HUNDRED AND THIRD GENERAL ASSEMBLY OF THE STATE OF ILLINOIS, THE HOUSE OF REPRESENTATIVES CONCURRING HEREIN, that there shall be submitted to the electors of the State for adoption or rejection at the general election next occurring at least 6 months after the adoption of this resolution a proposition to amend the Illinois Constitution in Article I by amending Section 8.1 as follows:

Article I — Bill of Rights

Section 8.1. Crime Victims' Rights

(a) Crime victims, as defined by law, shall have the following rights:

(1) The right to be treated with fairness and respect for their dignity and privacy and to be free from harassment, intimidation, and abuse throughout the criminal justice process.

(2) The right to notice and to a hearing before a court ruling on a request for access to any of the victim's records, information, or communications which are privileged or confidential by law.

(3) The right to timely notification of all court proceedings.

(4) The right to communicate with the prosecution.

(5) The right to be heard at any post-arraignment court proceeding in which a right of the victim is at issue and any court proceeding involving a post-arraignment release decision, plea, or sentencing.

(6) The right to be notified of the conviction, the sentence, the imprisonment, and the release of the accused.

(7) The right to timely disposition of the case following the arrest of the

accused.

(8) The right to be reasonably protected from the accused throughout the criminal justice process.

(9) The right to have the safety of the victim and the victim's family considered in denying or fixing the amount of bail, where the judiciary determines bail and includes, but is not limited to, monetary bail, determining whether to release the defendant, and setting conditions of release after arrest and conviction.

(10) The right to be present at the trial and all other court proceedings on the same basis as the accused, unless the victim is to testify, and the court determines that the victim's testimony would be materially affected if the victim hears other testimony at the trial.

(11) The right to have present at all court proceedings, subject to the rules of evidence, an advocate and other support person of the victim's choice.

(12) The right to restitution.

(b) The victim has standing to assert the rights enumerated in subsection (a) in any court exercising jurisdiction over the case. The court shall promptly rule on a victim's request. The victim does not have party status. The accused does not have standing to assert the rights of a victim. The court shall not appoint an attorney for the victim under this Section. Nothing in this Section shall be construed to alter the powers, duties, and responsibilities of the prosecuting attorney.

(c) The General Assembly may provide for an assessment against convicted defendants to pay for crime victims' rights.

(d) Nothing in this Section or any law enacted under this Section creates a cause of action in equity or at law for compensation, attorney's fees, or damages against the State, a political subdivision of the State, an officer, employee, or agent of the State or of any political subdivision of the State, or an officer or employee of the court.

(e) This Section is controlling over any proposed or enacted legislation that interferes with the rights enumerated in subsection (a)(1-12), including the Illinois Safety, Accountability, Fairness, and Equity-Today Act and the Pretrial Fairness Act (Public Acts 101-652 and 102-1104), 725 ILCS 5, Art. 110 (P.A. 101-652, eff. 1-1-23.), any such legislation must be struck down or amended to conform with this Section.

(f) Nothing in this Section or any law enacted under this Section shall be construed as creating (1) a basis for vacating a conviction or (2) a ground for any relief requested by the defendant.

SCHEDULE

This Constitutional Amendment takes effect upon being declared adopted in accordance with Section 7 of the Illinois Constitutional Amendment Act.

APPENDIX II
PROPOSED CONSTITUTIONAL AMENDMENT TO ART. I, SEC. 9

Synopsis as Introduced:

ILCON Art. I, Sec. 9 amended.

Proposes to amend the Bill of Rights Article of the Illinois Constitution. Provides that Section 9's provision that "all persons shall be bailable by sufficient sureties" be amended to explicitly include "monetary sureties" as a form of bail. Further provides that no law shall be passed that interferes with, negates, or diminishes the right of the court to make determinations concerning bail, including monetary and cash bail. Provides that defendants retain the consideration of cash bail as terms of pretrial release. Provides that these provisions are controlling over the Illinois Safety, Accountability, Fairness, and Equity-Today Act and the Pretrial Fairness Act (Public Acts 101-652 and 102-1104). Provides that the term "bail" be restored wherever it previously existed in multitudinous Illinois Codes. Effective upon being declared adopted.

SENATE JOINT RESOLUTION
CONSTITUTIONAL AMENDMENT

RESOLVED, BY THE SENATE OF THE ONE HUNDRED AND THIRD GENERAL ASSEMBLY OF THE STATE OF ILLINOIS, THE HOUSE OF REPRESENTATIVES CONCURRING HEREIN, that there shall be submitted to the electors of the State for adoption or rejection at the general election next occurring at least 6 months after the adoption of this resolution a proposition to amend the Illinois Constitution in Article I by amending Section 9 as follows:

Article I — Bill of Rights

Section 9. Bail and Habeas Corpus

(a) All persons shall be bailable by sufficient sureties, where sufficient sureties necessarily include monetary sureties. All criminally accused defendants retain the right to have cash bail considered when a judge sets the conditions of pretrial release.

(b) The exceptions to subsection (a) include the following offenses where the proof is evident or the presumption great: capital offenses; offenses for which a sentence of life imprisonment may be imposed as a consequence of conviction; and felony offenses for which a sentence of imprisonment, without conditional and revocable release, shall be imposed by law as a consequence of conviction.

(c) When the court, having the sole authority to make determinations concerning bail and habeas corpus, after a hearing, determines that release of the offender would pose a real and present threat to the physical safety of any person.

(d) The privilege of the writ of habeas corpus shall not be suspended except in cases of rebellion or invasion when the public safety may require it.

(e) Any costs accruing to a unit of local government as a result of the denial of bail, including monetary or cash bail, pursuant to the 1986 Amendment to this Section shall be reimbursed by the State to the unit of local government.

(f) This Section is controlling over any proposed or enacted legislation that interferes with the execution of the judiciary's power to set monetary bail, including:

(i) Illinois Safety, Accountability, Fairness, and Equity-Today Act (P.A. 101-652);

(ii) Pretrial Fairness Act (P.A. 102-1104);

(iii) 725 ILCS 5, Art. 110;

(iv) 725 ILCS 120 Sec. 4.5(c-5) (16);

(v) 50 ILC; 205/3b (a)(5);

(vi) and any such legislation that strikes "amount of any bail or bond" and replaces it, in all instances, with "conditions of pretrial prelease" or "pretrial release" must be struck down or amended to conform with this Section.

SCHEDULE

This Constitutional Amendment takes effect upon being declared adopted in accordance with Section 7 of the Illinois Constitutional Amendment Act.

APPENDIX III: ILLINOIS STATISTICS

A. ILLINOIS CRIME RATES COMPARED TO NATIONAL AVERAGES[348]

CHART 1.
ILLINOIS VIOLENT CRIME RATES COMPARED TO NATIONAL AVERAGES FROM 1979 TO 2018.

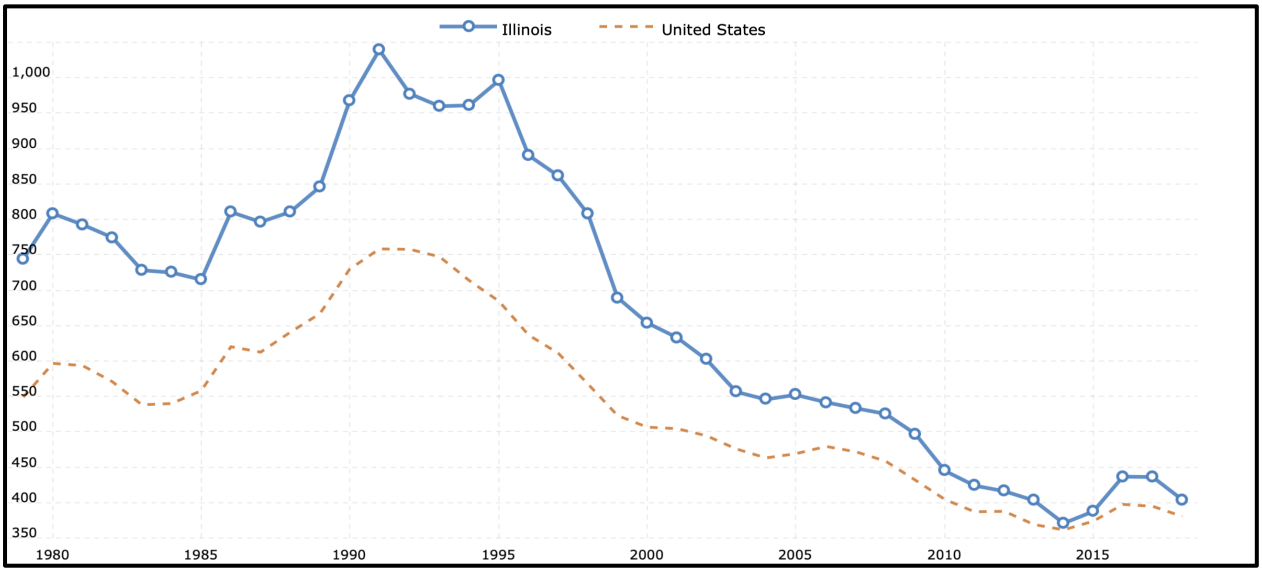
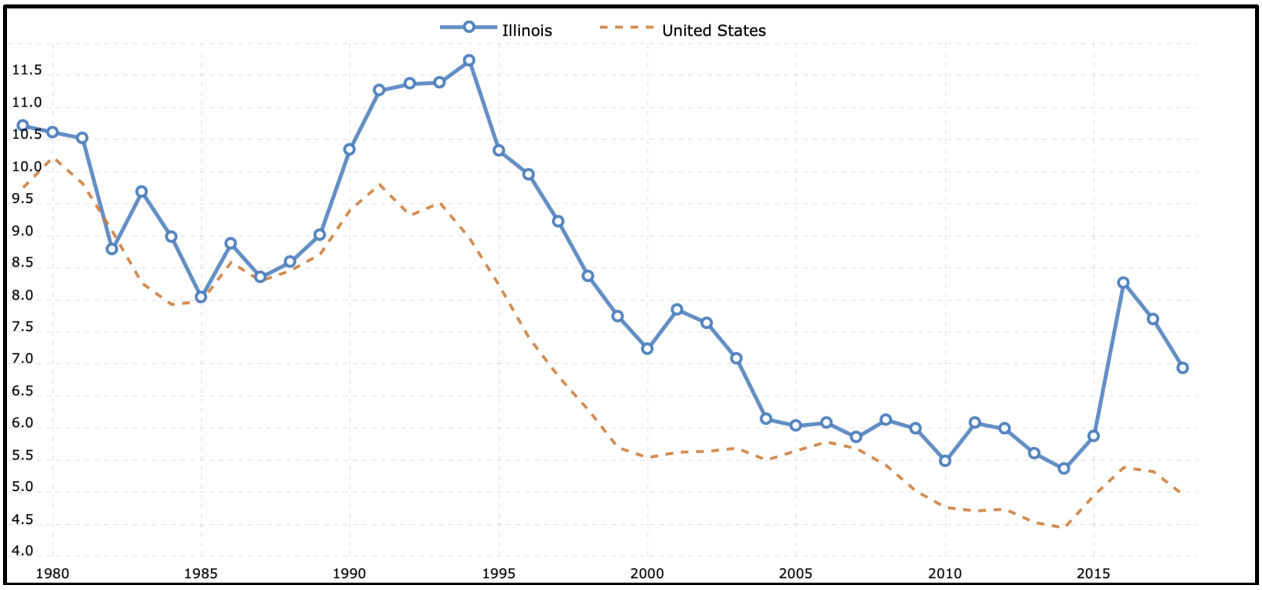


CHART 2. ILLINOIS MURDER RATE COMPARED TO NATIONAL AVERAGES (NUMBER OF HOMICIDES PER 100,000 POPULATION) FROM 1979 TO 2018.



[348] Federal Bureau of Investigation, *Crime in the United States,* https://www.macrotrends.net/states/illinois/crime-rate-statistics. Retrieved Feb. 2, 2024.

B. ILLINOIS POPULATION, DEMOGRAPHIC, AND CRIME STATISTICS

TABLE 1.
ILLINOIS POPULATION: RACIAL DEMOGRAPHICS BY PERCENT (2022).[349]

Population Estimates, July 1, 2022, (V2022)	12,582,515
PEOPLE	
Race and Hispanic Origin	
White alone, percent	76.1%
Black or African American alone, percent (a)	14.7%
American Indian and Alaska Native alone, percent (a)	0.6%
Asian alone, percent (a)	6.3%
Native Hawaiian and Other Pacific Islander alone, percent (a)	0.1%
Two or More Races, percent	2.2%
Hispanic or Latino, percent (b)	18.3%
White alone, not Hispanic or Latino, percent	59.5%

TABLE 2.
ILLINOIS CRIME VICTIM DEMOGRAPHICS: RACE BY OFFENSE CATEGORY (2022).[350]

Victims
Race by Offense Category, 2022

Offense Category		*Race*					
	Total Victims[1]	*White*	*Black or African American*	*American Indian or Alaska Native*	*Asian*	*Native Hawaiian Other Pacific Islander*	*Unknown Race*
Total	**251,041**	**37,731**	**162,334**	**1,142**	**11,839**	**264**	**37,731**
Crimes Against Person	**91,102**	**6,508**	**74,994**	**335**	**2,660**	**97**	**6,508**
Assault Offenses	**87,034**	6,097	71,877	322	2,549	92	6,097
Homicide Offenses	**672**	11	642	0	8	0	11
Human Trafficking	**17**	2	13	0	0	0	2
Kidnapping/Abduction	**593**	22	529	2	18	0	22
Sex Offenses	**2,727**	369	1,889	11	85	4	369
Sex Offenses, Non-Forcible	**59**	7	44	0	0	1	7
Crimes Against Property	**159,939**	**31,223**	**87,340**	**807**	**9,179**	**167**	**31,223**
Arson	**400**	62	266	2	8	0	62
Bribery	**1**	0	1	0	0	0	0
Burglary/Breaking and Entering	**8,946**	1,207	5,401	60	1,056	15	1,207
Counterfeiting/Forgery	**836**	186	345	8	111	0	186
Destruction/Damage/Vandalism	**48,726**	8,865	29,127	165	1,660	44	8,865
Embezzlement	**6**	1	4	0	0	0	1
Extortion/Blackmail	**139**	24	68	3	20	0	24
Fraud Offenses	**15,232**	3,142	7,345	123	1,452	28	3,142
Larceny/Theft Offenses	**54,704**	12,493	25,866	270	3,518	64	12,493
Motor Vehicle Theft	**23,661**	4,767	13,465	64	587	11	4,767
Robbery	**6,992**	399	5,326	110	754	4	399
Stolen Property Offenses	**296**	77	126	2	13	1	77

[349] *Illinois - Quick Facts,* United States Census Bureau (2023), https://www.census.gov/quickfacts/fact/table/IL/PST045222.

[350] *Illinois Uniform Crime Reporting (I-UCR): Victims Race by Offense Category,* Illinois State Police (2022), https://ilucr.nibrs.com/CrimeData/DownloadPDF?PublishReportID=12&ReportName=Race%20by%20Offense%20Category shows the stark contrast in the raw numbers of Black or African American crime victims compared to any other race; in Illinois, communities of color are disproportionately affected by crime. This table includes only data for individual (person) victims and does not include business, financial institution, government, religious organization, or other victim types. Victims are counted once for each offense type to which they are connected.

TABLE 3.
ILLINOIS CRIMINAL OFFENDER DEMOGRAPHICS: RACE BY OFFENSE CATEGORY (2022).[351]

Offenders
Race by Offense Category, 2022

		Race					
Offense Category	*Total Offenders[1]*	*White*	*Black or African American*	*American Indian or Alaska Native*	*Asian*	*Native Hawaiian Other Pacific Islander*	*Unknown Race*
Total	**285,162**	**55,029**	**171,667**	**314**	**2,980**	**143**	**55,029**
Crimes Against Person	**108,117**	**12,381**	**81,456**	**164**	**1,678**	**57**	**12,381**
Assault Offenses	**102,964**	11,429	78,335	150	1,567	54	11,429
Homicide Offenses	**781**	172	430	0	7	0	172
Human Trafficking	**22**	2	18	0	0	0	2
Kidnapping/Abduction	**801**	81	623	1	15	0	81
Sex Offenses	**3,473**	686	1,999	13	86	3	686
Sex Offenses, Non-Forcible	**76**	11	51	0	3	0	11
Crimes Against Property	**157,027**	**40,224**	**75,427**	**117**	**985**	**50**	**40,224**
Arson	**456**	138	177	0	3	0	138
Bribery	**1**	0	1	0	0	0	0
Burglary/Breaking and Entering	**11,551**	3,721	4,059	4	44	2	3,721
Counterfeiting/Forgery	**2,025**	606	786	0	26	1	606
Destruction/Damage/Vandalism	**40,214**	9,499	20,958	22	223	13	9,499
Embezzlement	**95**	8	79	0	0	0	8
Extortion/Blackmail	**199**	60	75	0	4	0	60
Fraud Offenses	**16,138**	5,481	4,966	18	182	10	5,481
Larceny/Theft Offenses	**53,986**	12,957	27,566	58	429	19	12,957
Motor Vehicle Theft	**12,387**	3,654	5,014	12	49	4	3,654
Robbery	**19,370**	4,011	11,326	3	18	1	4,011
Stolen Property Offenses	**605**	89	420	0	7	0	89
Crimes Against Society	**20,018**	**2,424**	**14,784**	**33**	**317**	**36**	**2,424**
Animal Cruelty	**90**	13	62	0	2	0	13
Drug/Narcotic Offenses	**9,685**	722	7,967	22	222	30	722
Gambling Offenses	**8**	0	8	0	0	0	0

[351] *Illinois Uniform Crime Reporting (I-UCR): Race by Offense Category,* Illinois State Police (2022), https://ilucr.nibrs.com/CrimeData/DownloadPDF?PublishReportID=12&ReportName=Race%20by%20Offense%20Category categorizes crime in Illinois by race of the offender. The table shows a disproportionate number of Black/African Americans implicated in criminal offenses in virtually every category. Note that offenders are counted once for each offense type to which they are connected. Furthermore, neither the offender data nor the offense data for the 182,305 incidents reported with unknown offenders were used in constructing this table.

C. ILLINOIS CORRECTION FACILITY POPULATIONS

TABLE 4.
COMPARING ILLINOIS PRISON POPULATIONS.[352]

	Non-Hispanic/White	African American/Black	Total
Total Population (IL) [353]	7,472,751	1,808,271	12,812,508
Total Population (U.S.) [354]	191,697,647	41,104,200	331,449,281
Prison Population (2016)[355]	13,497 (30.1%)	25,398 (56.7%)	44,817
Prison Population (2017)[356]	13,148 (30.5%)	29,194 (56.2%	43,075
Prison Population (June 2023)[357]	9,856 (32.8%)	16,156 (53.7%)	30,062
Prison Population (Dec. 2023)[358]	9,641 (32.3%)	16,169 (54.2%)	29,828

[352] *Prison Population Data Sets*, Ill. Dep't of Corr. (2023), https://idoc.illinois.gov/reportsandstatistics/prison-population-data-sets.html.

[353] *Illinois*, U.S. CENSUS BUREAU (2023), https://data.census.gov/profile/Illinois?g=040XX00US17 - populations-and-people.

The total population of Illinois is approximately 12,812,408. Black people make up approximately 14.11% of the state's population while non-Hispanic whites make up approximately 58.32% of the state's population. In other words, Black individuals make up a significantly smaller portion of the Illinois population than non-Hispanic whites do. Those are simply statistical truths.

[354] *Id.*

[355] *Fiscal Year 2016 Annual Report*, Illinois Dep't of Corr. (2016), https://idoc.illinois.gov/content/dam/soi/en/web/idoc/reportsandstatistics/documents/fy2016-annual-report.

The "disproportionate effects" argument stems from the statistical fact that Black people are detained at rates significantly greater than whites are detained. For instance, the total Illinois prison population in 2016 was 44,817 with Black people accounting for 56.7% of the total prison population while non-Hispanic whites accounting for only 30.1%.

[356] *Fiscal Year 2017 Annual Report*, Ill. Dep't of Corr. (2017), https://idoc.illinois.gov/content/dam/soi/en/web/idoc/reportsandstatistics/documents/fy2017-idoc-annual-report-final.pdf.

[357] *Fiscal Year 2023 Annual Report*, Ill. Dept. of Corr. (2023), https://idoc.illinois.gov/content/dam/soi/en/web/idoc/reportsandstatistics/documents/annualreports/FY23-Annual-Report.pdf

[358] *Id.*

The prison population has dropped precipitously since 2016 (over 69% less people detained in 2023 than in 2016), with a total population of prison population of 29,828 as of December 2023. The SAFE-T Act cannot account for the overall drop in Illinois prison population numbers: The total prison population in June 2023 was already significantly lower than in 2016, with a population of 30,062, and cash bail was not effectively abolished until September 2023. Nor can opponents of cash bail claim that the SAFE-T Act has made the racial disparities in detainment: as of December 2023, Black people still represent 54.2% of the total prison population while non-Hispanic whites constitute only 32.3%. If the prison population has decreased by over 69% between 2016 and 2023, but the disproportionate percentage of Black people represented in the total prison population has remained constant during the same period, one can only make inferences to account for these statistical inequities.