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Of the approximately 443,000 individuals currently incarcerated in county jails who have yet to be convicted of any of their charges, seventy percent are indigent and cannot afford the bail amount set by the judge at their initial bond hearing. Of these 443,000 individuals, 303,000 are awaiting trial for traditionally non-violent offenses. The Illinois General Assembly recently addressed this crisis by enacting the Illinois Bail Reform Act of 2017 with the goal of ensuring that pretrial incarceration is reserved not for the poor, but rather, for the minority of pretrial defendants who are a flight risk or a danger to society. The Act's language reveals good intentions, however, it arguably provides more virtue-signaling platitudes than it does cognizable, solid reforms. This article critically examines the Act by weighing it in the context of the history of bail in the United States, the Act's legislative history and substantive provisions, issues of public safety, mental health, the civil liberties of criminal defendants, and lastly, several critical shortcomings of the Act that must be amended as soon as possible to avoid the possibility of the Act failing to achieve its intended reforms.

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INTRODUCTION

Whether guilty or innocent, an arrest for many crimes in the United States begins a long, arduous process during which the accused is likely to spend at least some amount of time in custody with a requirement to pay a sum of money for his or her freedom pending further proceedings.[2] The requirement of posting cash bail to avoid spending weeks, months, or even years in the custody of the county jail awaiting trial is a staple of the American criminal justice system and the Anglo-Saxon common law system;[3] however, over the last forty years, for an increasing number of criminal defendants, bail is becoming less feasible both legally and economically.[4] Of the approximately 443,000 individuals currently incarcerated in county jails,

2. 725 ILL. COMP. STAT. 5/109-1 (2015); *see e.g.*, Bryce Covert, *America is Waking up to the Injustice of Cash Bail,* NATION (Oct. 19, 2017), https://www.thenation.com/article/america-is-waking-up-to-the-injustice-of-cash-bail/ [https://perma.cc/KN8M-XD7P].

3. *See* Covert, *supra* note 2; Matthew J. Hegreness*, America's Fundamental and Vanishing Right to Bail,* 55 ARIZ. L. REV. 909 (2013). Between 1978 and 1998, 16 states legislatively reduced the availability of bail. *Id.*

4. *Id.*

who have yet to be convicted of any of their charges,[5] seventy percent are indigent and cannot afford the bail amount set by the judge at their initial bond hearing.[6] Of these 443,000 individuals, 303,000 are awaiting trial for traditionally non-violent offenses.[7]

To place the issue of bail reform in a global perspective, the United States has the highest per capita rate of incarceration in the world,[8] and the number of Americans sitting in jail without a conviction is larger than most other countries' entire incarcerated population.[9] Combined with the fact that in 2009, in the seventy-five most populous counties in the United States, fifty-five percent of felony cases took more than three months to adjudicate,[10] thirty-three percent of felony cases took more than six months to adjudicate,[11] and fifteen percent of felony cases took more than a year to adjudicate,[12] hundreds of thousands of Americans are sitting in jail without a conviction, unable to tend to their families, homes, and employment, and with their lives left on pause.[13] While judges in many jurisdictions have discretion to release defendants on "personal recognizance" bonds,[14] which do not require the posting of cash bail for release, such bonds were granted in only fourteen percent of all felony criminal cases in the United States in 2009.[15] Therefore, despite the presumption of innocence that exists in all criminal cases in the United States,[16] the arrest of an indigent defendant for many crimes poses a high risk of incarceration from the arrest until the final judgement.[17]

Of course, the state has an obvious interest in ensuring that (1) defendants released before trial return for proceedings and (2) that our communities

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5. Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2017,* PRISON POL'Y INITIATIVE (Mar. 14, 2017), https://www.prisonpolicy.org/reports/pie2017.html [https://perma.cc/UB6Q-QESZ].

6. *See* Covert, *supra* note 2.

7. *See* Wagner & Rabuy, *supra* note 5.

8. Michelle Yee Hee Lee, *Yes, U.S. Locks People Up at a Higher Rate Than Any Other Country*, WASH. POST (July 7, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/?utm_term=.a99a640757c5 [https://perma.cc/S3NL-LZAP].

9. *See* Wagner & Rabuy, *supra* note 5.

10. Brian A. Reaves, *Felony Defendants in Large Urban Counties*, U.S. DEP'T OF JUST. (Dec. 2013), https://www.bjs.gov/content/pub/pdf/fdluc09.pdf [https://perma.cc/YQF7-YA9Z].

11. *Id.*

12. *Id.*

13. *See* Wagner & Rabuy, *supra* note 5.

14. *See, e.g.*, 18 U.S.C.A. § 3142(a)(1) (West, Westlaw through Pub. L. 115-90).

15. Reaves, *supra* note 10.

16. Coffin v. United States, 156 U.S. 432 (1895).

17. Reaves, *supra* note 10.

are safe from violent or repeat offenders.[18] For example, of all criminal defendants released before trial in 2009, seventeen percent failed to appear for at least one mandatory hearing,[19] and three percent became fugitives.[20] Felony defendants released before trial also have a high rate of violating conditions of release, as twenty-nine percent of felony defendants in 2009 either failed to appear for a hearing, were re-arrested for an unrelated offense, or violated other conditions of release,[21] demonstrating the importance of cash bail as a deterrent to the release of offenders with a history of flight or violence.

Thus, the bail system in the United States involves a clash between the interests of hundreds of thousands of incarcerated, indigent defendants and the interests of the government and the public.[22] In response to the sheer number of pretrial defendants whose incarceration is solely due to their inability to pay, Illinois is attempting to balance these opposing interests through its recent passage of the Bail Reform Act of 2017 (hereafter "the Act").[23] According to Illinois representative Elgie Sims, a House sponsor of the bill approved by Illinois Governor Bruce Rauner on June 9, 2016:[24]

> Our efforts to reform Illinois' broken criminal justice system must focus on protecting victims, providing second chances to individuals who have made mistakes and incapacitating those who are threats to the safety of our communities . . . [b]y reforming our broken bail system, Illinois becomes a national leader in ensuring incapacitation is reserved for those who are threats to public safety, not those who are poor or suffer from mental health or substance abuse challenges.[25]

Sims's statement reflects the need to balance the interests of both the state in preserving the safety and security of society, and criminal defendants in preserving their civil liberties and the presumption of innocence that serves

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18. ROBERT M.A. JOHNSON ET. AL., ABA STANDARDS FOR CRIMINAL JUSTICE 36 (3d ed. 2007), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf [https://perma.cc/EPV6-BMD9].

19. Reaves, *supra* note 10.

20. *Id.*

21. *Id.*

22. *See generally, id.*

23. Bail Reform Act of 2017, S.B. 2034, 100th Gen. Assembly, 12th Legis. Day (Ill. 2017); Kim Geiger, *Rauner Signs Law to Change Rules for Paying Cash to Get Out of Jail*, CHI. TRIB. (June 9, 2017), http://www.chicagotribune.com/news/local/politics/ct-bruce-rauner-bail-bill-met-0610-20170609-story.html [https://perma.cc/LZ6J-HUFD].

24. *Illinois Governor Signs Bail Relief Legislation in Chicago,* WICS NEWS CHANNEL 20 (June 9, 2017), http://newschannel20.com/news/local/gov-rauner-signs-criminal-justice-reform-bill [https://perma.cc/2AXY-U2X2].

25. *Id.*

as a foundation of the Anglo-Saxon system of law.[26] Like any other legislative act, however, bail reform in Illinois was not simply a proclamation brought into existence by a single sponsor statement, but rather, a long, arduous culmination of legislative debate, rewriting and amendments, and the forging of bipartisan support and compromise.[27] In addition, the implementation and future success of the Act will rely not merely on the words of legislators, but rather, on the strength of its substantive provisions, and the efforts of the courts, pretrial services divisions, and lawyers alike.

The purpose of this article is to critically examine the efforts of Illinois in its recent attempt to reform its bail system through the Act. By weighing this attempt in the context of the history of bail in the United States in Section II, the legislative history of the Act in Section III, the substantive provisions of the Act in Section IV, and issues of public safety, mental health, and the preservation of the civil liberties of defendants in Section V, this article will provide insight into the strengths and weaknesses of the Act as well as its likelihood of addressing the problems it seeks to remedy through reform. Lastly, Section VI addresses and offers solutions to several critical shortcomings of the Act which must be amended as soon as possible to avoid the possibility of the Act failing to achieve its intended reforms. Overall, this article seeks to instill in the reader an understanding, interest, and willingness to seek and demand change within the system of bail not simply in the state of Illinois, but for the whole country, in order to preserve and further both the civil liberties of the accused as well as safety of society.

I. WHY REFORM WAS (AND STILL IS) NEEDED

A. The Origin of the Anglo-Saxon Bail System

Prior to analyzing the substantive provisions of the Act, and comparing its substance with the intent of criminal justice reformers in the Illinois General Assembly, it is first necessary to provide context to the issue of bail by briefly examining its history in the Anglo-Saxon common law system and the United States. Originating in medieval England, a bail bond was typically determined as part of an individualized assessment of what the arrestee could pay in order to incentivize the arrestee to return for further legal proceedings.[28] For example, both before and after the Norman conquest of 1066, bail was available as an alternative to pretrial incarceration for all crimes except murder, and thus in the vast majority of criminal cases, arrestees would post

26. *See id.*; Reaves, *supra* note 10; *see also* text accompanying footnote 22.
27. Geiger, *supra* note 23.
28. *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966 (1961).

an amount proportional to their ability to pay and would be released sometime before trial.[29] Gradually, over the next several hundred years, England restricted the right of bail. Pursuant to the Statute of Westminster of 1275, bail was not an absolute and enumerated right of arrestees,[30] and was only available to arrestees charged with non-capital offenses "for which a Man shall not lo[s]e Life or Member[.]" [31]Judges had discretionary authority to first decide if bail would be granted, and second to set the amount of bail not only by what the arrestee could pay, but also by (1) the severity of the alleged offense, (2) the arrestee's prior criminal history, and (3) the weight and reliability of the evidence produced against the arrestee.[32] Thus, under the Statute, the decision to grant or deny bail was almost entirely within the discretion of the judge.[33]

In 1679, England began reforming its bail system by first adopting the Habeas Corpus Act guaranteeing that all arrestees could challenge the legality of their detention to ensure that they received a timely bail hearing.[34] Parliament adopted the English Bill of Rights ten years later prohibiting "excessive bail."[35] These reforms proved crucially important in preserving the liberties of pretrial arrestees, because as the English system of bail gradually strengthened the rights of arrestees, the English criminal code gradually expanded its list of capital offenses, its number of prosecutable crimes, and its severities of punishment.[36] With common offenses such as burglary, larceny, and robbery now being listed as capital offenses, and therefore offenses for which bail was no longer available, pretrial detention in England became significantly more common during the Colonial era, even with the advent of these reforms.[37]

B. A Brave "New World" for Bail

With each wave of English settlers arriving in the Thirteen Colonies, the English bail system was adopted in whole or in part by each of the colonies prior to the American Revolution and the subsequent ratification of the

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29. William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33 (1977).

30. *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966, 967 (1961).

31. June Carbone*, Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail,* 34 SYRACUSE L. REV. 517, 525 (1983).

32. *Id.* at 528.

33. *See Bail: An Ancient Practice Reexamined*, *supra* note 28, at 967.

34. *See* Carbone, *supra* note 31, at 528; *see also* Habeas Corpus Act of 1679, 31 Car. 2 c. 2. (Eng.).

35. Bill of Rights, 1 W. & M., c. 2 (1688).

36. *Id.* at 529.

37. *Id.*

United States Constitution.[38] In fact, the early colonies relied heavily on English criminal law in their colonial charters.[39] On the other hand, because the colonies had drastically lower rates of crime than England, the colonies relied far less frequently on pretrial detention as a means of guaranteeing that arrestees attend trial.[40] In direct contrast to England, the colonies began curtailing the severities of their criminal punishments, while at the same time increasing pretrial protections for arrestees.[41]

Massachusetts, and later Pennsylvania, were the first colonies to break with the English bail tradition by guaranteeing bail in all cases except those for capital offenses and by removing burglary, larceny, and robbery from the list of capital offenses, thus allowing arrestees accused of such charges at least a chance before the judge at obtaining pretrial release.[42] In particular, the Massachusetts Body of Liberties of 1641, which the Eighth Amendment to the United States Constitution mirrors in part,[43] states:

> No mans person shall be restrained or imprisoned by any Authority whatsoever, before the law hath sentenced him thereto, if he can put in sufficient securitie, bayle or mainprise, for his appearance, and good behaviour in the meane time, unlesse it be in Crimes Capital, and Contempts in open Court, and in such cases where some expresse act of Court doth allow it.[44]

Soon after declaring independence in 1776, the other colonies relied heavily on the bail codes of Massachusetts and Pennsylvania in drafting their own constitutions.[45] With the eventual ratification of the United States Constitution and the adoption of the Bill of Rights, the prohibition against "excessive bail" already adopted by many of the former colonies was applied to the federal government.[46] While later applied to all the states as a constitutional guarantee through the Supreme Court interpretations of substantive due process,[47] an approximate dollar amount for what constitutes "excessive

38. *See Bail: An Ancient Practice Reexamined, supra* note 28, at 967.
39. *See* Carbone, *supra* note 31, at 529.
40. TOM HEAD & DAVID B. WALCOTT, CRIME AND PUNISHMENT IN AMERICA 9 (2010).
41. *Id.* at 8-10.
42. *Id.*
43. *See* U.S. CONST. amend. VIII.
44. WILLIAM H. WHITMORE, A BIOGRAPHICAL SKETCH OF THE LAWS OF THE MASSACHUSETTS COLONY FROM 1630 TO 1686, Body of Liberties 1641, Preamble 18, http://www.mass.gov/anf/docs/lib/body-of-liberties-1641.pdf [https://perma.cc/9AUN-8LZ5].
45. *See* Carbone, *supra* note 31, at 532.
46. U.S. CONST. amend. VIII.
47. Schilb v. Kuebel, 404 U.S. 357 (1971).

bail" for different criminal charges has not been quantified by the Court;[48] but rather, has been left to the discretion of the judge to employ a reasonableness test in setting the amount of bail for each defendant.[49] Also absent in American constitutional law is an absolute right to bail in both capital and non-capital cases, as the Court has left this issue in the hands of both the federal and state legislatures.[50]

In light of the broad discretionary powers of judges, the amounts of bail for the same criminal charges under similar circumstances have varied within the same jurisdiction and between different state and federal jurisdictions, making the initial amount of bail unpredictable.[51] State legislatures have attempted to define and limit the factors upon which judges may determine the amount of bail.[52] Numerous cross-jurisdictional studies show that the most common factors are (1) the nature and perceived seriousness of the charges, (2) the arrestee's previous criminal convictions, and (3) a police or prosecutorial recommendation to either grant or deny bail,[53] as well as non-legal characteristics of (1) the strength of the arrestee's community ties, (2) the arrestee's gender (males denied bail more frequently than females), and (3) the arrestee's ethnicity (demographic minorities denied bail more frequently than demographic majorities).[54]

Post-ratification of the Bill of Rights and the adoption of differing bail codes across the former colonies, the societal effects of such policies were evident as early as 1831, when a study conducted by the Prison Discipline Society found that the economic status of arrestees determined the likelihood of their release.[55] The inability of many indigent arrestees to find a third party "surety" to post their bail resulted in an impoverished class of criminal defendants regularly being incarcerated for the full duration of their cases in contrast to wealthy arrestees who rarely awaited trial in a jail cell.[56]

C. From the Rise of the Bail Bondsmen to the Present Day

The lack of third party sureties to post bail for arrestees ushered in the industry of the for-profit American bail bondsmen, who would agree to post the arrestee's bail in exchange for a fee from the arrestee and a promise by

48. *See* Stack v. Boyle, 342 U.S. 1, 4–6 (1951).
49. *Id.*
50. *See* Carlson v. Landon, 342 U.S. 1 (1951).
51. 2 ENCYCLOPEDIA OF PSYCHOLOGY AND LAW 38 (Brian L. Cutler ed., 2008).
52. 2018 UNIFORM BAIL SCHEDULE (FELONY AND MISDEMEANOR), SUPER. CT. OF CAL. CTY. OF ORANGE (2018), https://www.occourts.org/directory/criminal/felonybailsched.pdf [https://perma.cc/3GLP-YHV3].
53. 2 ENCYCLOPEDIA OF PSYCHOLOGY AND LAW 38 (Brian L. Cutler ed., 2008).
54. *Id.*
55. *See* Carbone, *supra* note 31, at 532.
56. *Id.*

the bondsmen to the court to ensure the return of the arrestee for further proceedings and trial.[57] As state legislatures quickly adopted fee regulations limiting the amount bondsmen could charge arrestees, insurance companies began entering this new market and thus limited the risk of the bondsmen's risk of forfeiting the posted bond should the arrestee become a fugitive.[58] Thus, arrestees who cannot post the amount of bail need not only be concerned with the amount set by the court, but also the fee charged by the bondsmen, who in turn pay premiums to these insurance companies.[59]

As of 2017, the bail bondsmen industry posts or insures payment of approximately fourteen billion dollars in bail bonds each year for a total yearly profit of two billion dollars. Four states: Illinois, Kentucky, Oregon, and Wisconsin, have completely banned the use of private bail bondsmen.[60] Notably, the United States and the Philippines are the only countries in the world that rely on such a system at all.[61] Overall, pretrial incarceration is serious business in this country, and despite the guarantees of the Eighth Amendment and the reforms of many states, as stated above, 303,000 indigent arrestees currently await trial in a jail cell for traditionally nonviolent charges.[62] In response to these issues, Illinois lawmakers began seeking comprehensive bail reform.

II. LEGISLATIVE HISTORY OF THE ACT

After already banning the use of private bail bondsmen and requiring defendants to deposit only ten percent of the total amount of bond for pretrial release,[63] Illinois continued its progressive efforts through the introduction of the Act to the General Assembly. The Act followed a 2015 study conducted by the Cook County Sheriff's Office, which revealed that over 1,000 Cook County jail inmates spent more time in jail awaiting trial than their eventual sentences that year.[64] Cook County State's Attorney Kim Foxx agreed with the conclusion of Cook County Sheriff Tom Dart that the process of bail in Illinois was systematically "unfair to poor people."[65]

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57. *See Bail: An Ancient Practice Reexamined*, *supra* note 28, at 968.

58. Gillian B. White, *Who Really Makes Money Off of Bail Bonds?*, ATLANTIC (May 12, 2017), https://www.theatlantic.com/business/archive/2017/05/bail-bonds/526542/ [https://perma.cc/W39W-BQ5S].

59. *Id.*

60. *The Public Cost of Private Bail: A Proposal to Ban Bail Bonds in New York*, N.Y. CITY COMPTROLLER (January 17, 2018), https://comptroller.nyc.gov/reports/the-public-cost-of-private-bail-a-proposal-to-ban-bail-bonds-in-nyc/ [https://perma.cc/ES2X-MVPB].

61. *Id.*

62. *See* Wagner & Rabuy, *supra* note 5.

63. 725 ILL. COMP. STAT. 5/110-7 (2016).

64. *See* Geiger, *supra* note 23.

65. *Id.*

The General Assembly acted, and Illinois Senator Ira Silverstein introduced S.B. 2034 on February 10, 2017.[66] Entitled the "Bail Reform Act of 2017,"[67] S.B. 2034 easily passed through the Criminal Law Committee with no opposition and with a recommendation to pass the bill.[68] Subsequently, and in a rare occurrence of bipartisanship in the Illinois General Assembly, the Act unanimously passed the Senate. Passing the Illinois House of Representatives proved to be a more arduous task; however, as Representative Sims demanded two amendments,[69] the first of which would implement additional protections for all criminal defendants,[70] and the second would ensure that arrestees charged with certain violent and more serious offenses would not be entitled to the same relief as those charged with nonviolent or misdemeanor offenses.[71] Thus, in light of Sims's goal of reforming the Illinois criminal justice system to benefit the poor, the mentally-ill, and those with substance abuse problems,[72] his simultaneous support for both civil liberties and public safety are seemingly a compromise to further the likelihood of passage with a Republican governor ultimately having veto power.[73] With the adoption of both amendments on May 30, 2017,[74] S.B. 2034 was brought to a vote in the Illinois House, and subsequently passed with 80 "yeas" and 27 "nays."[75] The next day, the Senate unanimously approved Sims's amendments in their entirety.[76] On June 9, 2017, Governor Rauner signed and approved the Bail Reform Act of 2017.[77]

III. SUBSTANTIVE PROVISIONS OF THE ACT

The Act amends the existing Illinois Bail Code, adding several key provisions establishing protections for criminal defendants facing incarceration pending adjudication of their cases.[78] Prior to the passage of the Act, Illinois

66. S. Deb., 100th Gen. Assemb., 12th Legis. Day, at 12 (Ill. Feb. 10, 2017).

67. S.B. 2034, 100th Gen. Assemb., 12th Legis. Day (Ill. 2017).

68. *Bail Reform Act of 2017: Hearing on S.B. 2034 Before the Criminal Law Committee*, 100th Leg., 19th Sess. (Ill. 2017).

69. H. 100-57, 57th Leg. Day, at 56 (Ill. 2017).

70. *See* 725 ILL. COMP. STAT. 5/109-1(a-5) (2017); 725 ILL. COMP. STAT. 5/110-14 (2017); 725 ILL. COMP. STAT. 5/102-7.1-7.2 (2017); 725 ILL. COMP. STAT. 5/110-6.4 (2017); 725 ILL. COMP. STAT. 5/110-5(a-5) (2017).

71. 725 ILL. COMP. STAT. 5/102-7.1 (2017).

72. *Illinois Governor Signs Bail Relief Legislation in Chicago,* WICS NEWS CHANNEL 20 (June 9, 2017), http://newschannel20.com/news/local/gov-rauner-signs-criminal-justice-reform-bill [https://perma.cc/C6MC-YQ6M].

73. *See* Geiger, *supra* note 23. Illinois Governor Bruce Rauner is a Republican. *Id.*

74. H. Deb. 100th Gen. Assemb., 58th Leg. Day, at 214-15 (Ill. May 30, 2017).

75. *Id.*

76. S. 100-103, 58th Sess. at 1 (Ill. 2017).

77. *See* Geiger, *supra* note 23.

78. *See* 725 ILL. COMP. STAT. 5/102-7.1-7.2; 725 ILL. COMP. STAT. 5/110-6.4 (2017).

already mandated a presumption in all initial bond hearings that "any conditions of release imposed shall be nonmonetary in nature,"[79] and the court shall impose the "least restrictive conditions or combination of conditions necessary to reasonably assure the appearance of the defendant for further court proceedings."[80] The Act leaves this section intact as well as the preexisting list of nonmonetary conditions of release including, "but not limited to, electronic home monitoring, curfews, drug counseling, stay-away orders, and in-person reporting,"[81] and the mandate that the court shall consider the defendant's "socioeconomic circumstance" when setting these nonmonetary conditions or imposing monetary bail.[82]

A. Amendment I: Giving a Break to Nonviolent Offenders

For its first amendment to the Illinois bail code, the Act defines the post-arrest and pretrial bail remedies for criminal defendants based upon the seriousness of their charges.[83] First, the Act establishes "Category A" and "Category B" offenses, creating two distinct classes of criminal defendants awaiting trial.[84] While both classes of defendants are entitled to the presumption against monetary conditions, only indigent defendants charged with Class B offenses are entitled to a rehearing for release from custody or an alteration to the amount or conditions of bail set at their initial bond hearing.[85] The indigent defendant must be brought before the court at either the next available court date or within seven calendar days from the date of the initial bond hearing, whichever is earlier.[86] An additional advantage for Category B defendants is that for every day they are incarcerated, thirty dollars shall be deducted from the amount of bail set at their initial bond hearing.[87] As for all defendants charged with Category A offenses, the court "may" reconsider release or the conditions of release for "any other person whose inability to post monetary bail is the sole reason for continued incarceration, including a person in custody for a Category A offense."[88] Therefore, while defendants charged with Category A offenses are not necessarily entitled to the speedy rehearing guaranteed to Class B defendants, a hearing on a motion to reduce

79. 725 ILL. COMP. STAT. 5/110-5(a-5) (2017).
80. *Id.*
81. *Id.*
82. *Id.*
83. 725 ILL. COMP. STAT. 5/102-7.1-2 (2017).
84. *See id.*
85. 725 ILL. COMP. STAT. 5/110-6(a-5) (2017).
86. *Id.*
87. 725 ILL. COMP. STAT. 5/110-14 (2017).
88. 725 ILL. COMP. STAT. 5/110-6(a-5) (2017).

bond is still an available form of redress as it was prior to the adoption of the Act.[89]

Category A offenses, which are the more serious of the two categories, include first-degree murder, all Class X felonies (non-probational, six to thirty years in prison),[90] Class 1 felonies (probational, four to fifteen years in prison),[91] Class 2 felonies (probational, three to seven years in prison),[92] and a slew of specifically enumerated crimes separate from these felony classes, including fleeing or attempting to elude a police officer (Class A misdemeanor),[93] a second or subsequent conviction of driving under the influence (Class A misdemeanor),[94] aggravated driving under the influence (Class 4 felony, probational, one to three years in prison),[95] failure to report a motor vehicle accident causing personal injury or death (Class 4 felony),[96] involuntary manslaughter (Class 3 felony, probational, two to five years in prison),[97] child abduction (Class 4 felony),[98] all sexual crimes involving minors with lesser punishments than Class 2 sentencing,[99] violations of the Sex Offender Registry Act (sentencing varies)[100] aggravated assault (sentencing varies per case facts),[101] virtually all forms of battery and forms of physical coercion or intimidation (sentencing varies),[102] numerous firearms and deadly weapons offenses with lesser punishments than Class 2 sentencing,[103] false personification (sentencing varies)[104] and dogfighting (Class 4 felony).[105]

In contrast to Category A, Category B encompasses far fewer criminal offenses, and rather than enumerating specific criminal offenses, it instead operates as a catch-all provision for any "business offense, petty offense, Class C misdemeanor, Class B misdemeanor, Class 3 felony, or Class 4 felony, which is not specified in Category A."[106] Not specifically enumerated in

89. *See id.*
90. 730 ILL. COMP. STAT. 5/5-4.5-25 (2017).
91. 730 ILL. COMP. STAT. 5/5-4.5-30 (2017).
92. 730 ILL. COMP. STAT. 5/5-4.5-35 (2017).
93. 625 ILL. COMP. STAT. 5/11-204 (2004).
94. 625 ILL. COMP. STAT. 5/11-501 (2014).
95. 625 ILL. COMP. STAT. 5/11-501(d) (2014).
96. 625 ILL. COMP. STAT. 5/11-401 (2016).
97. 720 ILL. COMP. STAT. 5/9-3 (2012).
98. 720 ILL. COMP. STAT. 5/10-5 (2012).
99. 720 ILL. COMP. STAT. 5/11 (2012).
100. 730 ILL. COMP. STAT. 150/10 (2015).
101. 720 ILL. COMP. STAT. 5/12-2 (2012).
102. 720 ILL. COMP. STAT. 5/12-3 (2012).
103. 720 ILL. COMP. STAT. 5/24 (2012).
104. 720 ILL. COMP. STAT. 5/17-2 (2012).
105. 720 ILL. COMP. STAT. 5/48-1 (2012); 725 ILL. COMP. STAT. 5/102-7.1 (2012).
106. 725 ILL. COMP. STAT. 5/102-7.2 (2017).

either category are drug-related offenses, which accounted for 104,255 arrests in Illinois in 2014,[107] and range widely from Class X sentencing for manufacture and delivery or trafficking of large amounts of controlled substances,[108] to Class A misdemeanors for possession of cannabis-related paraphernalia,[109] to a civil citation and fine for possession of less than ten grams of cannabis.[110] Therefore, under the Act, the question of whether a defendant will be entitled to a speedy rehearing within seven calendar days requires a fact-intensive analysis into the charge itself, the facts surrounding it, and the possible sentencing upon conviction.[111]

B. Amendment II: A Right to Counsel in all Initial Bond Hearings

Secondly, the Act guarantees the right to counsel for all criminal defendants in Illinois at their initial bond hearings.[112] While all criminal defendants are entitled to counsel in nearly all stages of a criminal case,[113] the right to counsel in initial bond hearings has never been incorporated through the Fourteenth Amendment as a guaranteed right of substantive due process.[114] While Cook County, by far the most populous in Illinois,[115] already established a practice of providing a public defender to all criminal defendants at their initial bond hearing along with many other counties,[116] the Act now guarantees this right statewide.[117]

C. Amendment III: Authorization of a "Risk-Assessment Tool"

Lastly, the Act authorizes the Illinois Supreme Court to implement a statewide risk-assessment tool to be utilized in assisting the trial courts in setting the amount of bail for each criminal defendant[118] pursuant to the primary objectives of the Bail Code in (1) ensuring that defendants show up for

107. *Index Crime & Crime Rate Data*, ILL. ST. POLICE (2014), http://www.isp.state.il.us/docs/cii/cii14/cii14_sectioni_pg11_to_242.pdf [https://perma.cc/WEA8-8G56].

108. 720 ILL. COMP. STAT. 570/401(a) (2016).

109. 720 ILL. COMP. STAT. 600/3.5(a) (2016).

110. 720 ILL. COMP. STAT. 550/4(a) (2016).

111. *See* 725 ILL. COMP. STAT. 5/102-7.1-7.2 (2017).

112. 725 ILL. COMP. STAT. 5/109-1(a-5) (2017).

113. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

114. Rothgery v. Gillespie Cty, Tex. 554 U.S. 191 (2008).

115. *Illinois Counties by Population,* ILL. DEMOGRAPHICS (2017), https://www.illinois-demographics.com/counties_by_population [https://perma.cc/765Y-N2RD].

116. Sharlyn Grace, *Illinois Takes Small First Step Toward Bail Reform,* CHI. APPLESEED FUND FOR JUST. (June 9, 2017), http://www.chicagoappleseed.org/illinois-takes-small-first-step-toward-bail-reform/ [https://perma.cc/M2XC-X77Q].

117. 725 ILL. COMP. STAT. 5/109-1(a-5) (2017).

118. 725 ILL. COMP. STAT. 5/110-6.4 (2017).

further proceedings and trial, and (2) determining whether defendants pose a threat to others and the community.[119] The Act defines a risk-assessment tool as "an empirically validated, evidence-based screening instrument that reduced instances of a defendant's failure to appear for future court proceedings or prevents future criminal activity."[120] In addition, this section mandates that any risk-assessment tool adopted must "not discriminate on the basis of race, gender, educational level, socio-economic status, or neighborhood."[121]

III. WHERE THE ACT IS MOST LIKELY TO SUCCEED

A. One Risk-Assessment Tool is Already Showing Promise in Illinois

While no law is perfect in its language or execution, there is reason for optimism in the three amendments of the Act, especially in its authorization of a statewide risk-assessment tool to be utilized in all bail cases.[122] At first glance, this statutory language of the risk-assessment section of the Act is vague. However, the Illinois Supreme Court will find guidance in adopting such a system if it so chooses from an ongoing trial run of an existing bail risk-assessment tool known as the Public Safety Assessment (PSA) that has been conducted by pretrial services in Cook, Mclean, and Kane counties since 2014.[123]

The PSA was created by the Laura and John Arnold Foundation after analyzing 1.5 million bail cases in the United States across over 300 jurisdictions.[124] The PSA first involves researching a defendant's history and interviewing each defendant through pretrial services to identify the presence or absence of nine key factors.[125] These factors are (1) age at time of current arrest (younger defendants are considered higher risk),[126] (2) whether the current offense is violent, (3) other pending charges at time of arrest, (4) prior misdemeanor convictions, (5) prior felony convictions, (6) prior violent convictions, (7) any failures to appear for court in the last two years, (8) any

119. *Id.*
120. *Id.*
121. *Id.*
122. 725 ILL. COMP. STAT. 5/110-6.4 (2017).
123. Sara Anderson, *Illinois Supreme Court Adopts Statewide Policy Statement for Pretrial Services,* ILL. ST. B. ASS'N. (May 1, 2017), https://www.isba.org/iln/2017/05/01/illinois-supreme-court-adopts-statewide-policy-statement-pretrial-services [https://perma.cc/8LE4-RX8S].
124. *Id.*
125. *Id.*
126. *See id.*

failures to appear that are older than two years, and (9) any criminal sentences already being served by the defendant at the time of the current arrest.[127]

Then, each factor is assigned points given its presence, severity, and/or frequency, and a final "score" is tallied for three different risk categories, which are (1) risk of failing to appear (FTA), (2) risk of new criminal activity (NCA), and (3) risk of new violent criminal activity (NVCA).[128] If a defendant's score is high enough in any of the three categories, pretrial services will "flag" the final risk-assessment report as a recommendation against release or for the imposition of more strict conditions of bond.[129] For example, if a defendant has three or more prior violent convictions, and his current arrest was also for a violent offense, the defendant will receive an NVCA score of four out of six (one point for each violent conviction, one point for current violent offense), resulting in pretrial services flagging his report.[130] Ultimately, after receiving the report, the state's attorney still has the discretion to make its own recommendations, and the judge will have the discretion to set conditions of release, grant monetary bail, or deny bail outright.[131]

After two full years of conducting a trial run, the PSA succeeded in decreasing the pretrial population of Cook County Jail, by far the largest in Illinois.[132] From July 2014 to August 2016, the jail population decreased from 9,453 to 8,112 inmates, a reduction of 1,341 inmates.[133] In addition, by August 2016, 96.2 percent of all Cook County Jail inmates eligible for a PSA assessment had completed one with pretrial services.[134] While the Illinois Supreme Court has not yet decided to mandate the adoption of the PSA statewide, it did issue a pretrial services policy statement on April 28, 2017, where it acknowledged the success of the trial run of the PSA and affirmed that "[t]he power of an evidence-based risk instrument, combined with manageable and reasonable post-release conditions designed to mitigate offender risk, form the crucial foundation of a successful pretrial system of justice."[135] Thus, there is ample reason for optimism that the Act will succeed in its goal of ensuring that bail is not determined by one's socioeconomic status, but

127. *Public Safety Assessment: Risk Factors and Formula*, LAURA & JOHN ARNOLD FOUND. (2016), http://www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf [https://perma.cc/JDZ8-YXSJ].

128. *Id.*

129. *Id.*

130. *See id.*

131. *Public Safety Assessment: Risk Factors and Formula*, *supra* note 127.

132. Anderson, *supra* note 123.

133. *Id.*

134. *Id.*

135. Chris Bonjean, *Illinois Supreme Court Adopts Statewide Policy Statement for Pretrial Services*, ILL. COURTS 1, 2 (Apr. 28, 2017), http://www.illinoiscourts.gov/media/PressRel/2017/042817.pdf

rather, by one's risk to public safety and the community, through the use of narrow and unbiased risk-assessment tools such as the PSA.

On the other hand, the Act merely authorizes, and does not mandate, that the Illinois Supreme Court adopt a risk-assessment tool.[136] Even if the General Assembly added language binding the Supreme Court to adopt such a tool, a separation of powers dispute would immediately arise, as the Illinois Supreme Court has explicit supervisory authority over all lower courts in the state ,[137] which is not limited by any rules or means for its exercise.[138] Therefore, despite being empirically proven to reduce the populations of county jails across the state,[139] the adoption of the PSA will have to wait for Supreme Court authorization to mandate that it take effect statewide.[140]

B. The Act Will Provide Relief to Thousands of Arrestees Each Year.[141]

The Act's protections under Category B for defendants charged with traditionally nonviolent and low-level offenses will provide relief in a substantial portion of criminal cases.[142] In 2011 alone, 262,816 misdemeanor cases were filed in the circuit courts of Illinois,[143] including 51,463 under the Cannabis Control Act,[144] and 22,466 under the Drug Paraphernalia Act in 2014.[145] Even where bond is set above an amount a Category B arrestee is able to pay, the mandatory bond review within seven calendar days is likely to process eligible arrestees out of the county jails faster, and more efficiently.[146] With 284,000 people booked into Illinois county jails in 2014,[147] the Act may relieve the taxpayer burden imposed by pretrial incarceration.[148]

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136. *See*, 725 ILL. COMP. STAT. 5/110-6.4 (2018).
137. ILL. CONST. art. IV, § 16.
138. *E.g.*, McDunn v. Williams, 620 N.E.2d 385 (Ill. 1993).
139. *See*, Anderson, *supra* note 123.
140. *See, e.g.*, *McDunn*, 620 N.E.2d at 392.
141. *See infra* notes 142-48.
142. *See supra* note 107.
143. Michael P. Chomiak, *Misdemeanor Statistics*, CHOMIAK L. (July 9, 2014), https://www.chomiaklaw.com/misdemeanor-statistics/.
144. *See Index Crime & Crime Rate Data*, *supra* note 107.
145. *See id.*
146. *See* 725 ILL. COMP. STAT. 5/110-6(a-5) (2017).
147. Bryant Jackson-Green, *Illinois Jails Incarcerate Many People Who Don't Need to be There in the First Place*, ILL. POL'Y (Dec. 11, 2015), https://www.illinoispolicy.org/illinois-jails-incarcerate-many-people-who-dont-need-to-be-there-in-the-first-place/.
148. *See id.*

IV. WHERE THE ACT IS MOST LIKELY TO FAIL

A. "Non-Monetary Conditions" are "Monetary" in Practice.

The prefix "non" is defined as not, other than, reverse of, or absence of.[149] Therefore, "non-monetary" would logically follow as not monetary, and a condition that is not monetary would be a condition other than money. In the Illinois bail system, however, "non-monetary conditions" can cost the defendant money, a practice the Act does not reform.[150] Thus, the Act's greatest weakness lies not in its reforms, but rather, its lack thereof. Left unchanged by the Act is a provision in the Bail Code in direct conflict with the presumption that all conditions of bond shall be non-monetary in nature.[151] For defendants charged with violating an order of protection, domestic battery, kidnapping, unlawful restraint, stalking, cyberstalking, harassment by telephone, harassment through electronic communications, or an attempt to commit first degree murder committed against an intimate partner, the judge, at his or her discretion, may order the defendant to (1) undergo a risk-assessment separate from the risk-assessment tool authorized by the Act,[152] and (2) be placed on electronic GPS surveillance as a mandatory condition of pretrial release, and the monetary costs of both the assessment and surveillance "*shall be paid by the defendant, or on behalf of, the defendant.*"[153] Therefore, by leaving this provision unchanged, the Act not only carves out a slew of offenses to which the presumption of nonmonetary conditions does not apply,[154] but it also designates offenses that would have been classified as Category B offenses entitled to the greater defendant protections of the Act.[155] While the majority, if not the entirety, of these enumerated offenses are traditionally violent in nature,[156] and arguably demand stiffer conditions of pretrial release, requiring defendants to pay for the costs of their "non-monetary" conditions of bond will likely result in the same issues that prompted bail reform in the first place, as illustrated below by the tragic story of one Illinois man subjected to the electronic surveillance provision.

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149. *Non*, MERRIAM-WEBSTER ONLINE, https://www.merriam-webster.com/dictionary/non- (last visited May 5, 2018).

150. 725 ILL. COMP. STAT. 5/110-5(f) (2017).

151. *See* 725 ILL. COMP. STAT. 5/110-5(a-5) (2017). *Contra* 725 ILL. COMP. STAT. 5/110-5(f) (2017).

152. 725 ILL. COMP. STAT. 5/110-6.4 (2017).

153. 725 ILL. COMP. STAT. 5/110-5(f) (2017) (emphasis added).

154. *Id.*

155. *See* 725 ILL. COMP. STAT. 5/102-7.2 (2017). For example, a first-time violation of a civil order of protection is a Class A misdemeanor pursuant to 720 ILL. COMP. STAT. 5/12-3.4 (2017).

156. *See* enumerated Illinois criminal offenses, *supra* at notes 90-110.

At the age of forty-six, Brian McPherson, a long-time resident of Bloomington, Illinois, had never been arrested, charged with a felony, or convicted of any crimes other than minor traffic citations for moving and auto insurance violations.[157] On October 19, 2013, however, McPherson's relatively clean criminal record was shattered when he was arrested and charged first with disorderly conduct, and later with felony counts of stalking and a violation of a civil order of protection that had been previously entered against him by his ex-wife, despite achieving a mutual reconciliation with her earlier that year.[158] Two days later, McPherson was brought before a circuit court judge of McLean County, Illinois, who set his bail at $30,000.[159] As a federal employee, McPherson risked losing his livelihood and sole means of paying his court-mandated child support if he did not bail out of jail immediately.[160] All Illinois criminal defendants, regardless of their charges, are required to post ten percent of the bail amount set by their judge in order to be released pending trial, a provision left unchanged by the Act.[161] Thus, McPherson was required to post $2,787.46 to secure his release,[162] which he posted promptly within four days of his arrest, as it was his only choice to avoid losing his job for failing to report to his job the following week.[163]

McPherson's woes with the Illinois bail system were just beginning, however, as the judge mandated as a condition of his bond, that he wear a GPS monitoring bracelet at all times for the duration of his case, and the judge also ordered McPherson to pay monthly maintenance costs of $420.".[164] Over the next three and a half years, McPherson litigated an arduous criminal case in which he saw delay after delay and an the imposition of an additional felony cyberstalking charge for a Facebook post that was made

157. *Case Numbers For Brian Douglas McPherson*, MCLEAN CTY. PUB. ACCESS SYS., http://webapp.mcleancountyil.gov/webapps/PublicAccess/PubAC_SearchCriminal.aspx?AspxAutoDetectCookieSupport=1 (select "Search Criminal/Traffic Records" and enter defendant's first and last name into search bar).

158. *Id.*

159. *Case No. 2013CF001437*, *2013CF001613, 2013CM002449,* MCLEAN CTY. PUB. ACCESS SYS., http://webapp.mcleancountyil.gov/webapps/PublicAccess/PubAC_SearchCriminal.aspx?AspxAutoDetectCookieSupport=1 (select "Search Criminal/Traffic Records", search under defendant's first and last name, and browse by case number).

160. Interview with Brian McPherson in Bloomington, Ill. (Oct. 27, 2017).

161. 725 ILL. COMP. STAT. 5/110-7 (2016).

162. *Case No. 2013CF001437*, *2013CF001613, 2013CM002449,* MCLEAN CTY. PUB. ACCESS SYS., http://webapp.mcleancountyil.gov/webapps/PublicAccess/PubAC_SearchCriminal.aspx?AspxAutoDetectCookieSupport=1 (select "Search Criminal/Traffic Records", search under defendant's first and last name, and browse by case number).

163. Interview with Brian McPherson in Bloomington, Ill. (Oct. 27, 2017).

164. Interview with Brian McPherson in Bloomington, Ill. (Oct. 27, 2017).

from a profile that bore neither his name nor IP address two years after initial charges were filed.[165] When his three felony cases finally went to trial, the judge was suspended for misconduct halfway through, all the while for which McPherson was paying his private criminal defense attorney an additional $850 per day.[166] As McPherson's case was stymied yet again with no retrial in sight, McPherson had already paid the county approximately $19,000 in bail and GPS monitoring fees, and he would have to pay his defense lawyer thousands more to finish trial once the judge returned from his suspension by the Judicial Inquiry Board.[167] Destitute, dejected, and living in his father's basement, McPherson was out of money, and he subsequently made the terribly difficult decision to plead guilty to all charges.[168] Although McPherson was not sentenced to jail, and has since made a financial and emotional recovery, he is worried that more defendants will suffer similar hardships unless reform is adopted.[169]

Electronic surveillance through GPS monitoring as a condition of bond was already practiced in many Illinois counties prior to the passage of the Act.[170] However, a reasonable inference from the provisions of the Act in listing GPS monitoring as one of the enumerated "nonmonetary" conditions of bond,[171] combined with the mandated presumption that all conditions be "nonmonetary," is that it will be used more frequently across the state.[172] GPS

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165. *Case No. 2015CF000431,* MCLEAN CTY. PUB. ACCESS SYS., http://webapp.mcleancountyil.gov/webapps/PublicAccess/PubAC_SearchCriminal.aspx?AspxAutoDetectCookieSupport=1 (select "Search Criminal/Traffic Records" search under defendant's first and last name, and browse by case number).

166. Interview with Brian McPherson in Bloomington, Ill. (Oct. 27, 2017).

167. *Id.*

168. *Id.*

169. Interview with Brian McPherson in Bloomington, Ill. (Oct. 27, 2017).

170. *See, e.g.*, Andrea Azzo, *DeKalb County Uses Home Monitoring to Cut Down on Jail Crowding*, DAILY CHRON. (Jan. 21, 2017), http://www.daily-chronicle.com/2014/01/20/dekalb-county-uses-home-monitoring-to-cut-down-on-jail-crowding/ashh8i8/; Ann Jungen, *GPS Ankle Bracelet Monitoring of Low-Risk Offenders Costing More Than Expected*, GOVTECH (May 3, 2017), http://www.govtech.com/public-safety/GPS-Ankle-Bracelet-Monitoring-of-Low-Risk-Offenders-Costs-More-than-Anticipated.html; Susan DeMar Lafferty, *Will County Nixes Ankle Monitors as Jail Alternative*, DAILY SOUTHTOWN (Sept. 21, 2016), http://www.chicagotribune.com/suburbs/daily-southtown/news/ct-sta-will-county-ankle-bracelets-st-0918-20160921-story.html; Susan Sarkauskas, *Kane County Courts Start Dismantling Electronic Monitoring*, DAILY HERALD (Oct. 13, 2017), http://www.dailyherald.com/news/20171013/kane-county-courts-start-dismantling-electronic-monitoring.

171. *See* 725 ILL. COMP. STAT. 5/110-5(a-5) (2017).

172. *See* Cynthia Dizikes & Todd Lighty, *Electronic Monitoring Spikes in Cook County*, CHI. TRIB. (Feb. 23, 2015), http://www.chicagotribune.com/news/ct-electronic-monitoring-met-20150222-story.html. Cook County saw a seventy percent increase in the use of GPS home monitoring from 2013 to 2014, in which the number of criminal defendants enrolled in the GPS program increased from 8,657 to 14,717. *Id.*

monitoring has been particularly popular in Cook County, whose monitoring program has expanded from less than 100 enrollees in 2009 to 14,717 enrollees in 2014.[173] As a matter of fiscal policy, GPS monitoring as an alternative to pretrial incarceration appears to be ingenious. For example, the taxpayer cost of incarcerating an inmate is $143 per day in Cook County,[174] $97 per day in Will County,[175] and between $60 and $65 per day in DeKalb County, while the up-front cost for a standard GPS ankle bracelet unit is $800[176] with a daily monitoring and maintenance cost of between $6 and $15 varying by jurisdiction.[177] Adding in the costs of supervisory officers, Cook County reported a total yearly taxpayer cost of $2,815 per GPS unit in 2016,[178] compared to $8,151, the average yearly cost for per inmate housed in Cook County Jail.[179]

Thus, while GPS monitoring undoubtedly minimizes the taxpayer burden of pretrial supervision, the reduced costs are merely allocated to criminal defendants, thereby making their release from pretrial incarceration contingent on their ability to keep up with their mandatory fee schedules.[180] In the case of McPherson, this allocation of costs from the taxpayer to the defendant resulted in McPherson paying a total cost several magnitudes higher than he was ordered to pay through his up-front bail bond.[181] In light of the legislative findings of the Illinois General Assembly, which declared that "pretrial release shall not focus on a person's wealth and ability to afford monetary bail,"[182] the fact that criminal defendants under the Act (depending on their charges) are mandated to pay a monetary cost for their supposedly "nonmonetary" conditions is blatantly contradictory.[183]

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173. *Id.*

174. Adrienne Lu, *Jailing Fewer Would Trim County Costs, Official Says*, N.Y. TIMES (Oct. 29, 2011), http://www.nytimes.com/2011/10/30/us/reducing-jail-rolls-would-trim-cook-county-costs-preckwinkle-says.html.

175. *See* Lafferty, *supra* note 170.

176. *See* Jungen, *supra* note 170.

177. *See* Jungen, *supra* note 170; *see, e.g.*, Lafferty, *supra* note 170; *see also* Maya Schenwar, *The Quiet Horrors of House Arrest, Electronic Monitoring, and Other Alternative Forms of Incarceration*, MOTHER JONES (Jan. 22, 2015), https://www.motherjones.com/politics/2015/01/house-arrest-surveillance-state-prisons/.

178. *Circuit Court of Cook County Performance Metrics*, CIR. CT. COOK CTY. ADULT PROBATION (July 30, 2017), http://www.cookcountycourt.org/Portals/0/Chief%20Judge/Court%20Statistics/Adult%20Probation/280%20-Adult%20Probation%20(13)%20-IEO%20Annual%20Report%20FINAL%20Q2%2007.24.17.pdf.

179. *See* Jackson-Green, *supra* note 147.

180. *See* 725 ILL. COMP. STAT. 5/110-6 (2013).

181. Interview with Brian McPherson in Bloomington, Ill. (Oct. 27, 2017). McPherson's up-front bail cost was $2,787.46, while he ended up paying several times this amount in GPS monitoring fees to McLean County. *Id.*

182. S.B. 2034, 100th Gen. Assemb., 12th Legis. Day (Ill. 2017).

183. *Compare* 725 ILL. COMP. STAT. 5/110-5(a-5) (2017), *with* 725 ILL. COMP. STAT. 5/110-5(f) (2017) (In the same section of the Act, the first provision mandates a presumption

The implications of GPS monitoring for criminal defendants extend far beyond monetary cost. "Participants also can face criminal charges if they tamper with the equipment, or if they fail to properly charge the equipment and the battery dies."[184] According to McPherson, the monitoring bracelet had to be plugged into a wall outlet for two to three hours per day, during which time he would be essentially stuck to the wall outlet.[185] In addition, the monitoring bracelet could not get wet or submerged in water under any circumstance, as it would immediately malfunction and alert pretrial services of a potential violation.[186] To McPherson's recollection, in the three and a half years he wore the bracelet, his bracelet malfunctioned six times to no fault of his own, which forced him to argue his way out of numerous threats from his pretrial officers to arrest him and revoke his bond.[187] "I never knew that there were laws in place that could make me deal with this kind of thing when I had never been arrested before . . . . Had I not been able to argue my way out of those situations, I could have sat in jail for years," said McPherson.[188]

GPS monitoring is not the sole "nonmonetary" provision that defendants may be required to pay for as a condition of bond pursuant to the Act. At the judge's discretion, "reasonable fees" may be assigned to the defendant for a variety of pretrial conditions, including but not limited to pretrial supervision, diversion programs, drug and alcohol testing, DNA testing, and for assessments relating to domestic violence and victim impact services.[189] Given that as of 2014, eighty percent of arrestees in the United States are indigent,[190] and sixty-nine percent of Americans have less than $1,000 in savings,[191] an arrest, even one that does not later result in a conviction, can spell financial catastrophe.

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that conditions of bond shall be nonmonetary, while the subsequent provision mandates that the costs of electronic home monitoring shall be paid by, or on behalf of the defendant).

184. *See* Azzo, *supra* note 170.

185. Interview with Brian McPherson in Bloomington, Ill. (Oct. 27, 2017).

186. *Id.*

187. *Id.*

188. *Id.*

189. 725 ILL. COMP. STAT. 5/110-10(b)(14.3) (2016).

190. Editorial Board, *Pay Up or Go to Jail*, N.Y. TIMES (May 20, 2014), https://www.nytimes.com/2014/05/21/opinion/pay-up-or-go-to-jail.html.

191. *See* Ester Bloom, *Here's How Many Americans Have Nothing at All in Savings*, CNBC (June 19, 2017), https://www.cnbc.com/2017/06/19/heres-how-many-americans-have-nothing-at-all-in-savings.html. A 2016 GOBankingRates survey asked a sample of 7,000 American adults how much they currently had in savings, revealing that thirty-five percent had less than $1,000.00 in savings, and thirty-four percent had zero savings. *Id.*

B. *Even if Released Without Money Bail, Defendants are still at Risk of Bail Increases for Mere Failure to Pay a Fine or Fee.*

Furthermore, left unchanged by the Act is a provision of the Bail Code that permits the presiding judge, at his or her discretion, to increase the amount of bail or alter conditions of bail,[192] for violating provisions of bond under Section 10 of the Bail Code including failures to pay pretrial fees.[193] Pursuant to Section 10, arrestees receiving pretrial services may be ordered to pay all costs incidental to pretrial, and pretrial costs have been increasing in Illinois for several years.[194] With increasing costs, more defendants on pretrial release may be unable to pay these fees in the future, possibly resulting in more failures to pay. While Section 10 exempts indigent defendants charged with drug and alcohol-related offenses and "shall not unduly burden the offender,"[195] these protections are noticeably absent in the Section's language for other offenses.[196]

C. *The Act is Silent on the Inadequacy of the Illinois Criminal Justice System in Addressing Issues of Defendant Mental Health*

While the Illinois Mental Health Court Act authorized the Chief Judge of each judicial circuit to establish a mental health court program in 2008,[197] a 2015 study by the Illinois Criminal Justice Information Authority found that out of twenty-one responding circuits (out of twenty-four total),[198] six had no concrete plans to establish a mental health court, and six were still in the planning process to establish one, compared with nine that reported having fully operational programs.[199] An estimated forty percent of the jail population in the United States has some form of chronic mental illness,[200] including severe diagnoses such as schizophrenia, delusional disorders, and psychotic disorders in fifteen percent of male inmates and thirty-one percent

192. *See* Stephen A. Brundage, *Number of People Sent to Jail for Inability to Pay Legal Fines Spikes in Recent Years*, STEPHEN BRUNDAGE L. (Aug. 15, 2014), http://www.stephenbrundagelaw.com/dupage-criminal-attorney/2014/08/15/people-sent-to-jail-inability-pay-legal-fines-spikes/.

193. 725 ILL. COMP. STAT. 5/110-6(b) (2013).

194. *See* Brundage, *supra* note 192.

195. 725 ILL. COMP. STAT. 5/110-10(b)(14.2) (2016).

196. *See generally* 725 ILL. COMP. STAT. 5/110-10 (2016).

197. Illinois Mental Health Court Act, 730 ILL. COMP. STAT. 168/15 (2008).

198. *Illinois Judiciary Map*, ILL. COURTS, http://www.illinoiscourts.gov/CircuitCourt/CircuitMap/Map1.asp (last visited Mar. 9, 2018).

199. Tracy Hahn, *Mental Health Courts in Illinois*, ILL. CRIM. JUST. AUTH. (Oct. 22, 2015), http://www.icjia.state.il.us/articles/mental-health-courts-in-illinois.

200. Natalie Ortiz, *Addressing Mental Health and Mental Conditions in County Jails*, NAT'L ASS'N OF COUNTIES (Sept. 2015), http://www.naco.org/addressing-mental-illness-and-medical-conditions-county-jails.

of female inmates.[201] In light of the total number of jail bookings per year in Illinois,[202] and the high rates of mental illness in arrestees,[203] the fact that nineteen Illinois judicial circuits reported serving a total of only 302 participants in their combined respective mental health court programs in 2015 is alarming.[204] According to Sheriff Dart of Cook County, the Illinois judiciary has been unresponsive to the efforts of his office in ensuring that every defendant receives a mental health evaluation and recommendation while in Cook County Jail,[205] the largest de-facto mental health facility in the United States.[206] Although the population of inmates with a mental illness in Cook County Jail has increased exponentially from one in fifteen in 1990 to one in three in 2015,[207] the Cook County Mental Health Court served less than one thousand participants from its inception in 2004 to today. These statistics show that the Mental Health Court Act is being implemented painfully slowly.[208] With the absence of any language pertaining to mental health in both (1) the Illinois Supreme Court authorization of a statewide risk-assessment tool[209] and (2) the factors listed in the PSA,[210] the Act does nothing to address the increasingly common factor of mental health in determining conditions of bond likely to ensure public safety and the defendant's appearance for further proceedings.

VI. PROPOSED AMENDMENTS TO THE ACT

In light of the Act's failure to address these issues, the Act should be amended as follows:

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201. *See id.*

202. *See* Jackson-Green, *supra* notes 147.

203. Matt Ford, *America's Largest Mental Hospital is a Jail*, ATLANTIC (June 8, 2015), https://www.theatlantic.com/politics/archive/2015/06/americas-largest-mental-hospital-is-a-jail/395012/.

204. *See* Hahn, *supra* note 199.

205. Ford, *supra* note 203.

206. *Id.*

207. *Id.*

208. DBaille, *Mental Health Court Celebrates 10 Years*, TASC BLOG (June 4, 2017), https://iltasc.wordpress.com/2014/06/04/mental-health-court-celebrates-10-years/ [https://perma.cc/W8JS-TUWC] (providing that between 2004 and 2017, the Cook County Mental Health Court served 663 participants, an average of 51 per year).

209. *See* 725 ILL. COMP. STAT. 5/109-1(a-5) (2017). The General Assembly's definition of "risk-assessment tool" lacks any language pertaining to mental health. *Id.*

210. *See Public Safety Assessment: Risk Factors and Formula*, LAURA & JOHN ARNOLD FOUND. (2016), http://www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf [https://perma.cc/48YB-HVG8].

A. Guarantee that "Nonmonetary Conditions" will be "Nonmonetary."

Pursuant to the legislative goals and history of the Act, "nonmonetary conditions" of bond should not impose monetary costs on defendants. Therefore, the General Assembly should strike "[t]he cost of the electronic surveillance and risk-assessment shall be paid by, or on behalf, of the defendant,"[211] and replace it with "the cost of electronic surveillance and risk-assessment shall be paid for, or on behalf of, the defendant, only if the defendant is found guilty in the proceeding." By making the payment of the costs of nonmonetary conditions contingent on a finding of guilt, the Act would be less likely to impose burdensome pretrial costs on innocent or less culpable defendants.

B. Include Mental Health as a Mandatory Factor in any Risk-Assessments Tool Ultimately Adopted by the Illinois Supreme Court.

The issue of defendant mental health is absent from the guidelines issued to the Illinois Supreme Court for adopting a statewide risk-assessment tool.[212] Given the ineffective implementation of the Illinois Mental Health Court Act in relation to number of pretrial defendants with severe mental illnesses,[213] the General Assembly should restructure its statutory definition of "risk-assessment tool" to include a defendant's mental health as a factor of setting conditions of bond along with factors already included such as past instances of violent behavior or failure to appear in court.[214] With indigent misdemeanor and low-level felony defendants having roughly seven days between initial bond hearing and mandatory rehearing,[215] a preliminary bond risk-assessment, under the right guidelines, presents an opportunity for the court to obtain invaluable mental health information to be utilized in further proceedings. Therefore, this section of the Act should be amended to include "[t]he Supreme Court may establish a statewide risk-assessment tool to be used in proceedings to assist the court in establishing bail for a defendant by assessing the defendant's [mental health,] likelihood of appearing at future court proceedings or determining if the defendant poses a real and present threat . . . ."[216] By addressing defendant mental health at the outset of each criminal case, as opposed to later on in the criminal justice process, defendants will have a greater likelihood of gaining entry into the mental health courts, where their particular conditions will be better understood and processed with greater expertise.

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211. 725 ILL. COMP. STAT. 5/110-5(f)(12) (2015).
212. 725 ILL. COMP. STAT. 5/110-6(a-5) (2017).
213. *See* Hahn, *supra* note 199.
214. 725 ILL. COMP. STAT. 5/110-6.4 (2017).
215. 725 ILL. COMP. STAT. 5/110-6(a-5) (2017).
216. *See* 725 ILL. COMP. STAT. 5/110-6.4 (2017).

CONCLUSION

The Illinois Bail Reform Act of 2017, weighed in the historical context of the origin of bail in the English common law system and the adoption and evolution of bail in the United States, provides unprecedented relief at the state level for defendants accused of misdemeanor and low-felony offenses. Its future success, however, is contingent on the efforts of pretrial services in executing the provisions of the Act,[217] the discretion of the Illinois Supreme Court to adopt a statewide and empirically-proven risk-assessment tool,[218] and the political will of the Illinois General Assembly to amend the Act accordingly.[219] The accomplishment of these goals will hopefully balance the clashing interests of (1) the state in ensuring that monetary bail is determined on the risk of defendants failing to appear or committing future violent behavior, and (2) defendants and criminal justice advocates in establishing a bail system that does not impoverish defendants like Brian McPherson. Overall, with other states possibly looking to Illinois as a test subject for bail reform, the future success of the Act will likely influence the adoption of bail reform in other jurisdictions, and by making the aforementioned amendments, Illinois may serve as a shining example going forward.

217. *See* Anderson, *supra* note 123.
218. 725 ILL. COMP. STAT. 5/110-6.4 (2017).
219. *See* proposed amendments, *supra* notes 211-16.