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## Innocent but Incarcerated: Reforming Oklahoma's Criminal Pretrial Procedures to Combat Discrimination Against Indigent Defendants

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# Innocent but Incarcerated: Reforming Oklahoma's Criminal Pretrial Procedures to Combat Discrimination Against Indigent Defendants

## *Introduction*

Imagine a woman of thirty-two years of age. She works hard to make ends meet as a single mom, working two jobs and raising her two school-aged children. But she can be too trusting and finds herself arrested for receiving stolen property.<sup>1</sup> Unable to post \$500 cash bond,<sup>2</sup> let alone hire a private attorney, she sits in the local jail while her case trudges through the district court's backlogged criminal docket. She loses both of her jobs and, adding insult to injury, accrues a daily jail fee that she would unmistakably prefer to avoid—if only she could afford to leave.

She applies for free representation through her state's contract attorney system and is declared indigent, but she faces a predicament once her family manages to scrape together enough money to secure her pretrial release. Should she allow them to post bail and risk losing appointed counsel, or remain in jail to ensure that she receives some minimum level of representation during pretrial proceedings and a potential trial? Faced with two bad options, she gives up, accepting a plea deal that allows her to return home to her kids, but at a high cost—five years of probation and a felony record that forever alters the trajectory of her life.

While the crimes of arrest and particular circumstances vary among cases, this scenario is all too familiar for hundreds of thousands of poor defendants across the United States,<sup>3</sup> and Oklahoma is no exception. According to the most recently reported Oklahoma State Bureau of

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1. *See generally* 21 OKLA. STAT. § 1713 (2011 & Supp. 2019) (providing for punishment of up to eight years of incarceration upon conviction, depending on the value of the stolen property).

2. When an individual is charged with a crime, the judge who presides over the case generally sets a dollar amount that a defendant can pay to secure release from jail while the case is pending. The money paid into the court is returned if the defendant attends all court dates. If the individual cannot afford to pay the entire bail amount, they can pay a bail bondsman a portion of the amount in exchange for the bondsman's promise to pay the full amount. Once the defendant attends all court dates, the bail amount is returned to the bondsman.

3. *See generally* Nick Pinto, *The Bail Trap*, N.Y. TIMES (Aug. 13, 2015), <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html> (explaining that nine out of ten inmates are held in state facilities and 60% of the roughly 750,000 people held in state jails are “innocent in the eyes of the law” having not yet been convicted).

Investigation statistics, approximately 130,000 Oklahomans are arrested every year, more than 111,000 of whom are arrested for non-violent crimes.<sup>4</sup> Of those arrested, roughly 80% are poor enough to qualify for court-appointed representation.<sup>5</sup> These indigent defendants, many of whom are already subject to unequal treatment at the hand of oppressive social and political systems,<sup>6</sup> receive inadequate protections in the criminal justice system because they are poor and politically powerless.<sup>7</sup>

Though the rights of indigent defendants are burdened at every stage of the criminal prosecution,<sup>8</sup> they are most vulnerable during the early stages. Ensuring procedural fairness for the United States' most vulnerable citizens is paramount during initial appearances because the judge's determination of whether an arrestee must sit in jail for months or years pending resolution of the case prejudices every subsequent proceeding. Criminal justice reform advocates have long fought for widespread changes to state bail practices,<sup>9</sup> and Oklahoma leaders must act decisively to curtail the state's swelling incarceration crisis.<sup>10</sup>

This Comment addresses the incarceration crisis and proposes methods for remedying disparate treatment of indigent persons by a system that was

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4. OFFICE OF CRIMINAL JUSTICE STATISTICS, OKLA. STATE BUREAU OF INVESTIGATION, *CRIME IN OKLAHOMA 2018*, at 1-2-1-6 (2019).

5. See Lincoln Caplan, *The Right to Counsel: Badly Battered at 50*, N.Y. TIMES (Mar. 9, 2013), <https://www.nytimes.com/2013/03/10/opinion/sunday/the-right-to-counsel-badly-battered-at-50.html>; see also Christopher Zoukis, *Indigent Defense in America: An Affront to Justice*, CRIM. LEGAL NEWS (Mar. 16, 2018), <https://www.criminallegalnews.org/news/2018/mar/16/indigent-defense-america-affront-justice/>.

6. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (exploring the "rebirth of a caste-like system in the United States").

7. See Colin Warner, *Justice Works in America for Those Who Can Buy It*, USA TODAY (Aug. 23, 2017, 9:05 PM ET), <https://www.usatoday.com/story/opinion/policing/spotlight/2017/08/23/justice-works-america-those-who-can-buy/586864001/>.

8. Cf. Andrew Cohen, *How Americans Lost the Right to Counsel, 50 Years After 'Gideon'*, ATLANTIC (Mar. 13, 2013), <https://www.theatlantic.com/national/archive/2013/03/how-americans-lost-the-right-to-counsel-50-years-after-gideon/273433/> (suggesting that the right to an attorney "amounts to another unfunded mandate" because court-appointed attorneys are "almost certainly . . . vastly underpaid and grossly overworked").

9. See, e.g., VERA INST. OF JUSTICE, *MANHATTAN BAIL PROJECT: OFFICIAL COURT TRANSCRIPTS OCTOBER 1961–JUNE 1962* (1962), <https://www.vera.org/publications/manhattan-bail-project-official-court-transcripts-october-1961-june-1962>.

10. See Nicole McAfee, *ACLU Official: It's Time to End Mass Incarceration in Oklahoma*, OKLAHOMAN (Sept. 9, 2018, 12:00 AM), <https://oklahoman.com/article/5607524/aclu-official-its-time-to-end-mass-incarceration-in-oklahoma>.

designed to prey upon and perpetuate their misfortunes. Part I puts the state crisis into context, tracing the development of the American criminal justice system and identifying national trends that contribute to over-incarceration. Part II then discusses the Sixth Amendment right to counsel for indigent defendants, including how different states ensure this right. Part III examines Oklahoma's indigent defense mechanism and highlights troublesome aspects that demand legislative attention. Finally, Part IV discusses reforms that legislators and other state leaders can and should implement.

### *I. Putting the Crisis in Context*

To appreciate the importance of pretrial reforms, one must understand the gravity of the United States' current incarceration crisis along with the underlying policies and power structures that perpetuate it. Despite relatively consistent national incarceration rates—around 100 prisoners per 100,000 people—during the period from 1925 to 1975, the rate ballooned to over 500 prisoners per 100,000 people by 2008.<sup>11</sup> By 2018, when the Prison Policy Initiative reported that the United States incarcerates residents at *five to eighteen times the rate of other founding NATO countries*, the incarceration rate had grown to nearly 700 prisoners per 100,000 people.<sup>12</sup>

The troubling trend toward incarcerating primarily poor people without concern for economic, social, or other consequences is not a new phenomenon. However, the proliferation of inmates in the American criminal justice system has largely been caused by the confluence of four factors: shifting beliefs concerning the purpose of criminal punishment, criminalization of drug possession and other nonviolent activities, continued reliance on private prisons, and changing bail policies that impose a wealth-based test on criminal defendants' pretrial freedom.<sup>13</sup>

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11. *Data Visualization: U.S. Incarceration Rate, 1925–2008: Prisoners per 100,000 Population*, PRISON POL'Y INITIATIVE (2010), <https://www.prisonpolicy.org/graphs/incarceration1925-2008.html>.

12. Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POL'Y INITIATIVE (June 2018), <https://www.prisonpolicy.org/global/2018.html>. Of the twenty-three states with incarceration rates above the national average, Oklahoma sits atop the list at 1079 inmates per 100,000 people. *Id.*

13. *See infra* Section I.B.

*A. The Early American Criminal Justice System*

Though the United States' current status as the greatest incarcerator in the world<sup>14</sup> evokes a feeling of disregard for individual liberty, the creation of its criminal justice system represented an almost altruistic step forward in the global theory of punishment during the Age of Enlightenment.<sup>15</sup> Shifting attitudes concerning government and authority led intellectuals like Jeremy Bentham and Cesare Beccaria to contemplate an ideal method of punishment at a time when English courts punished more than 200 crimes with death.<sup>16</sup> As utilitarian thinkers, they believed that punishment, albeit necessary, should ultimately serve the greater purpose of deterring future crime.<sup>17</sup> Consequently, their ideal system was one that reduced reliance on torture and other severe penalties in favor of imprisonment.<sup>18</sup> To balance the competing interests in punishing past crimes and deterring future crimes, the systems that evolved prioritized the norms of consistency, proportionality, and promptness.

At its inception, the American prison system was a humanitarian revolt against draconian European traditions of criminal punishment.<sup>19</sup> The norms championed by utilitarian thinkers led Pennsylvania to reform its criminal law and substitute sentences of imprisonment for corporal punishment.<sup>20</sup> As the penitentiary came to play a more important role in holding convicts, the Pennsylvania system of prison discipline was born.<sup>21</sup> Under the Pennsylvania system, prisoners convicted of serious crimes were held in solitary confinement and only permitted to interact with guards, or the

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14. See Wagner & Sawyer, *supra* note 12.

15. See RACHEL O'CONNOR, *THE UNITED STATES PRISON SYSTEM: A COMPARATIVE ANALYSIS* 15–16 (2014).

16. *What Was the 'Bloody Code'?*, NAT'L JUSTICE MUSEUM, <https://www.nationaljustice-museum.org.uk/what-was-the-bloody-code/> (last visited Apr. 4, 2020); O'CONNOR, *supra* note 15, at 16.

17. See, e.g., CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS* (Henry Paolucci trans., Macmillan 1986) (1764); JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* (Prometheus Books 1988) (1789).

18. O'CONNOR, *supra* note 15, at 16.

19. See Harry Elmer Barnes, *The Historical Origin of the Prison System in America*, 12 J. AM. INST. CRIM. L. & CRIMINOLOGY 35, 38 (1921).

20. *Id.* at 48 (citing 12 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 280 (1906)).

21. See generally *Pennsylvania System*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/topic/Pennsylvania-system> (last visited Apr. 22, 2020).

occasional visitor.<sup>22</sup> The Pennsylvania system spread as far as Europe, but it was plagued by exorbitant costs and concerns for its effects on prisoners' minds.<sup>23</sup>

In response to the criticisms of the Pennsylvania system, the labor-based Auburn system evolved at Auburn Prison in New York.<sup>24</sup> Under the Auburn system, prisoners worked during the day and lived in solitary confinement at night.<sup>25</sup> Though this new system permitted prisoners greater human contact during their sentences, enforced silence still prevented them from communicating with one another.<sup>26</sup> The Auburn system gradually replaced the Pennsylvania system in the United States and gave rise to correctional facilities that profit from prisoner labor.<sup>27</sup> The Auburn system remained the dominant system in America until the Reconstruction and Progressive eras ushered in new reforms that sought to solve the problems of "overcrowding, corruption, and cruelty."<sup>28</sup>

As satisfaction with the Auburn system waned, the realities of the criminal justice system inhibited well-intentioned reform efforts.<sup>29</sup> More criminals received long sentences in lieu of corporal punishment, and as a result, prisons became overcrowded.<sup>30</sup> Because existing prisons endeavored to operate as efficiently as possible with limited funding, conditions continued to deteriorate.<sup>31</sup> This decay led prison reformers to approach the task of creating a better criminal justice system by looking at societal problems through a scientific lens.<sup>32</sup>

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22. *Id.*

23. *Id.*

24. Judith Anne Ryder, *Auburn State Prison System*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/topic/Auburn-State-Prison> (last visited Apr. 22, 2020).

25. *Id.*

26. *See id.*

27. *Cf. id.* (explaining that the labor-based Auburn system replaced the Pennsylvania system).

28. O'CONNOR, *supra* note 15, at 22–23 (quoting THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY (Norval Morris & David J. Rothman eds., 1998) (1995)).

29. *See id.*

30. *See id.* at 22 (explaining that there was overcrowding following the widespread adoption of the Auburn system).

31. *Id.*

32. *See The Prison Reform Movement*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/social-sciences/news-wires-white-papers-and-books/prison-reform-movement> (last updated May 3, 2020).

To highlight rampant inefficiencies and corruption, Enoch Wines and Theodore Dwight published the *Report on the Prisons and Reformatories of the United States and Canada* in 1867.<sup>33</sup> The Wines and Dwight report, along with advances in the fields of medicine and psychiatry, led to innovations regarding probation, parole, and sentencing at the turn of the twentieth century.<sup>34</sup> Probation emphasized society's interest in rehabilitating criminals without sending them to jail and tore down the barriers prisoners faced when reintegrating into society as law-abiding citizens.<sup>35</sup> Parole and sentencing changes—namely maximum sentences and indeterminate sentencing—also helped combat the problems associated with overcrowding by reducing the number of prisoners who continued to serve time after reforming their behavior.<sup>36</sup> Together, these changes reinforced a preference for rehabilitation and marked a shift toward reintegration. However, they were far from perfect solutions.

During the time when state governments assumed the cost of running prisons, these innovations transferred important functions of the criminal justice system back to city and local authorities.<sup>37</sup> Though probation eased the financial burden on state prisons, its adoption shifted those costs to local governments.<sup>38</sup> Poor funding at the local level prevented programs from operating with a sufficient number of probation officers.<sup>39</sup> Furthermore, because judges primarily gave probation to young, middle-class offenders, poor inmates grew to comprise a greater proportion of the incarcerated population in state facilities.<sup>40</sup>

Though state authorities implemented parole programs and indeterminate sentencing to reduce sentence lengths, systemic flaws prevented these promising reforms from fulfilling their intended goals. Parole boards, tasked with reviewing inmate cases, were composed of individuals who lacked the necessary expertise.<sup>41</sup> These individuals' lack of expertise,

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33. See E. C. WINES & THEODORE W. DWIGHT, COMM'RS OF THE PRISON ASS'N OF N.Y., REPORT ON THE PRISONS AND REFORMATORIES OF THE UNITED STATES AND CANADA (Albany, N.Y., Van Benthuysen & Sons 1867), <https://archive.org/details/reportonprisonsr00corruoft>.

34. *The Prison Reform Movement*, *supra* note 32.

35. *Id.*

36. *Id.*; O'CONNOR, *supra* note 15, at 22.

37. *The Prison Reform Movement*, *supra* note 32.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* (noting that members of parole boards had "little expertise in analyzing inmates' prison records and psychological profiles").

coupled with ever-growing caseloads, prevented them from dedicating adequate time to individual cases.<sup>42</sup> Even once prisoners were released, the parole officers that supervised compliance with various conditions faced the same challenges.<sup>43</sup> As a result, many prisoners served longer sentences under indeterminate sentencing than they would have under determinate sentencing.<sup>44</sup>

Despite reform efforts throughout the late nineteenth and early twentieth centuries, prison conditions failed to improve.<sup>45</sup> Growing racial tensions spilled over into the prison environment and inflamed relations between inmates and guards.<sup>46</sup> Many prisoners, influenced by civil rights protesters, demanded better treatment and living conditions in court.<sup>47</sup> However, when legal victories proved ineffective, riots and strikes broke out all across the country.<sup>48</sup> The turbulent 1960s and 1970s and rising recidivism rates led a majority of prison reformers to take the position that efforts to rehabilitate criminals were unsuccessful.<sup>49</sup> Public outcry, in response to increased crime rates and prison violence, led policymakers to abandon rehabilitative aspirations and adopt policies that created the prison-industrial complex responsible for today's incarceration crisis.<sup>50</sup>

#### *B. Factors Contributing to the Modern Incarceration Crisis*

##### *1. Growing Public Tensions and Support for Retributive "Justice"*

Though the total crime rate more than doubled in the United States during the 1960s,<sup>51</sup> levels of punishment remained relatively stable.<sup>52</sup>

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42. *Id.*

43. *Id.*

44. *Id.*

45. *See id.* (discussing overcrowding and riots during the mid-twentieth century).

46. *Id.* (recognizing that "relations between prisoners and guards and between black and white inmates grew increasingly tense").

47. *Id.*

48. *Id.* (detailing general strikes and "dozens of riots" that broke out, including those at the San Quentin State Prison in 1967 and at the Attica Correctional Institution in 1971).

49. *See id.*

50. *See id.* (explaining that the "tougher stance on crime that took shape" led to more imprisonments and many new facilities).

51. *See United States Crime Rates 1960–2018*, DISASTER CTR., <http://www.disastercenter.com/crime/uscrime.htm> (last visited Apr. 9, 2020) (compiling yearly population, crime number, and crime-rate data from the FBI UCS Annual Crime Reports).

Despite population growth of 12.3% over the period,<sup>53</sup> incarceration rates fell more than 5%.<sup>54</sup> The simultaneity of these trends led criminologist Jackson Toby to describe criminal punishment as “a vestigial carryover of a barbaric past” set to “disappear as humanitarianism and rationality spread.”<sup>55</sup> Unfortunately, Toby’s research failed to grasp the extent to which the American public preferred punishment over rehabilitation. And heightened social and political unrest during the Civil Rights Movement and Vietnam War stoked the flames of discontent beyond recognition.<sup>56</sup>

The Civil Rights Movement—often called the Second Reconstruction<sup>57</sup>—led to the realization of equal rights for black Americans under the law.<sup>58</sup> While the nearly two-decade battle for equality brought an end to segregation,<sup>59</sup> voter suppression,<sup>60</sup> employment discrimination,<sup>61</sup> and housing discrimination<sup>62</sup> on the basis of race, it ultimately failed to remedy the disproportionate incarceration of black Americans.<sup>63</sup> As implementation

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52. See Alfred Blumstein & Jacqueline Cohen, *A Theory of the Stability of Punishment*, 64 J. CRIM. L. & CRIMINOLOGY 198, 199 (1973) (“[I]t is not the level of actual criminal behavior which is stable, but rather the level of punished criminal acts.”).

53. See *United States Crime Rates 1960–2018*, *supra* note 51.

54. See PATRICK A. LANGAN ET AL., U.S. DEP’T OF JUSTICE, HISTORICAL STATISTICS ON PRISONERS IN STATE AND FEDERAL INSTITUTIONS, YEAREND 1925–86, at 10–11 (1988) (indicating that the incarcerated population fell from 208,105 total state and federal inmates on December 31, 1959 to 197,136 total inmates on December 31, 1969). When accounting for population growth over the period, per-capita incarceration rates fell by more than 15%. See *id.*; *United States Crime Rates 1960–2018*, *supra* note 51.

55. Jackson Toby, *Is Punishment Necessary*, 55 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 332, 332 (1964).

56. See *infra* notes 57–71 and accompanying text.

57. See generally C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955).

58. *Civil Rights Movement*, HISTORY (Oct. 27, 2009), <https://www.history.com/topics/black-history/civil-rights-movement>.

59. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

60. See Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C. and 52 U.S.C.).

61. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended in scattered sections of 5 U.S.C. and 42 U.S.C.).

62. See Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601–3619).

63. See Bruce Drake, *Incarceration Gap Widens Between Whites and Blacks*, PEW RES. CTR. (Sept. 6, 2013), <http://www.pewresearch.org/fact-tank/2013/09/06/incarceration-gap-between-whites-and-blacks-widens/>. In 1960, black Americans were five times more likely

of equal protection laws increased competition for jobs and housing, a phenomenon commonly referred to as “white backlash”<sup>64</sup> took hold.<sup>65</sup> Amid rising crime rates and growing racial tensions, many Americans demanded that the federal government take affirmative steps to punish lawbreakers.<sup>66</sup>

At the same time, U.S. involvement in the Vietnam War spurred protests against the government.<sup>67</sup> Though opposition to the Vietnam War began on college campuses, especially among hippies and intellectuals,<sup>68</sup> support for anti-war marches and protests grew alongside burgeoning casualty counts and war expenditures.<sup>69</sup> Once Northern Vietnamese troops launched the Tet Offensive<sup>70</sup> and successfully defended against U.S. and South Vietnamese troops, the impracticality of continued U.S. involvement turned the majority of the American public against the war.<sup>71</sup> Alongside rising crime rates and growing racial tensions, anti-war protests created a social and political environment that facilitated the federal government’s efforts to stifle dissent by cracking down on crime.

## 2. *The Wars on Poverty, Drugs, and Crime*

In response to the growing social and political tensions that plagued the 1960s, the federal government took a more active role in crafting, implementing, and enforcing criminal justice policy.<sup>72</sup> In 1964, President Lyndon B. Johnson launched the Great Society, a series of domestic

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to be incarcerated than white Americans; by 2010, that number rose to more than six times.  
*Id.*

64. See *White Backlash*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/white%20backlash> (last visited Apr. 9, 2020) (defining white backlash as “the hostile reaction of white Americans to the advances of the civil rights movement”).

65. See generally Eoin Higgins, *The White Backlash to the Civil Rights Movement*, EOINHIGGINS.COM (May 22, 2014), <https://eoinhiggins.com/the-white-backlash-to-the-civil-rights-movement-1817ff0a9fc> (reviewing literature that describes the underlying social, economic, and political forces influencing white backlash).

66. NAT’L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 105 (Jeremy Travis, Bruce Western, & Steve Redburn eds., 2014).

67. *Vietnam War Protests*, HISTORY (Feb. 22, 2010), <https://www.history.com/topics/vietnam-war/vietnam-war-protests>.

68. *Id.*

69. *Id.*

70. See generally *Tet Offensive*, HISTORY (Oct. 29, 2009), <https://www.history.com/topics/vietnam-war/tet-offensive>.

71. See *Vietnam War Protests*, *supra* note 67.

72. See *infra* notes 73–94 and accompanying text.

programs, in response to the growing incidence of poverty and racial injustice.<sup>73</sup> The so-called War on Poverty was the most ambitious and controversial part of Johnson's plan<sup>74</sup> and included legislation that brought anti-poverty programs to impoverished communities.<sup>75</sup> Along with anti-poverty measures that attempted to alleviate poverty through job programs and food stamps, the Great Society led to the passage of the Social Security Act of 1965 and the resulting expansion of medical care and welfare for the elderly and poor.<sup>76</sup> However, the rhetoric surrounding the 1964 presidential election shifted the national conversation from empowering marginalized demographics to punishing lawlessness.<sup>77</sup>

After defeating Barry "crime in the streets"<sup>78</sup> Goldwater in the 1964 presidential election,<sup>79</sup> President Johnson pivoted, declaring a War on Crime.<sup>80</sup> President Johnson established the President's Commission on Law Enforcement and Administration of Justice in July 1965 to evaluate the impact of crime on society, to improve law enforcement, corrections, and judicial methods, and to publish a report containing findings and recommendations.<sup>81</sup> The resulting report, "The Challenge of Crime in a Free Society," contained more than 200 recommendations,<sup>82</sup> including a

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73. See generally *Great Society*, HISTORY (Nov. 17, 2017), <https://www.history.com/topics/1960s/great-society>.

74. See *Here & Now: 'War on Poverty' Remains Controversial* (NPR radio broadcast Jan. 8, 2014), <https://www.wbur.org/hereandnow/2014/01/08/war-on-poverty>.

75. See Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (codified as amended in scattered sections of 42 U.S.C.); Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703 (codified as amended at 7 U.S.C. §§ 2011–2036c).

76. See Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (codified as amended primarily in scattered sections of 26 U.S.C. and 42 U.S.C.).

77. See generally Charles Mohr, *Goldwater Links the Welfare State to Rise in Crime*, N.Y. TIMES (Sept. 11, 1964), <https://www.nytimes.com/1964/09/11/archives/goldwater-links-the-welfare-state-to-rise-in-crime.html>.

78. See Steve Hoenisch, *Crime Policy of the Republican Party*, CRITICISM.COM (July 28, 2004), <http://www.criticism.com/policy/republicans-crime-policy.php>.

79. Michael Levy, *United States Presidential Election of 1964*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/United-States-presidential-election-of-1964> (last visited Apr. 22, 2020).

80. See Elizabeth Hinton, *Why We Should Reconsider the War on Crime*, TIME (Mar. 20, 2015, 7:00 AM EDT), <http://time.com/3746059/war-on-crime-history/>.

81. *The President's Commission on Law Enforcement and Administration of Justice: Organization and Goals*, 4 AM. CRIM. L. Q. 118, 118–19 (1966).

82. See PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 293–301 (1967).

national strategy for controlling crime that led to an increase in funding and training for police departments, prosecutors, and correctional systems.<sup>83</sup>

The report, and its resulting expansion of the criminal justice system, created a springboard from which President Richard Nixon's War on Drugs—a war that many commentators today believe America is losing, or has already lost<sup>84</sup>—could flourish. Nixon's portrayal of drug addicts and criminals as deserving of social condemnation predated his election in 1968.<sup>85</sup> But his efforts to tie drug addiction to crime proved unsuccessful until the simultaneous rise in recreational drug use and crime during the 1960s convinced the American public that drugs were responsible for the problem.<sup>86</sup>

Nixon officially declared a war on drugs in June 1971, “stating that drug abuse was ‘public enemy number one.’”<sup>87</sup> As a result, he increased federal funding for drug-control agencies, proposed mandatory sentences for drug crimes, and created new offices and agencies tasked with preventing drug abuse.<sup>88</sup> Nixon created the Drug Enforcement Administration in 1973 to “enforce the controlled substances laws and regulations of the United

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83. *See id.* at 279.

84. *See, e.g.,* José R. Cárdenas, *The United States Is Losing the War on Drugs in the Americas*, FOREIGN POL'Y (Sept. 18, 2017, 4:25 PM), <https://foreignpolicy.com/2017/09/18/the-united-states-is-losing-the-war-on-drugs-in-the-americas/>; Misha Glenny, *The War on Drugs Has Been Lost*, FIN. TIMES (Aug. 2, 2018), <https://www.ft.com/content/c9719098-964d-11e8-95f8-8640db9060a7>; Ben Wallace-Wells, *How America Lost the War on Drugs*, ROLLING STONE (Mar. 24, 2011, 6:44 PM ET), <https://www.rollingstone.com/politics/politics-news/how-america-lost-the-war-on-drugs-170965/>; *The War on Drugs Is Lost*, NAT'L REV. (July 28, 2014, 3:07 PM), <https://www.nationalreview.com/2014/07/war-drugs-lost-nro-staff/>.

85. *See* Richard Nixon, *What Has Happened to America?*, READER'S DIGEST, Oct. 1967, at 49, 49–50 (“[T]here is the indulgence of crime because of sympathy for the past grievances of those who have become criminals. . . . Our opinion-makers have gone too far in promoting the doctrine that when a law is broken, society, not the criminal is to blame.”); *see also* *United States Presidential Election of 1968*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/event/United-States-presidential-election-of-1968> (last visited Apr. 22, 2020).

86. *See* Jennifer Robison, *Decades of Drug Use: Data from the '60s and '70s*, GALLUP (July 2, 2002), <https://news.gallup.com/poll/6331/decades-drug-use-data-from-60s-70s.aspx> (“[I]n 1969, 48% of Americans told Gallup that drug use was a serious problem in their community.”).

87. *War on Drugs*, HISTORY (May 31, 2017), <https://www.history.com/topics/crime/the-war-on-drugs>.

88. *Id.* (referencing the creation of the Special Action Office for Drug Abuse Prevention and the Drug Enforcement Administration).

States,”<sup>89</sup> but revelations made by Watergate co-conspirator John Ehrlichman in a 1994 interview suggest a more nefarious intent.<sup>90</sup> Regardless of Nixon’s rationale for waging his war on drugs, the result has been a catastrophic increase in incarceration that stimulated the criminal justice system’s reliance on new facilities for housing inmates.<sup>91</sup>

The War on Drugs and other “Tough on Crime” laws passed in the 1970s and 1980s placed an immense strain on the criminal justice system as state and federal authorities scrambled to address the crisis of unprecedented overcrowding.<sup>92</sup> Chief among these “Tough on Crime” laws were mandatory minimum sentencing, truth in sentencing, and three-strikes laws.<sup>93</sup> Together, these laws limited judges’ discretion to impose alternative forms of punishment, required inmates to remain incarcerated even after being rehabilitated, and inflicted extreme sentences for repeat offenders.<sup>94</sup> Fortunately for policymakers—but unfortunately for society—the market

89. *History*, U.S. DRUG ENF’T ADMIN., <https://www.dea.gov/history> (last visited May 21, 2020).

90. See Dan Baum, *Legalize It All: How to Win the War on Drugs*, HARPER’S MAG., Apr. 2016, at 22, 22. When asked about the politics of drug prohibition, Ehrlichman responded:

You want to know what this was really all about? . . . The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I’m saying? We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.

*Id.* (quoting John Ehrlichman).

91. See Kathleen Miles, *Just How Much the War on Drugs Impacts Our Overcrowded Prisons*, in *One Chart*, HUFFINGTON POST (Mar. 10, 2014, 7:30 AM ET), [https://www.huffingtonpost.com/2014/03/10/war-on-drugs-prisons-infographic\\_n\\_4914884.html](https://www.huffingtonpost.com/2014/03/10/war-on-drugs-prisons-infographic_n_4914884.html) (showing that drug offenses accounted for 50.1% of federal inmates in 2014). *But see* German Lopez, *Why You Can’t Blame Mass Incarceration on the War on Drugs*, VOX (May 30, 2017, 9:00 AM EDT), <https://www.vox.com/policy-and-politics/2017/5/30/15591700/mass-incarceration-john-pfaff-locked-in> (discussing a new book by John Pfaff that suggests the war on drugs’ influence on incarceration rates is overstated).

92. See *supra* Part I.

93. DAVID SHAPIRO, AM. CIVIL LIBERTIES UNION, *BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION* 10–11 (2011).

94. *Id.*

offered a promising “solution” to the growing problem of overcrowded prisons.<sup>95</sup>

### 3. *Private Prisons and the Prison-Industrial Complex*

Though private prisons house less than 10% of state and federal inmates,<sup>96</sup> their continued existence imbues concerns about the future of mass incarceration.<sup>97</sup> When the Obama Administration’s Department of Justice decided to phase out private prisons for federal inmates,<sup>98</sup> stock prices for the two largest private prison companies in the U.S.—Corrections Corporation of America (CCA) and GEO Group—fell more than 35%.<sup>99</sup> Deputy Attorney General Sally Yates’ criticism of private facilities’ inadequate program offerings, high costs, and inferior safety and security<sup>100</sup> proved to be such a scathing rebuke that CCA had to change its name to CoreCivic to distance itself from its public reputation.<sup>101</sup> Despite these

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95. See *infra* notes 96–110 and accompanying text.

96. Peter Wagner, *Are Private Prisons Driving Mass Incarceration?*, PRISON POL’Y INITIATIVE (Oct. 7, 2015), [https://www.prisonpolicy.org/blog/2015/10/07/private\\_prisons\\_parasite/](https://www.prisonpolicy.org/blog/2015/10/07/private_prisons_parasite/).

97. See Carl Takei, *Private Prison Giant CoreCivic’s Wants to Corner the Mass Incarceration ‘Market’ in the States*, ACLU (Nov. 7, 2017, 4:30 PM), <https://www.aclu.org/blog/smart-justice/mass-incarceration/private-prison-giant-corecivics-wants-corner-mass>.

98. Memorandum from Sally Q. Yates, Deputy Att’y Gen., U.S. Dep’t of Justice, Reducing Our Use of Private Prisons (Aug. 18, 2016). *But see* Jefferson B. Sessions, Att’y Gen., U.S. Dep’t of Justice, Rescission of Memorandum on Use of Private Prisons (Feb. 21, 2017) (rescinding the August 18, 2016 memo).

99. Christopher Ingraham, *Private Prison Stocks Collapse After Justice Department Promises to Phase Them Out*, WASH. POST (Aug. 18, 2016, 12:48 PM CDT), [https://www.washingtonpost.com/news/wonk/wp/2016/08/18/private-prison-stocks-collapse-after-justice-department-promises-to-phase-them-out/?utm\\_term=.f227cd7dab72](https://www.washingtonpost.com/news/wonk/wp/2016/08/18/private-prison-stocks-collapse-after-justice-department-promises-to-phase-them-out/?utm_term=.f227cd7dab72).

100. Memorandum from Sally Q. Yates, *supra* note 98.

101. See Carl Takei, *CoreCivic’s Practices Unchanged Despite Dropping CCA Name*, TENNESSEAN (Dec. 12, 2016, 3:52 PM CT), <https://www.tennessean.com/story/opinion/2016/12/12/corecivics-practices-unchanged-despite-dropping-cca-name/93907514/> [hereinafter Takei, *CoreCivic*].

developments, Donald Trump's presidency<sup>102</sup> and industry lobbying efforts<sup>103</sup> have since given the private prison industry new life.

An understanding of how the industry's continued existence threatens to perpetuate mass incarceration in America requires some study of its resurgence in the 1980s.<sup>104</sup> The private prison industry as we know it today began in 1984, when CoreCivic (then called the Corrections Corporation of America<sup>105</sup>) opened its first private, for-profit facility in Shelby County, Tennessee.<sup>106</sup> By 1990, sixty-six more private facilities opened.<sup>107</sup> These facilities capitalized on the burgeoning prison population that outpaced state and federal facilities' capacity to hold inmates,<sup>108</sup> and the private prison population grew from approximately 8,000 inmates to 129,000 over the next twenty years.<sup>109</sup> Unprecedented increases in incarceration rates made this more than 1500% growth in the private prison inmate population

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102. See Jeff Sommer, *Trump's Win Gives Stocks in Private Prison Companies a Reprieve*, N.Y. TIMES (Dec. 3, 2016), <https://www.nytimes.com/2016/12/03/your-money/trumps-win-gives-stocks-in-private-prison-companies-a-reprieve.html>; Jeff Sommer, *Trump Immigration Crackdown Is Great for Private Prison Stocks*, N.Y. TIMES (Mar. 10, 2017), <https://www.nytimes.com/2017/03/10/your-money/immigrants-prison-stocks.html>.

103. See, e.g., *Statement on CoreCivic's Inducement to the State of Montana*, ACLU OF MONT. (Oct. 31, 2017, 4:45 PM), <https://www.aclumontana.org/en/news/statement-corecivics-inducement-state-montana>.

104. Though the first modern private prison opened in 1984, it was not the first of its kind in America. See Shane Bauer, *The True History of America's Private Prison Industry*, TIME (Sept. 25, 2018), <http://time.com/5405158/the-true-history-of-americas-private-prison-industry/> (discussing private prisons from the mid-1800s to the early 1900s).

105. In 2016, President Obama's Department of Justice decided to phase out private prisons for federal inmates. Memorandum from Sally Q. Yates, *supra* note 98. *But see* Sessions, *supra* note 98 (rescinding this memo). The Administration's 2016 memo criticized private facilities so badly that the Corrections Corporation of America changed its name to CoreCivic to distance itself from its soiled public reputation. See Takei, *CoreCivic*, *supra* note 101.

106. *The CCA Story: Our Company History*, CCA, <http://www.correctionscorp.com/our-history> (last visited May 21, 2020).

107. SHAPIRO, *supra* note 93, at 11.

108. Tara Joy, *The Problem with Private Prisons*, JUSTICE POL'Y INST. (Feb. 2, 2018), <http://www.justicepolicy.org/news/12006>.

109. JAMES J. STEPHAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 1995, at iv (1997); HEATHER C. WEST ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2009, at 33 app. tbl.19 (rev. 2011).

possible as state governments struggled to combat the consequences of federal involvement in criminal punishment.<sup>110</sup>

As reliance on private prisons grew, so too did the potential for increased profits through lobbying efforts.<sup>111</sup> Though the influence of the private prison lobby varies from state to state, the industry has played a central role in lobbying for mandatory-minimum sentencing, truth in sentencing, and three-strike laws at the federal level.<sup>112</sup> Alarming, the three biggest private prison companies spent a combined \$22 million lobbying Congress between 2001 and 2011.<sup>113</sup> As state inmate populations continue to grow, the risk of private prison lobbying poses problems on a different front—state contracts with minimum occupancy clauses.<sup>114</sup>

Today, twenty-eight states, including Oklahoma, still rely on private prisons.<sup>115</sup> While private facilities do ease the burden on overcrowded state facilities,<sup>116</sup> continued spending on housing inmates diverts funds that could be allocated to reform efforts. Furthermore, minimum occupancy agreements frequently require states to maintain anywhere from 70% to 100% occupancy at private facilities.<sup>117</sup> This mandate means that every new contract—even if intended as a short-term solution to a temporary increase in inmates—constitutes a commitment to incarcerating more individuals in that facility over the life of the agreement. When state governments are obligated to incarcerate a minimum number of individuals, they have a perverse incentive to ignore legitimate justifications for criminal

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110. *See supra* notes 92–94 and accompanying text.

111. *See* PICO NAT'L NETWORK & PUBLIC CAMPAIGN, UNHOLY ALLIANCE: HOW THE PRIVATE PRISON INDUSTRY IS CORRUPTING OUR DEMOCRACY AND PROMOTING MASS INCARCERATION 3 (2011).

112. *Id.* at 4.

113. *Id.* at 3.

114. *See generally* Joe Watson, *Report Finds Two-Thirds of Private Prison Contracts Include "Lockup Quotas"*, PRISON LEGAL NEWS (July 31, 2015), <https://www.prisonlegalnews.org/news/2015/jul/31/report-finds-two-thirds-private-prison-contracts-include-lockup-quotas/>.

115. THE SENTENCING PROJECT, PRIVATE PRISONS IN THE UNITED STATES 1 tbl.1 (2019). In 2017, Oklahoma housed 7353 inmates in private facilities, representing more than 26% of its incarcerated population. *Id.* This statistic suggests that Oklahoma is a state where private prison contracts still pose a substantial risk to efforts to reduce the incarcerated population.

116. *See* Ryan Gentzler, *Private Prisons Are Bad Policy, but They're Not to Blame for Oklahoma's Incarceration Problem*, OKLA. POL'Y INST.: OK POL'Y BLOG (Mar. 12, 2018), <https://okpolicy.org/private-prisons-are-bad-policy-but-theyre-not-to-blame-for-oklahomas-incarceration-problem/>.

117. Watson, *supra* note 114.

punishment and fill empty beds at all costs. This dynamic has led states to modify their bail practices in a way that categorizes criminal defendants according to their wealth, which has become the single greatest factor in determining whether they will be released pending trial. Despite concerns surrounding continued reliance on private prisons, the risks that these facilities pose to the incarceration crisis pale in comparison to the detrimental effects of changing bail practices.

#### 4. *Changing Pretrial Policies and the Warehouse Effect*

As sociopolitical tensions brewed, federal involvement in criminal punishment became more pervasive, and private prisons injected themselves into both federal and state criminal justice systems, the most troubling factor underlying the modern incarceration crisis took the form of mutating bail practices.<sup>118</sup> After arrest and booking, a criminal defendant typically sits in jail until a judge conducts a bail hearing.<sup>119</sup> At these hearings, the judge considers whether the accused is eligible for bail and, if so, what costs or conditions should accompany bail.<sup>120</sup> Judges enjoy broad discretion in setting bail amounts and conditions and may consider an array of factors.<sup>121</sup> While the majority of defendants were historically released pretrial, today, approximately 60% of defendants remain detained because they do not receive bail or are unable to afford the amount.<sup>122</sup> This troubling statistic contradicts the fundamental principle that defendants should be released unless they pose a flight risk or danger to the community.<sup>123</sup>

While the Eighth Amendment prohibits excessive bail, there is no Constitutional right to bail.<sup>124</sup> The Bail Reform Act of 1966 created a statutory right to pretrial release unless a particular defendant posed a flight

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118. See Peter Wagner, *Jails Matter. But Who Is Listening?*, PRISON POL'Y INITIATIVE (Aug. 14, 2015), <https://www.prisonpolicy.org/blog/2015/08/14/jailsmatter/> [hereinafter Wagner, *Jails Matter*].

119. See RAM SUBRAMANIAN ET AL., VERA INST. OF JUSTICE, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 29 (2015).

120. *Id.*

121. *Id.*

122. Cf. TODD D. MINTON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JAIL INMATES AT MIDYEAR 2013 - STATISTICAL TABLES, 7 tbl.3 (2014) (noting that over 60% of inmates in local jails are unconvicted).

123. See SUBRAMANIAN ET AL., *supra* note 119.

124. See *United States v. Salerno*, 481 U.S. 739, 754–55 (1987).

risk.<sup>125</sup> This statutory guarantee required federal judges presiding over bail hearings to release criminal defendants without financial considerations unless detention was necessary to prevent flight.<sup>126</sup> The Bail Reform Act of 1984 supplemented this framework by allowing judges to consider whether a defendant “endanger[s] the safety of any other person or the community”<sup>127</sup> in addition to flight. Thus, the presumption that a defendant should be released unless he poses a flight risk *or danger* was born.

However, while the Bail Reform Act of 1984 remains in effect today, courts now impose a third condition on a pretrial release: the defendant’s financial resources.<sup>128</sup> This third rationale is particularly insidious when it fails to even consider the defendant’s ability to pay. Moreover, many jurisdictions across the country use bail schedules and assign predetermined bail amounts based on the charged offense.<sup>129</sup> Though bail schedules have recently come under fire on procedural due process grounds,<sup>130</sup> counties in Oklahoma still employ them.<sup>131</sup> As a result of these practices, jails across the country effectively serve as debtor’s prisons.<sup>132</sup>

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125. See Bail Reform Act of 1966, Pub. L. No. 89-465, § 2, 80 Stat. 214, 214 (“The purpose of this Act is to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges . . . when detention serves neither the ends of justice nor the public interest.”). A defendant poses a flight risk when she is likely to flee the jurisdiction to avoid criminal prosecution. The primary factors that decrease a defendant’s flight risk include community ties through family or work. See SUBRAMANIAN ET AL., *supra* note 119, at 30.

126. See Bail Reform Act of 1966 sec. 3, § 3146(a), 80 Stat. at 214. Pretrial release without financial conditions is commonly referred to as a personal recognizance (PR) bond. *Personal Recognizance Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/p/personal-recognizance/> (last visited May 20, 2020). When a defendant is released on a PR bond, he promises to return to court for future proceedings. *Id.*

127. 18 U.S.C. § 3142(c)(1) (2018).

128. See Pinto, *supra* note 3.

129. See, e.g., Elizabeth Marcellino, *LA County Seeks Best Models for Bail Reform*, NBC 4: L.A. (Feb. 6, 2019, 2:15 AM), <https://www.nbclosangeles.com/news/local/LA-County-Bail-Reform-505405321.html>; Nick Powell, *Lead Plaintiff in Galveston County Bail Lawsuit Wants Fairer Process for Defendants*, CHRON (Jan. 23, 2019, 2:56 PM CST), <https://www.chron.com/local/article/Lead-plaintiff-testifies-in-federal-lawsuit-13555669.php>.

130. See Walker v. City of Calhoun, 901 F.3d 1245, 1265 (11th Cir. 2018); ODonnell v. Harris Cty., 892 F.3d 147, 157 (5th Cir. 2018).

131. See, e.g., Administrative Order: Amended Preset Bond Schedule, No. AO-2015-16 (Tulsa Cty. Dist. Ct., Nov. 5, 2015), [https://www.oklahomacriminallaw.com/Tulsa\\_County\\_Bond\\_Schedule.pdf](https://www.oklahomacriminallaw.com/Tulsa_County_Bond_Schedule.pdf). The ACLU of Oklahoma is currently challenging the use of bail schedules in Canadian County. See *Civil Rights Groups File Federal Lawsuit*

Recent statistics confirm that discriminatory bail practices disproportionately burden indigent defendants.<sup>133</sup> Disturbingly, jail growth has continued to rise over the past twenty years despite the convicted population shrinking.<sup>134</sup> And research shows that 99% of jail growth between 1999 and 2014 stemmed from an increase in the number of pretrial detainees.<sup>135</sup> This finding is especially problematic when pretrial detention increases the likelihood that a criminal defendant will plead guilty, be convicted, receive a sentence of imprisonment, and receive a longer sentence.<sup>136</sup> Because pretrial detention poses such deleterious risks to criminal defendants,<sup>137</sup> reforms that seek to address the incarceration crisis must focus on reducing the likelihood that an indigent defendant will receive a bail amount that she cannot afford to pay.

## II. *The Sixth Amendment Right to Counsel and its Many Variants*

The practices discussed above disproportionately affect poor defendants and perpetuate a system that traps them in a cycle of poverty-induced incarceration.<sup>138</sup> And while the Supreme Court has helped in one important way—by incorporating the Sixth Amendment right to counsel<sup>139</sup> in 1963<sup>140</sup>—the fact that this right does not assure indigent defendants representation at bail hearings inhibits its efficacy.<sup>141</sup> Despite this

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*Challenging Unjust Cash Bail System in Canadian County, OK*, ACLU OF OKLA. (Dec. 11, 2019), <https://www.acluok.org/en/press-releases/civil-rights-groups-file-federal-lawsuit-challenging-unjust-cash-bail-system-canadian>.

132. Wagner, *Jails Matter*, *supra* note 118.

133. See Pinto, *supra* note 3.

134. See Wagner, *Jails Matter*, *supra* note 118.

135. *Id.*

136. *Id.*; see MARY T. PHILLIPS, N.Y.C. CRIMINAL JUSTICE AGENCY, INC., *A DECADE OF BAIL RESEARCH IN NEW YORK CITY* 115 (2012).

137. Research shows that pretrial detention as short as three days can impact an individual's employment, finances, and housing as well as the wellbeing of dependent children. Joshua Aiken, *Era of Mass Expansion: Why State Officials Should Fight Jail Growth*, PRISON POL'Y INITIATIVE (May 31, 2017), <https://www.prisonpolicy.org/reports/jailsovertime.html#jailconvictionstatus> (citing studies from the Crime and Justice Institute).

138. See *id.*

139. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defence.”); see *infra* Section II.A.

140. See *infra* note 143 and accompanying text.

141. See *infra* note 156 and accompanying text.

shortcoming, states follow three methods—each inadequate in their own way—for assuring the right to counsel.<sup>142</sup>

*A. Incorporation Against the States*

*Gideon v. Wainwright* was the landmark case that first guaranteed a defendant in a state prosecution the right to counsel.<sup>143</sup> In *Gideon*, the Supreme Court incorporated the Sixth Amendment against the states through the Fourteenth Amendment Due Process Clause.<sup>144</sup> While this monumental decision fundamentally changed the nature of criminal proceedings for indigent defendants in state prosecutions, it only guaranteed the right to counsel in felony cases.<sup>145</sup> Despite the narrowness of this initial guarantee, the Court eventually extended the right to counsel to other categories of state proceedings.<sup>146</sup>

The right to counsel now applies at state juvenile delinquency proceedings that may result in commitment to an institution,<sup>147</sup> for misdemeanors that result in actual imprisonment,<sup>148</sup> during a first appeal,<sup>149</sup> and at all critical stages of the prosecution.<sup>150</sup> The right to counsel also includes the right to decide whether to have counsel<sup>151</sup> because defendants have the right to represent themselves as long as they make the decision knowingly and voluntarily.<sup>152</sup> It similarly includes the right to effective counsel.<sup>153</sup> Free representation need not be perfect, but it must be substantially equivalent to that which would be provided by a privately retained or appointed attorney.<sup>154</sup> Ineffective assistance of counsel can be grounds for reversal of a criminal conviction when the defendant proves

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142. See *infra* Section II.B.

143. See 372 U.S. 335, 339, 344 (1963).

144. See *id.* at 339.

145. See *id.* (concluding that the Sixth Amendment, as incorporated to apply against the states through the Due Process Clause of the Fourteenth Amendment, protects the right of an individual convicted of a felony to have counsel appointed to assist him).

146. See *infra* notes 147–50.

147. See *In re Gault*, 387 U.S. 1, 41 (1967), *abrogated on other grounds by* *Allen v. Illinois*, 478 U.S. 364, 372 (1986).

148. See *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972); *Scott v. Illinois*, 440 U.S. 367, 373 (1979).

149. See *Douglas v. California*, 372 U.S. 353, 357–58 (1963).

150. *United States v. Wade*, 388 U.S. 218, 224 (1967).

151. See *Faretta v. California*, 422 U.S. 806, 833–35 (1975).

152. See *Johnson v. Zerbst*, 304 U.S. 458, 467–68 (1938).

153. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

154. See *McCoy v. Court of Appeals of Wisc., Dist. 1*, 486 U.S. 429, 435, 438 (1988).

that the representation was objectively unreasonable and actually affected the outcome.<sup>155</sup>

Despite the broad application of the Sixth Amendment right to counsel in state prosecutions, the safeguard does not protect indigent defendants at what may be the most important stage for innocent persons: the initial bail hearing.<sup>156</sup> Although the Supreme Court mandates that states provide indigent defendants free representation at various stages of a criminal prosecution, state legislatures enjoy broad discretion in determining the methods through which they ensure the right to counsel within their jurisdictions.

*B. Methods for Ensuring the Right to Counsel*

There are three main models for ensuring the right to counsel for indigent defendants: assigned counsel, contract systems, and public defender programs.<sup>157</sup> Under the assigned counsel model, courts assign private attorneys to cases on an ad hoc or systematic basis.<sup>158</sup> Under the contract model, private attorneys, groups of attorneys, bar associations, or nonprofit organizations agree to represent some or all of the indigent defendants in a given jurisdiction for a specified period.<sup>159</sup> Under the public defender model, public or private nonprofit organizations employ staff attorneys and support staff to manage the indigent defense cases within a given jurisdiction on an ongoing basis.<sup>160</sup> Although none of these methods guarantee indigent defendants representation at the initial appearance, their relative benefits and shortcomings help elucidate opportunities for legislative and judicial reform.

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155. See *Strickland v. Washington*, 466 U.S. 668, 687–92 (1984).

156. See PRETRIAL JUSTICE CTR. FOR COURTS, PRETRIAL JUSTICE BRIEF NO. 7, ACCESS TO COUNSEL AT PRETRIAL RELEASE PROCEEDINGS 1 (2016) (explaining that the Supreme Court “left open whether a proceeding at which the decision is made to release or detain a defendant pending trial qualifies as one of these critical stages at which counsel must be present”).

157. Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 L. & CONTEMP. PROBS. 31, 32 (1995).

158. *Id.*

159. *Id.*

160. *Id.*

### *1. Assigned Counsel*

The ad hoc assigned counsel model is the oldest form of providing indigent defendants with the right to counsel.<sup>161</sup> Under this model, courts appoint attorneys without regard for a set rotation or list of qualification criteria.<sup>162</sup> For example, if an indigent defendant appears at a pretrial proceeding, the judge might look out into the courtroom, call an attorney to the bench, and assign the case to that attorney. Attorneys assigned in similar manners are usually paid an hourly rate, but they may receive a flat fee per case.<sup>163</sup> This is among the most commonly employed methods across the country, especially in small, less-populated counties.<sup>164</sup>

The coordinated assigned counsel model is similar to the ad hoc model, except that these types of programs operate under the direction of an administrative or oversight body.<sup>165</sup> These programs typically require minimum qualifications before attorneys may participate, and cases are assigned on a rotational basis according to the attorney's area of expertise and case complexity.<sup>166</sup> Compensation structures are similar to those employed under the ad hoc model, but this system helps ensure counsel's independence from the judiciary and higher standards of representation.<sup>167</sup>

### *2. Contract Systems*

The first type of contract system is the fixed-price contract system whereby attorneys, groups of attorneys, bar associations, or nonprofit organizations accept undetermined numbers of cases for a flat fee.<sup>168</sup> Contracting attorneys are generally responsible for all costs related to investigation and securing expert witnesses.<sup>169</sup> While contract prices are based on an estimated caseload, if the number of cases exceeds the projected amount, the contracting attorney, or group of attorneys, is responsible for providing representation without additional compensation.<sup>170</sup>

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161. *Id.* at 33.

162. *Id.*

163. *Id.*

164. *Id.*

165. *See id.*

166. *Id.*

167. *See id.* at 33–34.

168. *Id.* at 34.

169. *Id.*

170. *See id.*

The ABA has condemned the use of fixed-price contracts for providing indigent defense services,<sup>171</sup> and the Arizona Supreme Court has even declared them unconstitutional.<sup>172</sup> The Arizona Supreme Court cited the following reasons for prohibiting use of fixed-price contracts: (1) failure to take into account the time that attorneys spend representing indigent defendants, (2) failure to provide support costs for contracting attorneys, (3) failure to “take into account the competency of the attorney” providing indigent defense services, and (4) failure to “take into account the complexity of each case.”<sup>173</sup> In September 2006, the Washington Supreme Court prohibited fixed-price contracts that require attorneys to bear the cost of investigation or securing expert witnesses, because they “involve an inherent conflict between the interests of the client and the personal interests of the lawyer.”<sup>174</sup> This decision came after the ACLU of Washington brought a class-action lawsuit on behalf of indigent defendants represented by Grant County’s contracted public defense attorneys.<sup>175</sup>

The fixed-fee-per-case contract is a less common version of the contract method whereby attorneys, groups of attorneys, bar associations, or nonprofit organizations agree to represent indigent defendants in “a predetermined number of cases for a fixed fee *per case*.”<sup>176</sup> This system is far less common than the fixed-price contract system, mostly because the associated costs are higher.<sup>177</sup> However, where the fixed-fee-per-case system has been implemented, it has led to higher-quality representation.<sup>178</sup> ABA Standards favor these systems over fixed-price systems and require contracts to include, among other items, the following pieces of information: (1) type and number of cases, (2) fee per case, (3) attorney qualification standards, and (4) names of attorneys who will be working on the cases.<sup>179</sup>

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171. *Id.*

172. *Arizona v. Smith*, 681 P.2d 1374, 1381 (Ariz. 1984) (en banc).

173. *Id.*

174. *See* WASH. RULES OF PROF’L CONDUCT r. 1.8 cmt. 27 (2015).

175. *See Settlement Revamps Grant County, Washington Indigent Defense System; County Agrees to \$1.1 Million in Attorney Fees*, PRISON LEGAL NEWS (Jan. 15, 2007), <https://www.prisonlegalnews.org/news/2007/jan/15/settlement-revamps-grant-county-washington-indigent-defense-system-county-agrees-to-11-million-in-attorney-fees/>.

176. Spangenberg & Beeman, *supra* note 157, at 34.

177. *See id.* at 35.

178. *See id.*

179. *See* AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES 13, 49–50 (3d. ed. 1992).

### 3. Public Defender Programs

The final method for ensuring the right to counsel at the state level involves a public defender program, which “is a public or private nonprofit organization staffed by full- or part-time attorneys” who represent all indigent criminal defendants within a given jurisdiction.<sup>180</sup> While programs vary, the common characteristic underlying all public defender systems is the employment of staff attorneys.<sup>181</sup> The public defender concept existed in the early 1900s but became increasingly popular in the aftermath of *Gideon v. Wainwright*.<sup>182</sup> And by 2013, public defender systems closed at least 60% of cases handled by state indigent defense systems.<sup>183</sup>

Public defender systems are popular in larger jurisdictions that can afford to pay staff attorneys and professional staff, but operational costs tend to rise over time as caseloads expand.<sup>184</sup> The result is that public defenders, like those working within the fixed-price contract system, often carry heavy caseloads that complicate the task of providing effective representation to all clients who require indigent defense services.<sup>185</sup> Because conflicts of interest often arise when one organization defends all indigent criminal defendants within a particular geographic area, these systems often operate alongside an assigned counsel or contract system.<sup>186</sup>

## III. Oklahoma’s Indigent Defense Framework

### A. The Two-Pronged Approach

Like the U.S. Constitution, the Oklahoma Constitution guarantees criminal defendants the right to counsel.<sup>187</sup> Since 1978, Oklahoma law has permitted city governments with populations of 200,000 or more to create an office of public defender to protect the rights of any defendant charged

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180. Spangenberg & Beeman, *supra* note 157, at 36.

181. *Id.*

182. *Id.*

183. See SUZANNE M. STRONG, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, STATE-ADMINISTERED INDIGENT DEFENSE SYSTEMS, 2013, at 3 tbl.1 (rev. 2017) (showing that, in 2013, public defenders closed roughly 1.65 million out of 2.70 million indigent defense cases in twenty-eight states plus the District of Columbia).

184. See Spangenberg & Beeman, *supra* note 157, at 36.

185. *Id.* at 36–37.

186. *Id.* at 36.

187. OKLA. CONST. art. II, § 20.

with violating any ordinance, upon the order of any criminal judge.<sup>188</sup> As of 1995, counties with populations of at least 300,000 automatically have an office of public defender to “protect[] . . . the rights of any defendant to a criminal action.”<sup>189</sup> For cities and counties with insufficient populations, indigent defense work is provided under the Indigent Defense Act.<sup>190</sup>

### *1. Public Defender*

Only two counties satisfy the population requirements under titles 11 and 19 to establish an office of public defender: Oklahoma County and Tulsa County.<sup>191</sup> The Oklahoma County Public Defender and Tulsa County Public Defender offices provide the following categories of representation for indigent defendants: misdemeanors, felonies, capital crimes, juvenile defense, domestic, civil commitment, and child advocacy—including trial and appellate work.<sup>192</sup> Manned with attorneys, investigators, and professional support personnel, county public defender offices provide representation to criminal defendants who are too poor to hire a private attorney.<sup>193</sup>

Defendants who request representation by a public defender must, under oath and penalty of perjury, apply and pay a nonrefundable \$15 application fee.<sup>194</sup> A court will not accept an application that is not accompanied by the fee, unless the court decides to waive the fee after determining that the applicant is in custody or lacks the financial resources to pay.<sup>195</sup> If the defendant requests representation after being released on bond, the application must include a statement certifying that the applicant has contacted three licensed attorneys and has been unable to obtain private counsel.<sup>196</sup> The court sends a copy of each application to the prosecuting attorney for review and will, upon request, require a hearing before declaring a defendant indigent and thus eligible for appointment of a public

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188. 11 OKLA. STAT. § 28-110 (2011).

189. 19 OKLA. STAT. § 138.1a(A) (2011).

190. See 22 OKLA. STAT. § 1355(C) (2011).

191. See POPULATION DIV., U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION: APRIL 1, 2010 TO JULY 1, 2018 (2018).

192. *Public Defender*, OKLA. CTY., <https://www.oklahomacounty.org/169/Public-Defender> (last visited May 21, 2020); *What We Do*, TULSA CTY. PUB. DEFS., <http://tulsa-publicdefender.net/tulsa-county-public-defender/> (last visited May 21, 2020).

193. See 19 OKLA. STAT. § 138.5(A) (2011 & Supp. 2019).

194. *Id.* § 138.5(B).

195. *Id.*

196. *Id.*

defender.<sup>197</sup> If a defendant has posted bond, other than by recognizance, the court may consider that fact in determining eligibility for appointed counsel, as long as such payment of bond is not the sole factor in determining whether an applicant is indigent.<sup>198</sup>

## 2. Oklahoma Indigent Defense System

Following the Oklahoma Supreme Court's 1990 decision in *Oklahoma v. Lynch*,<sup>199</sup> the Oklahoma Legislature passed the Indigent Defense Act (the Act) to expand indigent criminal defendants' access to counsel.<sup>200</sup> The Act created the Oklahoma Indigent Defense System (OIDS)<sup>201</sup> and the Oklahoma Indigent Defense System Board (the Board).<sup>202</sup> Under the Act, the Board is tasked with governing OIDS.<sup>203</sup> The Act also established the process for determining whether a defendant is indigent<sup>204</sup> and identified the scope of proceedings for which indigents receive representation.<sup>205</sup>

The application process for representation under OIDS is similar to that for representation by a county public defender<sup>206</sup> but is governed by rules promulgated by the Court of Criminal Appeals.<sup>207</sup> Like individuals applying for representation by a county public defender, individuals applying under the Act must disclose information pertaining to financial status, the possibility of family assistance, and bond status under oath and penalty of perjury.<sup>208</sup> Like individuals who have posted bond before applying for representation by a public defender, OIDS applicants must include a written statement certifying that they have contacted three licensed attorneys and

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197. *Id.*

198. *Id.* § 138.5(C).

199. 1990 OK 82, 796 P.2d 1150.

200. 22 OKLA. STAT. § 1355(B) (2011).

201. *Id.*

202. *See id.* § 1355.1.

203. *Id.*

204. *See id.* § 1355A.

205. *See id.* § 1355.6(A) (guaranteeing representation in capital cases, felony cases, misdemeanor and traffic cases punishable by incarceration, "juvenile delinquency proceedings, adult certification proceedings, reverse certification proceedings, youthful offender proceedings," and other cases pursuant to the Oklahoma Juvenile Code); *see also id.* § 1355.6(B) (giving the Executive Director the power to approve representation in other state proceedings when the "representation is related to the case for which the original appointment of the System was made" if the Act does not otherwise prohibit it).

206. *See supra* notes 194–98 and accompanying text.

207. 22 OKLA. STAT. § 1355A(B)(1) (2011 & Supp. 2019).

208. *See id.* app. § XIII, form 13.3.

have been unable to obtain private counsel.<sup>209</sup> Furthermore, courts similarly send a copy of all applications to the prosecuting attorney and, upon request by any party, will hold indigency determination hearings.<sup>210</sup> If applicants post bond, other than by recognizance, the court may consider that fact in determining eligibility for appointed counsel, as long as such payment of bond is not the sole factor in determining whether an applicant is indigent.<sup>211</sup> Unlike applicants seeking representation by a public defender, those applying under the Act must pay a \$40 application fee.<sup>212</sup> However, if the court determines that the applicant lacks financial wherewithal, the court may defer the fee until conviction.<sup>213</sup>

Pursuant to the Indigent Defense Act, the Oklahoma Court of Criminal Appeals promulgated Rule 1.14 to establish the factors that courts should consider when determining an applicant's indigency status.<sup>214</sup> The court elected to follow the guidelines set forth in *Cleek v. Oklahoma*,<sup>215</sup> *In re Humphrey*,<sup>216</sup> and *Bruner v. Oklahoma*.<sup>217</sup> Thus, an applicant's indigency determination depends on consideration of the following factors:

1. Ability and decision to post appeal bond;
2. Availability of liquid assets;
3. Debts and liabilities;
4. Financial history;
5. Income potential and living expenses;
6. Credit standing;
7. Family size and number of dependents; and
8. Ability and willingness of family members to provide financial assistance.<sup>218</sup>

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209. *Id.* § 1355A(A).

210. *Id.* § 1355A(C).

211. *Id.* § 1355A(D).

212. *Id.* § 1355A(A).

213. *Id.*

214. *See* OKLA. CT. CRIM. APP. R. 1.14(A)(1).

215. 1987 OK CR 278, ¶ 5, 748 P.2d 39, 40, *overruled on other grounds by* Norton v. Oklahoma, 2002 OK CR 10, 43 P.3d 404.

216. 1979 OK CR 97, ¶ 14, 601 P.2d 103, 108.

217. 1978 OK CR 65, ¶ 7, 581 P.2d 1314, 1317–18.

218. OKLA. CT. CRIM. APP. R. 1.14(A)(1).

Consulting these factors, the Chief Judge, or the Chief Judge's designee, determines whether the applicant is indigent and thus eligible for representation by OIDS.<sup>219</sup> Once an applicant has been declared indigent, the case will be handled by an attorney appointed on a coordinated assignment basis<sup>220</sup> or by the attorney, or group of attorneys, who has secured the contract to represent indigent criminal defendants and indigent juveniles in a given jurisdiction for a certain period.<sup>221</sup>

Contracts for noncapital trial representation are available annually and become open for bidding should the previous holder elect not to renew an existing contract for the next fiscal year, or should the Board elect to solicit new offers.<sup>222</sup> When the Board decides not to renew a contract, the Executive Director publishes a notice in the Oklahoma Bar Journal inviting offers for the upcoming year.<sup>223</sup> Such notice must include information regarding attorney qualifications, the contract period, and a description of services to be rendered.<sup>224</sup> Members of the Oklahoma Bar Association in good standing are eligible to bid on contracts,<sup>225</sup> and the Board accepts the best offer (or offers) after considering the following factors:

1. "Whether the attorney or attorneys submitting the offer maintain an office within th[e] county";
2. Whether the office is the attorney's or attorneys' primary office;
3. Whether the attorney or attorneys have a contract in another county;
4. Whether the attorneys included in the offer can handle the cases to be covered; and
5. The accessibility of the attorney or attorneys to clients requiring representation.<sup>226</sup>

Contracts awarded under the Act are fixed-price contracts,<sup>227</sup> but cases assigned under the coordinated assignment program or not otherwise

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219. *Id.*

220. *See* 22 OKLA. STAT. § 1355.6(C) (2011).

221. *See id.* § 1355.8 (providing a framework to award contracts for representation of indigent criminal defendants).

222. *Id.* § 1355.8(A).

223. *Id.* § 1355.8(B).

224. *Id.* § 1355.8(B)(2)–(4).

225. *Id.* § 1355.8(C).

226. *Id.* § 1355.8(D)(1)(a)–(e).

covered by a fiscal year noncapital trial contract follow a fixed-fee-per case arrangement.<sup>228</sup> Assigned cases are subject to statutory maximums that vary depending on the type of case.<sup>229</sup>

*B. Consequences of Oklahoma's Two-Pronged Approach*

*1. Surface-level Benefits*

Oklahoma's indigent defense system was designed to be as cost-effective as possible.<sup>230</sup> Public defender systems enjoy economies of scale by employing dedicated legal, investigative, and support staffs to serve indigent persons in high population areas like Oklahoma City and Tulsa.<sup>231</sup> Public defender offices lend themselves to the division of labor, which facilitates more productive operations. While growing caseloads may threaten public defenders' ability to provide the same quality of service to a broader client base, specialized organizations are better positioned to respond to increased demands at only marginally higher costs.<sup>232</sup>

Similarly, the predominantly fixed-price contract system that OIDS employs makes it cheaper to provide services in less populated areas.<sup>233</sup> Where a solo practitioner or small practice can manage an entire city or county's caseload, as small-town criminal defense attorneys may sometimes do, it may not make sense to establish a bureaucratic system. Additionally, awarding the majority of cases through fixed-price contracts helps keep costs down and appropriations predictable. Once the Board awards contracts for a given fiscal year, OIDS can project, with an above-average degree of certainty, what its yearly expenses will be. However,

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227. See *supra* notes 168–75 and accompanying text.

228. See *supra* notes 176–79 and accompanying text.

229. See 22 OKLA. STAT. § 1355.8(F) (establishing a maximum compensation of \$3500 for felony cases and \$800 for other cases, subject to Executive Director and Board approval of additional compensation in exceptional cases that require “extraordinary amount[s] of time to litigate” and for which a “request for extraordinary attorney fees is reasonable”).

230. *Oklahoma Indigent Defense System*, STATE OF OKLA., <https://www.ok.gov/OIDS/> (last visited May 21, 2020).

231. See *supra* notes 191–93 and accompanying text.

232. See Ivillegas, *City Controller: Public Defender Provides Most Cost-Efficient Means of Representing Poor*, S.F. PUB. DEF. (June 24, 2009), <http://sfpublicdefender.org/news/2009/06/city-controller-public-defender-provides-most-cost-efficient-means-of-representing-poor/>.

233. See *supra* notes 219–21.

these cost savings negatively affect the populations they were created to serve, to the detriment of every arrested indigent.

## 2. *The Human Cost of Prioritizing Efficiency over Equity*

Despite—or perhaps because of—the economic incentives that motivate the current system, Oklahoma has constructed an indigent defense apparatus that suffers from all the negative consequences that the ABA seeks to discourage in its suggested standards.<sup>234</sup> The most egregious characteristic is that the system relies heavily on fixed-price contracts to provide indigent defense services in 97% of Oklahoma counties.<sup>235</sup> While fixed-price contracts may help keep expenditures under control, they substantially limit the quality of service that the most vulnerable criminal defendants receive.

The fixed-price contract system creates perverse incentives that place the interests of attorneys directly at odds with those of their clients.<sup>236</sup> Because contract attorneys earn a flat monthly rate regardless of the time that they dedicate to each case, they lack an incentive to provide their clients with significant representation. Instead, the system's incentive structure encourages cutting corners on research and writing and negotiating plea deals in cases that should not be plead out. As a result, indigent clients receive inferior representation that falls short of the constitutional guarantee of *effective* counsel.

Fixed-price contracts also negatively affect the attorneys who represent clients under their terms. By inadvertently encouraging attorneys across the state to provide lower quality services, the OIDS system exposes attorneys to an increased risk of grievances and sanctions by the Oklahoma Bar Association. Furthermore, requiring attorneys to manage caseloads that far exceed national recommendations and ABA standards diminishes their ability to be proud of their work and confidence that they are doing all they can for every client.<sup>237</sup> These economic and emotional consequences contribute to attorney burnout, reducing the supply of individuals with the training, skill, and passion for representing indigent clients.

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234. *See supra* notes 168–75 and accompanying text.

235. *See supra* notes 191–92 and accompanying text.

236. *See supra* notes 168–75 and accompanying text.

237. *See* Andrew Cohen, *The Most Overworked, Underfunded 'Army' in American History*, ATLANTIC (July 1, 2013), <https://www.theatlantic.com/national/archive/2013/07/the-most-overworked-underfunded-army-in-american-history/277363/> (discussing the emotional consequences of overburdening public defenders).

#### IV. Proposed Reforms

Since the Prison Policy Initiative released its 2018 statistics that recognized Oklahoma as the leading incarcerator in the world,<sup>238</sup> Oklahoma has made limited progress toward reducing the incarcerated population.<sup>239</sup> In May 2019, the Legislature passed HB 1269.<sup>240</sup> The bill made SQ 780, a 2016 ballot initiative which made simple drug possession a misdemeanor instead of a felony, retroactive.<sup>241</sup> HB 1269 also created the Pardon and Parole Board, which was tasked with reviewing commutation applications by individuals serving sentences for simple possession. And on November 4, 2019, 462 Oklahomans were released in the largest single-day commutation in U.S. history.<sup>242</sup>

Unsurprisingly, this measure overwhelmingly favored individuals with the financial resources to hire an attorney to complete an application on their behalf.<sup>243</sup> And, as a criminal justice analyst at the Oklahoma Policy Institute recognized, “For Oklahoma, the preferred solution to almost any infraction [remains] incarceration.”<sup>244</sup> Notwithstanding the passage of HB 1269, the Oklahoma Legislature has failed to pass any meaningful criminal justice bills since the state first gained its reputation as the leading incarcerator in the world.<sup>245</sup> And in its 2020 budget request, the Oklahoma Department of Corrections included \$884 million to build 5200 new beds in

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238. See *supra* notes 11–12 and accompanying text.

239. See Bret Shulte, *Oklahoma Focuses on Criminal Justice Reform*, U.S. NEWS (Oct. 31, 2019, 8:41 AM), <https://www.usnews.com/news/best-states/articles/2019-10-31/oklahoma-focuses-on-criminal-justice-reform>.

240. See Damion Shade, *HB 1269 Makes 780 Retroactive But Leaves Issues Unresolved*, OKPOLICY.ORG.: OKLA. POL’Y INST. (May 23, 2019), <https://okpolicy.org/hb-1269-makes-780-retroactive-but-leaves-issues-unresolved/>.

241. See *id.*

242. See Joshua Bote, *Hundreds of Oklahoma Inmates to be Freed, The Largest Mass Release in US History*, USA TODAY (Nov. 4, 2019, 10:09 AM ET), <https://www.usatoday.com/story/news/nation/2019/11/04/hundreds-oklahoma-inmates-released-largest-commutation-history/4154598002/>.

243. See Shade, *supra* note 240.

244. Shulte, *supra* note 239 (quoting Damion Shade, criminal Analyst for Oklahoma Policy Institute).

245. See Quinton Chandler, *Legislators Leave Criminal Justice Reform Bills on the Table as Prison Population Grows*, STATEIMPACT OKLA. (May 30, 2019, 3:18 PM), <https://stateimpact.npr.org/oklahoma/2019/05/30/legislators-leave-criminal-justice-reform-bills-on-the-table-as-prison-population-grows/>.

its facilities that were operating at over 110% capacity.<sup>246</sup> The lack of political will to pass measures that help the most vulnerable criminal defendants and never-ending desire to increase facility capacity reinforces the need for pretrial reforms that actually address the crux of the incarceration issue: the criminalization of poverty and eagerness to prey upon the misfortunes of indigent persons.

Although it may be enticing to operate state government in a way that decreases spending on social services,<sup>247</sup> indigent defense deserves to be adequately funded and systematically reformed in ways that restore the dignity of the poorest and most vulnerable citizens. If criminal justice systems are judged by how effectively they deliver justice to their most vulnerable citizens, Oklahoma's is failing miserably. The following reforms address pretrial proceedings in ways that, if implemented together, would provide indigent criminal defendants with higher quality representation, reduce prison and jail populations, and disrupt powerful systems of oppression that perpetuate poverty and criminality. These reforms also illustrate that the Oklahoma Legislature has an arsenal of tools at its disposal if it actually wants to address the state's ongoing incarceration crisis.

*A. Replace the Fixed-Price OIDS Contract System with a Statewide Public Defender Program*

First, the Oklahoma Legislature should abandon the fixed-price contract system that incentivizes attorneys who provide indigent defense services to allocate minimal time and resources to individual cases.<sup>248</sup> While assigned counsel programs dominated the indigent defense landscape in the lead up to the landmark decisions in *Gideon* and *Argersinger*,<sup>249</sup> public defender systems became commonplace in metropolitan areas following the Supreme Court's sweeping mandate.<sup>250</sup> But even as metropolitan areas increasingly

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246. *Oklahoma Board of Corrections Approves State System 2020 Budget Request*, OKLA. DEP'T CORRECTIONS (Oct. 30, 2018), <http://doc.ok.gov/oklahoma-board-of-corrections-approves-state-prison-system-2020-budget-request>.

247. Cf. Matt Grossmann, *Republican Control in the States Hasn't Stopped the Growth of Government*, FIVETHIRTYEIGHT (Oct. 10, 2019, 11:33 AM), <https://fivethirtyeight.com/features/republican-control-in-the-states-hasnt-stopped-the-growth-of-government/> (explaining that Republican legislators often promise to avoid expanding social services).

248. See *supra* notes 168–73 and accompanying text.

249. See AM. BAR ASS'N, QUESTIONS AND ANSWERS CONCERNING FIXED PRICE CONTRACTS FOR REPRESENTATION OF INDIGENT DEFENDANTS 1 (1996).

250. *Id.*

adopted public defender models, rising costs threatened their desirability, and legislatures across the country—especially those responsible for implementing programs that saved money in smaller, rural jurisdictions—shifted toward contract systems like OIDS in the 1970s.<sup>251</sup> But the growing number of indigent defendants requiring appointed counsel limits the effectiveness of contract systems that prioritize cost savings.<sup>252</sup> The national—and Oklahoma—trend toward prioritizing cost savings over judicial efficiency and high-quality indigent defense services bolsters concerns about whether indigent defendants receive constitutionally adequate representation.<sup>253</sup> Chief among these concerns is that emphasizing cost will lead to lower-quality services.<sup>254</sup>

In 2015, the ACLU of Idaho sued the state over “its unconstitutional system of public defense, which deprive[d] thousands of Idahoans of their Sixth Amendment right to adequate legal representation.”<sup>255</sup> The class-action suit challenged the state’s combination public defender and fixed-price contract system.<sup>256</sup> The Idaho system, analogous to that in Oklahoma, operated with such inadequate resources that indigents who sued the state received bail amounts that they could not afford, spent weeks or months in jail, and lacked access to investigative help.<sup>257</sup> Though the Idaho Legislature passed the Public Defense Act in 2014 to ban fixed-price contracts, nineteen out of forty-four counties still used fixed-price contracts at the time the suit was filed.<sup>258</sup> Although the trial court originally dismissed the lawsuit in January 2016, the Idaho Supreme Court reversed in 2017 and allowed the case to proceed.<sup>259</sup>

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251. *See id.*

252. *See id.* at 1–2; CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SPECIAL REPORT NO. NCJ 179023, DEFENSE COUNSEL IN CRIMINAL CASES 2–3 (2000).

253. *See Spangenberg & Beeman, supra* note 157, at 35.

254. *See id.*

255. Leo Morales, *ACLU Sues Idaho Over Defective Public Defense System*, ACLU OF IDAHO (June 17, 2015, 9:15 AM), <https://www.acluidaho.org/en/news/aclu-sues-idaho-over-defective-public-defense-system>.

256. *See id.*

257. *Id.*

258. See Bill Dentzer, *ACLU Sues Idaho for Lack of Action to Fix ‘Broken’ Public Defender System*, IDAHO STATESMAN (June 17, 2015, 9:10 AM), <https://www.idahostatesman.com/news/politics-government/state-politics/article40864158.html>.

259. *Tucker, et al. vs. State of Idaho, et al.*, ACLU, <https://www.aclu.org/cases/tucker-et-al-vs-state-idaho-et-al> (last updated Nov. 27, 2019). “The case is currently back on appeal in

While the Idaho commission tasked with adopting new standards and implementing new procedures following the prohibition on fixed-price contracts failed to deliver, the Oklahoma Legislature should follow suit by banning fixed-price contracts. Banning these contracts may require reforming the entire OIDS system and, in turn, allocating more taxpayer money to indigent defense, but doing so would increase the quality of indigent defense services by removing contradictory incentives that pit providers against receivers. While abandoning the fixed-price contract system would allow the Legislature to alter the underlying incentive structures that prevent indigent defendants from receiving adequate representation, such a reform does not go far enough to address Oklahoma's unparalleled incarceration crisis.

*B. Provide Indigent Defendants with Counsel at Bail Hearings*

The Oklahoma Legislature should also consider recognizing bail hearings—sometimes called initial appearances—as critical proceedings. Doing so would ensure the Sixth Amendment right to counsel at indigent defendants' first appearance before a judge.<sup>260</sup> Having appointed counsel present at bail hearings would ensure that those who are most susceptible to sit in jail pending trial have a chance to argue in favor of reduced or recognizance bond. While determinations of what constitutes a critical proceeding have historically occupied the province of the judicial branch, the Oklahoma Legislature possesses the authority to decide matters of public policy concerning the availability of defense counsel for indigent defendants at pretrial proceedings.<sup>261</sup>

Should the Legislature be unwilling to act, the courts could also guarantee indigent defendants counsel at bail hearings. Though the Supreme Court has never decided the issue of whether the Sixth Amendment right to counsel applies at a bail hearing, it came close in *Rothgery v. Gillespie County, Texas*.<sup>262</sup> In *Rothgery*, an indigent sued a Texas county for refusing to appoint him a lawyer until six months after his

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the Idaho Supreme Court—this time to determine the proper legal standard to be used in this case and in public defense reform cases more generally.” *Id.*

260. See *United States v. Wade*, 388 U.S. 218, 224–25 (1967).

261. As an example of this legislative authority, the Indigent Defense Act has a provision that allows indigents to be represented in other state proceedings (such as pretrial proceedings) not specifically enumerated within the Act upon approval by the Executive Director. See 22 OKLA. STAT. § 1355.6(A)–(B) (2011).

262. 554 U.S. 191 (2008).

initial appearance.<sup>263</sup> The Supreme Court held that the right to counsel attached at the initial appearance but did so without deciding whether a bail hearing is a critical stage.<sup>264</sup> Consequently, the Court failed to mandate that the right to counsel attaches *at or before* the bail hearing, as opposed to *after* the bail hearing.

However, in the time since *Rothgery*, the New York Court of Appeals and Connecticut Supreme Court have determined that bail proceedings are critical stages that require the presence of counsel.<sup>265</sup> The Oklahoma Supreme Court should follow suit and declare that the importance of the assistance of counsel at proceedings where courts may impose potentially prohibitive bail amounts justifies granting the right to counsel at initial appearances. Doing so would help propel a national trend toward guaranteeing counsel at bail hearings while contributing to ending the practice of incarcerating poor individuals before they have even been proven guilty. Should the Oklahoma Supreme Court choose not to interpret the Sixth Amendment how the New York and Connecticut courts did, it could accomplish the same outcome within the state using article 2, section 20 of the Oklahoma Constitution, which guarantees a state right to counsel.<sup>266</sup> Though guaranteeing indigent criminal defendants the right to counsel at bail hearings will reduce the number of individuals who spend prolonged periods in jail awaiting trial, it will not address the issue as effectively as rectifying the bail system at large.

### C. Mandatory Recognizance Bonds for Nonviolent Crimes

While guaranteeing the right to counsel at bail hearings would reduce the likelihood that an indigent is incarcerated, wholly eliminating cash bond for nonviolent crimes would eliminate the need for counsel at such hearings in more than 80% of cases.<sup>267</sup> Jurisdictions across the country are beginning to implement similar reforms to limit the extent to which the criminal justice system punishes indigent defendants for their financial misfortunes.<sup>268</sup>

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263. *Id.* at 196–97.

264. *See id.* at 213.

265. *Hurrell-Harring v. New York*, 930 N.E.2d 217, 223 (N.Y. 2010); *Gonzalez v. Comm’r of Corr.*, 68 A.3d 624, 635–36 (Conn.), *cert. denied*, 751 U.S. 1045 (2013).

266. *See* OKLA. CONST. art. II, § 20 (protecting the “[r]ights of accused in criminal cases”).

267. *See* OFFICE OF CRIMINAL JUSTICE STATISTICS, *supra* note 4, at 1-2 (showing that nonviolent crimes accounted for roughly 85% of reported index crimes in Oklahoma in 2018).

268. *See infra* notes 269–80 and accompanying text.

Reform efforts in Georgia, Illinois, and New York offer blueprints that the Oklahoma Legislature could consider in reducing its reliance on a wealth-based test for determining pretrial release.

In February 2018, Atlanta Mayor Keisha Lance Bottoms signed an ordinance that eliminated cash bond requirements for certain low-level offenses.<sup>269</sup> The ordinance gives the Atlanta Detention Center authority to release individuals charged with nonviolent misdemeanors or city ordinance violations on their own recognizance.<sup>270</sup> Though the state bail-bond industry opposed the measure, the Atlanta City Council voted 13-0 in favor.<sup>271</sup> When asked about the ordinance, Mayor Bottoms replied, “There are poor people who don’t have resources to get out of jail . . . it ma[kes] no fiscal sense to hold someone who cannot post a \$500 bond at a cost to taxpayers of thousands of dollars.”<sup>272</sup> Fulton County, where Atlanta is located, also passed an ordinance that eliminated cash bail for violations of county ordinances and certain misdemeanors.<sup>273</sup> According to Robb Pitts, Chairman of the Fulton County Board of Commissioners, the change will save the county seventy-seven dollars per day per inmate.<sup>274</sup> Based on Oklahoma’s estimated 4000 inmates who are held in jails pretrial despite not yet being convicted,<sup>275</sup> an estimated 80% of whom committed nonviolent crimes, such a change could amount to nearly \$250,000 in savings per day.

In May 2015, the Illinois Legislature passed Senate Bill 202, which guarantees that defendants “accused of nonviolent crimes such as trespassing,” will be released without bond if their case lasts thirty days or

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269. See Keith Whitney, *Atlanta, Fulton County Looks to Eliminate Cash-Bonds for Non-Violent, Minor Crimes*, CBS 46 [ATLANTA] (Jan. 25, 2018), [https://www.cbs46.com/news/atlanta-fulton-county-looks-to-eliminate-cash-bonds-for-non/article\\_e9d70c4c-3614-55f3-8d35-c39270b5b7ce.html](https://www.cbs46.com/news/atlanta-fulton-county-looks-to-eliminate-cash-bonds-for-non/article_e9d70c4c-3614-55f3-8d35-c39270b5b7ce.html).

270. Rhonda Cook, *Atlanta Mayor Signs New Ordinance Changing Cash Bail System in a Nod to the Needy*, ATLANTA J.-CONST. (Feb. 6, 2018), <https://www.myajc.com/news/local/atlanta-council-oks-changes-cash-bail-system-nod-the-needy/SW50dABJAtWgBwpB4vtgBN/>.

271. *Id.*

272. *Id.* (internal quotations omitted) (quoting Atlanta Mayor Keisha Lance Bottoms).

273. Carson Cook, *Fulton Passes Measure to Ease Bail Requirement*, N. FULTON (Oct. 8, 2018), [https://www.northfulton.com/news/fulton-passes-measure-to-ease-bail-requirement/article\\_251ee1d2-cb5c-11e8-8e75-bfbce99237ae.html](https://www.northfulton.com/news/fulton-passes-measure-to-ease-bail-requirement/article_251ee1d2-cb5c-11e8-8e75-bfbce99237ae.html).

274. Whitney, *supra* note 269.

275. See *Oklahoma Profile*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/profiles/OK.html> (last visited May 20, 2020).

longer.<sup>276</sup> Cook County Sheriff Tom Dart, who proposed the bill, asserted, “These folks are nonviolent, not dangerous. They are in here because of inertia built into a large system.”<sup>277</sup> By releasing defendants who cannot afford to post bond after thirty days, Cook County stands to save \$143 per day per inmate.<sup>278</sup> If Oklahoma were to adopt a similar policy, using the same numbers as above,<sup>279</sup> this could lead to more than \$450,000 in daily savings. In July 2016, New York City Mayor Bill de Blasio launched a program that released approximately 3400 of the city’s inmates under a monitored supervision program.<sup>280</sup>

Oklahoma stands to benefit significantly should it choose to implement a similar system for nonviolent offenses. While bail is not supposed to be imposed as a punishment,<sup>281</sup> it often becomes punitive when imposed against indigent criminal defendants.<sup>282</sup> Requiring individuals to remain in jail because they cannot afford to purchase their temporary freedom goes far beyond the government interest in ensuring appearance at court dates and serves no legitimate purpose. For example, in Washington, D.C., most criminal defendants are released on recognizance bonds, yet the city still boasts “an 89% court appearance rate.”<sup>283</sup> Reliance on outdated cash bail practices serves no other purpose than to criminalize and perpetuate poverty among those classes of individuals who are most susceptible to it. However, if the Oklahoma Legislature truly wants to address the state’s incarceration crisis and remedy the injustices being effectuated against the state’s poorest citizens, it should go even a step further.

#### *D. Abolish Cash Bail Entirely*

Finally, the Oklahoma Legislature should abolish cash bail entirely. While this proposition may sound like an excessive step to take in implementing criminal justice reform, it gets to the root of the issue that indigent criminal defendants face when they find themselves at a bail hearing. Rather than conditioning one’s freedom on wealth, systems that

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276. Fiona Ortiz, *Poor, Nonviolent Inmates Benefit from U.S. Bail Reform Push*, REUTERS (July 16, 2015, 10:36 AM), <https://www.reuters.com/article/us-usa-chicago-bail-idUSKCN0PQ1UN20150716>.

277. *Id.* (quoting Cook County Sheriff Tom Dart).

278. *Id.*

279. *Oklahoma Profile*, *supra* note 275.

280. Ortiz, *supra* note 276.

281. *See supra* notes 124–27 and accompanying text.

282. *See supra* notes 128–37 and accompanying text.

283. Ortiz, *supra* note 276.

reject the premise of the cash bail system treat bail hearings as they were intended.<sup>284</sup>

In August 2018, “California . . . became the first state to fully abolish cash bail.”<sup>285</sup> The California Money Bail Reform Act<sup>286</sup> ensured that suspects accused of crimes “will be evaluated on the basis of risk to public safety and the likelihood of not appearing in court, rather than on his or her ability to post a certain bail amount.”<sup>287</sup> Tani Cantil-Sakauye, Chief Justice of the California Supreme Court, lauded the law as “a fair and just solution for all Californians.”<sup>288</sup>

Under the new system, the California Judicial Council, tasked with setting state court rules, would create a new system for assessing suspects as “low risk,” “medium risk,” and “high risk.”<sup>289</sup> Courts would be able to detain suspects “if there is a substantial likelihood that no condition or combination of conditions of pretrial supervision will reasonably assure public safety or the appearance of the person in court.”<sup>290</sup> While supporters claimed that the law would end wealth-based discrimination in the setting of bail, opponents feared that it gave courts too much power.<sup>291</sup>

Natasha Minsker, Director for the ACLU of California Center for Advocacy & Policy,<sup>292</sup> worried that the new statute “lacks protections against racial bias.”<sup>293</sup> Some legislators also expressed concerns that the state rushed to pass a bill involving complex issues that deserved more time.<sup>294</sup> The Essie Justice Group feared that the law “gives too much discretion to prosecutors” and may lead to “incarceration without any due process.”<sup>295</sup>

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284. See *supra* notes 124–27.

285. Thomas Fuller, *California Is the First State to Scrap Cash Bail*, N.Y. TIMES (Aug. 28, 2018), <https://www.nytimes.com/2018/08/28/us/california-cash-bail.html>.

286. S. 10, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

287. Fuller, *supra* note 285.

288. *Id.* (quoting Tani Cantil-Sakauye, Chief Justice of the California Supreme Court).

289. *Id.*

290. *Id.* (quoting the law itself).

291. *Id.*

292. Natasha Minsker, LINKEDIN, <https://www.linkedin.com/in/natasha-minsker-77427019> (last visited May 21, 2020).

293. Fuller, *supra* note 285 (quoting Natasha Minsker, advocate for California ACLU).

294. *Id.*

295. *Id.* (quoting statement from Essie Justice).

Unfortunately, the California bail bill has been put on hold pending a referendum in November 2020.<sup>296</sup> Following the law's passage in 2018, a national coalition of the two-billion-dollar bail lobby organized a referendum drive and gathered enough signatures to put the issue to a vote.<sup>297</sup> Despite this setback, the bill's original author is confident that the voters will approve the measure.<sup>298</sup> In the meantime, at least eleven counties are experimenting with pilot programs to reduce the number of people in jail, and approximately fifty counties have started using risk assessment tools to determine which defendants qualify for release.<sup>299</sup>

Though the California Legislature may have rushed the legislation without taking time to work through all the details, Oklahoma can change the way its criminal justice system works by passing similar legislation. Thankfully, Oklahoma could convene a task force to study the California county pilot programs and risk assessment tools to determine which ones mitigate risks that opponents of California's bill raised. A new risk-based system that only considers risks of flight and public safety would reduce the likelihood that indigent criminal defendants are unjustly jailed for minor crimes. And with the power of hindsight, the Oklahoma Legislature could also address those areas that the California bill failed to consider.

To limit the courts' and prosecutors' discretion, the Oklahoma Legislature could enumerate certain crimes for which detention should be mandatory. Such a system would result in mandatory pretrial detention for certain individuals who might otherwise be eligible for release on a sizable bond, but it would be a step in the right direction by basing pretrial detention on the offense charged rather than the defendant's financial resources. If the purpose of pretrial detention is to limit risks of flight and danger to public safety, it should be reserved for individuals who pose such risks, not those who are simply too poor to afford their freedom.

### *Conclusion*

Oklahoma's incarceration crisis is part of a national trend, not an isolated occurrence.<sup>300</sup> Despite the regularity with which states construct and

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296. See Jazmine Ulloa, *California's Historic Overhaul of Cash Bail is Now on Hold, Pending a 2020 Referendum*, L.A. TIMES (Jan. 16, 2019, 7:25 PM), <https://www.latimes.com/politics/la-pol-ca-bail-overhaul-referendum-20190116-story.html>.

297. *Id.*

298. *Id.*

299. *Id.*

300. See *supra* notes 11–12 and accompanying text.

administer two-tiered criminal justice systems that criminalize poverty, Oklahoma's system deserves special attention. The state's status as the highest incarcerator per capita in the entire world<sup>301</sup> makes it an ideal candidate to implement comprehensive reforms.

Though cost savings have historically driven legislative and executive decisions regarding the administration of the state's indigent defense system, continued reliance on the same policies will only serve to aggravate the incarceration crisis. The only sensible way to address Oklahoma's broken system is to reform the pretrial policies that disproportionately impact the most vulnerable criminal defendants—those who are too poor to afford to get out of jail. While criminal justice reforms that will reverse the troubling trends toward relentless incarceration may require initial expenditures in the form of increased appropriations for indigent defense, the state stands to offset many of its short-term costs in the long term.

Each of the proposed reforms will produce an economic benefit once its effects are realized.<sup>302</sup> Ending fixed-price contracts may increase short-term costs for statewide indigent defense services, but higher quality representation will reduce the costs associated with incarcerating innocent defendants for crimes they did not commit.<sup>303</sup> This is true during both the pretrial stage and post-conviction. Reducing the number of beds occupied by innocent indigents will save city and county governments funds, and reducing the number of individuals who plead guilty to crimes they did not commit will do the same for the state government. Better representation would ensure that prosecutors give guilty defendants access to information that helps reduce the length of their sentences, and it will also make it less likely that an innocent indigent either pleads guilty or gets convicted at trial. Ensuring the right to counsel at bail hearings may cost judicial resources on the front end but would simultaneously reduce the strain on overcrowded jails. Eliminating cash bail—either for nonviolent crimes or all crimes—may raise pretrial supervision costs but would significantly curtail spending on pretrial detention.

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301. Matt Clarke, *Oklahoma Is Number One ... in Incarceration Rates*, PRISON LEGAL NEWS (Feb. 5, 2019), <https://www.prisonlegalnews.org/news/2019/feb/5/oklahoma-number-one-incarceration-rates/>.

302. For example, Georgia and Illinois saved \$77 and \$143 per inmate per day, respectively, through their reform efforts. *See supra* notes 274, 278.

303. *Cf.* Spangenberg & Beeman, *supra* note 157, at 35 (explaining that contract programs for representing indigent defendants sacrifice quality for low cost).

These proposed reforms, whether implemented individually or together, would reduce the strain on overcrowded prisons and jails. They would also save taxpayer funds that would otherwise be spent on incarcerating poor criminal defendants. Though the exact short-term financial costs are difficult to predict, the long-term financial and societal benefits of reforming pretrial procedures far exceed any such expenditure. Finally—and perhaps most importantly—these reforms would help restore the dignity of the most vulnerable individuals in the criminal justice system and send a clear signal that our legislators truly care about all citizens, not just the wealthy.

*Bailey Betz*