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I. INTRODUCTION

Empirical research shows that pre-trial proceedings in Illinois' misdemeanor and felony courtrooms have unexpectedly created a divide in access to a fair trial along the lines of income. Therefore, the Illinois pre-trial process should be reformed to eliminate monetized bail bonds.

Significant local and national community stakeholders have attempted to increase awareness of systematic issues within the United States criminal justice system. Recurring themes in those stakeholders' statements include concerns with the over population of American prisons, the economic impact of over incarceration on minority communities, and the unnecessary stressors mandatory sentences place on non-violent misdemeanor offenders.

On the national level, President Barack Obama noted in his 2015 remarks at the NAACP National Conference his disappointment with the current state of the judiciary.[1] President Obama reflected on his historic visit to a federal prison, his reasoning behind said visit, and his subsequent stance on criminal justice reform.[2] According to President Obama, the United States is home to 5% of the world's population, yet our prison population accounts for 25% of those incarcerated worldwide.[3] In an effort to address this alarming statistic, President Obama suggested local governments take actions designed to reduce prison populations by adopting methods proven to work in other jurisdictions.[4]

Locally, Cook County Sheriff Tom Dart publicly voiced his concern in his lobbying for the Accelerated Resolution Court Act.[5] According to Dart, he came across many cases similar to that of a 51 year-old homeless man who spent 308 days in jail awaiting trial for stealing toothpaste because he didn't have an address to qualify for electronic monitoring.[6] Dart went on record in an interview, and stated that the Cook County criminal justice system operates differently for the poor than it does for the rich.[7]

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[1] Barack H. Obama, Former U.S. President, Remarks by the President at the NAACP Conference (July 14, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/07/14/remarks-president-naacp-conference [hereinafter Remarks by the President].

[2] Tom LoBianco, *President Barack Obama Makes Historic Trip To Prison, Pushes Reform*, CNN (July 17, 2015, 12:24 AM), http://www.cnn.com/2015/07/16/politics/obama-oklahoma-federal-prison-visit/.

[3] Remarks by the President, *supra* note 1

[4] *Id*.

[5] Accelerated Resolution Court Act, 730 ILL. COMP. STAT. 169/1 (2017); *see also infra note 6*.

[6] Mark Konkol, *A Year In Jail For Stealing Toothpaste? New Law Frees Poor Chicago Inmates*, DNAINFO (Aug. 26, 2015, 6:23 AM), https://www.dnainfo.com/chicago/20150826/little-village/sheriff-tom-dart-wins-one-for-petty-criminals-locked-up-for-being-poor.

[7] *Newsviews*: *Proposal To End Cash Bail System*, ABC7 CHICAGO (Dec. 4, 2016), http://abc7chicago.com/news/newsviews-proposal-to-end-cash-bail-system/1639014/.

Most notably, the Administrative Office of the Illinois Courts (AOIC), in consultation with The National Center of State Courts, issued recommendations to the Illinois judiciary in 2014 after an empirical operational review of 147 stakeholders in the Circuit Court of Cook County Pretrial Services Program.[8] In pertinent part, the AOIC recommendations suggested that, "pre-trial management and the judiciary consider establishing clear and appropriate criteria for pretrial release recommendations."[9] The recommendations contained in the report, reflected upon by Dart, show a problem with our current criminal justice system that is tied to not only race, but to income.

This article includes a brief historical overview of the pretrial process in Cook County, IL. Additionally, the systematic issues and trends which led to the unexpected divide in access to fair pre-trial treatment along income lines are identified and outlined herein. To solve these issues, I propose bail hearings be reduced to determining whether a defendant should remain in custody or not; I conclude with a recommendation that we phase out the monetary element of bail bonds altogether.

II. THE HISTORY OF THE PRE-TRIAL SYSTEM

A brief examination of the historical development of an American bail bond system shows that this system was created with the intention of requiring accountability from accused offenders. Later, this article intends to show the poor translation of those intentions when the applicable bail bond laws are practically applied in Cook County Illinois, and, arguably, nationwide.

Our modern pre-trial bail and bond system derives from English practices. In England, prior to 1789, the bail bond system required a third-party to be assigned to an accused fugitive and for that third party to be responsible for the appearance of the alleged fugitive at trial. Our modern process of granting a person accused of a crime their freedom based on their ability to produce bail to ensure their appearance at trial are derivative of England's practices.[10] Pennsylvania's state legislature is largely credited with the creation of legislative language leading to the development of an American bond system, and that regime departed from the methods characteristics of the English system. Pennsylvania's 1682 constitution provided, "all prisoners shall be Bailable by Sufficient Sureties, unless for capital Offenses, where proof is evident or the presumption great."[11] Scholar June Carbone explains, "the Pennsylvania law was quickly copied, and as the country grew the Pennsylvania provision became the model for almost every state constitution adopted after 1776."[12] Obviously, the 13th Amendment to the United States Constitution is the major source of legislative power for the United States pre-trial system. The 13th Amendment provides for the formal abolishment of slavery except as it relates to

[8] Circuit Court of Cook County Pretrial Operational Review: Illinois Supreme Court Administrative Office of the Illinois Courts, In consultation with The National Center of State Courts (March 2014), http://www.illinoiscourts.gov/supremecourt/reports/pretrial/pretrial_operational_review_report.pdf. [hereinafter Pretrial Operational Review].

[9] *Id*. at 6.

[10] John V. Ryan, *Last Days of Bail*, 58 J. CRIM. L. & CRIMINOLOGY 542, 542-43 (1968).

[11] Claire M. B. Brooker, et. al, *The History of Bail and Pretrial Release*, PRETRIAL JUSTICE INSTITUTE, 5 (Sept. 24, 2010), https://www.pretrial.org/download/pji-reports/PJI-History%20of%20Bail%20Revised.pdf (citing June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 334 SYRACUSE L. REV. 517 (1983)).

[12] *Id*. at 4.

punishment for "crime whereof the party shall have been duly convicted."[13] Further, the 8th Amendment provides the ceiling for which bail may be charged, explicitly stating that "excessive bail shall not be required."[14] As such, the right to bail in non-capital cases is a federal statutory right codified in the Federal Rules of Criminal Procedure part 46, and is further adopted in Illinois under 75 ILCS 5/110-4(A).

The history of the bail bond system in America shows that the intention of this system, at its inception into American criminal law, was to protect alleged non-capital criminals' right to bail. The language of Pennsylvania's 1682 constitution reflects the intention of the law to be all-inclusive by its use of the term "all prisoners." Further the 1682 language indicates an intention to create a right for all of said prisoners; the Pennsylvanian legislature's use of the term "shall" (as quoted above) does not leave any question as to whether bail is an option for any prisoner. The Pennsylvanian language focuses on the alleged criminal's sureties and capability to convince the court of their accountability. The applicable Illinois statutory provision, 725 ILCS 5/110-4, however, dawdles from mere sureties and requires guaranties of future behavior. The difference is that the current Illinois law makes a departure from protecting the alleged offender and, instead, focuses on the propensity for the alleged offender to harm the public. The system that was originally intended to calm fears of being overwhelmed by an over-zealous government is now used to incite fear into alleged criminals.

Currently, fourteen counties in Illinois have established "pretrial service units".[15]Sixteen counties do not offer pretrial services.[16] There were 43,066 pre-trial bond investigations conducted in Illinois in 2013. Of those investigations, 24,987 were conducted by the Cook County Pretrial Services Unit, amounting to nearly 60% of all pre-trial service investigations in Illinois.[17] These realities make it clear that Cook County heavily utilizes the bail bond system.

III. SYSTEMATIC TRENDS AND ISSUES OF THE PRE-TRIAL SYSTEM

A. The Current Bail Bond System Increases Recidivism By Criminalizing Poverty

In a report compiled by the Illinois Sentencing Policy Advisory Council (SPAC) during the Summer of 2015, 48% percent of Illinois' prison population recidivates within three years of release, and 19% will recidivate within one year of release.[18] According to SPAC, technical violations of mandatory supervised release contribute to the high cost of recidivism felt by taxpayers. "In 2013, almost a quarter of all prison admissions [in Illinois] occurred as a result of offenders violating the conditions of mandatory supervised release admissions."[19] Overall, probation violators account for about 15% of all those sentenced to prison in Illinois.

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[13] U.S. CONST. amend. XIII.

[14] U.S. CONST. amend. VIII.; *See also* CONG. RESEARCH SERV., CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, 1709-11 (2016), https://www.congress.gov/content/conan/pdf/GPO-CONAN-REV-2016.pdf (the 8th Amendment was included in the Bill of Rights without clarification as to whether the right to an in-excessive bail was included with the intent to refer to rights conferred by the Statute of Westminister of 1275 which set forth a detailed enumeration of those offenses which were bailable, or, those rights conferred by England's Habeas Corpus Act of 1679, or both.).

[15] Pretrial Operational Review, *supra* note 8.

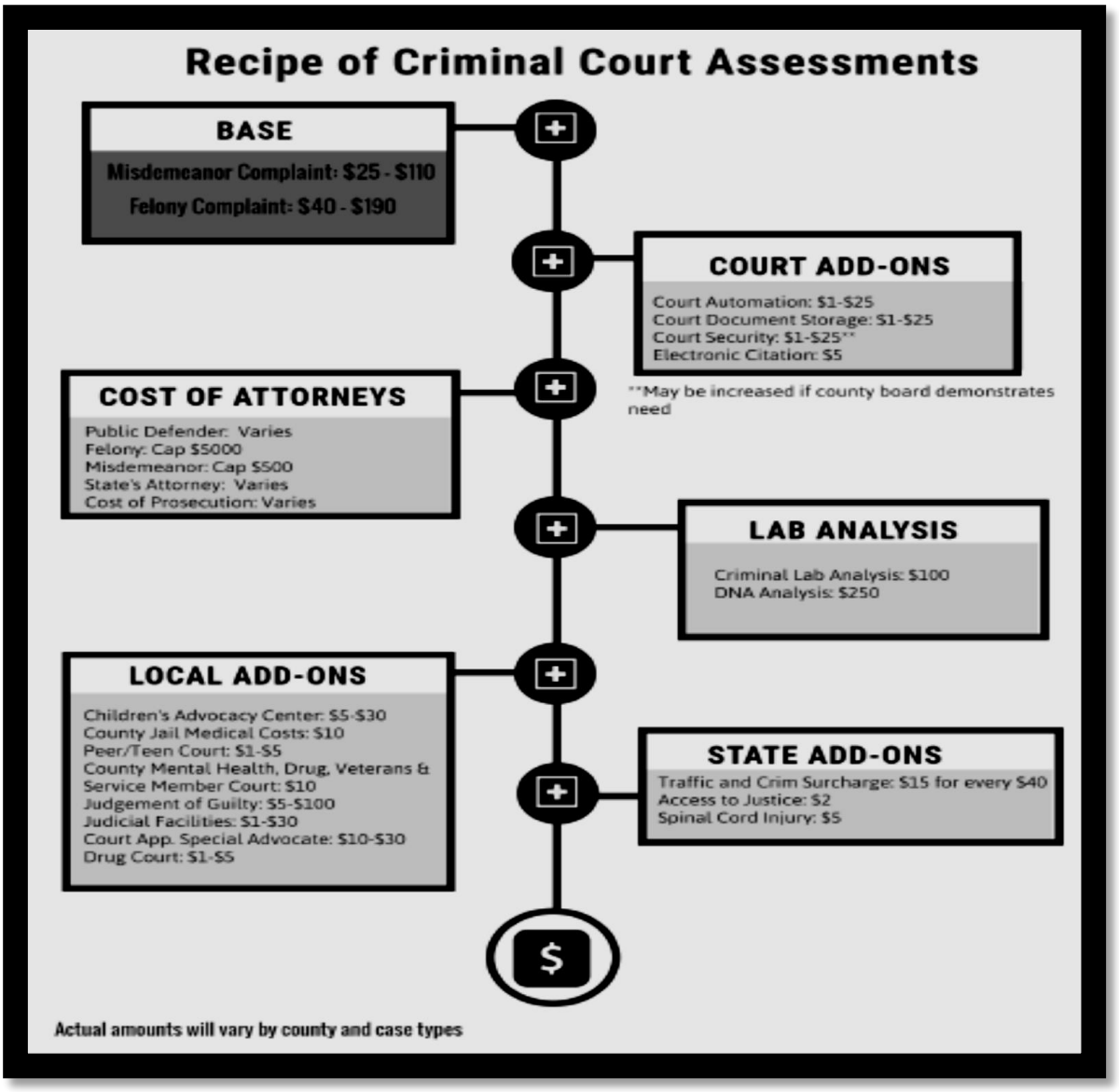
[16] *Id.*

[17] *Id.*

[18] *Illinois Results First: The High Cost of Recidivism*, Illinois Sentencing Policy Advisory Council (SPAC) 1 (Summer 2015), http://www.icjia.state.il.us/spac/pdf/illinois_results_first_1015.pdf.

[19] *Id.*

As it relates to court costs prior to trial, "criminal defendants may find that their sentences can be severely impacted by something as insignificant as the side of the street on which their arrest occurred. The resulting inconsistency threatens the fairness, both actual and perceived, of the current system."[20] Average court costs for a criminal offender were calculated by the Statutory Court Fee Task Force in their June 2016 report and embodied in the following figure[21]:



Before a bail bond is set, misdemeanor offenders face Court fees between $40 and $200. Though this may seem to be a nominal fee, it is a huge stressor for indigent individuals that

[20] *Illinois Court Assessments: Findings and Recommendations for Addressing Barriers to Access to Justice and Additional Issues Associated with Fees and Other Court Costs in Civil, Criminal, and Traffic Proceedings*, Statutory Court Fee Task Force (June 2016), http://www.illinoiscourts.gov/2016_Statutory_Court_Fee_Task_Force_Report.pdf [hereinafter *Findings and Recommendations*].

[21] *Id* at 12.

undoubtedly frequent Cook County's criminal courts. Merely being arrested is expensive. Furthermore, where a defendant is incapable of posting a bail bond, Illinois' current pre-trial process unintentionally punishes the indigent. Their poverty becomes a crime in and of itself. Defendants whom are unable to satisfy pre-trial court costs and bail are faced with serving time in jail *before* innocence is adjudicated. Though pre-trial investigations and mandatory supervised release methods are well intentioned, these tools have not had the type of positive effects hoped for at their inception. To be clear, technical violations of mandatory supervised release can include anything from failure to pay fines to failure (or inability) to satisfy community service requirements. Hard and fast rules related to these types of minor infractions have made a tool intended to minimize the prison population account for nearly 25% of Illinois' prison population. The unintended effect of these systematic shortcomings is that the Illinois pretrial system ultimately fails to serve the purpose for which it was founded.

B. The Current Bail Bond System Over- Taxes The Community It Pines To Protect

The purpose of the pretrial process is, among other things, to "protect victims, witnesses, and the community from threat, danger, or interference," of alleged criminals.[22] The Illinois Sentencing Policy Advisory Council estimates from Illinois' patterns of recidivism that recidivism will cost Illinois over 16.7 billion in the next 5 years. The average instance of recidivism costs taxpayers $40,987. In jailing those indigent alleged offenders whom are incapable of paying bail, "the expense for taxpayers has been significant – a year's stay in the jail for an inmate with no serious mental or health problems is estimated to cost about $60,000."[23] The Illinois Statutory Court Fee Task Force noted in their recommendations in addressing barriers to access to justice that "the amount of assessments should not impede access to the courts and should be waived, to the extent possible, for indigent litigants and the working poor."[24]

Ultimately, the effect of assessing the indigent fines which they can't afford to pay shifts the burden to Illinois taxpayers, and in some instances, exponentially increases the fiscal burden. When alleged criminals are jailed due to inability to fulfill pre-trial requirements like bail bonds, these alleged criminals are stripped of their liberty and taxpayers are required to bear the fiscal burden. The estimated range for bail bonds for violent offenses spans from $1000 to $250,000.[25] However, even the highest point of this range is only a fraction of the cost to taxpayers should the alleged offender be incapable of satisfying said bail bond. With the Illinois state budget at a current impasse, expenses to the state derivative of the bail bond system are significant. Further, with Illinois ranking as the fifth highest taxed state, any cost to taxpayers is also significant.[26] The current bail bond system has failed to adequately balance these two interests and, ultimately, burdens those it intends to protect.

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[22] National Association of Pretrial Services Agencies (NAPSA), *Standards of Pretrial Release*, 17 (3rd ed. Oct. 2004), https://www.pretrial.org/download/performance-measures/napsa%20standards%202004.pdf.

[23] Steve Schmadeke, *Cook County Cash Bail Under Fire As Discrimination While Poor Inmates Languish In Jail*, CHICAGO TRIBUNE (Nov. 15, 2016 7:16 AM), http://www.chicagotribune.com/news/local/breaking/ct-cook-county-cash-bail-met-20161114-story.html.

[24] *Findings and Recommendations*, *supra* note 20, at 2.

[25] Christine Devitt, et. al., *The Pretrial Process In Cook County: An Analysis of Bond Decision Made in Felony Cases During 1982-'83*, Illinois Criminal Justice Information Authority, 54- 59 (Aug.1987), http://www.icjia.state.il.us/assets/pdf/ResearchReports/Pretrial%20Process%20in%20Cook%20County.pdf.

[26] Catey Hill, *Ten States with The Highest Taxes*, MARKET WATCH (Jan. 24, 2016 8:37 AM), www.marketwatch.com/story/10-states-with-the-highest-taxes-2016-01-22?page=2.

C. Bail Bonds Encourage Otherwise Innocent Individuals To Consider Plea Bargains Regardless Of Guilt Or Innocence For The Sake Of Regaining Freedom

"Defendants often face great pressure to plead out quickly, which may lead them to make life-altering decisions before they come to appreciate the consequences. One way to reduce this pressure would be a cooling-off period for plea bargains authorizing five years' imprisonment or more. … to avoid pressure to plead immediately after first meeting one's defense lawyer."[27] Supreme Court Rule 11 has codified and expanded the *Boykin v. Alabama* advisories and proscribed more advisories; Rule 11 requires warnings and waivers of procedural rights, as a minimal factual basis for pleas. However, these warnings do not account for the pressures applied by high bond amounts.[28]

In addition to monetary consequences, there are qualitative effects that bail bonds have on the criminal trial process. Any bill or financial obligation can be a source of stress and/or pressure for any obligor. In the criminal trial process in Illinois, bail bonds have been noted as a source of angst contributing to alleged criminals' eagerness to accept plea bargains. Arguably, these negative feelings cannot be eliminated without eliminating the debt created by bail bonds altogether. There is no admonishment or warning that could eliminate the feeling of hopelessness one has when incapable of satisfying a debt, especially when such a debt may determine one's freedom.

IV. PROPOSED SOLUTIONS

The Statutory Court Fee Task Force recommends that the "Illinois General Assembly authorize a uniform assessment schedule for criminal and traffic cases that is consistent throughout the state."[29] The Task Force also suggests the Illinois General Assembly and the Supreme Court authorize the waiver or reduction of assessments, but not fines, imposed on criminal defendants living in or near poverty. Sheriff Tom Dart, along similar lines, has suggested that all non-violent and/or victimless offenders be allowed automatic release without a bail bond.[30] Although all of these recommendations are steps in the right direction, I have an alternative approach more in line with the recommendations of Attorney General Loretta Lynch.[31] Sheriff Dart's approach encroaches on successful programs designed for non-violent

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[27] Stephanos Bibas, *Regulating the Plea Bargaining Market from Caceat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1156 (2011).

[28] *Id*. (*citing* Fed. R. Crim. P. 11 and Advisory Committee Note (1974) (*citing* Brady v. United States, 397 U.S. 742, 752-53 (1970); Santobello v. New York, 404 U.S. 257, 260 (1971)). *Compare* Boykin v. Alabama, 395 U.S. 238, 243 (1969) (requiring a formal, substantial, waiver of the privilege against self-incrimination, the right to jury trial, and the right to confront one's accusers upon a defendant's acquiescence to a guilty plea in a state criminal trial), *with* Fed. R. Crim. P. 11(b)(1) (requiring warnings not only about the three rights required by *Boykin* but also requiring additional explanation of the rights to plead not guilty, testify, counsel, and compulsory process, as well as the danger of prosecution for perjury, the existence of any appeal waiver, the various penalties, and the existence of sentencing guidelines).

[29] *Findings and Recommendations*, *supra* note 24, at 36.

[30] *Supra* note 7. /

[31] Ann E. Marimow, *Attorney General Lynch: Treat defendants as citizens, not cash registers*, THE WASHINGTON POST (Nov. 16, 2016), https://www.washingtonpost.com/news/true-crime/wp/2016/11/16/attorney-general-lynch-treat-defendants-as-citizens-not-cash-registers/?utm_term=.6a4138adcdca (Attorney General Lynch is quoted as saying "we stain the sanctity of our laws. And we only tighten the shackles of those struggling to break the chains of poverty." Ultimately, Lynch calls for a recalibration of the nation's justice system including an overhaul of court fees, fines and a money bail system that can lead to a cycle of debt, incarceration and poverty for those who cannot afford to pay.)

offenders in specialty courts such as the Veteran's Court and the Drug Courts. Moreover, the recommendations of the Task Force only address the issue of abused discretion, neglecting concerns regarding financial burdens suffered by taxpayers and indigent defendants. Instead, the ultimate goal should be, as Lynch suggests, to completely de-monetize the bail bond system. I recommend this goal be achieved without robbing judicial fact-finders the opportunity to pass judgment as to the propensity of alleged criminals to (1) flee or (2) re-offend while awaiting trial.

Alternatively, I'd recommend a revision of standards used to determine the amount and conditions of a defendant's bail bond. Those standards should be altered by the Illinois General Assembly so that judicial decision-makers are faced with one question: whether the defendant before them should remain in custody or not. The courts should have additional discretion to assess bail bonds only for repeat and violent offenders. The statutory considerations should be amended to include: indigence, cultural considerations, and judicial waste. A bail bond should become an exception, as opposed to a commonality.