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Freedom Isn't Free: Why Washington State Needs to Move Beyond a Cash Bail System

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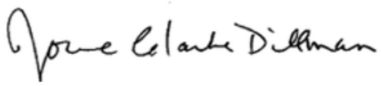

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ABSTRACT

Despite the belief that our justice system holds people "innocent until proven guilty," for those who are unable to pay for their freedom from pretrial detention, they find the opposite to be true. The cash bail system in this country allows people to pay a court-determined fee to be released from jail after arrest while they wait for their trial. But as this paper demonstrates, the cash bail system as it currently stands in Washington State criminalizes poverty and simultaneously exacerbates racial inequities. Under this system, accused individuals who cannot afford bail, as well as their families, face extreme social and economic consequences. In this paper, I will explore the impacts of cash bail and the changes we must make to move forward as a community. I will begin with an analysis of the origins of the cash bail and pretrial detention system, transitioning to exploring the history of U.S. bail reform over the last 70 years. I will then analyze the global concerns and consequences of increased reliance on pretrial detention, with particular emphasis on the use of secured financial conditions and the persisting harms of this system. Finally, I will focus on recent Washington State attempts to better understand the landscape of our pretrial detention system, using Pierce County as a case study. This paper demonstrates the inequities of the bail and pretrial detention system through its departure from cash bail's original intent: to ensure defendants returned for court dates. Ultimately, this paper calls for three pretrial reform recommendations: codifying "the presumption of release," investing in services to reduce barriers to defendants returning to court without incarceration, and abandoning the decentralized Pretrial Services Program model.

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INTRODUCTION

"Clear!" the uniformed officer shouted as we squeezed into the small freight-like elevator. The elevator bell rang three times, and the door slowly opened to a long corridor. I still remember the row of doors on the right and the bay of windows overlooking the city on the left. One side represented freedom, and the other side told a different story. My grandmother and I walked down the hall until finally, she stopped, giving me a slight smile before opening a door. I remember peering in and seeing an empty room divided by a thick piece of glass and a small black phone hanging on the wall. Finally, after a few minutes of waiting, the door on the other side of the glass opened, and my mother sat down, picked up the phone, and could barely say my name before breaking into tears. This moment, forever etched in my brain, was my first experience with the pretrial detention system.

It was tough to see a loved one behind a piece of glass, especially as a nine-year-old young person who couldn't begin to understand what was happening. My mother spent four months in the Pierce County Jail before she accepted a plea. Beyond that initial visit, I never saw my mom in jail because my grandmother couldn't stomach watching me go through that experience again.

But my experience is not unique. Both global and national dependence on pretrial detention has exploded since the 1970s. Recent reports indicate that some regions have experienced a 225% percent increase in the pretrial population, with the Americas experiencing a 71% increase over the same period of time.[1] Today in the United States we know that upwards of 60% of our jail and prison population is held pretrial, and on average, 30% of those held pretrial are there because they

[1] Penal Reform International, "Pre-Trial Detention," Global Prison Trends 2021, last modified July 27, 2021, https://www.penalreform.org/global-prison-trends-2021/pre-trial-detention/.

cannot afford release.[2] According to the Prison Policy Initiative, "over 555,000 people are locked up who haven't even been convicted or sentenced."[3] In Washington State, 72% of our incarcerated population is held pretrial, far above the national average.[4]

Despite the belief that our justice system holds people "innocent until proven guilty," those who cannot pay for their freedom find the opposite to be true. When someone is arrested, they are currently held in jail based on the accusation of criminality. The accused then goes before a judge who, in the United States, almost always sets a bail amount, no matter how serious or non-serious the crime. An average felony bail amount is $10,000, far greater than low-income people, and even many middle-class people, can bear.[5] Those who can't afford to pay sit in jail, which increases the chances of them pleading guilty and suffering long-term impacts of incarceration, including rearrests and further incarceration.[6] Consequently, accused individuals, and their families shoulder the extreme social and economic burden of upholding this inequitable system. As this paper will demonstrate, the pretrial detention system as it currently stands in Washington State perpetuates class disparities. Combine this with economic exclusion, systemic racism, and over-policing and

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[2] Curiel, Felipe, and John Matthews. "Criminal Justice Debt Problems." Americanbar.org, November 30, 2019. https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economic-justice/criminal-justice-debt-problems/.

[3] Sawyer, Wendy, and Peter Wagner. "Mass Incarceration: The Whole Pie 2020." Mass Incarceration: The Whole Pie 2020. Prison Policy Initiative, March 24, 2020. https://www.prisonpolicy.org/reports/pie2020.html.

[4] Washington State Auditor's Office, "Reforming Bail Practices in Washington ," February 28, 2019, https://sao.wa.gov/wp-content/uploads/Tabs/PerformanceAudit/PA_Reforming_Bail_Practices_ar1023411.pdf, 11.

[5] Ibid.

[6] Vieraitis, Lynne M., Tomislav V. Kovandzic, and Thomas B. Marvell. "The Criminogenic Effects of Imprisonment: Evidence from State Panel Data, 1974-2002." *Criminology & Public Policy* 6, no. 3 (September 15, 2007): 594.

we are simply continuing to widen the racial and wealth disparities that have marginalized communities for generations.

In this paper, I argue that if we want to begin working towards a safer, more equitable system in Washington State, we must eliminate the exploitative practice of cash bail and pretrial detention. First, I will examine how reforms to the pretrial detention system have led to class and racial disparities in the criminal legal system. I will further discuss the impacts of pretrial detention globally, and the persisting harms of this system. Finally, through analysis of recent reform efforts both statewide and locally, I will show how the cash bail and pretrial detention system criminalizes poverty, does not contribute to public safety, and targets marginalized groups. Building on this foundation, I will then argue the necessity of abolishing cash bail, abandoning the current pretrial services program in Washington State, and ensuring individuals have the resources to return for their court dates—the original intent of pretrial detention.

ORIGINS OF THE CASH BAIL SYSTEM

The process of assigning a price to an act committed by an individual began with the Germanic Angles and Saxons who created a system of payments based on the "wergeld" (which loosely translates to "man price").[7] In a criminal dispute, defendants were required to pay the wergeld to the person they harmed based on the rank or class of the individual. The English practice of requiring a friend or family member to commit to pay a fine if the accused did not show up to their trial, often referred to as a surety, is believed to be the ancestor to the American bail system.[8] The repayment required the process of securing a family member as a "surety" for the accused and

[7] Schnacke, Timothy R. "A Brief History of Bail," *The Judges' Journal* 57, no. 3 (June 22, 2018): 12.
[8] "The Bail Reform Act of 1966." *Iowa Law Review* 53, no. 1 (August 1967): 170. Schnacke, *A Brief History of Bail*, 12-13.

ensuring that the defendant paid the wergeld over time. We see evidence of this practice in the 1951 Supreme Court case *Stack v. Boyle*, which likens bail to "the ancient practice of securing oaths," a case foundational to the first wave of bail reform discussed later.[9] The nature of this practice followed four tenets: the surety must be related to the accused, they were held personally responsible for repayment, the surety was not allowed to profit, and the wergeld amount was identical to the punishment so there was equity for all.[10]

But the 11th-century Norman Invasion led to drastic changes, and turned a criminal restitution-based system into a criminal punishment system. The invasion led to the breakdown of the wergeld system and in its wake a detention system was birthed. The creation of jails and prisons in the 12th century, and the need for judges to travel to courts across England led to massive delays that necessitated pretrial release. The courts only met two times annually for misdemeanors and less often for more serious crimes.[11] To standardize the process of who should (and should not) be released pretrial, the 'Writ of Liberty' was written, creating the first written list of non-bailable offenses in recorded history.[12]

At the close of the 13th century, King Edward I began to scrutinize this process of bailable and non-bailable offenses, and quickly saw the inequities present in the system. The opportunity to be released while waiting for trial was left to the discretion of the local sheriff. The problem they were facing is that depending on when someone was arrested, if the sheriff denied release, they could sit in jail for longer than their actual sentence if convicted.[13] King Edward began to see the corruption present in the system where non-bailable defendants, who paid large amounts of

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[9] Ibid.
[10] Schnacke, *A Brief History of Bail*, 15.
[11] *The Bail Reform Act of 1966*, 170.
[12] Schnacke, *A Brief History of Bail*, 13.
[13] Ibid.

money, were being released, while conversely bail-eligible defendants were being detained until they paid money to the sheriff.[14] Realizing that this was problematic, Parliament created the Statute of Westminster in 1275, which sought to limit the boundaries of the sheriff's discretion contingent on a friend or family member committing to the responsibility of the individual making it back to court or pay a fine.[15] This statute expressly labeled offenses as bailable or non-bailable and assigned consequences to law enforcement officials that did not follow these guidelines.[16] This system remained largely unchanged for approximately 500 years, with small reforms made to increase the amount of bailable offenses.[17]

British colonies in the Americas adopted the English bail and pretrial release system, which clearly identified bailable and non-bailable offenses. The early U.S. criminal justice system relied on sureties, which became known as recognizances.[18] Bail was offered to every defendant who was accused of a bailable offense, creating the presumption of release, which we see supported in Supreme Court opinions from 1891 to 1951.[19] The personal sureties would be personally liable if the defendant did not show up to court.

The first time the bail system was reformed in the United States was in the Bill of Rights. The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[20] While we often focus on the overly vague phrase "cruel and unusual punishments" clause at the end, often in reference to the death penalty, the words "excessive bail shall not be required" rarely receive attention. Despite the cash bail system's

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[14] Ibid., 15.
[15] *The Bail Reform Act of 1966*, 171. Schnacke, *A Brief History of Bail*, 15.
[16] Schnacke, *A Brief History of Bail*, 15-17.
[17] Ibid., 17.
[18] Ibid., 24.
[19] Ibid., 32.
[20] U.S. Const. Amend. 8

archaic English origins, little has been done nationally to reform the cash bail or pretrial detention system.

U.S. BAIL REFORM IN HISTORICAL PERSPECTIVE

Over the past seventy years, we have seen bail reform in the United States at the federal, state, and local levels. Scholars have periodized three waves of bail reform.[21] Although the U.S. bail system was modeled off of the unsecured sureties, originated in England, the use of secured financial conditions facilitated by the commercial bond industry created an inequitable system, where bailable defendants were being held for the inability to secure their bail amount. Starting in the 1950s, the first wave of bail reform began with significant scholarly research focused on the flight risk of individuals and pretrial services. Legal scholar Caleb Foote studied bail practices in New York, finding that bail in practice had departed from its original intent of making sure defendants returned to court.[22] Foote's study also began building the connection between excessive bail amounts that required indigent defendants to serve unnecessary sentences in pretrial detention.[23] Research by Foote and others served as the basis for the Vera Institute's Manhattan Bail Project, launched in 1962.[24] This initiative revealed that "many people accused of committing a crime can be relied on to appear in court and do not have to post bail or be held until trial."[25] A

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[21] Van Brunt, Alexa, and Locke E Bowman. "Toward a Justice Model of Pretrial Release." *The Journal of Criminal Law & Criminology* 108, no. 4 (2018): 709.
[22] Ervin, Sam J. "Legislative Role in Bail Reform." *George Washington Law Review* 35, no. 3 (March 1967): 431.
[23] Ibid.
[24] Schnake, Thomas. "Fundamentals of Bail: A Resource Guide for Pretrial Practioners and a Framework for Pretrial Reforms." *National Institute of Corrections*, 2014, 37. Heller, Benjamin, Jacob Kang-Brown, and Erica Bryant. "Manhattan Bail Project." Vera Institute of Justice, March 10, 1962. https://www.vera.org/publications/manhattan-bail-project-official-court-transcripts-october-1961-june-1962.
[25] Heller, Kang-Brown, and Bryant, *Manhattan Bail Project.*

few years prior, the U.S. Supreme Court case *Stack v. Boyle* determined the rule that "bail set at a figure higher than an amount reasonably calculated to assure the presence of an accused is 'excessive' under the Eighth Amendment and that bail must be individualized", setting the legislative framework for the Bail Reform Act of 1966.[26]

The Bail Reform Act sought to guarantee that criminal defendants would not "needlessly be detained."[27] This act created the presumption of release for all non-capital crimes while giving judicial officers guidance on assessing bail amounts as well as the option to consider the defendant's ties to their community in setting bail.[28] Instead of their being a more standardized approach to setting amounts, this act also gave judicial officers the ability to assess a defendant's ability to pay, requiring that each defendant be given an individualized bail amount.[29] The concept of the presumption of release, foundational to the Bail Reform Act of 1966, was designed to uphold the constitutional principle of innocent until proven guilty. Still, by not eliminating money bail altogether, it fell short of addressing the defendant's ability to pay, thus continuing the practice of criminalizing poverty.[30]

When low-income individuals are arrested and unable to pay bail, oftentimes their only focus is to get out of jail so they can return to work and family obligations. Prosecutors play on this desire for freedom and fear of the increasing rise in social costs associated with a stay in jail

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[26] *Stack v. Boyle* 342 U.S. 1, 72 S. Ct. 1 (1951). National Taskforce on Fines, Fees & Bail Practices. "Bail Reform: A Practical Guide Based on Research." Accessed March 18, 2022. https://www.ncsc.org/__data/assets/pdf_file/0023/16808/bail-reform-guide-3-12-19.pdf.
[27] Freed, Daniel J., and Patricia M. Wald. "The History and Theory of Bail." Essay. In *Bail in the United States, 1964*, 63. Borman, Paul D. "Preventive Detention and the Constitution," *Northwestern University Law Review* 65 (1970): 2.
[28] Freed and Wald, *The History and Theory of Bail*, 63.
[29] Ibid.
[30] Wald, Patricia. "The Bail Reform Act of 1966: A Practitioner's Primer," *PsycEXTRA Dataset*, n.d., pp. 630-639, https://doi.org/10.1037/e452852008-262: 631.

to pressure individuals to take plea deals to avoid prolonged pretrial detention. Studies have proven a causal relationship between remaining in jail before trial and the likelihood of a conviction.[31] In jail, it is far more difficult to build a case, communicate with your attorney, and corroborate witnesses, which not only increases the likelihood of a conviction but can also result in a longer sentence. One study found that those held in jail pretrial are on average sentenced five months longer than those who can pay bail and return to their communities.[32] Another study focused on the hidden costs of cash bail found that people in pretrial detention who are unable to pay are more likely to plead guilty to crimes they did not commit, are found guilty more often, and receive longer prison sentences on average.[33]

Beyond the obvious economic injustices of this system, there are other costs associated with pretrial incarceration.[34] One study found that detained individuals face about $30,000 in lost wages and government support.[35] But harder to measure are the social costs associated with prolonged and unnecessary pretrial detentions such as job loss, increased rates of houselessness, the threat of child separation, and declines in mental and physical health. According to the National Institute of Corrections, for every dollar spent incarcerating an individual pretrial, there is an additional ten dollars in social costs, which are often placed upon the family and community

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[31] Gutenplan, Hannah. "A Fairer, Safer, and More Just System for All New Yorkers: Domestic Violence and New York Bail Reform." *Columbia Journal of Gender and Law* 40, no. 2 (2021): 206–44. https://doi.org/10.52214/cjgl.v40i2.8062.

[32] Stevenson, Megan T. "Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes." *The Journal of Law, Economics, and Organization* 34, no. 4 (June 18, 2018): 519. https://doi.org/10.1093/jleo/ewy019.

[33] Clayton, Gina, Taina Vargas-Edmond, and Tanea Lundsford. "The Hidden Cost of Money Bail: How Money Bail Harms Black Women." *Harvard Journal of African American Public Policy*, January 1, 2017, 61.

[34] Ibid.

[35] Dobbie, Will, Jacob Cioldin, and Crystal S. Yang, "The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges," *The American Economic Review* 108, no. 2 (February 1, 2018): 222.

members connected to the arrested individual.[36] Today the practice of pretrial detention continues to criminalize poverty with longer sentences, economically burdening our most vulnerable community members.

The second wave of bail reform marks the introduction of the condition of public safety in offering cash bail or pretrial release.[37] Ushered in by fear regarding the perceived increase of violent crimes committed by defendants who were released pretrial, the 1970s marked a dramatic increase in the prison population, with politicians on both sides calling for stricter policies to maintain "law and order."[38] We begin to see bail being used as a tool to keep people detained, and denied release. The Detroit Civil Disorder of 1967 is one example of how prosecutors and judicial officers began to use bail (and the setting of bail amounts) to needlessly detain individuals.[39] In the summer of 1967 police raided a "blind pig," a bar that was illegally selling alcohol. The raid escalated quickly and took police over an hour to violently clear the scene. Word spread and soon a crowd of 200 formed and by one officer's report, the onlookers began to "loot," triggering the arrival of several hundred state and local police.[40] The civil disorder lasted nearly six days leading to over 7,000 arrests.[41] During the civil disorder, Wayne County Prosecutor William Cahalan announced that he would request $10,000 minimum bail amounts for those arrested, justifying his actions by stating, "even though they had not been adjudged guilty, we would eliminate the danger

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[36] "The Economic Burden of Incarceration in the U.S." National Institute of Corrections. Accessed March 18, 2022. https://www.prisonpolicy.org/scans/iajre/the_economic_burden_of_incarceration_in_the_us.pdf.
[37] National Taskforce on Fines, Fees & Bail Practices, *Bail Reform: A Practical Guide Based on Research.*
[38] Van Brunt and Bowman, *Toward a Justice Model of Pretrial Release*, 731.
[39] "The Administration of Justice in the Wake of the Detroit Civil Disorder of July 1967," *Michigan Law Review* 66, no. 7 (1968): 1542.
[40] Ibid.
[41] Ibid.

of returning some of those who had caused the riot to the street during the time of stress."[42] These tactics of setting high bail amounts to prevent defendants from release in the name of public safety created a toxic dynamic that led to a sharp spike in the jail population and a sharp decrease in pretrial releases. To this point, the bail system was designed to ensure people return for trial, but we see this intention abandoned in the District of Columbia Court Reform and Criminal Procedure Act of 1970, which expanded judicial discretion to now consider public safety in addition to the defendant's likelihood of reappearance for trial.[43] The condition of the threat level of the accused is further expanded upon in the federal Bail Reform Act of 1984 which allowed the federal courts to deny pretrial release if the prosecutors could prove that the accused posed a threat to the community.[44] This concept is then constitutionally supported in 1987 by the Supreme Court in *United States v. Salerno*, which holds that the danger to the community should be considered above the individual's rights, justifying the use of pretrial detention as a crime deterrent.[45] In *United States v. Salerno* the government alleged that Salerno and his codefendant were prominent members of the La Cosa Nostra crime family, posing a danger to the community. Chief Justice Rehnquist, in the opinion of the court, writes, "The legislative history of the Bail Reform Act clearly indicates that Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals. Congress instead perceived pretrial detention as a potential solution to a pressing societal problem. There is no doubt that preventing danger to the community is a legitimate regulatory goal."[46]

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[42] Van Brunt and Bowman, *Toward a Justice Model of Pretrial Release*, 736.
[43] Ibid.
[44] "*United States v. Slaerno*," Oyez, accessed May 11, 2022, https://www.oyez.org/cases/1986/86-87.
[45] *United States v. Salerno*, 481 U.S. 739 (1987)
[46] Ibid.

The Court upheld the Bail Reform Act as constitutional because it believed that pretrial detention served as a "potential solution to a pressing social problem," an extreme departure from the original intent of pretrial detention and bail.[47] The Bail Reform Act of 1984 and this case gave increased power to judicial officers granting them the ability to increase the bail amount based on the danger the individual posed to the community.[48] This feeds the exploding prison population, which increased from 329,820 to 770,000 across the 1980s.[49] We also see the jail population increase 63%.[50]

Criminologists today argue that pretrial detention does not deter crime but, in fact, creates it. Studies have established a causal relationship between pretrial detention and post-release offenses. One study found that "when held 2-3 days, low-risk defendants are almost 40 percent more likely to commit new crimes" and that being held 8-14 days increases the likelihood of future offenses by 51%.[51] Studies identify several reasons why once someone enters the pretrial system they are more likely to be rearrested, including the disruption of interpersonal relationships, the loss of employment, and the accompanying difficulty of finding new employment with a criminal

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[47] *United States v. Salerno.*
[48] Freed and Wald, *The History and Theory of Bail*, 33. Overbeck, A.M. "Detention for the Dangerous: The Bail Reform Act of 1984," Detention for the Dangerous: The Bail Reform Act of 1984 | Office of Justice Programs (Office of Justice Programs, 1986), https://www.ojp.gov/ncjrs/virtual-library/abstracts/detention-dangerous-bail-reform-act-1984.
[49] Cohen, Robyn L. "Prisoners in 1990." Bureau of Justice Statistics. U.S. Department of Justice, January 25, 1993. https://bjs.ojp.gov/content/pub/pdf/p90.pdf.
[50] Sawyer, Wendy. "Pretrial Detention." Prison Policy Initiative. Accessed March 18, 2022. https://www.prisonpolicy.org/research/pretrial_detention/.
[51] Laura and John Arnold Foundation. Rep. *Pretrial Criminal Justice Research*. Laura and John Arnold Foundation, November 2013. https://www.ils.ny.gov/files/Pretrial%20Criminal%20Justice%20Research.pdf.

record. Moreover, pretrial detainees' propensity to plead guilty increases the likelihood of prosecutors charging future offenses because of past criminal records.[52]

After the 1984 Bail Reform Act, we see racial disparities increase in the number of pretrial detainees. These new reforms gave judges more power to act upon racial bias in determining who is considered a danger to the community.[53] Studies completed in the late 1980s revealed that Black defendants received higher monetary bail amounts than their white counterparts, a disparity that has only increased in decades since.[54] Today, Black and Brown defendants are 10-25% more likely to be unable to post bail and be detained pretrial than their White peers, with young Black men 50% more likely to be incarcerated pretrial.[55] Nationally, Black defendants also receive bail amounts higher than similarly accused white defendants. According to one study, Black defendants received bail amounts that were 9,923 dollars higher.[56] Researchers have also studied the lack of judicial oversight, which because of little to no interaction with defendants prior to sentencing encourages judges to rely on stereotypes that increase racial bias.[57] Hence, we see the pretrial detention system, facially race-neutral, criminalizing low-income populations and oppressing communities of color, particularly the Black community. These systemic disparities have led some scholars to trace a throughline from chattel slavery to today's mass incarceration crisis. As leading scholar of race and law Dorothy Roberts explains, from the antebellum era to the present, the

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[52] Heaton, Paul and Megan Stevenson, "The Downstream Consequences of Misdemeanor Pretrial Detention," *SSRN Electronic Journal*, 2017: 762-771. Dobbie, Cioldin, and Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges,* 235.
[53] Van Brunt and Bowman, *Toward a Justice Model of Pretrial Release*, 738.
[54] Ibid., 741.
[55] Sawyer, *Pretrial Detention.*
[56] Arnold, David, Will Dobbie, and Crystal S Yang. "Racial Bias in Bail Decisions*." *The Quarterly Journal of Economics* 133, no. 4 (September 30, 2018): 1886.
[57] Arnold, David, Will Dobbie, and Crystal S Yang, "Racial Bias in Bail Decisions," *National Bureau of Economic Research*, May 2017: 1.

carceral state "still aims to control populations rather than judge individual guilt or innocence, to 'manage social inequalities' rather than remedy them."[58]

Unlike the second wave of bail reform which transformed the intention of bail from ensuring appearance in court to a public crime prevention strategy, the third and most recent wave of bail reform has been motivated by advocacy groups attempting to remove the financial barriers to pretrial freedom.[59] The third wave makes attempts at "fixing the holes left by states not fully implementing improvements from the first two generations of bail reform [and] using legal and evidence-based practices to create a more risk-based system of release and detention."[60] With the rise in incarceration, especially those held pretrial, there has been increased attention on the cash bail system. Bail reform in the third wave has been far more decentralized, with many reforms appearing in state, county, and local governments. These reforms take many different forms, such as "establishing a presumption of pretrial release without conditions, requiring access to counsel during bail hearings, eliminating a formal bond schedule, or abolishing cash bail altogether."[61]

Another widespread bail reform effort that has taken root nationally involves the use of algorithms to aid judges in conducting risk assessments to determine bail amounts and eligibility for release. These algorithms rely on data to assess the individual's flight risk and the level of threat they present to the community if released. Yet Roberts, among other scholars, warns against the dangers of algorithm-based assessments. Indeed, studies have shown that these algorithms only

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[58] Ibid.
[59] Van Brunt and Bowman, *Toward a Justice Model of Pretrial Release*, 757.
[60] Schnake, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for Pretrial Reforms*, 38.
[61] Jorgensen, Isabella, and Sandra Smith. "The Current State of Bail Reform in the United States: Results of a Landscape Analysis of Bail Reforms across All 50 States." *HKS Faculty Research Working Paper Series*, RWP21-033, December 2021, 1–50. https://doi.org/10.2139/ssrn.3975594.

increase the racial and economic injustices that bail reform facially hopes to address.[62] The problem these risk assessment tools present is that they use corrupt data, pulling together arrest records, sentencing decisions, warrants, and frequency of interactions with the police to determine someone's threat level to a community. Policing and contact with the criminal justice system disproportionately impacts people of color and low-income populations. According to Devon W. Carbado, a leading critical race theorist, "a variety of social forces converge to make African Americans vulnerable to ongoing police surveillance and contact."[63] Proactive policing practices, or broken windows policing is designed to deter crime. But due to economic marginalization, often communities of color, are the targets for this type of uneven policing of neighborhoods. This type of proactive policing relies on the mass criminalization of low-level, non-violent crimes to support the increased interaction with police. Data reveals that Black people are more likely to be stopped than whites, and are viewed as more criminally suspect.[64] The increased frequency with police leads to higher conviction rates, and criminal records and incarceration rates for Black residents, which as we've explored above has extreme social costs and consequences. Hence using this data to determine conditions of release is biased and discriminatory and should be rejected as a practice.[65] As Roberts concludes, "the digital poor house is mirrored in the digital prison."[66]

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[62] Digard, Leon and Elizabeth Swavola, "Justice Denied: The Harmful and Lasting Effects of Pretrial Detention," *Vera Institute of Justice*, April 2019: 2. Arnold, Dobbie, and Yang, *Racial Bias in Bail Decisions*, 23. O'Brien, Tim, "Compounding Injustice: The Cascading Effect of Algorithmic Bias in Risk Assessments," *Georgetown Law Review* 13, no. 39 (2020): 42.
[63] Carbado, Devon W, "Blue-on-Black Violence: A Provisional Model of Some of the Causes," *UCLA Law Review* 16, no. 31 (July 1, 2016): 1479.
[64] Ibid., 1487.
[65] Mayson, Sandra G. "Dangerous Defendants." *Faculty Scholarship at Penn Law*, 2018, 494.
[66] Roberts, Dorothy. "Digitizing the Carceral State." *Harvard Law Review* 132 (April 10, 2019): 1716.

THE GLOBAL SCOPE OF THE PROBLEM

Governor Gavin Newsom of California received extensive media coverage for his recent commentary on the U.S. cash bail system. In a gubernatorial debate on October 8, 2018, he stated, "Only Duterte's Philippines and Trump's United States of America have money bail."[67] Now, while it is true that the Philippines and the United States are the only two countries that have facilitated the *commercialization* of cash bail, nearly every country has some combination of bail and/or pretrial detention. Other countries have found solutions to the decrease in people willing to serve as personal sureties, such as England which passed the Bail Act of 1898, allowing judicial officers to significantly decrease or not require bail for defendants who are unable to pay.[68] Alternatively in Germany, which has codified release for non-capital offenses, requiring bail is rare, even when the defendant is identified as a flight risk.[69] If the court deems someone a flight risk, they are still released but must forfeit their passport and make daily calls to the police.[70] For those in countries that offer non-commercialized bail the accused must pay the court directly to secure release, and because of the rules against profiting off of bail the amounts are often much lower. But pretrial detention is an increasing global concern, and to many, one of the most ignored human rights crises of our time.[71]

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[67] Jacobsen, Louis. "Only Duterte's Philippines and Trump's United States of America have money bail.", last modified October 9, 2018, https://www.politifact.com/factchecks/2018/oct/09/gavin-newsom/are-us-philippines-only-two-countries-money-bail/.

[68] Schnacke, *A Brief History of Bail*, 36.

[69] Joachimski, Jupp, "Criminal Procedure in Germany," Rechtsvergleich, accessed May 11, 2022, http://www.joachimski.de/StPO/Rechtsvergleich/rechtsvergleich.html.

[70] Ibid.

[71] Open Society Justice Initiative, "Imagine Spending Time behind Bars and Never Being Convicted," Imagine Spending Time Behind Bars and Never Being Convicted , September 12, 2014, https://www.justiceinitiative.org/voices/why-overuse-pretrial-detention-overlooked-human-rights-crisis.

According to Penal Reform International, while Europe has seen a decrease in the pretrial detention population, in the Americas and Oceania[72] there has been a strong increase and a heavier reliance on pretrial detention in the last 20 years.[73] In fact, a report in 2021 cites a 71 percent increase in pretrial detention in the Americas and a 225 percent increase in Oceania.[74] Globally there has been a 30 percent increase in the total population of pretrial detainees.[75] Despite the severity humanitarian issue there is no large scale transnational analysis that studies this rise in pretrial detention globally.

Scholars struggle to measure the scope of the problem on a global scale for numerous reasons. The main barrier is there is not a consistent reporting structure for tracking the pretrial detention populations transnationally. David Berry of Penal Reform International created a framework for measuring the pervasive nature of pretrial detention that focuses on three main indicators: the duration of time spent by individuals pretrial, the amount of pretrial detainees that pass through a country's criminal justice system in a given year, and the percentage of people held in the pretrial stage.[76]

The amount of time that people spend in pretrial detention varies widely by country. The last time that this was tracked by the European Commission was in 2003 in which it discovered that the average pretrial detainee spent 167 days or 5.5 months in jail.[77] The most recent study by

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[72] Oceania is defined as the collective name for the islands scattered throughout most of the Pacific Ocean. The term, in its widest sense, embraces the entire insular region between Asia and the Americas.
[73] Penal Reform International, *Pre-Trial Detention*.
[74] Ibid.
[75] Ibid.
[76] Berry, David. "The Socioeconomic Impact of Pretrial Detention" (Open Society Foundation , n.d.): 15.
[77] European Commission , "Accompanying Document to the Proposal for a Council Framework Decision on the European Supervision Order in Pre-Trial Procedures between Member States of the European Union" (SEC, August 29, 2006): 10-11.

the U.S. Department of Justice regarding the duration of pretrial detention was conducted in 1980, which found that the average detained American spent 135 days in pretrial detention.[78] There has been little reduction in pretrial length of stays in the last 40 years. In 2019, the City of New York reported that the median length of stay was 97 days, and the mean length of stay was 136 days.[79] In some cases and places globally, people spend upwards of 3.7 years in jail awaiting their trial.[80]

With respect to Berry's second measure, the number of pretrial detainees that pass through a country's criminal justice systems, approximately three million people around the world are held pretrial at any one point in time, but an estimated 10 million people are held pretrial per year.[81] This is due to jail churn, a measure of how many times people are booked into a correctional facility in a year.[82] The U.S. currently detains nearly 445,000 people pretrial per year, amassing 15% of the pretrial detainee population globally, despite only possessing 4.25% of the global population.[83]

As for Berry's third measure, the percentage of people held pretrial in relation to the total incarcerated population, according to the International Centre for Prison Studies nearly 1 out of 3 incarcerated people have not been tried.[84]

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[78] Carstensen, T.P. "Duration of Pretrial Detention," *Monatsschrift Fuer Kriminologie Und Strafrechtsreform* 63, no. 5 (October 1980): 290.
[79] City of New York , "Justice Brief Jail: State Parolees 2019," 2019, https://criminaljustice.cityofnewyork.us/wp-content/uploads/2020/08/Jail-State-Parolees-Fact-Sheet_August-13-2020.pdf.
[80] Berry, *The Socioeconomic Impact of Pretrial Detention,* 15.
[81] Ibid.
[82]Prison Policy Initiative, "Local Jails: The Real Scandal Is the Churn," Local Jails: The real scandal is the churn, Prison Policy Initiative, https://www.prisonpolicy.org/graphs/pie2022_jail_churn.html.
[83] Sawyer and Wagner. *Mass Incarceration: The Whole Pie 2020*.
[84] Berry, *The Socioeconomic Impact of Pretrial Detention,* 15.

Despite the lack of accurate and current data to track the pretrial detention system consistently across nation-states, the severe impacts on pretrial detainees, their families, and the communities they are taken from continue to suffer from prolonged inaction. As one of the countries with the largest pretrial detention population, complicated by our commercialized cash bail system, the United States should follow the example of European countries who have proactively worked to reduce their pretrial population, honoring the international human right of the presumption of innocence.

PERSISTING HARMS OF PRETRIAL DETENTION

While there continues to be a lack of analysis on the drivers of increasing pretrial detention populations globally, there does seem to be international consensus of the harms resulting from these practices. This recently crystallized into the United Nations 2030 Agenda for Sustainable Development, which calls for broad collaboration across 193 participating countries. In response to the harmful conditions suffered by pretrial detainees globally, the United Nations commits to "promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels."[85] As one of the metrics of success, the 2030 Sustainable Development Plan directly calls for tracking of the "unsentenced detainees as a proportion of [the] overall prison population."[86] Its authors' rationale lies within the understanding that unnecessary reliance on pretrial detention depletes resources and creates economic burdens on the accused and their families.[87] Beyond the social costs covered

[85] "Transforming Our World: The 2030 Agenda for Sustainable Development, Department of Economic and Social Affairs," United Nations, accessed May 11, 2022, https://sdgs.un.org/2030agenda.
[86] Ibid.
[87] Ibid.

previously, the increased reliance on pretrial detention continues to produce unintended consequences.

One of the major consequences is the safety of pretrial detainees, especially in countries where overcrowding is a concern. One report states that "of the 47 countries where more than half of the prison population are untried, 32 are operating above their official capacity."[88] The concern of overcrowding is even more evident in the Philippines which employs a commercialized cash bail system, similar to the United States, where 80 percent of their prison population is untried contributing to their prison capacity being overcrowded by 450 percent.[89] In the United States where 67 percent of our prison population is held pretrial, we also see most state prison facilities operating above their max capacity, which many experts link to increased violence and decrease in access to health care and educational opportunities.[90]

Secondly the prevalence of pretrial detention and lack of reform, creates an environment for corruption to flourish, both from state-actors but also from non-state actors seeking to exploit this vulnerable population. Corruption is especially pervasive in the pretrial detention stage because of the lack of scrutiny, from arrest to trial.[91] The Justice Initiative describes the relationship between excessive pretrial detention and corruption as a vicious cycle where, "a dysfunctional justice system leads to corruption, and that corruption further twists the justice system."[92]

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[88] Penal Reform International, *Pre-Trial Detention*.
[89] Ibid.
[90] Prison Policy Initiative, "Since You Asked: Just how overcrowded were prisons before the pandemic and at this time of social distancing how overcrowded are they now?," Prison Policy Initiative, accessed April 23, 2022, https://www.prisonpolicy.org/blog/2020/12/21/overcrowding/.
[91] Open Society Justice Initiative, *Imagine Spending Time behind Bars and Never Being Convicted.*
[92] Ibid.

WASHINGTON STATE PRETRIAL DETENTION REFORMS

In Washington State, where 40% of residents report that a $400 emergency would place them at risk of financial crisis, large bail amounts only serve to criminalize poverty.[93] Those who can pay the set bail amount can return to their communities, continue working, and maintain their family structures. Scholars have begun to draw connections between an incarceration experience and propensity to re-offend. Some specifically point to "the barren, inhumane and psychologically destructive nature of imprisonment" as a contributor to increased "likelihood of crime after release."[94] There are also significant social costs associated with pretrial incarceration, such as loss of jobs, housing, children, and health.[95]

But the concept of cash bail and pretrial detention reform is not new to Washington State. Pretrial service reform has begun gaining traction recently with two reports revealing the inherent problems with a system that does not support the presumption of innocence. In 2017 the Washington State Superior Court Judges' Association, the District and Municipal Court Judges' Association, and the Supreme Court Minority and Justice Commission formed the Pretrial Reform Task Force. This group had the express mission of "examining current pretrial practices in Washington and developing consensus-driven recommendations for local jurisdictions."[96] The task force was guided by three principles as members began reviewing the efficacy of the pretrial services offered across the State of Washington.

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[93] "Emergency Savings Can Save the Day," Department of Retirement Systems, May 4, 2022, https://www.drs.wa.gov/emergency-savings-can-save-the-day/.
[94] Vieraitis, Kovandzic, and Marvell, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data*, 597.
[95] Jorgensen and Smith, *The Current State of Bail Reform in the United States: Results of a Landscape Analysis of Bail Reforms across All 50 States*, 21.
[96] "Pretrial Reform Task Force - Final Recommendations Report," February 2019: 2. https://www.courts.wa.gov/subsite/mjc/docs/PretrialReformTaskForceReport.pdf.

The first principle was to "improve the implementation of evidence based practices."[97] In Washington State most of the pretrial systems use an algorithmic-based assessment tool to determine what pretrial services, if any, a defendant qualifies for.[98] Judges are keen advocates of this type of software because often judges have very limited information and time to spend with defendants, and so the reliance on algorithmic data helps to quickly inform the judge of the defendant's potential risk of not appearing in court, or posing a danger to their community.[99] While there is brief acknowledgement of the potential for racial bias in algorithm-based programming due to over policing of racially and economically marginalized neighborhoods and the convergence of crime and poverty, the use of algorithmic methods is justified under Washington Criminal Rule (CrR) 3.2 and Criminal Rule for Courts of Limited Jurisdiction (CrRLJ) 3.2 which give judges the ability to consider criminal history in release decisions.[100]

The second principle that guided the task force's work was a responsibility to "support judicial discretion."[101] The members of this task force specifically sought to avoid limiting or restraining a judge's discretionary power. In fact, they sought to increase the information and support services given to judicial officers in the decision-making process.[102]

Finally, the task force agreed on a principle of "maximize justice for all."[103] The task force supported the practice of ensuring that "the fewest number of people are held pretrial, with the fewest conditions and without jeopardizing public safety."[104] There seemed to be clear consensus

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[97] Ibid.
[98] Ibid.
[99] Ibid., 4.
[100] Ibid., 9.
[101] Ibid., 8.
[102] Ibid.
[103] Ibid.
[104] Ibid.

from the group that no one should be held pretrial simply because they could not afford to pay the bail amount.[105]

The task force's report makes several important findings, the first being the lack of geographic equity in the availability of pretrial services. As of 2019, the taskforce could only identify 32 active or former pretrial service programs, with 3 deemed inactive.[106] Another important finding is that there is no consistency in the quantity or quality of services across various jurisdictions. The taskforce found over 10 different services used in varying combinations including mental health treatment, home visits by law enforcement or pretrial staff, service referrals, robo-texting, office visits, drug/breath testing, electronic monitoring and call reminders for courts.[107]

Simultaneously, the State Auditor's office was auditing the current bail and pretrial services across Washington. The audit was conducted independent of the taskforce, but the report does cite areas of collaboration to avoid duplication of efforts.[108] The Auditor's report reveals several key findings that point to the flaws inherent with our current pretrial service and detention system. The first significant finding by the auditor is how expensive maintaining this current system is for Washington taxpayers. On average, according to the report there are approximately 4,700 people who are eligible for pretrial release.[109] The audit found that releasing these eligible candidates pretrial would save between $6 million and $12 million dollars annually.[110] This is based on the cost data of Washington prisons, which average about $100 per inmate per day.[111]

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[105] Ibid.
[106] Ibid., 10-11.
[107] Ibid., 11.
[108] Washington State Auditor's Office, *Reforming Bail Practices in Washington*, 6.
[109] Ibid., 10.
[110] Ibid.
[111] Ibid., 11.

These funds fall into three categories, variable costs (food, laundry, healthcare; sensitive to changes in jail population), step-fixed costs (salaries, benefits which are slightly affected by jail population), and fixed costs (facilities, utilities; which are not affected by increases or decreases in the jail population).[112] The average variable cost is calculated by the Auditor's office to be $10.92 per inmate per day, compared to the costs of operating a pretrial services program that ranges from $1.80 to $7.26 per person per day.[113]

Another significant finding is that there was no direct link to decreased public safety among the population that released pretrial. Measuring both Spokane and Yakima counties' pretrial services program, the report found that according to two metrics, re-offense rates and failure-to-appear rates, that people responded better to pretrial services than being released on bail alone.[114] The consensus is clear: continuing to increase our pretrial detention population is a costly price to pay that has severe consequences for our community and fails to keep us safe.

Case Study: Pierce County Pretrial Services and Outcomes

In 2014, in response to calls for reform, a working group was put together to investigate Pierce County's pretrial services with the mission to "Improve the process by which the pretrial jail population is determined through utilization of objective, evidence-based decision-making."[115] Despite crime rates decreasing between 1994 to 2013, over 80% of the jail population was held pretrial during this same period, leading to severe overcrowding.[116] Through a competitive

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[112] Ibid.
[113] Ibid.
[114] Ibid., 13.
[115] Advancing Pretrial Policy & Research (APPR). *"Pierce County, Washington."* National Partnership for Pretrial Justice, August 25, 2021. https://advancingpretrial.org/implementation/research-sites/pierce-county-washington/.
[116] Ibid.

proposal process, Pierce County was chosen in 2015 to become a Research Action Site with the national advocacy group Advancing Pretrial Policy and Research. According to the advocacy group, "Participating sites receive intensive technical assistance, ongoing data support, and rigorous evaluation to identify effective, research-based pretrial practices that can serve as a model for communities nationwide."[117] The five Research Action Sites are Fulton County, Georgia, Montgomery County, Alabama, Pierce County, Washington, Pulaski County, Arkansas, Ramsey County, Minnesota, and Thurston County, Washington. Since the partnership was established in 2015, the only Pierce County Report to be published was the Legal Landscape of Pretrial Release and Detention in Washington, which covers the legality of the pretrial release process at the federal and state level. Beyond the report, the only action to have been taken by Pierce County in the last seven years, is creating a Pretrial Services program. This program relies on individual interviews with the defendant conducted by judicial officers. The service is only available to "low-level felonies" and is "not available to all people accused of a crime."[118] When Judge Stanley Rumbaugh, lead of the County's Pretrial Taskforce, was asked in 2021 about his hopes for the future of pretrial detention in Pierce County, he stated, "We hope to have more community voices working with us in the coming year. We are working to implement the Public Safety Assessment and finalize our metrics. We are developing a communications strategy so our community better understands pretrial justice. And we continue gathering data to analyze the impact our pretrial release decisions have on court appearances and criminal activity."[119]

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[117] Ibid.
[118] Ibid.
[119] Rumbaugh, Stanley. "Leading with a Shared Vision and Values." Advancing Pretrial Policy & Research (APPR). National Partnership for Pretrial Justice, June 22, 2021. https://advancingpretrial.org/story/leading-with-a-shared-vision-and-values/.

But despite the working group's hope for the future, the number of jail bookings, booking outcomes, arraignment outcomes, and the total jail population have remained stagnant.[120] Further this working group's vision to "[p]rotect the community while eliminating racial, economic, cultural, and other disparities in pretrial release decisions," there has been no significant data to show a decrease in the jail population after the implementation of the Pretrial Services program.[121] In Pierce County, from 2010 to 2020, Black people have made up between 17-20% of the jail population, and today currently sit at 20%, despite only making up 5% of the Pierce County population.[122] In arraignment outcomes, Black people are still jailed at disproportionate rates compared to their White counterparts.[123] Even more surprising, given the Pretrial Services program stated goal of a "presumption of release, not detention," there has been little done to actually decrease the number of people who are not released, offered cash bail, and released on their own recognizance, with the primary outcome (62-67%) of arrests resulting in detention.[124]

RECOMMENDATIONS

In sum, Washington State's Pretrial Service system is not working as evidenced by the disproportionate way it affects communities of color and still jails most defendants pretrial.[125] If Washington State truly values community safety, we need to move beyond a cash bail and pretrial detention system, ensuring that freedom is free. We must pursue the belief that everyone, regardless of skin color or socioeconomic status, is innocent until proven guilty. The notion that

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[120] "Criminal Justice Dashboard Presentation." internal.open.piercecountywa.gov. Accessed March 18, 2022. https://internal.open.piercecountywa.gov/stories/s/Criminal-Justice-Dashboard-Presentation/b9ai-vjbv/.
[121] Advancing Pretrial Policy & Research (APPR), *Pierce County, Washington.*
[122] *Criminal Justice Dashboard Presentation.*
[123] Ibid.
[124] Ibid.
[125] *Pretrial Reform Task Force - Final Recommendations Report,* 4.

detaining accused individuals pretrial keeps our communities safe is a fallacy that unduly burdens the taxpayers of Washington, and creates unintended consequences for the accused and their loved ones.

The Pretrial Reform Task Force made 19 recommendations, of which this policy paper utilizes three. Building on the task force's assessment, I propose the following recommendations to begin building a safer and more just community:

1. **Guarantee Release for All Non-Capital Offenses**

   Enforce the Washington Criminal Rule 3.2 and Criminal Rule for Courts of Limited Jurisdiction 3.2 which ensures that "Any person, other than a person charged with a capital offense, shall at the preliminary appearance… be ordered released on the accused's personal recognizance pending trial."[126] Allow all non-capital crimes to have the presumption of release, ending the algorithmic, and risk assessment-based method of determining bail.

2. **Invest in Supportive Services to Decrease Failure-to-Appear Violations**

   The State should provide funding for strategies and programming to assist people returning to court, including free or subsidized transportation, childcare, and court date reminders through text, email or phone calls.[127] These services should also include voluntary referrals to mental and behavioral health services at little or no cost to the individual.[128]

[126] Ibid.
[127] Ibid., 5.
[128] Ibid.

3. **Abandon the Decentralized Pretrial Service Program Model**

   Currently Washington State does not have a consistent or equitable pretrial service program across all 39 counties. A decentralized approach that relies on varying levels of service does not provide our community with the tools they need for success. This system also continues to rely on judicial discretion which does not guarantee this program will be offered to everyone accused of a crime.[129]

Only with these changes can we begin the process of ensuring that freedom is free for every Washington resident.

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[129] Ibid., 4.

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