DOES BAIL REFORM INCREASE CRIME? AN EMPIRICAL ASSESSMENT OF THE PUBLIC SAFETY IMPLICATIONS OF BAIL REFORM IN COOK COUNTY, ILLINOIS

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Recently bail reform issues have been in the news across the country, as concerns about fair treatment of defendants and possible public safety risks from expanding pretrial release have collided. These issues involve important empirical questions, including whether releasing more defendants before trial leads to additional crimes. An opportunity to investigate this public safety issue has developed in Chicago, our nation's third largest city. There, the Office of the Chief Judge of the Cook County Courts adopted new bail reform measures in September 2017 and reviewed them empirically in May 2019. Cook County's Bail Reform Study concluded that the new procedures had released many more defendants before trial without any concomitant increase in crime. This Article disputes the Study's conclusions. This Article explains that, contrary to the Study's assertions, the new changes to pretrial release procedures appear to have led to a substantial increase in crimes committed by pretrial releasees in Cook County. Properly measured and estimated, after more generous release procedures were put in place, the number of released defendants charged with committing new crimes increased by 45 percent. And, more concerning, the number of pretrial releasees charged with committing new violent crimes increased by an estimated 33 percent. In addition, as reported by the Chicago Tribune, *the Study's data appears to*

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undercount the number of releasees charged with new violent crimes. A substantial number of aggravated domestic violence prosecutions were dropped after the changes, presumably because batterers were able to more frequently obtain release and intimidate their victims into not pursuing charges. These public safety concerns call into question whether the bail "reform" measures implemented in Cook County were cost beneficial. And because Cook County's procedures are state of the art and track those being implemented in many parts of the country, Cook County's experience suggests that other jurisdictions may similarly be suffering increases in crime due to bail reform.

TABLE OF CONTENTS

I. INTRODUCTION 934
II. AN OVERVIEW OF THE CHANGES MADE BY THE COOK COUNTY BAIL REFORMS 939
III. PROBLEMS WITH THE BAIL REFORM STUDY'S CONCLUSIONS ABOUT LINKAGES TO THE TOTAL NUMBER OF CRIMES IN COOK COUNTY 943
IV. PROBLEMS WITH THE BAIL REFORM STUDY'S CONCLUSIONS ABOUT CRIMES COMMITTED BY PRETRIAL RELEASEES 948
- A. *Crimes Committed by Pretrial Releasees Appear to Have Increased After Pretrial Release Was Expanded* 949
- B. *Violent Crimes Committed by Pretrial Releasees Appear to Have Increased After Pretrial Release Was Expanded* 959
- C. *The Data from the Bail Reform Study Appears to Have Significantly Undercounted Violent Crimes Committed by Pretrial Releasees* 962
- D. *Prosecutors Dropped Aggravated Domestic Violence Cases More Frequently After the Bail Changes* 965

V. THE BAIL REFORM STUDY'S DUBIOUS COST-BENEFIT ASSESSMENT 967
- A. *The Need for Reanalysis of the Data Regarding Crimes by Pretrial Releasees* 967
- B. *Some Tentative Thoughts on a Complete Cost-Benefit Assessment* 970
  - 1. *The Cost of Expanded Pretrial Release* 970
  - 2. *The Benefits of Expanded Pretrial Release* 976

VI. CONCLUSION 982

I. INTRODUCTION

Bail reform issues have been in the news across the country recently. Reformers and their critics have argued about how to make

the nation's pretrial release procedures fairer while protecting the public from crimes committed by released defendants.[1] Reformers have claimed that traditional cash bail requirements for pretrial release needlessly incarcerate many indigent individuals merely because they are unable to raise the required sums. And, the critique continues, those incarcerated are mostly poor and disproportionately Black or Hispanic. These individuals are presumed to be innocent and could often be released before trial without jeopardizing public safety.[2] In light of that widely accepted criticism, many jurisdictions have experimented with new procedures that reduce the use of cash bail as a requirement for a defendant's release and, more broadly, that lead to the release of more defendants before trial.

Bail reform critics have responded that the expanded release of defendants leads to an increase in crime.[3] For example, in New York, more generous pretrial release procedures have been blamed for an upsurge in crime at the beginning of this year.[4] As such reform measures continue to be considered in counties and states around the

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1. *See generally* SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM 214 (2017) (stating, for example, that "[b]y utilizing a new model for predicting pretrial crime, creating alternatives to incarceration through technology, and expanding pretrial supervision programs," states can make pretrial release procedures fairer and do not have to jeopardize public safety in the process).

2. *See, e.g.*, CRIM. JUST. POL'Y PROGRAM, HARV. L. SCH., BAIL REFORM: A GUIDE FOR STATE AND LOCAL POLICYMAKERS 7, 27 (2019), http://cjpp.law.harvard.edu/assets/BailReform_WEB.pdf.

3. *See, e.g.*, Dan Frosch & Ben Chapman, *New Bail Laws Leading to Release of Dangerous Criminals, Some Prosecutors Say*, WALL ST. J. (Feb. 10, 2020, 10:21 AM), https://www.wsj.com/articles/bail-reform-needs-reform-growing-group-of-opponents-claim-11581348077; Jesse McKinley et al., *Why Abolishing Bail for Some Crimes Has Law Enforcement on Edge*, N.Y. TIMES (Dec. 31, 2019), https://www.nytimes.com/2019/12/31/nyregion/cash-bail-reform-new-york.html.

4. *See* Ben Chapman & Katie Honan, *New York City Police Commissioner Blames New Bail Law for Rising Crime,* WALL ST. J. (Feb. 4, 2020, 5:38 PM), https://www.wsj.com/articles/new-york-city-police-commissioner-blames-new-bail-law-for-rising-crime-11580855914#:~:text=Serious%20crimes%20rose%20in%20New,Mr.&text=1%2C%20prohibits%20judges%20from%20imposing,misdemeanor%20offense%20and%20nonviolent%20felonies; Rafael A. Mangual, *Reforming New York's Bail Reform: A Public Safety-Minded Proposal*, MANHATTAN INST. 9 (Mar. 2020), https://media4.manhattan-institute.org/sites/default/files/reforming-ny-bail-reformRM.pdf. In April 2020, after a new bail reform law had been in effect in New York for just three months, the New York legislature scaled back the reforms. *See* Taryn A. Merkl, *New York's Latest Bail Law Changes Explained*, BRENNAN CTR. FOR JUST. (Apr. 16, 2020), https://www.brennancenter.org/our-work/analysis-opinion/new-yorks-latest-bail-law-changes-explained.

nation, arguments about their effects on public safety will likely be at the forefront of public policy debates.[5]

An opportunity to empirically assess these public safety issues has recently developed in Cook County, Illinois—which includes Chicago, the nation's third largest city—one of the nation's largest trial court systems.[6] On September 18, 2017, the Chief Judge of the Cook County Circuit Court (Judge Timothy Evans) implemented sweeping bail reforms by issuing General Order 18.8A ("G.O. 18.8A" or the "Order").[7] The Order was designed to not only reduce reliance on money bail but also increase pretrial releases in Cook County courts.[8] About a year-and-a-half later, Chief Judge Evans reviewed the results of these new procedures and published a study entitled "Bail Reform in Cook County" (the "Bail Reform Study" or the "Study").[9] The Study trumpets the fact that the new pretrial reforms led to a significant increase in the percentage of defendants who were released before trial—up from about 72 percent of all defendants to about 81 percent of all defendants.[10] The Study also argues that this

5. *See* Ctr. on Media, Crime, & Just., *Prosecutors, Legislators Push Back Against Bail Reform,* CRIME REP. (Feb. 11, 2020), https://thecrimereport.org/2020/02/11/prosecutors-legislators-push-back-against-bail-reform/ (noting bail reform initiatives adopted in more than twenty states and many counties); Dall. Morning News Ed. Bd., Opinion, *What's causing Dallas crime to spike? We Need to Study how Jail Detainees are Bailing Out.*, DALL. MORNING NEWS (Feb. 13, 2020), https://www.dallasnews.com/opinion/editorials/2020/02/13/is-bail-reform-the-cause-of-dallas-climbing-crime/ (arguing bail reform causes an increase in crime rates in United States cities); Richard Winton, *Arrested 4 Times in 3 Weeks: L.A. Police Blame Zero Bail for Rise in Repeat Offenders*, L.A. TIMES (Apr. 30, 2020, 10:02 AM), https://www.latimes.com/california/story/2020-04-30/los-angeles-police-blame-zero-bail-rise-repeat-offenders#:~:text=Eric%20Medina%20has%20been%20arrested,fueled%20by%20the%20coronavirus%20outbreak.

6. *Facts & Statistics*, CHICAGO, https://www.chicago.gov/city/en/about/facts.html (last visited Dec. 18, 2020) (stating that Chicago is the third largest city in the United States); *Organization of the Circuit Court,* STATE ILL. CIR. CT. OF COOK CNTY., http://www.cookcountycourt.org/ABOUTTHECOURT/OrganizationoftheCircuitCourt.aspx#:~:text=The%20Circuit%20Court%20of%20Cook,and%20its%20126%20surrounding%20suburbs (last visited Dec. 18, 2020) ("The Circuit Court of Cook County of the State of Illinois is the largest of the 24 judicial circuits in Illinois and one of the largest unified court systems in the world.").

7. Ill. Cir. Ct. of Cook Cnty. Gen. Order No. 18.8A (Sept. 18, 2017).

8. *See* Press Release, The People's Lobby, New Bond Policy Could Cut Jail Population by Half (Sept. 18, 2017), https://www.thepeopleslobbyusa.org/cook-county-bond-reform/#more-522.

9. OFF. OF THE CHIEF JUDGE, STATE OF ILL. CIR. CT. OF COOK CNTY., BAIL REFORM IN COOK COUNTY: AN EXAMINATION OF GENERAL ORDER 18.8A AND BAIL IN FELONY CASES 1 (2019) [hereinafter BAIL REFORM STUDY].

10. *Id.* at 24 ("[A] larger percentage of post-G.O. 18.8A defendants had secured release than their pre-G.O. 18.8A counterparts (pre = 71.6% vs. post = 80.5%).").

increase in pretrial releases was accompanied by "considerable stability" in the "community safety rates" of the releases.[11] Specifically, the Study claims that the new, more generous release procedures did not increase crime, stating that "[i]t should be noted that the increase in pretrial release has not led to an increase in crime"[12] and that the changes have "not led to an increase in violent crime in Chicago."[13]

Research designed to develop empirical evidence on the effect of new judicial practices is commendable. Judges may be reluctant to make changes, falling prey to the same "preferences for the familiar status quo as the rest of us."[14] Thus, judges may need prodding to make changes in long-standing procedures, such as money bail. And yet, it is important that any "reform" measure be a genuine improvement. Only if empirical research accurately captures what has happened after a change in judicial procedures can the reform measure's value be evaluated.[15]

In this Article, we explore the public safety implications of the Cook County changes and, specifically, the Bail Reform Study's sanguine conclusions that the new procedures did not lead to more crimes. While the two of us have differing points of view on various subjects, we both are committed to empirically assessing such questions—a pragmatic bent that has led us to team up in the past,[16] including researching Chicago crime issues.[17] Having carefully reviewed the Bail Reform Study, we have serious doubts about its upbeat conclusions.

Properly understood, the Study's data raises significant concerns about what happened after changes to Cook County's pretrial release procedures. The Study fails to recognize that, because more defendants are being released after the reforms, even a "stable" rate of community safety will inexorably lead to more crimes. That stable rate of safety—and, inversely, the stable rate of failure or public

11. *Id.* at 33.

12. *Id.* at 1.

13. *Id.* at 2.

14. Matthew Tokson, *Judicial Resistance and Legal Change*, 82 U. CHI. L. REV. 901, 903 (2015).

15. *See, e.g.*, RICHARD FOWLES & SOFIA NYSTRÖM, UTAH COMM'N ON CRIM. & JUV. JUST., INTRODUCTION TO AN ECONOMETRIC COST-BENEFIT APPROACH: UTAH COST OF CRIME 1 (2012).

16. *See, e.g.*, Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998); Paul G. Cassell & Richard Fowles, *Still Handcuffing the Cops? A Review of Fifty Years of Empirical Evidence of* Miranda*'s Harmful Effects on Law Enforcement*, 97 B.U. L. REV. 685 (2017).

17. *See* Paul G. Cassell & Richard Fowles, *What Caused the 2016 Chicago Homicide Spike? An Empirical Examination of the "ACLU Effect" and the Role of Stop and Frisks in Preventing Gun Violence*, 2018 U. ILL. L. REV. 1581, 1581, 1585 (2018).

safety danger—applies across a larger pool of released defendants, which necessarily means that the public suffers additional crimes. In other words, at least in Cook County, more bail reform means more crimes.

In addition, we find that, contrary to the Study's suggestion of stability, the number of crimes committed by pretrial releasees appears to have significantly increased. Correctly estimated, the number of released defendants charged with committing new crimes increased by about 45 percent after G.O. 18.8A's implementation.[18] And, more concerning, the number of pretrial releasees charged with new violent crimes increased by about 33 percent.[19] In addition, as reported by the *Chicago Tribune*, good reasons exist for concluding that these figures on violent crimes committed by releasees undercounted what really happened after the reforms, including failing to capture a significant number of additional murders.[20] And finally, as also reported by the *Chicago Tribune*, the percentage of aggravated domestic violence prosecutions dropped by prosecutors increased from 56 percent before G.O. 18.8A to 70 percent after.[21] It is a reasonable inference that the increase in dropped cases resulted from batterers more frequently obtaining pretrial release and intimidating their victims into not pursuing charges at trial.

These public safety harms call into question whether the bail reform measures as implemented in Cook County were cost beneficial. And because Cook County's procedures are state-of-the-art and track those being implemented in many parts of the country, Cook County's experience suggests that other jurisdictions may similarly be suffering increases in crime due to bail reform.[22] Accordingly, our findings will be useful to policymakers across the country as they consider whether and how to implement changes in pretrial release procedures.

Our analysis proceeds in several steps. Part II describes how pretrial release procedures worked in Cook County before the recent reforms and how they work after. Part III reviews the Bail Reform Study's argument that the expansion in pretrial releases has not

18. *See infra* notes 122–26 and accompanying text.

19. *See infra* notes 136–38, accompanying text, and Figure 4.

20. David Jackson et al., *Bail Reform Analysis by Cook County Chief Judge Based on Flawed Data, Undercounts New Murder Charges*, CHI. TRIB. (Feb. 13, 2020), https://www.chicagotribune.com/investigations/ct-cook-county-bail-bond-reform-tim-evans-20200213-tkodxevlyvcp7k66q2v2ahboi4-story.html.

21. David Jackson & Madeline Buckley, *Domestic Violence Victims Face Risk of Being Attacked Again Following Cook County Reforms, a Tribune Investigation Found*, CHI. TRIB. (May 2, 2019), https://www.chicagotribune.com/investigations/ct-met-domestic-violence-bonds-20190219-story.html.

22. *See* Ctr. on Media, Crime, & Just., *Chicago Bail Reforms Followed by 'Substantial Increase' in Crime: Study*, CRIME REP. (Mar. 11, 2020), https://thecrimereport.org/2020/03/11/chicago-bail-reforms-followed-by-substantial-increase-in-crime-study/#.

increased the crimes committed in Cook County. Because many factors apart from pretrial release procedures can affect aggregate crime totals, looking generally to such aggregations is an inappropriate method for determining G.O. 18.8A's public safety implications. Part IV turns specifically to crimes committed by pretrial releasees and examines data presented in the Bail Reform Study about a "stable" community safety rate before and after the changes. Examining the issue more closely, we find that the Study's data suggest substantial increases in the total number of crimes committed by pretrial releasees after the implementation of more generous release procedures, including increases in violent crimes. We also concur with conclusions of the *Chicago Tribune* that the Study's methodology and data significantly undercount the number of defendants who committed violent crimes after the changes.[23] Finally, for domestic violence cases, it appears (as first reported by the *Chicago Tribune*) that many abusers were able to take advantage of new release procedures to intimidate their victims into having charges dropped.[24] Part V then considers how these crime increases might factor into a more extended cost-benefit analysis assessing Cook County's reforms. While we are unable to provide a full cost-benefit analysis, clear reasons exist for thinking that the recent changes may not have been net beneficial. Part VI concludes with implications of our Article for changes in pretrial release procedures elsewhere. Because the kinds of changes that were made in Cook County in 2017 are being pursued in other jurisdictions, we caution that public safety dangers similar to what we found in Cook County may be occurring in these other jurisdictions as well.

II. AN OVERVIEW OF THE CHANGES MADE BY THE COOK COUNTY BAIL REFORMS

In this Part, we briefly review, first, the changes made to bail procedures by G.O. 18.8A,[25] and then, second, the conclusions reached by the Bail Reform Study.

By way of historical background, bail reform has long been an issue in Cook County, with concern about cash bail systems dating back to the early part of the twentieth century.[26] More recently, the critique has been that judges in Cook County, distrusting information

23. Jackson et al., *supra* note 20.

24. *See infra* notes 166–77 and accompanying text.

25. *See* BAIL REFORM STUDY, *supra* note 9, at 4. Ill. Cir. Ct. of Cook Cnty. Gen. Order No. 18.8A (Sept. 18, 2017) (A copy of the order can be found at http://www.cookcountycourt.org/Portals/0/Orders/General%20Order%20No.%20 18.8a.pdf).

26. *See* Amos N. Guiora, *Transnational Comparative Analysis of Balancing Competing Interests in Counter-Terrorism*, 20 TEMP. INT'L & COMPAR. L.J. 363, 365 (2006) (discussing denial of bail to suspected radicals in the early twentieth century); *see, e.g.*, ARTHUR L. BEELEY, THE BAIL SYSTEM IN CHICAGO (1927).

provided by pretrial services, set large cash bonds as a means of detaining defendants, even defendants who are being held on relatively minor charges.[27] In October 2016, a class-action lawsuit was filed in Illinois state court, challenging Cook County's bail system.[28] While that case was ultimately dismissed without a decision on the merits,[29] advocacy efforts connected with the lawsuit led to new legislation in Illinois, the Bail Reform Act of 2017 (the "Act").[30] The Act encouraged (but did not require) expanded use of non-monetary alternatives to cash bail.[31]

In line with the suggestion of the new legislation, on September 18, 2017, Chief Judge Evans of the Circuit Court of Cook County issued G.O. 18.8A which was designed to both reduce the use of cash bail and increase the number of defendants released before trial.[32] These are two separate issues. While the shorthand phrase "bail reform" is often used to cover both topics, it is possible to eliminate cash bail while at the same time decreasing the number of persons detained before trial.[33] Bail has simply been the historical device often used as part of detention decisions.

In this Article, our interest is not in whether Cook County courts reduced or eliminated cash bail as a means for essentially detaining defendants (and assuring their appearance at trial). Indeed, we have some sympathy for the argument that monetary bail is an ineffective mechanism for making such determinations. Instead, our focus here is on the distinct question of how many persons should be released

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27. *See* Alexa Van Brunt & Locke E. Bowman, *Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next*, 108 J. CRIM. L. & CRIMINOLOGY 701, 761 n.322 (2018) (citing Frank Main, *Cook County Judges Not Following Bail Recommendations: Study*, CHI. SUN TIMES (July 3, 2016, 9:00 PM), https://chicago.suntimes.com/2016/7/3/18325456/cook-county-judges-not-following-bail-recommendations-study).

28. Complaint at 1–4, 25–31, Robinson v. Martin, No. 2016 CH 13587 (Ill. Cir. Ct. 2016).

29. Order Granting Section 2-619.1 Motion to Dismiss at 1–2, 16–17, *Robinson*, No. 2016 CH 13587 (June 26, 2018); *see also* Megan Crepeau, *Judge Throws Out Proposed Class-Action Lawsuit Over Cook County Bond Practices*, CHI. TRIB. (June 28, 2018, 6:35 PM), https://www.chicagotribune.com/news/breaking/ct-met-cash-bail-lawsuit-dismissed-20180627-story.html; Van Brunt & Bowman, *supra* note 27, at 762.

30. The Bail Reform Act of 2017, S. 2034, 100th Gen. Assemb. (Ill. 2017).

31. *Id.*

32. BAIL REFORM STUDY, *supra* note 9, at 1, 4; *see also* Megan Crepeau, *Judges Ordered to Set Affordable Bonds for Defendants Who Pose No Danger*, CHI. TRIB. (July 17, 2017, 6:05 PM), https://www.chicagotribune.com/news/breaking/ct-cook-county-bail-reform-met-20170717-story.html.

33. *See* CRIM. JUST. POL'Y PROGRAM, *supra* note 2, at 1 (noting that "[a]s the problems of money bail and pretrial detention become more well known, pretrial reform has attracted . . . support").

pretrial considering the public safety risks associated with placing a suspected criminal back on the streets.

G.O. 18.8A was designed to expand the pretrial release of defendants awaiting trial.[34] Chief Judge Evans established a new division focusing on bail hearings and related determinations in connection with G.O. 18.8A within the Circuit Court (the "Pretrial Division").[35] Under the new procedures, when a defendant is arrested, he[36] is first given an initial bail hearing in what is often referred to as "bond court."[37] During this hearing, the defendant can argue for release before one of the pretrial judges who are responsible for determining this issue, including the type and amount of bond or other conditions of release.[38]

In determining release conditions, the court must ensure that the kind of bond imposed will assure the appearance of a defendant in court, the safety of the community, and compliance by the defendant with all the conditions of release.[39] In addition to these factors, the court must also consider "the facts of the case, requirements of Illinois statute, input from the defense and prosecution, and the [public safety assessment].[40] The Public Safety Assessment ("PSA") was created and implemented by Chief Judge Evans in 2013 with the assistance of the Laura and John Arnold Foundation and is designed to identify when releasing a defendant before trial is dangerous to the community.[41]

Following an evaluation of all these factors, the pretrial judge can detain a defendant or allow release based on several different types of bonds, including release on individual recognizance (an "I-Bond"), a deposit bond, or a cash bond.[42] Additionally, nonmonetary conditions may be imposed with any bail, including (but not limited to) electronic monitoring and pretrial supervision within the community.[43]

Although the presumption under G.O. 18.8A is nonmonetary pretrial release, if monetary bail is determined to be necessary to ensure the defendant's appearance in court, the amount of bond required is to be determined based upon the defendant's ability to pay

34. Ill. Cir. Ct. of Cook Cnty. Gen. Order No. 18.8A (Sept. 18, 2017).
35. BAIL REFORM STUDY, *supra* note 9, at 4.
36. For convenience, we use male pronouns in referring to defendants involved in the study, as more than 80 percent of the defendants were male. *Id.* at 33 tbl.7B.
37. *Id.* at 4.
38. *Id.*
39. *Id.* at 3–4.
40. *Id.* at 4.
41. *Id.* at 3.
42. *Id.* at 4.
43. *Id.* at 5.

and should not serve as an oppressive barrier to pretrial release.[44] Ultimately, in situations where monetary bail is warranted, it should not be a pretrial punishment against the defendant and should be affordable.[45]

Approximately eighteen months following the implementation of G.O. 18.8A, in May 2019, Chief Judge Evans released a thirty-nine-page report entitled "Bail Reform in Cook County."[46] The Study contained detailed information about the effects of the changes in pretrial release procedures, including several conclusions related to the effectiveness of the Order regarding recidivism, jail populations, and types of bail imposed.[47]

One important conclusion from the Study was that pretrial release of defendants had expanded significantly under the new procedures.[48] While before the Order 71.6 percent of felony defendants had secured pretrial release, after the Order 80.5 percent of such defendants were released.[49] This meant that in the fifteen months before the Order, 20,435 defendants were released while awaiting trial;[50] in the fifteen months after the Order, 24,504 defendants were released—about four thousand more defendants.[51] The Study explained that the mechanism for these additional releases was a significant increase in individual recognizance releases with a corresponding decrease in the rate of cash bond releases.[52] Further, the Study noted that when cash bail was required, the amounts were significantly more affordable.[53] The Study also found that persons who were released pretrial generally appeared for subsequent court hearings.[54]

Among the various findings announced in the Study, perhaps the most encouraging was its assertion that the reforms had substantially reduced jail populations without increasing crime—particularly violent crime—in Cook County.[55] Specifically, the Study directly claimed that "the increase in pretrial release has not led to

44. Ill. Cir. Ct. of Cook Cnty. Gen. Order No. 18.8A (Sept. 18, 2017); *see also* BAIL REFORM STUDY, *supra* note 9, at 4.

45. BAIL REFORM STUDY, *supra* note 9, at 4.

46. *See id.*

47. *Id.* at 1–4.

48. *Id.* at 1.

49. *Id.* at 24.

50. *Id.*

51. *Id.*

52. *Id.* at 2.

53. *Id.*

54. *Id.* at 30–32. Because our focus is on public safety implications of G.O. 18.8A, we do not explore the issue of appearance at trial in this Article.

55. *Id.* at 1.

an increase in crime"[56] and that "[b]ail reform has not led to an increase in violent crime in Chicago."[57]

Although the Study generally provided a positive assessment of the reform, the Study included several caveats. Perhaps the most significant stipulation was the continuing need to monitor and update the PSA instrument to ensure that it properly measured defendants' dangerousness if released.[58] For example, the Study conceded that, following the implementation of G.O. 18.8A, it appeared that some defendants released pretrial were later re-arrested on murder charges.[59] The Study argued that using a PSA as a part of release decisions means using "a probabilistic tool" that "will fail at times to accurately predict human behavior. When this happens, community members can be victimized and the Court acknowledges this very unfortunate possibility."[60] Nonetheless, the Study explained, the risk of crimes committed by pretrial releasees "exists in any criminal justice system that relies on pretrial release."[61] The Study concluded that the changes had been, on balance, cost beneficial: G.O. 18.8A had been "associated with positive changes in the process" because it "allowed more pretrial defendants to remain in their communities pending resolution of their cases where they can work, pursue education, and support their families without an increased threat to public safety."[62]

III. PROBLEMS WITH THE BAIL REFORM STUDY'S CONCLUSIONS ABOUT LINKAGES TO THE TOTAL NUMBER OF CRIMES IN COOK COUNTY

The Bail Reform Study was generally greeted with enthusiasm in Chicago—particularly its finding that expanded releases did not increase crime. For example, shortly after the Study's publication, the Chicago Council of Lawyers distributed a statement that bail reform "has been a tremendous success."[63] Noting the public safety assertions in the Study, the Council of Lawyers argued that "reform[] simply [has not] had the harmful effects opponents predicted" and that "[o]pponents of bail reform who still state that bond reform is

56. *Id.*
57. *Id.* at 2.
58. *Id.* at 36.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. Sarah Staudt, *The Data is Out: Bond Reform in Cook County has been a Tremendous Success,* CHI. COUNCIL OF LAWS. (June 11, 2019), https://chicagocouncil.org/the-data-is-out-bond-reform-in-cook-county-has-been-a-tremendous-success/.

dangerous should be consistently asked to defend their opposition to bond reform in light of what this data show[] us."[64]

We do not count ourselves among the opponents (or proponents) of bail reform. Instead, our interest is the same as the Chicago Council of Lawyers: what the data show us. Unfortunately, we believe that the reported statistics do not prove what the Study suggests. In broadly asserting that the data demonstrate that pretrial release reform did not increase crime in the Chicago area, the Study advances an unsustainable position.

One fundamental problem is that looking merely at a change in the total number of crimes after a reform and then attributing that change (or stability) to that single factor is not how well-regarded criminology studies are conducted. Instead, a researcher must consider potential confounding variables that might contribute to any trends.[65]

For example, we recently published a study considering the changes in stop-and-frisk policy that occurred in late 2015 and the subsequent 2016 Chicago homicide spike.[66] Rather than merely examine before and after crime totals, we crafted multiple regression equations controlling for a variety of factors that have been reported in the literature to have some association with crimes. Our equations included not only the stop-and-frisk variable of particular interest to us but also control variables for temperature, the number of 9-1-1 calls to police, the Chicago area unemployment rate, homicides in the surrounding areas, property crime arrests, violent crime arrests, gun arrests, shooting arrests, drug arrests, and trends over time.[67] We then made a qualitative examination of other possible confounding variables before attempting to reach tentative causal conclusions.[68] The Bail Reform Study failed to take any of these standard steps.[69]

The Bail Reform Study's failure to control for other factors is a serious problem because parts of the study's before and after periods coincided with an intense effort in Chicago to reduce crime rates in the wake of the 2016 Chicago homicide spike. Some tragic history is important to recount here. In 2016, Chicago garnered unwanted

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64. *Id.*

65. Tyler J. VanderWeele & Nancy Staudt, *Casual Diagrams for Empirical Legal Research: A Methodology for Identifying Causation, Avoiding Bias and Interpreting Results*, 10 LAW, PROBABILITY & RISK 329, 329 (2011).

66. *See* Cassell & Fowles, *supra* note 17, at 1581–82.

67. *See id.* at 1613–18.

68. *See id.* at 1618.

69. The Study also asserts that public safety was protected under G.O. 18.8A because there was an increase in "no bail orders" under the new procedures. BAIL REFORM STUDY, *supra* note 9, at 2. But this appears to have been a mere procedural change regarding the way in which defendants were detained. Previously it appears that many presumptively dangerous defendants were, as a practical matter, detained through the setting of high bail figures. *See id.* at 22 tbl.3B (noting substantially higher bond amounts imposed before G.O. 18.8A).

attention for a nearly unprecedented spike in homicides—a "crushing wave of violence."[70] More than 750 people were killed in Chicago in 2016, the highest number of homicides the city experienced in nearly twenty years.[71] In fact, in the previous nine years, Chicago's yearly homicides were always substantially lower, ranging between four hundred and five hundred.[72] In January 2017, the television program ***60 Minutes*** aired "Crisis in Chicago," in which the program's correspondent recounted, "[i]n the six days we were in Chicago, 55 people were shot, 16 were killed. We were struck by just how routine it all felt. The dead and wounded were removed with grim efficiency—right down to the hazmat crews that cleaned away the blood. Murder seemed almost normal."[73] On the last day of that bloody year, hundreds of Chicagoans marched down Michigan Avenue (Chicago's "Magnificent Mile") carrying more than 750 crosses, each numbered to represent where each death fell in the year's homicide count.[74]

This history potentially impacts the Bail Reform Study. The before period in the study is the fifteen months spanning from July 1, 2016, through September 30, 2017.[75] Thus, a significant part of the before period coincides with a dramatic increase in homicides and shootings in Chicago—the Chicago homicide spike.[76]

As a result of that spike, federal, state, and local authorities all brought to bear important crime fighting measures, most starting in or around the first half of 2017 and continuing through 2018.[77] For example, Mayor Rahm Emanuel hired hundreds of new police officers in 2017 and 2018.[78] In June 2017, a law increasing sentences for

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70. *Crime and Policing: The Chicago Lessons that Chicago has to Relearn*, CHI. TRIB. (Sept. 23, 2016, 7:36 PM), https://www.chicagotribune.com/opinion/editorials/ct-rahm-emanuel-police-chicago-crime-edit-20160923-story.html.

71. Azadeh Ansari & Rosa Flores, *Chicago's 762 Homicides in 2016 is Highest in 19 Years*, CNN (last updated Jan. 2, 2017, 6:20 PM), http://edition.cnn.com/2017/01/01/us/chicago-murders-2016/index.html.

72. Ray Sanchez & Jason Hanna, *Chicago Police Tout 14% Homicide Drop, and Concede There's More to Do*, CNN (last updated Dec. 1, 2017, 5:58 PM), http://www.cnn.com/2017/12/01/us/chicago-homicide-shooting-statistics/index.html.

73. *Chicago's Crime Epidemic: How You Can Help*, CHI. TRIB. (Jan. 3, 2017, 7:15 PM), https://www.chicagotribune.com/opinion/editorials/ct-mentor-emanuel-chicago-crime-homicide-murder-edit-0104-jm-20170103-story.html?int=lat_digitaladshouse_bx-modal_acquisition-subscriber_ngux_display-ad-interstitial_bx-bonus-story.

74. Marwa Eltagouri, *Loved Ones of People Killed in 2016 Carry More than 750 Crosses Down Magnificent Mile*, CHI. TRIB. (Dec. 31, 2016, 6:44 PM), https://www.chicagotribune.com/news/breaking/ct-met-michigan-ave-march-0101-20161231-story.html.

75. BAIL REFORM STUDY, *supra* note 9, at 7.

76. *See* Cassell & Fowles, *supra* note 17, at 1595–96.

77. *See id.* at 1639.

78. *See id.* at 1639–40.

repeat gun offenders was enacted by the Illinois Legislature.[79] In 2017, the federal government deployed to Chicago many new Bureau of Alcohol, Tobacco, and Firearms ("ATF") agents and federal prosecutors focused on gun crimes.[80] In 2017, new "shot-stopper" technology was also deployed in Chicago's high-crime neighborhoods.[81] Also, the Partnership for Safe and Peaceful Communities was formed "that committed $75 million toward reducing gun violence in Chicago."[82]

Fortunately all of these efforts in combination apparently had at least some success in reducing Chicago's homicide and shooting crimes—reductions that coincided with the changes in pretrial release policies.[83] Without any effort to control for these other factors that likely reduced crime in Chicago during the after period but not the before period, it would be unreasonable to assert that pretrial release changes did not increase crime in Chicago.

The Study also failed to account for seasonal changes in crime rates. It is well known that violent crime in Chicago (and many other large cities in cold weather climates) exhibits "seasonality." That is, more violent crimes occur in the warmer months than in the colder months.[84] Our previous article on the Chicago homicide spike, for example, contained this graph showing the monthly data for shooting deaths in Chicago over five years, including 2016 (the year of the spike).[85] As is readily apparent, during the "summer" months (i.e., June, July, and August) the number of shootings can be as much as three times higher (or even more) compared to the number committed during winter months.

79. *See id.* at 1639.

80. *See id.*

81. *See id.* (explaining that surveillance cameras and gunfire detection technology were installed in two districts with especially high rates of violence).

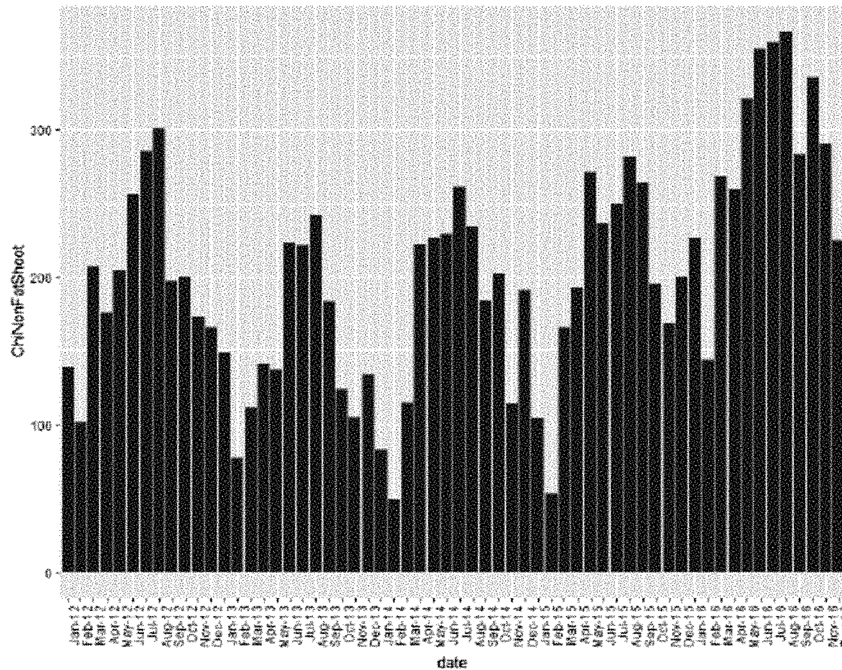
82. Inquirer Ed. Bd., Opinion, *Important Lessons for Philadelphia From Chicago's Three-Year Decline in Gun Violence*, PHILA. INQUIRER (Jan. 10, 2020, 12:21 PM), https://www.inquirer.com/opinion/editorials/chicago-homicides-decline-gun-violence-shootings-philadelphia-20200110.html; *see also About Us*, P'SHIP FOR SAFE & PEACEFUL CMTYS., https://safeandpeaceful.org/about-us/ (last visited Dec. 18, 2020) (describing the Partnership for Safe and Peaceful Communities as a "coalition of more than 40 foundations and funders").

83. *See generally* Cassell & Fowles, *supra* note 17, at 1639–42 (discussing homicide decline in Chicago in 2017 and noting multiple factors, such as those discussed in the previous paragraph, that were likely responsible).

84. Shannon J. Linning et al., *Crime Seasonality: Examining the Temporal Fluctuations of Property Crime in Cities with Varying Climates*, 61 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 1866, 1869 (2017).

85. Cassell & Fowles, *supra* note 17, at 1591 fig.3.

FIGURE 1: CHICAGO SHOOTINGS 2012 TO 2016 (MONTHLY DATA)



Source: Cassell & Fowles, *supra* note 17, at 1591 fig.3.

As we explained in our earlier article, strong empirical support exists for the seasonality explanation of these fluctuations,[86] particularly given that some studies find that crime seasonality is stronger in cities (such as Chicago) with colder climates.[87] The connection

86. *See, e.g.*, Craig A. Anderson, *Heat and Violence*, 10 CURRENT DIRECTIONS PSYCH. SCI. 33, 36 (2001) (concluding hot temperatures increase violence directly by increasing feelings of hostility); Gerhard J. Falk, *The Influence of the Seasons on the Criminal Rate*, 43 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 199, 212 (1952) ("Whereas crimes against the person consistently reach their maximum frequency in the summer . . . criminal homicide is higher in December than in June and August."); Brian Jacob et al., *The Dynamics of Criminal Behavior: Evidence from Weather Shocks*, 42 J. HUM. RES. 489, 502 (2007) (finding that "weather—particularly temperature—is strongly correlated with violent crime"); Linning et al., *supra* note 84, at 1869 (stating that summer months consistently show an increase in assault); *see also* Andrew W. Lehren & Al Baker, *In New York, Number of Killings Rises with Heat*, N.Y. TIMES (June 18, 2009), http://www.nytimes.com/2009/06/19/nyregion/19murder.html (concluding qualitatively that more homicides occur in New York during the summer).

87. *See, e.g.*, John R. Hipp et al., *Crimes of Opportunity or Crimes of Emotion? Testing Two Explanations of Seasonal Change in Crime*, 82 SOC. FORCES 1333, 1339–40 (2004); Linning et al., *supra* note 84, at 1885; David McDowall et al., *Seasonal Cycles in Crime, and Their Variability*, 28 J. QUANTITATIVE CRIMINOLOGY 389, 402 (2012).

between crime and weather, however, is not always perfect.[88] For instance, an analysis of Chicago crime data by the *Chicago Tribune* concluded that while frequency for several crimes increased with temperature, homicides did not.[89]

The fact that the Bail Reform Study includes more warm weather months in the fifteen-month before period than in the fifteen-month after period would artificially depress the number of crimes committed in the after period, potentially obscuring any increase in crime due to the pretrial release changes. The before period was July 1, 2016, through September 30, 2017; the after period was October 1, 2017, through December 31, 2018.[90] Thus, the before period includes five of the most high-crime months; the after period includes only three of the most high-crimes months. An apples-to-apples comparison would be to use twelve months both before and after. Unfortunately, the Study's presentation of its data does not readily permit us to undertake such a reanalysis.

Finally, an even more important point about the Study's conclusion that crime rates did not increase after bail reform is that pretrial releasees are only a part of the crime problem. Persons not on pretrial release commit many (perhaps most) significant crimes. Changes in pretrial release procedures may alter the perceived consequences of committing other crimes, thereby reducing the deterrent effect of the criminal justice penalties across the board. Without a better understanding of what fraction of crimes pretrial releasees commit and changes in deterrent effects, it would be difficult to draw firm conclusions about linkages between the total number of crimes committed in Cook County and changes to pretrial release procedures.

IV. PROBLEMS WITH THE BAIL REFORM STUDY'S CONCLUSIONS ABOUT CRIMES COMMITTED BY PRETRIAL RELEASEES

Because of the problems just discussed, looking simply at the total number of crimes in Cook County and then attempting to draw firm conclusions about the effects of bail reform on public safety is

88. *See, e.g.*, Ellen G. Cohn, *Weather and Crime*, 30 BRIT. J. CRIMINOLOGY 51, 61 (1990) (finding that while assaults tend to increase with temperature, "at least up to about 85°F . . . the relationship between heat and homicide is uncertain").

89. Mowafak Allaham & Ryan Marx, *Does a Hot Summer Mean More Crime? Here's What the Data Show*, CHI. TRIB. (Aug. 23, 2017, 3:54 PM), http://www.chicagotribune.com/news/data/ct-crime-heat-analysis-htmlstory.html; *see also* Dean DeChiaro, *Does Chicago's Homicide Rate Rise and Fall with Cold Winter Weather?*, MEDILL REPS. CHI. (Feb. 5, 2015), http://news.medill.northwestern.edu/chicago/does-chicagos-homicide-rate-rise-and-fall-with-cold-winter-weather-2/ (explaining that the homicide rate appears unimpacted by cold weather).

90. BAIL REFORM STUDY, *supra* note 9, at 1.

problematic. One needs a more refined analysis to make reliable conclusions.

But an alternative way of measuring the impact of bail reform on public safety avoids most of these difficulties. Instead of tabulating all of the crimes committed in Cook County, it is possible instead to analyze just the subset of crimes committed by pretrial releasees.[91] The Study attempts to do this, collecting data and then asserting that there was no "increased threat to public safety" as a result of changes made by G.O. 18.8A.[92]

In this Part, we examine whether the Study's assertion is true. On closer examination, we find that both the total number of crimes and the number of violent crimes committed by pretrial releasees appears to have substantially increased after G.O. 18.8A, contrary to the Study's assertions. In addition, it appears that the Study has undercounted the number of crimes committed by pretrial releasees. Finally, the Study has failed to capture public safety costs caused by the changes, particularly in the area of domestic violence. These problems raise serious doubts about the Study's assertions concerning public safety.

A. Crimes Committed by Pretrial Releasees Appear to Have Increased After Pretrial Release Was Expanded.

The Bail Reform Study sought to compare crimes committed by pretrial releasees during the fifteen months before G.O. 18.8A and the fifteen months after.[93] As discussed above, difficulties exist with this approach, such as confounding influences from rising or falling overall crime rates.[94] But even simply adopting this approach, the

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91. We follow the same approach as the authors of the Bail Reform Study in using a new arrest as an indicator that a new crime was committed. We recognize, of course, that someone who is re-arrested is legally presumed to be innocent. But for purposes of determining danger to public safety, a re-arrest is a commonly used measure of recidivism. *See, e.g.*, MATTHEW R. DUROSE ET AL., U.S. DEP'T OF JUST., RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010 1, 14–15 (2014), https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf (measuring recidivism by re-arrest rates and discussing other measures of recidivism in addition to re-arrest rates). Using re-arrest as indicating that a new crime has been committed is the conventional approach to measuring reoffending used by other researchers in this area. *See, e.g.*, Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 513–22 (2012) (reviewing previous research on predictions of violence in other pretrial release studies). Indeed, because only a fraction of criminals committing crimes are arrested, this approach significantly undercounts the actual costs of crimes committed by pretrial releasees. *See infra* notes 198–99 and accompanying text.

92. BAIL REFORM STUDY, *supra* note 9, at 36.

93. *See id.* at 1, 3–4.

94. A further difficulty arises from the fact that the new pretrial release procedures may have had effects beyond the binary release/detain determination. In particular, a decision to release a defendant can be predicated on imposing

Study's data suggest that, contrary to the Study's assertions, the pretrial release changes likely placed Cook County's public at greater risk of crimes from pretrial releasees.

The Bail Reform Study reported figures for the number of defendants who "remained crime free" in both the fifteen months before G.O. 18.8A and the fifteen months after—i.e., the number of defendants who were not charged in Cook County for another crime after their initial bail hearing date.[95] Based on these data, the Study concluded that "considerable stability" existed in "community safety rates across the pre- and post-implementation periods."[96] Indeed, the Study highlighted "community safety rates" that were about the same (or even better) following G.O. 18.8A's implementation.[97] The Study reported, for example, that the "community safety rate" for male defendants who were released improved from 81.2 percent before to 82.5 percent after. For female defendants the community safety rate improved from 85.7 percent to 86.5 percent.[98] Combining the male and female figures produces the result that the overall community safety rate improved from 81.8 percent before implementation of the changes to 83.0 percent after.

But while the concept of a community safety rate might be useful in other contexts, it is not the best measure for effects on public safety caused by changes in pretrial release policies. The public is concerned about the total number of crimes that released defendants commit in

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certain conditions, such as electronic monitoring, that might deter crimes while released. Among the defendants counted as "released pretrial" were about 5,700 defendants released on electronic monitoring before versus about 2,200 after, about a 60 percent decrease in electronic monitoring during the after period. *Id.* at 24 fig.9. If (as intuition might suggest) defendants released on electronic monitors are less likely to commit crimes while released than those who receive traditional forms of release, then this reduction in electronic monitoring may have led to an increase in crime during the after period. *See* WILLIAM BALES ET AL., FLA. STATE UNIV., A QUANTITATIVE AND QUALITATIVE ASSESSMENT OF ELECTRONIC MONITORING 116–17 (2010), http://criminology.fsu.edu/wp-content/uploads/A-Quantitative-and-Qualitative-Assessment-of-Electronic-Monitoring.pdf. On the other hand, Chicago's electronic monitoring program has come under heavy fire for including releasees who are too dangerous for such programs and for lack of effective follow up for violations. *See, e.g.*, Megan Hickey, *Police Supt. David Brown Says Electronic Monitoring Programs Are Insufficient in Wake of Violent Weekend, Sheriff Tom Dart Agrees*, CBS2 CHI., (June 22, 2020, 6:14 PM), https://chicago.cbslocal.com/2020/06/22/police-supt-david-brown-says-electronic-monitoring-programs-are-insufficient-in-wake-of-violent-weekend-sheriff-tom-dart-agrees. We do not have any ability to pursue this important sub-issue further given the limitations in the Study's reported data.

95. BAIL REFORM STUDY, *supra* note 9, at 33 tbls.7A & 7B; *see id.* at 30 n.16 (defining "community safety rate").

96. *Id.* at 33.

97. *Id.* at 33 tbls.7A & 7B.

98. *Id.* at 33 tbl.7B.

the community, not a safety "rate" that can vary depending on the denominator.

A simple illustration will prove this point. Suppose that a community implements changes to pretrial release procedures such that (as in Cook County) more defendants are released before trial—but the "community safety rate" remains stable. If the community releases one hundred defendants before the changes and 150 defendants after the changes, with a stable "community safety rate" of 80 percent, then that community will suffer more crime after the changes. Specifically, the total number of crimes suffered will increase from twenty crimes before the change to thirty crimes after the change.[99]

Turning from this simple illustration to the data reported in the Bail Reform Study, the number of defendants released pretrial increased from 20,435 in the before period to 24,504 in the after period—about a 20 percent increase.[100] So even though the "community safety rate" remained roughly stable (and even improved slightly), the total number of crimes committed by pretrial releasees increased after G.O. 18.8A. In the fifteen months before G.O.18.8A, 20,435 defendants were released[101] and 16,720 remained "crime free"[102]—and, thus, arithmetically (although this number is not directly disclosed in the Study), 3,715 defendants were charged with committing new crimes while they were released. In the fifteen months after G.O. 18.8A, 24,504 defendants were released,[103] and 20,340 remained "charge free"[104]—and, thus, arithmetically, 4,164 defendants were charged with committing new crimes while they were released. Directly comparing the before and after numbers shows a clear increase from 3,715 defendants who were charged with

99. This simple illustration assumes that the community has not had any significant change in population between the before and after period. This assumption appears to be roughly correct for Cook County, Illinois, during the thirty-month period of time in which G.O. 18.8A was studied, where recent year-to-year population changes have been declines of a little under 0.5 percent. *See Cook County, Illinois Population 2020*, WORLD POPULATION REV., http://worldpopulationreview.com/us-counties/il/cook-county-population/ (last visited Dec. 18, 2020).

100. BAIL REFORM STUDY, *supra* note 9, at 28 tbls.5A & 5B.

101. 17,431 males + 3,004 females = 20,435 total defendants released. *See id.* at 33 tbl.7B.

102. 14,146 males + 2,574 females = 16,720 crime free released defendants. *See id.* Of course, a "crime free" released defendant might just be a defendant who was never *caught* committing new crimes. We explore this issue of undetected recidivism at greater length *infra* notes 2007–99 and accompanying text.

103. 21,326 males + 3,178 females = 24,504 total defendants released. *See* BAIL REFORM STUDY, *supra* note 9, at 33 tbl.7B.

104. 17,591 charge free males + 2,749 charge free females = 20,340 total charge free defendants. *See id.*

committing new crimes before to 4,164 after—a 12 percent increase.[105]

While one can debate whether this 12 percent increase is significant, the growth contradicts the Study's assertion that crime did not increase after G.O. 18.8A. Moreover, it turns out that this figure understates the number of additional crimes that likely occurred during the after period. The Bail Reform Study acknowledged that defendants with initial bail hearings before the changes spent significantly more time released into the community than defendants from the post-implementation period—an average of 243 days before compared to 154 days after.[106] The reason for these differing time periods is not a real-world difference between the two populations but merely an artifact of the Study's construction. The Study's authors decided to report data on the after period very rapidly—and, as a consequence of this methodology, the authors reported data before the cases in the after period had fully run their course. The fifteen-month after period in the Study ended on December 31, 2018, and the Study closed its analysis of those released defendants just two months later (on February 28, 2019).[107] In contrast, the fifteen-month before period in the Study ended on September 30, 2017—and the Study continued its analysis of those defendants for a much longer time. For example, a defendant who was released on the last day of the before period would have been reviewed for seventeen months to determine if he was re-arrested; in contrast, a defendant who was released on the last day of the after period would have been reviewed for just two months to determine if he was re-arrested.[108]

It is generally accepted that the longer a criminal defendant is free on the streets, the greater the possibility that the defendant will commit a new crime—i.e., will recidivate.[109] While there does not appear to be a great deal of literature on specific timeframes for recidivism by pretrial releasees, the empirical literature on recidivism by prison releasees consistently shows that the longer the time over which recidivism is observed, the greater the chance of finding recidivism. For example, a study measuring recidivism over a one-year timeframe will find a lower rate of recidivism than over a three-year timeframe or nine-year timeframe.[110]

105. One question that arises is whether this increase was due to an increase in the number of cases that were filed by prosecutors in the after period. *See infra* notes 127–29 and accompanying text (discussing this issue).

106. BAIL REFORM STUDY, *supra* note 9, at 30.

107. *See id.* at 1, 30.

108. *See id.*

109. *See* MARIEL ALPER ET AL., U.S. DEP'T OF JUST., 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005–2014) 4 (2018), https://www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf.

110. *See, e.g.*, *id.*

Because the Bail Reform Study allowed the pre-implementation defendants more time to commit additional crimes than the post-implementation defendants, the Study's construction skewed the results toward finding a lower recidivism rate after G.O. 18.8A. It is not an apples-to-apples comparison to look at one group of defendants who were released for an average of 243 days and then to compare them to another group of defendants who were released for an average of 154 days. The second group will undoubtedly commit fewer additional crimes simply because they have had less time to commit such crimes.

Given this disparate treatment, it is appropriate to try to estimate what the total number of after pretrial releasees committing crimes would have been if an average period of 243 days had existed for both the before and after parts of the Study. This figure is straightforward to estimate. One can simply divide 243 by 154 to come up with 1.58—i.e., the before period involved releasees who were on the street for about 58 percent more time. After the reform, during the days that they were released, a total of 4,164 defendants released pretrial were charged with committing new crimes.[111] Taking this number of defendants committing new crimes and assuming that if the releasees had been measured for a 58 percent longer period, we might straightforwardly expect a 58 percent increase in the number of defendants charged with committing crimes over this longer period.

However, this simple approach of using a 58 percent increase assumes a constant (i.e., linear) rate of re-offending over time for the group of pretrial releasees in question. Is this assumption accurate? We are unaware of any study providing a precise timeline for month to month re-offending among pretrial releasees. However, an interesting comparison—albeit an imperfect one—is provided by a comprehensive Bureau of Justice Statistics study on recidivism rates for releasees from prison over time, including recidivism data in six-month increments.[112] That study shows a slightly declining rate of recidivism. So, if prisoners and pretrial releasees recidivate at the same (declining) rates, using a straight line, linear figure of 57 percent may somewhat overstate the rate at which recidivism occurred among the after pretrial releasees.

Using this Bureau of Justice Statistics study of recidivism by prisoners released from prison, 36.8 percent of all released prisoners who were re-arrested within five years of release were re-arrested within the first six months, and 56.7 percent were re-arrested by the

111. Subtracting total defendants from "charge free" defendants, i.e., 17,591 charge free males + 2,749 charge free females = 20,340 total crime-free defendants, which can be subtracted from 24,504 released defendants to produce the result that 4,164 defendants were not crime free. *See* BAIL REFORM STUDY, *supra* note 9, at 33 tbl.7B.

112. DUROSE ET AL., *supra* note 91, at 1.

end of the first year.[113] It is possible to take these numbers and fit a slightly declining polynomial value to the recidivism rate—and then estimate what number of defendants would have been discovered committing crimes. Applying this polynomial value to the Study's data to correct for slightly declining recidivism rates over time produces the result that we would expect about a 45 percent increase in the number of crimes in the after period had the releasees been observed for the same length of time as the before period.[114]

Interestingly, after we had made the calculation set out in the previous paragraph, we were able to find data on recidivism among Cook County pretrial releasees—data that corresponds with the estimate set out above.[115] The Cook County courts maintain a "dashboard" of statistics regarding the new pretrial release measures.[116] These statistics report whether pretrial releasees have been charged with a new offense while released. These statistics show the "community safety" rate—from which it is simple to determine an inverse "community safety failure" rate. For example, a "community safety" rate of 90 percent means a "community safety failure" rate of 10 percent.

The Cook County dashboard tabulates information by quarter,[117] so it is possible to review the failure rate in the after period quarter-by-quarter. It is also possible to estimate the recidivism rate quarter-by quarter, as shown in Figure 2 below.

113. *Id.* at 7.

114. The linear recidivism detection rate is based on fitting a line at the two points (0, 0) and (6, 36.8). The polynomial rate is based on fitting the three values of (0, 0), (6, 36.8), and (12, 57.6). We use 240 days rather than 243 days for convenience, since that is a (roughly) eight-month period of time. A linear extrapolation of the total number of crimes that would be expected to have been committed by defendants released after the reform—had they been studied for the same number of days as the defendants released before the reform—produces a figure of 6,537 crimes (1.57 x 4,164). This figure then drops down slightly to 92.76 percent (45.499/49.048) of the linear figure. Put another way, 1.57 x .927 = 1.455—i.e., the appropriate correction for the shorter observation period is to increase the number crimes observed by about 45.5 percent. In making these calculations, we freely acknowledge that state *prisoner* data may not be the best substitute for *pretrial releasee* data. *See infra* notes 117–21 (using pretrial releasee data on this topic).

115. *Model Bond Court Initiative*, ILL. CIR. CT. COOK CNTY., http://www.cookcountycourt.org/HOME/ModelBondCourtInitiative.aspx (last visited Dec. 18, 2020).

116. *Id.*

117. *See id.* (reporting data on "community safety rate," as measured by felony defendants who appeared in bond court and were released after October 1, 2017, and had not been charged with a new offense while in the community).

FIGURE 2: COOK COUNTY COMMUNITY SAFETY FAILURE RATE

Year (in quarterly increments)	**Q4 2017**	**Q1 2018**	**Q2 2018**	**Q3 2018**	**Q4 2018**
Public Safety Failure Rate	5.9%	9.1%	11.4%	13.2%	15.3%
Number of Defendants Released	4,378	9,199	13,985	19,711	24,534
Total New Crimes	258	837	1,594	2,602	3,754
1Q Dft's (and failure rate)	4,378 (6.25%	4,281 (6.25%)	4,786 (6.25%)	5,726 (6.25%)	4,823 (6.25%)
2Q Dft's (and failure rate)		4,378 (5.75%)	4,281 (5.75%)	4,786 (5.75%)	5,726 (5.75%)
3Q Dft's (and failure rate)			4,378 (4.5%)	4,281 (4.5%)	4,786 (4.5%)
4Q Dft's (and failure rate)				4,378 (4.0%)	4,281 (4.0%)
5Q Dft's (and failure rate)					4,378 (2.0%)

Source: Data from Circuit Court of Cook County, Model Bond Court Initiative, Data Dashboards (various quarters from 2017 through 2018).

What this Figure shows is the community safety failure rate from October 1, 2017 (the beginning of the Study's after period), through December 31, 2018 (the end of the after period), although the releasees were followed for an additional two months, through February 28, 2019.[118] For example, in the fourth quarter of 2017, 4,378 defendants were released, and 5.9 percent recidivated (i.e., failed by being charged with new crimes) during that quarter—producing 258 additional crimes. In the next quarter—the first quarter of 2018—an additional 4,821 defendants were released, bringing the total of released defendants under the new pretrial

118. BAIL REFORM STUDY, *supra* note 9, at 1, 30.

release initiative to 9,199 (as shown in Figure 2). At this time, the total number of new crimes committed by pretrial releasees was 837, which is the sum of the new crimes committed by those who had been out on the streets for one quarter and those who had been out on the streets for two quarters.

Examining the data for the five quarters from the fourth quarter of 2017 through the fourth quarter of 2018, we were able to estimate a decaying recidivism function that best explained the actual data above on a quarter-by-quarter basis. This function was calibrated using Cook County pretrial release data with a focus on both the marginal and total public safety failure rates. Our method minimized the discrepancy between the actual and fitted number of total failures over the five-quarter span. We estimated that defendants had a recidivism rate of 6.25 percent during that first quarter, 5.75 percent during the second quarter, 4.5 percent during the third quarter, 4 percent during the fourth quarter, and 2.0 percent during the fifth quarter. The total of number of new crimes is simply a function of the number of defendants who have been released in each quarter multiplied by the estimated recidivism rate for each quarter during which they were released. Our fitted model matches the observed recidivism rate for the first five quarters of the new pretrial release procedures—a total of 3,754 new crimes were observed from pretrial releasees during those five quarters. The same number would be estimated by our model. We believe that this is a conservative estimate because we have included all five quarters in our model (i.e., fourth quarter 2017 through fourth quarter 2018), even though the new pretrial release procedures took some time to phase in and implement.[119]

With our model, we can more accurately estimate the undercount resulting from the Bail Reform Study's decision to observe defendants only through February 28, 2019. Our model enables us to estimate how many additional crimes would have been observed if the after defendants who were released following G.O. 18.8A had been observed through the end of 2019. Observing these after defendants through the end of the year would have been about the same amount of time that the before defendants were observed. Again, our approach is slightly conservative (i.e., produces a lower number of a crimes in the after group than was likely actually the case).[120] In other words, our approach has the effect of roughly equalizing the

119. *See* Kiran Misra, *Shifting Fronts in Bail Reform: Despite Reform Efforts, the Pretrial Detention System Still Causes Harm*, S. SIDE WKLY. (Mar. 6, 2018), https://southsideweekly.com/shifting-fronts-bail-reform/.

120. The before period in the study ended on September 30, 2017, and data collection in the study ended on February 28, 2019. Thus, new crimes committed by the before defendants were apparently collected for a seventeen-month period. Our approach allows an estimate of crimes committed by the after defendants for a shorter, twelve-month period, i.e., all of 2019.

243-day observation period for the before defendants with a comparable observation period for the after defendants.[121]

Our model estimates that an additional 1,753 crimes were committed during 2019, and that 1,212 of these would have occurred after February 28, 2019.[122] In other words, we estimate that the Bail Reform Study undercounted the number of crimes committed by pretrial releasees in the after period by 1,212 crimes.

Using the additional crimes estimated above, we can then calculate a corrected figure of after crimes moving from an observed 4,164 to an estimated 5,376.[123] Thus, the corrected figure suggests that the Study's figures should be increased by 29 percent to correct for the undercount.[124] In other words, a reasonable and conservative estimate is that, if the Study's authors had not truncated the time during which they had studied the rates of re-arrest for pretrial releasees after G.O. 18.8A, then that group of releasees would have been found to have committed 5,376 crimes.

With this figure in place, we can directly compare the 3,715 defendants who were charged with committing new crimes in the before period to an estimated 5,376 defendants in the after period to tentatively conclude that G.O.18.8A produced an additional 1,661 pretrial releasees who committed a crime after their release[125]—an (estimated) 45 percent increase from the before period.[126] This is different than the reported information in the Study, as shown in Figure 3 below.

121. The alert reader may wonder why, if the before observation period was 243 days, we have chosen an after "observation" period of 365 days (i.e., all of 2019). The answer is that while our model observes (i.e., predicts) crimes committed throughout all of 2019, it allows for some percentage of defendants to be finally adjudicated during the year—just some percentage of defendants were finally adjudicated during the before period. Again, our approach is conservative (i.e., produces a lower number of crimes than were actually committed by the after defendants) for the reasons explained in the previous footnote.

122. Our model produces 810 additional crimes in Q1 2019, 541 additional crimes in Q2 2019, 306 additional crimes in Q3 2019, and 96 additional crimes in Q4 2019. We then assume that the Bail Reform Study captured two-thirds of the crimes in Q1 2019 (i.e., January and February 2019, but not March of 2019), and estimate that 270 crimes were committed in March 2019 (1/3 x 810).

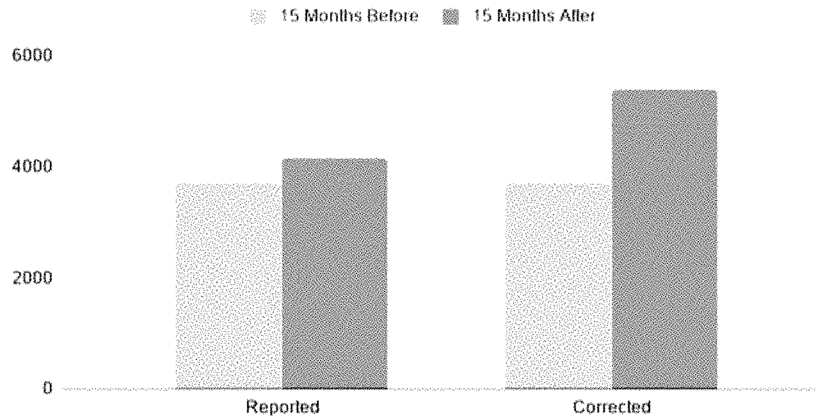
123. 4,164 + 1,212 = 5,376. This is a more conservative estimate than the linear function or the polynomial function discussed above would have produced.

124. 5,376 ÷ 4,164 = 1.291.

125. 5,376 estimated/projected releasees committing crimes in the after period - 3,715 releasees committing crimes in the before period.

126. 5,376 ÷ 3,715 = 1.447.

FIGURE 3: CRIMES BY PRETRIAL RELEASEES BEFORE AND AFTER CHICAGO BAIL REFORM



One question that arises is whether that 45 percent difference can be attributed to some difference between the before period and the after period. Interestingly, the Study itself disclaims any such difference.[127] The Study notes a slight increase in filings between the before and after periods: filings went up modestly from the before period to the after by about 6.6 percent, which could arguably explain part of the difference.[128] But other than that change, the Study reported that "basic age, gender, and race/ethnicity data . . . remained stable" over both periods.[129] Also, the Study reported that case factors and PSA risk measures remained stable between both periods.[130]

Nor does the change appear to be attributable to an external increase in crime due to other factors apart from changes in pretrial release procedures. For example, in 2018 (the bulk of the after

127. BAIL REFORM STUDY, *supra* note 9, at 2.

128. There were 30,432 felony hearing cases with completed PSAs in the after period compared to 28,547 cases in the before. BAIL REFORM STUDY, *supra* note 9, at 8 tbl.1B. The Study calls this an increase in "filings" by prosecutors. *See id.* at 7–8. But it may also be the case that there were differences in the extent to which PSAs were completed in the before and after periods. *See infra* note 161 and accompanying text (noting that more than 2,300 defendants did not receive a completed PSA in the after period). Moreover, as discussed below, crime was declining in Chicago for much of the after period. *See infra* note 132 and accompanying text. Data from the Cook County Attorney's Office indicates that felony filings increased in calendar year 2018, which comprises most of the after period. *See Data Dashboard*, COOK CNTY. STATE'S ATT'Y, https://www.cookcountystatesattorney.org/about/data-dashboard (last visited Dec. 18, 2020) (felony filings initiated were 37,335 in 2016, 37,380 in 2017, and 39,841 in 2018).

129. BAIL REFORM STUDY, *supra* note 9, at 8.

130. *Id.* at 28.

period), crime declined in Chicago[131] by 8 percent compared to 2017, continuing a downward trend of declining by 10 percent since 2016.[132] Thus, if anything, we would expect that downward trends in overall crime rates would be matched by a similar downward trend in crime committed by pretrial releasees. Instead, the opposite appears to have occurred, as crimes committed by pretrial releasees appear to have increased in the after period.

B. *Violent Crimes Committed by Pretrial Releasees Appear to Have Increased After Pretrial Release Was Expanded.*

The numbers discussed so far have involved defendants who recidivated as measured by being charged in Cook County with a new crime of any type.[133] Of course, not all crimes are equally serious. Of particular interest is whether pretrial releasees committed additional *violent* crimes.

The most widely publicized figure from the Bail Reform Study is that only 0.6 percent of pretrial releasees committed another violent crime after G.O. 18.8A, compared to 0.7 percent before.[134] Drilling down into this number, however, produces significant cause for concern. To begin with, one of the features of G.O. 18.8A was that it led to more defendants being released.[135] Accordingly, even if the percentage of defendants who committed violent crimes remained stable over the two periods, we would expect an increase in the violent crimes simply because more defendants were released.

Good reasons exist for concluding that pretrial releasees committed more violent crimes after G.O. 18.8A than before. Although the Study does not report this figure (or other raw numbers of violent crimes), a figure for violent crimes can be straightforwardly derived. The number of violent crimes committed by pretrial releasees in the fifteen months before G.O. 18.8A was about 143; the number in the fifteen months after was about 147.[136]

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131. Cook County is, of course, a larger area than Chicago. But Chicago's population is a majority of the Cook County population and a majority of the crimes committed in Cook County are committed in Chicago. As with the Bail Reform Study, we use Chicago figures here because we believe that they will track trends in Cook County. *Cf.* BAIL REFORM STUDY, *supra* note 9, at 1 n.3 (using Chicago crime data).

132. CHI. POLICE DEP'T, *CPD End-of-Year Crime Statistics: 2018* (Dec. 31, 2018), https://home.chicagopolice.org/cpd-end-of-year-crime-statistics-2018/. Chicago is a component part of Cook County and accounts for most its crime. We do not immediately have available to us Cook County crime statistics for the relevant periods, so we used Chicago statistics as indicative of general trends in the area.

133. *See* BAIL REFORM STUDY, *supra* note 9, at 30 n.16.

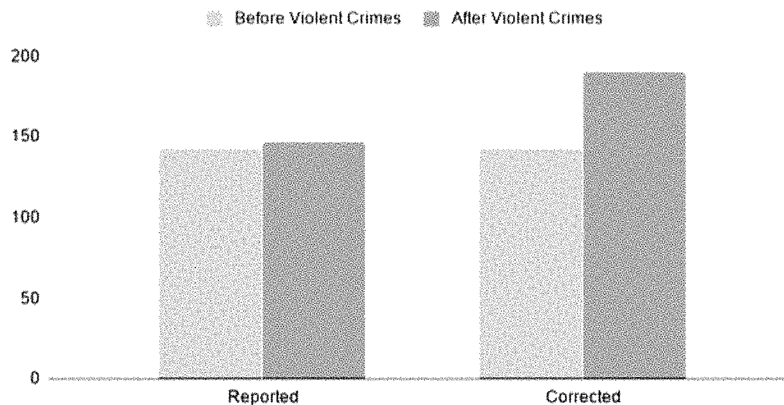
134. *Id.* at 35 fig.14; *see also* Staudt, *supra* note 63.

135. *See* BAIL REFORM STUDY, *supra* note 9, at 24 fig.9.

136. 20,435 released before x 0.7% = 143.0; 24,504 x 0.6% = 147.0. *See id.* at 35 fig.14.

But as just discussed above, the before and after periods during which pretrial releasees were observed were not identical—the difference between the 243-day observation period before versus the 154-day observation period after. As also discussed above in connection with additional *total* crimes committed by pretrial releasees, it is possible to correct for these different observation periods in calculating additional *violent* crimes they committed. Adjusting for this difference, instead of the 147 violent crimes committed after G.O. 18.8A, it is reasonable to estimate that pretrial releasees committed 190 violent crimes.[137] This means that, based on our estimation, new violent crimes committed by pretrial releasees went from 143 before G.O 18.8A to 190 after—an estimated increase of seventy violent crimes or about a 33 percent increase in the number of violent crimes after the new pretrial release procedures, as shown in Figure 4 below.[138]

FIGURE 4: VIOLENT CRIMES BY PRETRIAL RELEASEES BEFORE AND AFTER CHICAGO BAIL REFORM



The fact that the total number of violent crimes increased after G.O. 18.8A is hardly surprising given that more dangerous defendants are being released under G.O. 18.8A.[139] The PSA appears

137. 147 x 1.2915 = 189.8. *See supra* note 124 and accompanying text (deriving the 1.291 figure for adjusted reported additional crimes in the Study to estimated actual crimes in the Study). As discussed in the next Part, this number for total "violent" crimes is substantially lower than the number of crimes actually involving violence committed by pretrial releasees. In addition, because violent crime cases may take longer to work their way through the system and be charged, our lagged recidivism model may slightly *understate* recidivism for those charged with violent crimes. These two facts may render our calculation here somewhat conservative (i.e., lower) than the actual number of violent crimes.

138. 190 ÷ 143 = 1.329. As discussed above, it is possible that some of this increase is due to increased filing by the Cook County State's Attorney's Office.

139. *See* BAIL REFORM STUDY, *supra* note 9, at 25 tbl.4A.

to have at least some modest predictive value of new criminal activity.[140] And yet, G.O. 18.8A made it much easier for defendants to be released even if their PSA scores were concerning. As one example, the number of defendants with a "violence flag" who nonetheless secured their pretrial release increased from 747 in the before period to 1,038 in the after period—a 39 percent increase.[141] Put another way, before G.O. 18.8A, 33.6 percent of those with a violence flag were released.[142] After G.O. 18.8A, 40.2 percent with a violence flag were released. If the PSA has any predictive value, one would expect to find an increase in violence as a result of these release decisions—which is what our estimated number reported above suggests.

G.O. 18.8A also lead to a significant increase in the release of defendants charged with grave offenses, including defendants charged with gun crimes. The percentage of released defendants charged with violent crimes increased from 43.2 percent to 46.5 percent; the percentage of released defendants charged with crimes against the person increased from 48.8 percent to 61.6 percent; and, perhaps most concerning for an area flooded with gun violence, the percentage of released defendants charged with weapons offenses increased from 60.6 percent to 76.4 percent.[143]

Given the high cost of gun crimes, a brief illustration of how the new procedures operated in practice might be useful. A Chicago TV station, WGN-TV, investigated every felony gun case committed during two of Chicago's historically most violent weekends in 2019: Memorial Day and Labor Day. The station found:

- A total of 118 adults were charged with felony weapons offenses.
- 87 percent were released on bond. The most anyone had to pay to get out of jail before trial was $5,000.
- 72 percent were released the same day they were arrested, or the very next day.
- 30 percent walked out of jail without paying any money—they received I-Bonds.[144]

This seems like a very high rate of release of defendants who appear to pose a significant danger to the community.

Other bail studies have suggested, unsurprisingly, that those who are denied pretrial release are generally more dangerous than

140. *See id.* at 32 fig.12 (presenting data showing a slightly declining community safety rate with increases in New Criminal Activity Score).

141. *See id.* at 35 fig.14.

142. *See id.* at 25 tbl.4A.

143. *See id.*

144. Meghan Dwyer, *The Politics of Bail Reform: Part I*, WGN (Oct. 8, 2019, 9:35 PM), https://wgntv.com/2019/10/08/chicago-police-question-bail-in-gun-cases/.

those who were released. For example, Professor John Goldkamp examined emergency releases of inmates and found that the incremental releases involved more dangerous inmates.[145] It also appears to be the case that a defendant facing a charge of a violent crime is, if re-arrested, more likely to be arrested for a crime of violence.[146] To be sure, these rates of re-arrest are likely to be low. But even a low re-arrest rate means an increased number of crimes. It should come as no surprise, then, that as Cook County decided to release more pretrial detainees charged with violent or potentially violent crimes, the result was that additional violent crimes were committed.

C. The Data from the Bail Reform Study Appears to Have Significantly Undercounted Violent Crimes Committed by Pretrial Releasees.

Obviously, it would be useful to know more about the kinds of violent crimes that increased after G.O. 18.8A. The Study's definition of "violent" crimes was confined to "murder, attempted murder, non-negligent manslaughter, forcible rape, robbery and aggravated battery."[147] As result, serious charges involving weapons (including unlawful possession or use of a firearm) were excluded.[148]

The Study fails to report data on precisely what kinds of violent crimes pretrial releasees committed.[149] And even more concerning, a recent investigative report by the *Chicago Tribune* casts doubt on whether the Bail Reform Study fully captured all of the violent crimes caused by Cook County's more generous pretrial release

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145. John S. Goldkamp, *Questioning the Practice of Pretrial Detention: Some Empirical Evidence from Philadelphia*, 74 J. CRIM. L. & CRIMINOLOGY 1556, 1564, 1586 (1983). *See generally* Baradaran & McIntyre, *supra* note 91, at 526, 541–44 (stating that Goldkamp found held inmates to be more dangerous than released inmates).

146. *See* Baradaran & McIntrye, *supra* note 91, at 528 (finding that "defendants charged initially with violent crimes were much more likely to be rearrested for violent crimes").

147. BAIL REFORM STUDY, *supra* note 9, at 5. This is the same definition employed by the FBI's *Uniform Crime Report* for violent crimes.

148. *See id.* (placing weapon charges in a separate category from violent charges).

149. The Study does have an appendix, available online, reporting data for the community safety rate for pretrial defendants broken down into various categories. *Appendix Table 4. Court Appearance and Community Safety Rate for Pretrial Defendants by Gender, Top Charge Category and Class, PSA-Risk, and Race/Ethnicity*, *in* BAIL REFORM STUDY, *supra* note 9, http://www.cookcountycourt.org/Portals/0/Statistics/Bail%20Reform/Appendix%20Table%204.pdf. But that appendix does not contain data on the kinds of crimes that pretrial releases committed, as it reports only data for "no new criminal activity" and "new criminal activity." *See generally id.* (discussing community safety rate information as "No New Criminal Activity" and "New Criminal Activity" only).

procedures.[150] While the Study does not provide a crime-by-crime breakdown of what crimes were committed by pretrial releasees, it does contain several explanatory sentences about the violent crime of greatest interest: murder. The Study reports that, during the post-implementation period, nine defendants were charged with murder.[151] The Study goes on to report that, of those nine, six had committed the murders before their original bail hearing dates.[152] Apparently these six cases involved situations where someone had committed a murder, was later arrested on a different crime, released on bond, and then was subsequently charged with the murder.[153] Of course, murders can take considerable time to investigate, and this lag time between the commission of a murder and the subsequent filing of criminal charges could mean that the murderer (while under investigation) would have subsequent interactions with the criminal justice system. Because the murder occurred before the release decision, it would not be fair, of course, to attribute a murder such as this to someone having been released on bond. The Study thus removed six of the nine murders committed in the post-implementation period, leaving only three murders committed by pretrial releasees. This was what the Study's authors reported.[154]

Three reporters at the *Chicago Tribune* investigated this assertion in greater depth.[155] Digging more deeply into Chicago's homicide numbers, the reporters used Chicago police data to identify all adults charged with a Chicago homicide since G.O. 18.8A went into effect and then reviewed criminal court data to determine whether those adults were out on bail at the time.[156] Those records showed that twenty-one defendants were charged with killing people while they were out on pretrial bond for other pending charges during the fifteen month period after G.O. 18.8A went into effect (i.e., during October 1, 2017, through December 31, 2018).[157] Sixteen of those twenty-one people accused of murder were out on bail awaiting trial for felony charges including attempted murder.[158] The other five defendants had been bonded out on misdemeanor crimes.[159] Yet even among this group, four of the five had felony backgrounds, and three had done prison stints: one had violated his current bond, and one was charged with street gang contacts as a parolee.[160]

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150. Jackson et al., *supra* note 20.
151. BAIL REFORM STUDY, *supra* note 9, at 36.
152. *Id.*
153. *See id.*
154. *Id.* at 36–37.
155. Jackson et al., *supra* note 20.
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*

The reporters were also able to explain the dramatic disparity between the three homicides disclosed in the Study and the twenty-one identified by the *Tribune*'s extended investigation. The reasons for the dramatic undercount varied from case to case, but included:

- [The Study] included only those defendants whose initial charge was a felony; it excluded those charged with a misdemeanor, which is far more common . . . .
- [The Study] counted only the first new charge against defendants after they were released from custody. The Tribune identified two people who were released, charged with another crime, released again and then charged with murder, all within the time period being examined. Those later murder charges were not entered into the database used for the report.
- [The Study] excluded three murder defendants whose first charge occurred before bail reform—even though they were released on bond after the reforms took effect in September 2017.
- [The Study contained] mistakes in data entry and incomplete court records [which] marred the data set used in the analysis.[161]

Of course, these twenty-one homicide cases involve only a tiny fraction of the Study's data set involving crimes of all sorts. But there is every reason for thinking that such problems permeate the rest of the Study's dataset.[162]

The *Tribune* also analyzed the Study's use of a narrow definition of "violent crime," counting only murder (or attempted murder or non-negligent manslaughter), rape, robbery, and aggravated battery.[163] While this definition largely tracks the FBI's *Uniform Crime Reports*,[164] it excludes many crimes that would commonly be viewed as violent, including domestic battery, battery, assault, assault with a deadly weapon, and armed violence. For the purposes of this Article, we will refer to this broader definition as "crimes against

161. *Id.* (noting that "[a]t least 2,334 felony defendants did not receive [a pretrial risk] assessment").

162. It is also possible that the Study used a narrow definition for pretrial "releasees" as including only defendants released at their *initial* bond hearing. *See* BAIL REFORM STUDY, *supra* note 9, at 7 (reporting data on the "initial felony bail hearing cases"); *id.* at 32 (reporting community safety rate for felony defendants who secured an "initial" pretrial release). If this assumption is correct, then the Study definitionally moved a number of crimes committed by defendants who had, in fact, been released pretrial from the Study's category for "defendants released pretrial" into a category for defendants who had not secured "initial" release. Because of the way in which the Study's data is reported, it is not possible to determine, one way or the other, whether this maneuver occurred.

163. *Id.* at 5.

164. The *Uniform Crime Reports* counts all "aggravated assaults," a category that might be slightly different than the Study's "aggravated battery" category.

persons." If crimes such as these were included in the count of crimes committed by pretrial releasees, then the total number of "crimes against persons" would have been at least four times greater than the number of "violent" crimes.[165]

Using the *Tribune*'s more fulsome definition of crimes against persons, we can estimate how many additional such crimes were committed as the result of Cook County's expanded release procedures. Taking our figure of seventy additional violent crimes based on the Bail Reform Study's definition and simply multiplying by 400 percent produces the reasonable estimate that at least 280 additional crimes against persons were committed by the defendants released after G.O. 18.8A than before.[166]

D. Prosecutors Dropped Aggravated Domestic Violence Cases More Frequently After the Bail Changes.

Another serious defect in the Bail Reform Study's data deserves a brief mention. In May 2019 (about the same time as the Bail Reform Study was released), two reporters at the *Chicago Tribune* compared Cook County domestic violence cases in 2016 before G.O. 18.8A with those in 2018 after G.O. 18.8A was in effect.[167] Focusing on the most serious cases (aggravated domestic batteries), the reporters found that it was easier for defendants accused of aggravated domestic batteries to obtain pretrial release after bail reform.[168] In 2016, the average bond per defendant accused of such attacks was $63,859; in 2018, the average bond was $13,505.[169] In addition, the percentage of defendants who were released on their own recognizance[170] essentially doubled, from 10 percent of all defendants to 19 percent of all defendants.[171]

It would seem logical that if more domestic defendants were released pretrial, then they would be able to place increased pressure on their victims not to continue to support prosecution, leading to an increase in the number of domestic violence prosecutions that would be dropped. It is widely recognized that domestic "[b]atterers put hydraulic pressures on domestic violence victims to recant, drop the

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165. Jackson et al., *supra* note 20.

166. To be clear, just as we use an expanded definition of "crimes against persons" in the after period, for consistency we would also need to use that expanded definition in the before period. We simply assume that the percentage of such crimes would have been the same in both periods, permitting us to simply multiply by the 400 percent expansion figure derived by the *Chicago Tribune* to arrive at the figure cited in text above.

167. Jackson & Buckley, *supra* note 21.

168. *Id.*

169. *Id.*

170. In Cook County, such releases are known as an "Individual Recognizance Bond" or "I-Bond." *See* BAIL REFORM STUDY, *supra* note 9, at 4.

171. Jackson & Buckley, *supra* note 21.

case, or fail to appear at trial."[172] Consistent with what that logic would predict, the *Tribune* reporters discovered that the percentage of aggravated domestic battery cases dropped by prosecutors increased from 56 percent of all cases in 2016 before G.O. 18.8A to 70 percent of all cases in 2018 when G.O. 18.8A was in effect.[173]

The *Tribune* also provided a reason why the new approach to pretrial release might have particularly harmed the prosecution of serious cases. The bail reform efforts in Cook County relied on the Arnold Foundation's PSA.[174] But while that assessment sets out restrictive guidelines for releasing persons charged with certain violent offenses (e.g., murder, sexual assault, and robbery), it fails to provide similar restrictions for domestic violence crimes.[175] Moreover, the Arnold Foundation's PSA does not take into account current or prior protective orders, nor does it consider a defendant's violation of those orders as a risk factor.[176] While the Arnold Foundation is planning a research initiative to explore whether domestic violence cases should receive different treatment in the future,[177] its exclusion in the PSA so used by the Bail Reform Study appears to have significantly under-protected victims of aggravated domestic violence. The data suggest that G.O. 18.8A led to a significant increase in cases that could not be prosecuted, presumably due to witness intimidation by domestic abusers.[178] This fact prompted the *Chicago Tribune*'s editorial board to wonder "how promises to be more deft in lower-stakes cases of retail theft or minor

172. Douglas E. Beloof & Joel Shapiro, *Let the Truth be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 COLUM. J. GENDER & L. 1, 4 (2002); *see also* DOUGLAS E. BELOOF, PAUL G. CASSELL, MEG GARVIN & STEVEN J. TWIST, VICTIMS IN CRIMINAL PROCEDURE 473–502 (4th ed. 2018) (reviewing problems with pursuing domestic violence prosecutions).

173. Jackson & Buckley, *supra* note 21.

174. *See supra* note 411 and accompanying text.

175. Jackson & Buckley, *supra* note 21. For an insightful discussion of how such risk assessments operate (including the Arnold PSA), see BAUGHMAN, *supra* note 1, at 195–99.

176. Jackson & Buckley, *supra* note 21.

177. *Id.*

178. *Id.* When the *Tribune*'s findings were presented to Chief Judge Evans, his Office responded with its own analysis purporting to show that fewer than 6 percent of domestic violence defendants committed a new crime while they were free on pretrial bonds. But this analysis did not include defendants charged with bond violations—only those defendants who formally had new charges filed against them. Even more concerning, Judge Evans did not allow the *Tribune* to examine the case records underlying his analysis, saying that he wanted to protect the privacy of defendants who had not been found guilty of a crime.

drug offenses morphed into a lighter touch with those who allegedly beat or choke their intimate partners or family members."[179]

V. THE BAIL REFORM STUDY'S DUBIOUS COST-BENEFIT ASSESSMENT

So far, we have focused on the public safety implications of G.O. 18.8A. In this Part, we try to take a step back and briefly ask the broader question of whether G.O. 18.8A was cost beneficial. The Bail Reform Study asserted that the changes were cost beneficial, given various financial savings and other benefits of reducing the number of Cook County pretrial detainees.[180] Our conclusion is a cautionary one: We think it is premature to reach broad conclusions about whether G.O. 18.8A has been a positive or negative change for the Cook County criminal justice system. Instead, a more careful review of the issues is necessary before any firm conclusions can be reached. This Part discusses some of the data that would be needed to reach firmer conclusions as well as some of the overlooked challenges to determining that bail reforms are truly cost beneficial.

A. The Need for Reanalysis of the Data Regarding Crimes by Pretrial Releasees.

In publishing the Bail Reform Study, the Office of the Chief Judge of the Cook County Circuit Court boldly pronounced that the Chief Judge's order had been a success.[181] According to the Study's opening paragraph, G.O. 18.8A had not only "promoted justice" through greater release of defendants before trial but also "protected public safety" through greater use of no bond orders, producing a net result of no increase in crime.[182] These are strong claims—and empirical claims that ultimately rest on the reliability of the Study's data.

Against that backdrop, it is surprising to learn that the Office has been reluctant to share the Study's data with researchers in the past. In 2019, the *Chicago Tribune* made a concerted effort to obtain the data underlying the Bail Reform Study.[183] It requested electronic docketing data for felony criminal defendants in 39,051 cases that occurred from September 18, 2017, through March 31, 2019, thus

179. Opinion, *Cook County Jail Reforms Shouldn't Put Domestic Violence Victims at Risk*, CHI. TRIB. (May 6, 2019), https://www.chicagotribune.com/opinion/editorials/ct-edit-domestic-violence-reform-cook-county-jail-20190506-story.html.

180. *See* BAIL REFORM STUDY, *supra* note 9, at 1–2.

181. *See id.* at 1.

182. *Id.*

183. *See* Complaint for Writ of Mandamus at 1–2, Chi. Trib. v. Brown, No. —— (Ill. Dec. 23, 2019).

covering the cases involved in the Bail Reform Study.[184] But the Chief Judge withheld basic case information for 76 percent of the cases because the defendants had not yet been convicted.[185] The effect of this decision was to prevent the *Chicago Tribune* from investigating the claims made in the Bail Reform Study.[186]

On December 23, 2019, the *Chicago Tribune* sought a writ of mandamus from the Illinois Supreme Court, asking it to direct the Cook County courts to produce the records regarding the cases in the study.[187] The *Tribune*'s legal claims were well founded. The First Amendment guarantees the public a right of access to basic criminal court records, such as court records regarding charges filed, pretrial release decisions, convictions, and other similar information.[188] Rather than contest the matter further, the Office of the Chief Judge agreed to produce at least some of the records[189]—but because of its delay in producing the data, analysis of the issue was correspondingly delayed.[190]

The delay in producing the data is disturbing to us because, in our experience as academics, the exchange of data underlying an empirical research study is standard practice. Moreover, after the Chief Judge released an empirical report claiming that his new policy was a success, he should have at least been open to the possibility that his conclusions could be challenged. In any event, now that the underlying data will be released, it will be interesting to see what that data reveals.[191]

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184. *See* Petition for Writ of Mandamus at SR010, Chi. Trib. v. Brown, No. — — (Ill. Dec. 23, 2019) (correspondence between *Tribune* and Office of the Chief Judge) (exhibit to mandamus petition).

185. *See id.* at 3.

186. *See* Editorial, *A Report's Flaws Suggest: Cook County Bail Reforms May Have Endangered the Public*, CHI. TRIB. (Feb. 14, 2020), https://www.chicagotribune.com/opinion/editorials/ct-edit-crime-chicago-timothy-evans-report-20200214-uxfccucdwferrjikzwi2zshtla-story.html (noting that *Tribune* reporters were "stonewalled repeatedly as they tried to gather the facts" surrounding the Bail Reform Study).

187. Complaint for Writ of Mandamus, *supra* note 183, at 2–3.

188. *See, e.g.*, Press-Enter. Co. v. Super. Ct., 478 U.S. 1, 13 (1986).

189. Todd Lighty et al., *Cook County Chief Judge Reverses Court Data Policy*, CHI. TRIB. (Feb. 13, 2020), https://www.chicagotribune.com/investigations/ct-cook-county-court-records-evans-supreme-court-20200213-r77n6l3qh5gvjoqd6t6xn4zwz4-story.html.

190. *See generally A Report's Flaws Suggest: Cook County Bail Reforms May Have Endangered the Public*, *supra* note 186 (stating that reporters hit multiple stumbling blocks and were consistently "stonewalled").

191. *See* Lighty et al., *supra* note 189 (noting that the Chief Judge plans to release complete records "in the coming weeks and months"). We made a request to the Office of the Chief Judge to obtain data pertinent to the problems with the Study that we discuss here in August. But despite multiple follow-up requests, the Office ignored our requests to make arrangements to provide the data to us.

But even without looking at the details of the data, based on the information collected in this Article, we believe that it is important that the Bail Reform Study be revised and updated, ideally by the Study's authors themselves. Indeed, we join with the *Chicago Tribune*, whose Editorial Board recently wrote that "[c]ertainly this is clear: [The Chief Judge's Report] evaluating his own program is deficient and therefore of limited value. Withdraw and redo it, Your Honor."[192]

Beyond those general revisionist sentiments, we believe that it would be appropriate for the Study's authors to undertake a reanalysis in the following specific areas:

- Rather than using different fifteen-month periods that do not include the same number of warm weather (i.e., high crime) months, the Bail Reform Study data should be reported based on identical one-year before and after periods. Specifically, the before period should be October 1, 2016, through September 30, 2017; the after period should be October 1, 2017, through September 30, 2018. This would eliminate the problem with the current report in which the before period contains five warm weather months while the after period contains only three warm weather months.[193]

- The data in the Bail Reform Study on "crime free" defendants should be reanalyzed, so that any new charges filed up through February 1, 2020, are included. As discussed above, the after period in the current study ran from October 1, 2017, through December 1, 2018—but the analysis of whether pretrial releasees had committed any crimes terminated just two months later at the end of February 2019. The net result of truncating the study period was that the defendants released in the after period were studied for a much shorter period than were the defendants released in the before period—skewing the findings toward concluding that released defendants committed fewer crimes after G.O. 18.8A. Whatever the merits of that approach might have been in 2019, now that additional time has passed it should be easy to extend the observation period for an additional year. This would eliminate the skewing effect by equalizing the length of time that data on new crimes charged against pretrial releasees were collected in both the before and after periods.[194]

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192. *A Report's Flaws Suggest: Cook County Bail Reforms May Have Endangered the Public*, *supra* note 186.

193. *See supra* notes 85–90 and accompanying text.

194. *See supra* notes 104–19 and accompanying text.

- The Bail Reform Study should provide more detailed information about the specific types of crimes committed by pretrial releasees in both the before and after periods, particularly the kind of violent crimes and gun crimes offenses that were committed. Because the Study is vague about the nature of the recidivism of pretrial releasees, it is difficult to engage in detailed cost-benefit analysis about G.O. 18.8A. The costs of the Order are likely to be concentrated in the most violent crimes, particularly homicides and gun crimes offenses. Detailed information about those crimes is needed.[195]

Because of our concerns about the Bail Reform Study, before our Article was publicly distributed, we sent an advance copy to the Office of the Chief Judge requesting comments on these points and, more broadly, on our study. We followed up numerous times. But in the months that followed, the Office of the Chief Judge, while initially promising to send comments, ultimately never did so. We continue to hope that the Office of the Chief Judge will consider the points advanced here and provide detailed answers regarding these important issues. Even more importantly, we hope that the Office of the Chief Judge will consider revising the study in light of the concerns that we and others have raised.

B. Some Tentative Thoughts on a Complete Cost-Benefit Assessment.

For the reasons just explained, at this time it is impossible to precisely tabulate all of G.O. 18.8A's costs—i.e., the increase in the number of crimes caused by the new, more generous pretrial release procedures. We hope that it will be possible to have better information soon, which would then be the first step in a more rigorous cost-benefit analysis than that offered by the Bail Reform Study. But at this preliminary stage, we offer some tentative thoughts on how a complete cost-benefit analysis might ultimately be made as more data becomes available.

1. The Costs of Expanded Pretrial Release.

We turn first to the costs of G.O. 18.8A. In determining how to calculate costs, we are aided by Professor Shima Baradaran Baughman's groundbreaking recent article, "Costs of Pretrial Detention."[196] There, Professor Baughman sketches out how a comprehensive cost-benefit assessment might be made of a change in pretrial release procedures. In assessing the potential costs of expanded pretrial release, Baughman identifies four kinds of costs:

195. *See supra* notes 162–65 and accompanying text.

196. *See* Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. REV. 1 (2017).

(1) additional prosecuted crimes during the pretrial release period, (2) additional crimes not detected during the pretrial release period, (3) additional failures to appear in court, and (4) additional costs of monitoring released defendants.[197] Focusing on the first two costs,[198] it is important to have some measure of the number of crimes committed by pretrial releasees that are not detected by law enforcement. For example, we have estimated above that an additional 1,212 defendants were charged with new crimes while released, including seventy new violent crime charges as well as a total 280 new charges for crimes against persons.[199] These measures

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197. *Id.* at 10.

198. The other costs are not trivial. For example, Cook County appears to be spending millions of dollars more on probation officers to monitor the increased number of pretrial releasees. *See* Patrick Smith, *Bail Reform Forces Cook County To Add 70-Plus Probation Officers*, NPR (Nov. 5, 2019), https://www.npr.org/local/309/2019/11/05/776352061/bail-reform-forces-cook-county-to-add-70-plus-probation-officers. Of course, the cost of probation officers to monitor releasees is far less than the cost of maintaining those same releasees in jail.

199. To be clear, the figure of 280 above includes the seventy violent crimes. This finding of increased crimes committed by an increased number of releasees is also consistent with another recent study. *See* Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 226–27 (2018). The Dobbie Study concluded that "the marginal released defendant is 18.9 percentage points more likely to be rearrested for a new crime prior to disposition." *Id.* at 226. This is consistent with our finding that the marginal released defendant under G.O. 18.8A was more prone to committing additional crimes. *See infra* notes 207–19 and accompanying text. But Dobbie's finding was somewhat offset, from a cost-benefit point of view, by a medium run criminogenic effect—essentially that exposure to pretrial incarceration leads to more crime in later years after the disposition of the crime for which pretrial detention occurred. Dobbie et al., *supra*, at 226–27. One difference between the Dobbie Study and the Bail Reform Study is that it included misdemeanor defendants. *Id.* at 209. A criminogenic effect from pretrial incarceration seems more likely to occur for defendants who might otherwise escape incarceration altogether. *Cf. id.* at 236 (noting that lack of criminal conviction leads to increased employment and decreased likelihood of future criminal activity). In Cook County, the defendants at issue were all felony defendants who would have often been incarcerated at sentencing regardless of pretrial detention decisions. *See* BAIL REFORM STUDY, *supra* note 9, at 1. These factors all warrant additional research. The Dobbie Study also contains an online appendix reporting the results of a cost-benefit analysis of the results of a marginal release of an individual pretrial. They find a net positive benefit, but it appears that one important part of that calculation is that releasing an individual before trial would somehow lead to an overall *decreased* risk of murder, thereby saving between $4 million to $11 million for each murder prevented. *See Appendix Table D.1: Details of Cost-Benefit Calculation, in* Dobbie et al., *supra*, at 38, https://assets.aeaweb.org/asset-server/files/6277.pdf. This is a curious result, unexplained in the main paper, that appears to be at odds with the possible increase in homicides by pretrial releasees in Cook County. *See supra* notes 151–57 and accompanying text.

of recidivism rely on the police detecting and solving the new crimes and then prosecutors filing new charges. Of course, not every crime committed by a pretrial releasee is solved by police and then prosecuted by prosecutors. So for an accurate cost-benefit calculation, some substantial adjustment is necessary. Given that police solve or "clear" violent crimes only about 45 percent the time and property crimes only about 20 percent of the time,[200] any cost calculation based on charged crimes will likely require multiplication by 200 percent or more to reflect the number of crimes released defendants actually committed. One of the defects in the Bail Reform Study is that it fails to clearly acknowledge that its data on additional charges filed against pretrial releasees does not capture all of the crimes that those releasees likely committed.[201]

One conservative calcuation will illustrate this point. We have previously estimated that the expanded pretrial releases from G.O. 18.8A led to at least 280 additional charged crimes against persons in the fifteen months after the Order compared to the fifteen months before. Using crime clearance rates to estimate what fraction these charged crimes were compared to the crimes actually committed by the pretrial releasees, we can estimate that G.O. 18.8A led to 845 additional crimes against persons in the after period compared to the before period.[202]

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200. *See 2018 Crime in the United States, Percent of Offenses Cleared by Arrest or Exceptional Means*, FBI:UCR (2018), https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-26; *see also* Cassell & Fowles, *Still Handcuffing the Cops?*, *supra* note 16, at 709–10 (discussing long term trends in national clearance rates). Clearance rates in Cook County (particularly in Chicago) may be lower than national averages. *See infra* note 200; *see also* Jeremy Gorner, *With its Low Solve Rate for Shootings, Chicago Police to Add 50 Sergeants to Oversee Detectives*, CHI. TRIB. (Dec. 4, 2018, 7:10 AM), https://www.chicagotribune.com/news/breaking/ct-met-chicago-police-detectives-20181203-story.html. *But cf.* Frank Main, *Chicago's Murder-Clearance Rate Rose Sharply in 2019, Police Say*, CHI. SUN-TIMES (Dec. 31, 2019, 4:15 PM), https://chicago.suntimes.com/politics/2019/12/31/21044720/murder-clearance-rate-chicago-police-department (stating Chicago's murder clearance rate rose from 29 percent in 2016 to 53 percent in 2019).

201. *See, e.g.*, BAIL REFORM STUDY, *supra* note 9, at 5 (asserting that apparently, the study's data captures all crimes committed by pretrial releasees); *see also* Jackson et al., *supra* note 19 (stating the definition of crime in the study was limited).

202. To derive this number, we first took Chicago's "violent" crime clearance rate for 2018, which is 33.1 percent. *See* CHI. POLICE DEP'T, 2018 ANNUAL REPORT 62 (2018), http://home.chicagopolice.org/wp-content/uploads/2019/07/2018AnnualReport-05July19.pdf (reporting clearance rates for homicide, rape, robbery, aggravated assault, and aggravated battery). We then applied that 33.1 percent figure to our estimated 280 charged new crimes against persons to produce our estimated actual number of crimes against persons. This is a conservative calculation (i.e., produces a lower figure) because the clearance rate for "violent" crimes is higher than for other crimes, which receive less attention

With some estimate of the actual number of crimes committed by pretrial releasees in hand, the salient issue becomes what cost to assign to each additional crime committed. Other research has explored the subject of the cost of crime.[203] In her article on pretrial detention, Professor Baughman has helpfully collected some of the available information in a table, containing an estimate for the range of the costs of each type of crime.[204]

The striking conclusion from the data is that any cost-benefit calculation will likely hinge on the number of additional murders produced by increasing pretrial releases, perhaps in combination with a few other very serious crimes such as rape and gun crimes. Professor Baughman reports that, in a cost-benefit calculation regarding pretrial release programs, the benefits of preventing a murder range from $4,602,326 to $18,780,120 (in 2014 dollars).[205] The high figure includes not only tangible but also intangible costs,[206] an issue that one could debate in deciding how best to conduct a cost-benefit calculation. But for present purposes, it is enough to note that even if G.O. 18.8A produced several additional homicides, a serious argument could be made that the costs of the measure were substantial, in the tens of millions of dollars. Given the *Chicago Tribune*'s discovery that, rather than just three murders being committed by pretrial releasees after the Order, a total of twenty-one were committed, this possibility is not mere idle speculation.[207]

This issue of additional crimes committed by pretrial releasees is critical to any full cost-benefit analysis, as bail reformers have been optimistic that more accurate tools for making pretrial release decisions would allow more defendants to be released without increasing crime.[208] But, properly understood, the data from Cook County raises questions about whether this will be possible.

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from law enforcement. Here again, we use Chicago figures rather than Cook County figures, because of their ready availability. *See supra* note 131.

203. *See, e.g.*, Cassell & Fowles, *supra* note 17, at 1648 (reporting research on the cost of gun crimes).

204. Baughman, *supra* note 196, at 11–12 tbl.2.

205. *Id.* at 11 (citing Matt DeLisi et al., *Murder by Numbers: Monetary Costs Imposed by a Sample of Homicide Offenders*, 21 J. FORENSIC PSYCHIATRY & PSYCH. 501, 506 tbl.1 (2010)); TED R. MILLER ET AL., VICTIM COSTS AND CONSEQUENCES: A NEW LOOK 9 tbl.2 (1996), https://perma.cc/468DHALR. One of us (Fowles) has used a different methodology, limited to tangible costs, to produce figures (for Utah) that are lower. *See* Fowles & Nyström, *supra* note 15, at 6 tbl.2. Exploring differences in these calculations is beyond the scope of this article.

206. Baughman, *supra* note 196, at 9 tbl.1.

207. *See supra* notes 154–61 and accompanying text.

208. *See, e.g.*, *2017 Annual Report: Creating a Fairer Pretrial System*, ARNOLD VENTURES (Dec. 1, 2017), https://www.arnoldventures.org/stories/creating-a-fairer-pretrial-system/ (discussing the PSA, a pretrial risk assessment that assesses the likelihood that an individual will commit a new crime or not return to court if released, as "produc[ing] better overall outcomes").

Cook County released about four thousand more defendants pretrial in the fifteen months after G.O. 18.8A went into effect than in the fifteen months before.[209] Given that more defendants were released in the after period, a question naturally arises as to whether the Order produced more defendants charged with new crimes because more defendants were being released or because more dangerous defendants were released. The data suggest that the answer is *both*.

As reported by the Bail Reform Study, pretrial releasees in the after period went up numerically by about 20 percent.[210] Accordingly, one might expect the number of crimes to have increased by about 20 percent. But the total estimated crimes committed in the after period verus the before period actually went up by roughly 45 percent.[211] So it appears that somewhat more than half of the additional estimated crimes appear to have resulted from the release of more dangerous (i.e., more crime-prone) defendants.

Another approach that also suggests this conclusion is that in the fifteen months before G.O.18.8A, 20,435 defendants[212] were released for an average of 243 days.[213] Multiplying those numbers together produces 4,965,705 days when defendants were released pretrial before the new order. During those days, 3,715 of the defendants were charged with committing new crimes.[214] This means that during the before period, it took 1,337 days of defendants being released for the public to suffer a new charged crime[215] from a pretrial releasee.[216]

In the fifteen months after G.O.18.8A, 24,504 defendants[217] were released for an average of 154 days.[218] Multiplying those numbers together produces 3,773,616 days when defendants were released

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209. *See* BAIL REFORM STUDY, *supra* note 9, at 31 tbl.6A (stating 20,435 released before, 24,504 released after). As discussed above, these figures apparently include only those defendants released at initial bail hearings. *See supra* note 161 and accompanying text.

210. BAIL REFORM STUDY, *supra* note 9, at 31 tbl.6A. 24,504 releasees ÷ 20,435 releasees = 1.20.

211. 6,059 crimes ÷ 3,715 crimes = 1.63. *See infra* notes 212, 217.

212. BAIL REFORM STUDY, *supra* note 9, at 28 tbl.5B. 17,431 males + 3,004 females = 20,435 total defendants.

213. *Id.* at 30.

214. *Id.* at 33 tbl.7B. Subtracting total defendants from "crime free" defendants, i.e., 14,146 crime free males + 2,574 crime free females = 16,720 total crime free defendants, which can be subtracted from 20,435 released defendants to produce the result that 3,715 defendants were not crime free.

215. For simplicity in calculation, we assume that a defendant who was not "crime free" committed one crime. It is likely that the pool of such defendants committed, on average, more than one crime.

216. 4,965,705 days ÷ 3,715 crimes = 1,337 days for each crime.

217. BAIL REFORM STUDY, *supra* note 9, at 28 tbl.5B. 21,326 males + 3,178 females = 24,504 total defendants.

218. *Id.* at 30.

pretrial after the Order. During those days that they were released, 4,164 of the defendants were charged with committing new crimes.[219] This means during the after period, it took 906 days of defendants being released for the public to suffer a new charged crime from a pretrial releasee.[220]

In other words, after the reform, it appears that the pool of released defendants committed crimes more rapidly than the pool before—committing a new crime, on average, within 906 days rather than the earlier 1,337 days. Presumably the reason for this acceleration in crime commission was because more crime-prone defendants were being released. We can estimate that releasees after G.O. 18.8A were, roughly speaking, about 50 percent more likely to commit crimes on a crimes per day basis than were releasees before G.O. 18.8A.[221] The fact that the additional pretrial releasees appear to have been substantially more likely to commit crimes is important because bail reform, like other public policy reforms, presumably reaches a point of diminishing returns as more dangerous defendants are released.

To be sure, G.O. 18.8A's defenders could properly point out that our numbers regarding additional crimes consistute a relatively small percentage of the overall number of crimes in Cook County. We agree that it would be unreasonable to attempt to blame Cook County's expanded pretrial release measures as somehow singlehandedly explaining Cook County's overall high crime rates. Many other factors would need to be considered. But our focus in this Article is whether expanded pretrial release procedures can pay their way forward under a cost-benefit analysis. Any costs from expanded pretrial release measures are akin to a self-inflicted wound[222] because costs are caused by additional crimes that policymakers could have simply avoided by never "reforming" release procedures at all.

Defenders of G.O. 18.8A are also likely to argue that, even under a more fulsome cost-benefit analysis of the type we are describing here, the measure could still ultimately prove to be cost beneficial. These arguments are not without merit, as we discuss in the next Part below. But the key point of our Article is not that G.O. 18.8A could never be justified as cost beneficial; rather, our more limited point is

219. *Id.* at 33 tbl.7B. Subtracting total defendants from "crime free" defendants, i.e., 17,591 crime free males + 2,749 crime free females = 20,340 total crime free defendants, which can be subtracted from 24,504 released defendants to produce the result that 4,164 defendants were not crime free. Of course, as discussed at length above, this figure likely undercounts the number of defendants in the after period who were not crime free.

220. 3,773,616 days ÷ 4,164 crimes = 906 days for each crime.

221. 1,337 days ÷ 906 days = 1.476.

222. *Cf.* FRED P. GRAHAM, THE SELF-INFLICTED WOUND 153, 168, 184–85, 190 (1970) (discussing unnecessary costs stemming from release of convicted criminals due to *Miranda*'s retroactive application).

that it is yet to be so justified. The Bail Reform Study appears to rest on an illusion that G.O. 18.8A is entirely without costs.[223] Our conclusion is that the reality in Cook County is more complicated. In particular, we question the counterintuitive assertion that many more arrested defendants could be released before trial without causing the public to suffer at least some additional crimes. Instead, the analysis here suggests that additional crimes—and, thus, additional costs—have to be tabulated as part of any thorough cost-benefit analysis.

2. The Benefits of Expanded Pretrial Release.

While G.O. 18.8A's costs need to be accurately measured, the Order undeniably provided considerable benefits to the public and to the released defendants that need to be measured as well. Here again, Profesor Baughman's article provides a helpful starting point for analysis. As she explained, expanding pretrial release can be expected to produce multiple benefits including benefits to detainees of avoiding loss of liberty, disruption to family life and other relationships, and direct economic costs such as lost income and lost job opportunities.[224] Expanded pretrial release can also produce benefits to society, notably reduction in the direct costs associated with incarcerating defendants such as the costs of building and operating jails, and the indirect costs such as depriving children of the financial and emotional support from their detained parents. Expanding release can also produce difficult-to-quantify benefits related to protecting the presumption of innocence.[225]

Estimating the value of such benefits is difficult but not impossible. Professor Baughman, for example, has made an initial attempt at what such figures might look like for national levels of pretrial release decisions.[226] In this Article, we are not in a position to calculate the value of all these benefits for the changes implemented in Cook County through G.O. 18.8A. But we tentatively suggest that, using Baughman's approach, it may be the case that G.O. 18.8A is not cost beneficial.

As noted above,[227] as a jurisdiction increases the number of defendants who are released pretrial, the pool of pretrial releasees will often become progressively more dangerous. Professor Baughman has quantified this important point with her cost-benefit calculations about pretrial release decisions, based on data from

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223. *Cf.* Paul G. Cassell, Reply, *All Benefits, No Costs: The Grand Illusion of* Miranda*'s Defenders*, 90 NW. U. L. REV. 1084, 1123–24 (1996) (arguing that *Miranda* reforms have not been subjected to serious cost-benefit analysis).

224. *See* Baughman, *supra* note 196, at 5–6, 15–17.

225. *See id.* at 6–7, 17.

226. *See id.* at 16–17 tbl.3.

227. *See supra* note 219 and accompanying text.

multiple jurisdictions across the country.[228] Her data suggest that, initially, a societal net benefit exists to increasing the percentage of defendants who are released pretrial. But at some point, releasing more defendants becomes too dangerous, and further releases are not net beneficial.[229] Using her data, Professor Baughman derives a figure for the optimal level of pretrial releasees. She tentatively estimates that releasing defendants until the point at which about 31 percent of all defendants are detained produces a net societal benefit compared to the 38 percent rate at which judges around the country currently detain defendants.[230]

Professor Baughman's estimate has important public policy implications for bail reform efforts in this country. If her estimate is correct,[231] pretrial releases could be expanded around the country and produce a net societal benefit in the average jurisdiction. But Baughman's calculation of an optimal national release rate becomes quite interesting when compared to Cook County's rate. Before G.O. 18.8A, Cook County detained only 28.4 percent of felony defendants—already a higher percentage of releases than Baughman estimates would be optimal.[232] After the new procedures were implemented, Cook County's detention rate fell even further, to only 19.5 percent.[233] This suggests that Cook County may have taken its reform measures to such an extreme that, however well-intentioned, went too far.

In addition, one cautionary note is needed about the kind of cost-benefit calculations that Baughman's article so nicely summarizes. Baughman's cost-benefit calculations implicitly equate, for example, a one dollar value of a defendant's liberty with a one dollar value of the cost of a crime. While from a pure dollars and cents point of view this assumption can be defended, relying on the assumption for public policy purposes creates what economists characterize as "distributional" issues.[234] The benefits of expanded pretrial release are most directly conferred, of course, on the defendants who have been arrested. On the other hand, the costs of the crimes those releasees commit fall on victims who, by and large, have done nothing

228. *See* Baughman, *supra* note 196, at 10.

229. *See id.* at 19–23.

230. *Id.* at 22.

231. In this Article, we simply assume that Professor Baughman's cost and benefit figures are correct, although opponents and proponents of bail reform might offer different tabulations.

232. *See* BAIL REFORM STUDY, *supra* note 9, at 24 (stating that 71.6 percent of defendants were released before the Order); Baughman, *supra* note 196, at 22.

233. *See* BAIL REFORM STUDY, *supra* note 9, at 24 (stating that 80.5 percent of defendants were released after the Order).

234. For an illustration of how distributional issues can affect cost-benefit analysis, see, for example, Miqdad Asaria et al., *Distributional Cost-Effectiveness Analysis: A Tutorial*, 36 MED. DECISION MAKING 8, 8–9 (2016) (explaining how health inequality concerns can affect cost-benefit analysis when implementing medical reforms).

to warrant suffering those crimes committed. Without considering the relative entitlement to benefits of the two groups—pretrial releasees and victims of crime—it is difficult to argue that a simple cost-benefit analysis accurately captures all the competing tradeoffs.

It is possible to illustrate this point with a hypothetical example. Let's assume that new expanded pretrial release procedures could be implemented in our hypothetical jurisdiction—giving defendants greater liberty but at the cost of additional crimes. Let's also assume that the new procedures produce one additional murder, ten additional rapes, one hundred additional assaults, and one hundred additional robberies. The total cost of these new procedures, using conservative figures from Professor Baughman's table on the costs of crime, is about $8.6 million, mostly stemming from the additional murder.[235] On the other hand, let's also assume that the new procedures confer certain benefits on the released defendants, such as greater freedom, greater income, and lower strain on intimate relationships.[236] Let's further assume that our hypothetical jurisdiction's expanded pretrial release procedures will release five hundred defendants for an additional one hundred days each. The total benefit conferred on defendants of the new procedures using Professor Baughman's figures is about $9,000,000[237]—a million dollars more than the cost. And yet we are uncertain whether many policymakers would be convinced to adopt the new measure based on the greater benefits conferred on the pool of released defendants. After all, the one thing that we do know for certain about every pretrial detainee is that, even though he is legally presumed to be innocent, he has done something that led a judge to find probable cause for believing the defendant committed a serious crime justifying detention.[238] Giving equal weight to the benefits the pool of such defendants receive when compared to the costs inflicted on crime victims seems dubious.

To be sure, this hypothetical example would require additonal examination before determining whether it was cost beneficial. Most obviously, the general public also incurs costs if defendants are detained, such as the significant costs of jailing detainees. But here again, distributional issues arise. The costs of crime appear to fall

235. *See* Baughman, *supra* note 196, at 11 tbl.2 (providing "low" estimate of the cost of murder at $4,602,326; of rape at $136,191; of assault at $14,715; and of robbery at $12,523).

236. *See id.* at 16–17 tbl.3 (providing daily estimate of the cost of loss of freedom at $11; of loss of income at $85; and of strain on intimate relationships at $84).

237. 500 defendants released x 100 days per defendant x $180 benefit from release = $9 million.

238. *See* Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (requiring judicial determination of probable cause as a prerequisite to any prolonged period of detention).

most heavily on impoverished communities;[239] the benefits of tax savings will, of course, extend disproportionately to upper-income taxpayers who pay the most taxes. In addition, some of the distributional issues will involve other innocent persons. Pretrial detention of parents, for example, imposes costs on children who lose financial and emotional support,[240] not to mention the costs to taxpayers who may have to provide financial assistance to such children. The basic point remains that, without some assessment of the relative entitlement of the recipients of the cost and benefits of bail reform, the cost-benefit analysis is incomplete.

Other distributional issues also exist with the benefits of bail reform. As the Bail Reform Study repeatedly noted, the additional persons who received release under G.O. 18.8A were disproportionately members of racial minority groups, particularly Black and Hispanic individuals.[241] But it is virtually certain that the costs of the additional crimes committed as the result of the changes are not distributed evenly throughout Cook County, but rather are heavily concentrated among minority crime victims. The victims of crime in Cook County, and particularly of violent crimes, do not mirror Cook County's population. On the contrary, the vast majority of the victims were racial minorities.[242] For example, Chicago's homicide victims in 2018 were 79.9 percent African-American, 13.7 percent Hispanic, and 5.7 percent white.[243] Similarly, Chicago's aggravated assault and battery victims in 2018 were 69.1 percent African-American, 19.6 percent Hispanic, and 8.9 percent white.[244]

A related point can be made about another commonly cited benefit of bail reform. Proponents of expanded pretrial release have often noted that defendants who are held pretrial are more likely to be convicted.[245] In the period "[f]rom 1990 to 2004, 78 percent of pretrial detainees were eventually convicted, but only 60 percent of alleged criminals released were convicted of a crime."[246] A

239. *See* Cassell & Fowles, *supra* note 17, at 1585–89.

240. Baughman, *supra* note 196, at 7.

241. *See* BAIL REFORM STUDY, *supra* note 9, at 2, 12.

242. *See* Dahleen Glanton, *With 500 Homicides in Chicago, Time for African-Americans to get Tough on Crime*, CHI. TRIB. (Sept. 7, 2016), http://www.chicagotribune.com/news/columnists/ct-violence-african-americans-glanton-20160907-column.html (discussing disproportionate number of African-American victims, as well as perpetrators, in Chicago in 2016).

243. CHI. POLICE DEP'T, *supra* note 202, at 52.

244. *Id.* at 53. Of the reported cases of aggravated assault and battery, 6.3 percent had an unknown or undisclosed victim race/ethnicity, thereby creating the possibility that the minority victimization rates for this offense are higher than indicated.

245. Baughman, *supra* note 1, at 5.

246. *Id.* at 83 (citing THOMAS H. COHEN & BRIAN A. REAVES, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS, STATE COURT PROCESSING STATISTICS, 1990–2004 7 (2007)).

conventional narrative offered to explain these differences is that defendants who are detained are less able to assist with their defense.[247] This may, of course, explain part of the difference. But other explanations seem important, particularly in Cook County. As suggested by the increased "drop" rate in domestic violence cases after G.O. 18.8A, it appears many released defendants take advantage of their liberty to intimidate their victims into dropping charges. For these defendants, the lower conviction rate should not be regarded as a social benefit but a social cost. These costs are not distributed equally. Instead, the costs are concentrated among women, particularly among lower-income women of color.[248]

Another point that appears to have often been overlooked in discussions about bail reform is that a defendant who is released pretrial will often be convicted and then sentenced to a term of incarceration. If that defendant had been detained pretrial, he would receive credit for time served as part of his sentence.[249] Unless bail reform is coupled with lower terms of imprisonment, the mere fact of pretrial release does not necessarily equate with cost savings from shorter terms of imprisonment.

For example, if one defendant is charged with armed robbery and obtains pretrial release for six months while his case adjudicated, he might upon conviction be sentenced to two years in prison.[250] A defendant facing an identical charge who does not obtain pretrial release might also ultimately be sentenced to two years in prison but receive credit for the six months of pretrial detention.[251] From a cost of incarceration perspective, the costs of the two cases are roughly the same[252]—both defendants are incarcerated for two years. A simplistic bail reform calculation might calculate the cost of incarceration to be six months shorter for the second defendant, ignoring the issue of credit for time served.

Transferring this point to the Study, distributional issues may arise. If the first defendant faces two years in prison, it may be the case that the taxpayers of Illinois pay for his incarceration in state prison. For the second defendant, it may be the case that taxpayers in Cook County pay for his six months of detention in jail while

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247. *See, e.g.*, Stephanos Bibas, *Designing Plea Bargaining from the Ground Up: Accuracy and Fairness Without Trials as Backstops*, 57 WM. & MARY L. REV. 1055, 1071 (2016).

248. *See* Jackson & Buckley, *supra* note 21.

249. *See* 730 ILL. COMP. STAT. 5/5-4.5-100(b) (effective June 22, 2012) ("[T]he offender shall be given credit on the determinate sentence or maximum term and the minimum period of imprisonment for the number of days spent in custody as a result of the offense for which the sentence was imposed.").

250. For the statutory basis for this example in Illinois, see *id.*

251. *See id.*

252. We assume that jail costs and prison costs are equal, although there may be some marginal differences between the two.

Illinois taxpayers pay for his eighteen months in prison.[253] Thus, from a societal point of view, while there is no difference between the costs of the two cases, County County will claim a cost "saving" that is really merely a cost transfer—a transfer of the cost to another set of taxpayers.

To be clear, we are fully prepared to consider arguments that shorter terms of incarceration are cost beneficial. Indeed, one of us has very publicly criticized certain lengthy mandatory minimum sentences.[254] But the point here is that if total terms of incarceration remain equal both before and after a bail reform, it is not accurate to attribute cost saving to a mere transfer of expense.

As a final point, some readers may wonder whether all of this discussion of costs and benefits is academic, because of the constitutional rights of pretrial detainees. After all, if a defendant has a constitutional right to pretrial release, then any debate about whether their detention is cost beneficial is beside the point.

This brief article is not the place for an extended discussion of the constitutionality of pretrial detention. It is enough to note that several decades ago, in *United States v. Salerno*,[255] the Supreme Court rejected a facial attack on the federal Bail Reform Act, holding that neither the Due Process Clause nor the Eighth Amendment prohibited the government from detaining especially dangerous defendants, without bail, in order to protect the community from danger.[256] Neither the parties nor the Court ever questioned that, in appropriate circumstances, pretrial detention and monetary bail are constitutional.[257] Based on *Salerno*, many other researchers in this area have assumed the pretrial detention programs can be implemented constitutionally.[258] Indeed, the Chief Judge who promulgated G.O. 18.8A does not believe that, as currently drafted, this Order is constitutionally required. Instead, as disclosed in the end of the Bail Reform Study, the Chief Judge is considering modifications that might "strengthen public safety" such as in connection with firearms offenses.[259] We simply follow in that vein to

253. We are not familiar with the details of how Illinois finances incarceration, but the point made in text would be the case in our home state of Utah and, we believe, many other states.

254. *See, e.g.*, Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 17 (2010).

255. 481 U.S. 739 (1987).

256. *Id.* at 754–55. Nor is the presumption of innocence implicated in pretrial detention, as the Supreme Court has explained that the presumption of innocence is merely "a doctrine that allocates the burden of proof in criminal trials." Bell v. Wolfish, 441 U.S. 520, 532–33 (1979).

257. *Salerno*, 481 U.S. at 753.

258. *See, e.g.*, Baughman, *supra* note 1, at 3.

259. BAIL REFORM STUDY, *supra* note 9, at 37.

conclude that the Constitution permits policymakers to consider whether alterations of the Order are appropriate.

Again, we emphasize we are not arguing that bail reform measures such as G.O. 18.8A will ultimately fail a rigorous cost-benefit assessment. Instead, we offer these points as cautionary counterweights to be considered before one accepts the Bail Reform Study's optimistic conclusions that the 2017 changes were, indeed, cost beneficial. More careful analysis considering the points raised here would be necessary before any definitive conclusions could be reached.

VI. CONCLUSION

This Article examines the conclusions of the Cook County Bail Reform Study, which offered data suggesting that Cook County's recent bail reform efforts expanded pretrial release without any increase in crime. The Study's presentation of empirical evidence on this crucial issue regarding bail reform is commendable.[260] But a concern about bias always lurks when an entity implementing a reform later studies whether that reform was successful. In this case, it appears that many dangers stemming from the Cook County court's expansion of pretrial release were not carefully assessed when the court did it own subsequent study.

A more careful analysis of the Study's underlying data undercuts the Study's upbeat conclusions. Contrary to the Study's assertion that bail reform did not increase crimes by pretrial releasees, its data suggest that quantifiable and significant increases in crimes occurred. Based on reanalysis of the data, after the Cook County courts implemented more expansive pretrial release procedures, the number of released defendants who were charged with committing new crimes increased by about 45 percent. And, more concerning, the number of pretrial releasees who were charged with committing new violent crimes increased by about 33 percent. Recent investigations by the *Chicago Tribune* also raise concern about whether, after the procedural changes, pretrial releasees committed more homicides and intimidated more victims of aggravated domestic violence into dropping charges.[261] We also conservatively estimate that at least 845 additional crimes against persons were committed by pretrial releasees in the fifteen months after the changes than in the fifteen months before. These public safety harms call into question whether Cook County's bail "reform" measures were truly cost beneficial.

These conclusions about the Cook County reform measures have broader implications. Cook County appears to have used state-of-the-

260. *See* Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 312–14 (2018) (describing benefits of evidence based criminal justice policymaking).

261. *See* Jackson & Buckley, *supra* note 21.

art risk assessment.[262] Cook County's PSA was implemented with the assistance of the Laura and John Arnold Foundation, which has been actively involved in bail reform efforts across the country.[263] The Foundation's risk assessment instrument has been used, in some form or another, "in over twenty-nine jurisdictions, including three state-wide programs."[264] Cook County is one of the nation's largest jurisdictions, which appears to have diligently attempted to follow the Foundation's recommendations. If Cook County's bail reforms have produced additional crimes, then many other jurisdictions may have suffered similar harmful consequences.

In closing, we underscore that this Article does not reach definitive conclusions about the balance of costs and benefits in Cook County. Instead, this Article makes a more limited but important point. As Cook County's experience demonstrates, bail reform measures are not cost-free. Additional crimes committed against the public are costs of such changes that policymakers must carefully consider in reaching an ultimate cost-benefit conclusion. To be sure, such pretrial release reforms can have significant benefits. But only if both benefits and costs are accurately measured can a sound decision be made about which way the scales tip—that is, whether the "reform" was truly an improvement.

262. Whether risk assessment tools are appropriate is, itself, a controversial topic. *See, e.g.*, ACLU, A NEW VISION FOR PRETRIAL JUSTICE IN THE UNITED STATES 8 (2019), https://www.aclu.org/sites/default/files/field_document/aclu_pretrial_reform_toplines_positions_report.pdf (arguing against actuarial algorithms because of their "potentially detrimental racial impact, lack of transparency, and limited predictive value"); *see also* Emily J. Salisbury et al., *Risk Assessment and Judicial Decision Making*, 46 CRIM. JUST. & BEHAV. 181, 182 (2019) (discussing controversy surrounding risk assessment in pre conviction settings). Risk assessment tools have also been used in other contexts, such as mental health. *See, e.g.*, JOHN MONAHAN ET AL., RETHINKING RISK ASSESSMENT: THE MACARTHUR STUDY OF MENTAL DISORDER AND VIOLENCE 3 (2001).

263. *21 Cities, States Adopt Risk Assessment Tool to Help Judges Decide Which Defendants to Detain Prior to Trial*, ARNOLD VENTURES (June 26, 2015), https://www.arnoldventures.org/newsroom/more-than-20-cities-and-states-adopt-risk-assessment-tool-to-help-judges-decide-which-defendants-to-detain-prior-to-trial/.

264. BAUGHMAN, *supra* note 1, at 66.