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JAIL, BAIL, AND PRETRIAL POLICIES: THE POLITICS OF MODERN BAIL REFORM EFFORTS IN THE FIGHT AGAINST MASS INCARCERATION

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Although current activists and change-makers have rallied together to tackle the notorious system of mass incarceration within the United States, one critical pillar of this system has been often overlooked: the practice of commercial bail in pretrial policies. These policies directly impact jail population and growth, and the discriminatory practice of bail has resulted in an increase of people being held in pretrial detention simply due to their lack of means to pay their bail amount. The existing literature agrees that unjust pretrial policies must be addressed in any future efforts to change the system of mass incarceration. Yet, efforts to transform pretrial services and bail have been unsuccessful thus far, even within liberal state legislatures initiating the reform efforts. What has made this pretrial practice so resistant to change even though there is increasing attention to its faults? To address this gap, this paper seeks to answer one key question: what are the underlying dynamics surrounding unsuccessful commercial bail reform efforts in liberal state legislatures today? Gathering data from legislation, news articles, official voter guides, policy reports, news articles, court cases, nonprofit mission statements, policy updates, budget reports, and more, this paper utilizes a comparative case study of California and New York and will explore various political, economic, and socio-cultural factors that have contributed to the persistence of the bail industry. In this, it aims to build a more nuanced framework through which to understand the issue of commercial bail, as well as shed light on the current dynamics surrounding criminal justice reform in modern-day society.

The issue of mass incarceration has produced a deep and nasty divide among the American people, one rooted in centuries of structural oppression and injustice towards marginalized communities. This divide illustrates the brokenness of a carceral system that allows

for 2 million American people to be locked-up in a complex series of (federal, state, and military) prisons, jails, juvenile correctional facilities, immigration detention facilities, Indian country jails, civil commitment centers, state psychiatric hospitals, and prisons is U.S. territories (Sawyer & Wagner 2022). The United States' punitive criminal justice system has become notorious around the world, as even "single U.S. states incarcerate more people per capita than virtually any independent democracy on earth" (Herring & Widra 2021). Because mass incarceration is a complex and dynamic system inherently interlinked with other forms of institutionalized oppression, activists face a huge challenge in tackling this issue. However, a crucial pillar holding up mass incarceration is often overlooked.

There is a growing awareness of the significant role pretrial policies and practices within local jails have in perpetuating this issue. Jail and pretrial policies directly influence prison populations later down the line. The Prison Policy Initiative's 2022 Report on mass incarceration in the United States found that even though roughly 600,000 people enter prison gates in a typical year, over 10 million people go to jail annually (Sawyer & Wagner 2022). Within these jails, a particular phenomenon currently occurs. While it has become clear that the U.S. jail population continues to grow at alarming rates, "jail growth has occurred predominantly — and in the last 15 years, almost entirely — in the number of people being detained pre-trial" (Aiken 2017). This means that the majority of people being held in jails remain unconvicted and still presumed legally innocent. Why is it that so many people are being held in jail before they are even found guilty of a crime? A growing body of research found the answer to lie primarily in the practice of commercial bail within a state's pretrial services. Commercial bail is a practice of conditional pre-trial release in which the defendant must post a certain amount of money with the promise that they will return for all future court hearings and trials. It is evident this system of

bail adversely influences the justice process. Commercial bail allows for income and wealth to be the main determinants of whether or not a defendant will be released pretrial, leading to more poor and marginalized communities being overrepresented within jail populations. Because of bail's negative impact on an individual's path in the carceral system from higher likelihood of conviction to various social costs, activists are increasingly focusing on either the reform or total elimination of commercial bail as a strategy to combat mass incarceration. However, like all other aspects of criminal justice reform, policy changes in this arena do not come easily.

This paper will focus on the underlying dynamics surrounding recent criminal justice reform, particularly that of commercial bail and pretrial policy. Performing a comparative case study of the states of California and New York, this paper seeks to answer the following key question: what are the underlying dynamics surrounding unsuccessful commercial bail reform efforts in liberal state legislatures today? Although there is a growing consensus that bail is a broken system, "it is easy to forget that the system has been in a suspended state of crisis for decades and proved resistant to change before" (Weldon 2018). What has made this pretrial practice so resistant to change even though there is increasing attention to its faults, especially within the states with strong liberal reputations? Not only is it critical to understand the resounding impacts of pretrial services and practices on the justice system to effectively combat mass incarceration, but understanding the dynamics around these reform efforts will better provide a more nuanced framework of achieving change for activists to utilize in the future. To achieve a more equitable and just carceral system, pretrial policies and commercial bail cannot be overlooked.

The Structure and Intricacies of the U.S. Criminal Justice System

It is important to note that the overall criminal justice system in the United States is by no means a singular entity, but rather encapsulates thousands of individual yet interconnected systems at the federal, state, local, and tribal levels. Within the several smaller systems under the broader institution of U.S. Criminal Justice, there are "1,566 state prisons, 102 federal prisons, 2,850 local jails, 1,510 juvenile correctional facilities, 186 immigration detention facilities, and 82 Indian country jails, as well as in military prisons, civil commitment centers, state psychiatric hospitals, and prisons in the U.S. territories" (Sawyer & Wagner 2022). This complexity makes it very difficult for justice-involved individuals and their families to navigate the system, as well as render it challenging for activists to formulate a comprehensive plan of action against mass incarceration.

There are five common aspects of the justice system that generally occur across the board: system entry, pretrial services and prosecution, adjudication, sentencing and sanctions, and corrections (Bureau of Justice Statistics). Pretrial services constitute the time between the arrest and conviction or release of a suspect. This is the portion of the carceral system revolving around jail and the practice of commercial bail, and will thus be the main focus of this research paper. Even though there are these common aspects of the justice system, it is important to note that each U.S. state has its own department of corrections and penal code, the set of statutes and laws regarding criminal offenses and crimes; therefore, pretrial services, sentencing, and correction practices vary considerably across states lines (Hood & Schneider 2019; Lofstrom & Raphael 2016; Weldon 2018). Especially since pretrial practices and policies are tied primarily to local criminal justice structures and jails, they are most influenced by the "peculiarities of state law" (Weldon 2018). Currently, there is no federal mandate requiring state pretrial policies to be uniform across the board.

Although both have similar negative effects on justice-involved individuals, there remain important differences between the organization and function of jails as compared to the organization and function of prisons within the United States (Bales & Copp 2018; Lofstrom & Raphael 2016). In general, prisons mostly function to house convicted individuals with terms longer than one year, and they are mostly operated by state or federal governments with state or federal funds (Bales & Copp 2018; Lofstrom & Raphael 2016). In contrast, the main function of jails is to be a holding place for individuals awaiting arraignment or trial (Lofstrom & Raphael 2016). Jails are managed at the local or county level and are funded usually via authorized, tax-supported budgets (Bales & Copp 2018). Serving as the gateway into the carceral system, jails also house a wider array of individuals, from various ages, genders, offenses committed, stages in the court process, etc., and often deal with more individuals dealing with different physical and mental health conditions (Bales & Copp 2018). Prisons generally do not deal with the same amount of diversity in inmates. Jails are the primary site of pretrial services, as those held in pretrial detention remain there.

Bail: Its Function and History

At its core function, bail is both a mechanism for pretrial release and preventative detention, one utilized if the arrested individual is considered a risk of either not appearing to future court dates, being a danger to public safety, or both (Rahman 2019). On the international stage, the practice of commercial bail is an uncommon one, making the U.S. a "global outlier" in how it structures and facilitates pretrial detention (Hood & Schneider 2019; Page et al. 2019). In fact, the only two countries in the world with a for-profit bail industry are the United States of America and the Philippines (Page et al. 2019). Within the overall U.S. Criminal Justice system, judges are the ones responsible for all pretrial decisions regarding a defendant's case (Bales &

Copp 2018; Rahman 2019; Weldon 2018). There are three typical choices judges can make regarding their pretrial decisions: "release on bail, release without bail (that is, on the accused's own recognizance), or hold in jail until trial" (Bales & Copp 2018). Judges and magistrates not only can determine whether or not bail should be set but also what amount it should be set at. This differs amongst states according to state and local statutes; some jurisdictions require judges to consider certain factors in a case, while others give judges broad discretion in making these decisions (Weldon 2018). Across the country, bail amounts range anywhere from under $10,000 to over $100,000 (Hood & Schneider 2019). However, "nonfinancial release has declined steadily over time" and bail amounts have doubled (Hood & Schneider 2019).

The earliest practices of bail in the United States can be traced back to the colonial era (Bowman & Van Brunt 2018). However, although it was a common practice in the early U.S. states, the finalized expression of the country's federal pretrial policy within the Constitution was written with no clear right to bail (Bowman & Van Brunt 2018). The only mention of bail within the Constitution lies in the Eighth Amendment to the Bill of Rights, but even this has produced a "measure of uncertainty into constitutional bail precedent" (Weldon, 2018). The lack of explicit and unambiguous language regarding pretrial release has had resounding impacts on the structure of the country's carceral system further down the line (Bowman & Van Brunt 2018; Rahman 2019). Within early state pretrial practices, bail amounts were secured primarily through personal sureties with the aid of one's family members, friends, or other members of the community. Surety is a guarantee by an individual to assume the responsibility of paying off another's debt. In the use of personal sureties, the amount of bail posted to the court would always be returned as long as the individual went to all required court appearances (Rahman 2019). However, as the United States expanded geographically and population-wise, the community ties that personal

sureties depended on fractured as people migrated to different places; this resulted in a decline of available personal sureties, and defendants increasingly had to deal with the bail bonds by themselves (Bowman & Van Brunt 2018). These conditions, along with the lack of explicit federal policies on bail and pretrial release, gave rise to the establishment of the commercial bail bond industry (Bowman & Van Brunt 2018; Rahman 2019). Unlike personal sureties in which money was guaranteed to be returned after all requirements were met, commercial bail bonds are premised on making a profit (Bowman & Van Brunt 2018; Rahman 2019). Commercial bail agencies often "required an upfront payment, usually 10% of the total bail amount, and kept that deposit regardless of whether the person appeared and even if the charges were ultimately dismissed" (Rahman 2019). This new commercialized system of the money bond remains pervasive in pretrial policies and practices in the U.S. today, and it is often the focus of bail reform efforts within contemporary society.

This trend of ambiguous language regarding bail and pretrial practices at the federal level is reflected in some major U.S. court cases throughout American history. The first major supreme court case regarding bail was *Stack v. Boyle* in 1951. In this case, the defendants appealed to the court to reduce their bail amount of $50,000, arguing that this amount was "excessive" under the Eighth Amendment. The Supreme Court decided in the appellants' favor, ruling that the amount set was unreasonable and constituted an "infliction of punishment prior to conviction" (Weldon 2018). However, the problem lies in how the court worded its case ruling, as "nowhere does the Court state that inability to pay would or should preclude a determination that the bail amount was reasonable" (Bowman & Van Brunt 2018). Therefore, the ruling of *Stack v. Boyle* never actually created a substantive, precedential right to affordable bail, but is rather better known for its "high ideals of pretrial liberty" and "aspirational language" (Bowman

& Van Brunt 2018, Weldon 2018). The first wave of bail reform really began after the ruling of *Stack v. Boyle* (1951) in the 1960s. These early efforts were in response to the wider recognition of the discriminatory nature of the country's system of "wealth-based pretrial incarceration" (Bowman & Van Brunt 2018). Thus, the activists of the 1960s focused primarily on reducing those being held in pretrial detention by emphasizing individualized bail determinations (Bowman & Van Brunt 2018). This first bail reform movement resulted in the passage of the 1966 Bail Reform Act, which was the "first major modification of the bail system" since the Judiciary Act of 1789, and it essentially provided protection against needless pretrial detention, set specific guidelines for bail determinations, and entitled defendants to release through either personal recognizance or an unsecured appearance bond (Bowman & Van Brunt 2018).

However, right after the Bail Reform Act of 1966 was passed, the United States entered into an era notorious for its tough-on-crime rhetoric and policies of the following decades. In contrast to the reform efforts of the 1960s, the second wave of bail reform was centered more on public safety than ensuring pretrial liberty, stemming largely from the dominant opinions regarding the use of violence by pretrial defendants (Bowman & Van Brunt 2018). This movement culminated in the enactment of the Bail Reform Act of 1984, which sought to create more of an "in-or-out system" of pretrial release by establishing a set number of pretrial decisions that could be made regarding release and detention (Bowman & Van Brunt 2018). However, this bill also expanded the groups of people who could be held in pretrial detention and did little to help those unable to afford bail (Bales & Copp 2018; Bowman & Van Brunt 2018). The U.S. Supreme Court further codified the standards of the Bail Reform Act of 1984 through their ruling in the *United States v. Salerno* in 1987. This 6-3 decision, in which the three dissenters were Justices Thurgood Marshall, William Brennan, and Paul Stevens, upholds that

there is “no categorical prohibition on preventive detention under the Constitution” (Bowman & Van Brunt 2018). The decisions of *Stack v. Boyle* (1951) and the *United States v. Salerno* (1987) are the two main cornerstones of bail policy in this country, yet neither has placed clear and defining language on what constitutes “excessive” bail under the Eighth Amendment (Bowman & Van Brunt 2018; Weldon, 2018). There have been no significant rulings or policy changes since on a federal level.

The Maladies of the Modern Day Bail Industry

Even though there is growing recognition of the devastating and discriminatory impacts of bail in the U.S. Criminal Justice System, it is important to see that this system of predation is deeply entrenched within contemporary society as it managed to persist throughout time (Bowman & Van Brunt 2018; Page et al. 2019; Weldon 2018). Over the past 25 years, jail population growth has been primarily located in those being held in pretrial detention (see Figure 1) due to the fact that the majority of defendants lack the economic means to pay their bail amount (Sawyer & Wagner 2022). In 2021, 445,000 out of the 685,000 people sent to jail were being detained pretrial and not legally convicted (Sawyer & Wagner 2022). Out of the 445,000 individuals in pretrial detention, over 300,000 people were arrested and detained for nonviolent offenses (see Figure 2) which includes property, drug and public order offenses. Why is it that a significant amount of people are being held in jail without a conviction for nonviolent offenses? These facts further highlight the problem that modern-day bail reform efforts attempt to address.

As typical bail determinations can amount up to a year’s income worth for lower and middle-class households, bail and pretrial detention overwhelmingly affect poorer families, leaving them overrepresented in jail populations. Pretrial detention is extremely damaging to the lives of those detained, resulting in lost opportunities to earn income, maintain employment, seek

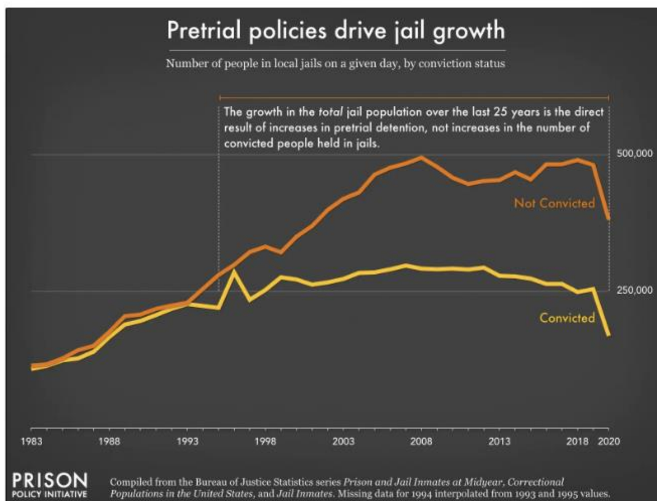

FIGURE 1 - Jail Growth | *Source*: Prison Policy Iniative 2022

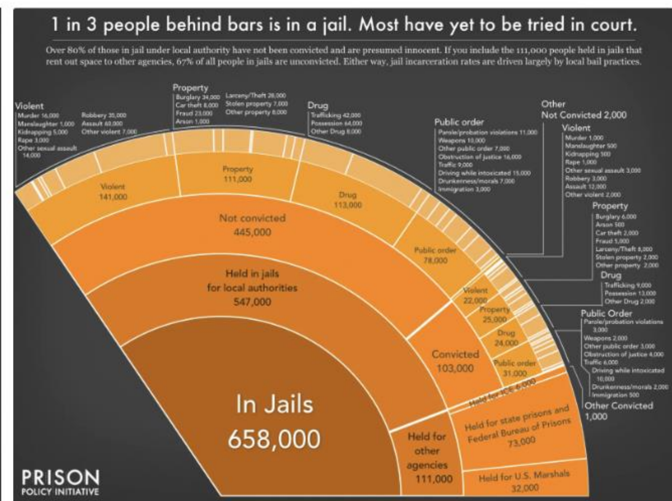

FIGURE 2 - Jail Populations | *Source*: Prison Policy Initiative 2022

mental or physical healthcare, be with one's family, gain an education, etc. (Bales & Copp 2018; Shalom 2014); it impacts any form of stability the individual or their household may have at the time as people are uprooted from their lives and placed in a cell until their trial. This is more acutely felt by those in lower socio-economic classes as they often cannot afford to miss work for extended periods of time.

Existing research has also found that pretrial detention directly impacts the individual's path in the carceral system, as defendants in detention are more likely to accept plea bargains to get out of jail even if no substantial evidence has been found pointing to their guilt (Bales & Copp 2018; Rahman 2019; Shalom 2014). Oftentimes, the cost of pretrial incarceration is overlooked as well. The expanding use of pretrial detention in jails is no cheap practice, and that financial burden is placed on already resource-deprived localities (Bales & Copp 2018; Shalom 2014). The cost of unnecessary pretrial detention to county governments is estimated to be $9 billion annually (Bales & Copp 2018). In addition to the widespread acknowledgment of the deep social costs bail exerts on vulnerable communities in the United States, there is also a growing acknowledgement that these pretrial policies and practices have had no success in

reducing crime rates or increasing public safety at large (Bales & Copp 2018; Lofstrom & Raphael 2016). Rather, the practice of pretrial detention via bail seems "yet another tool to exert social control on minorities" (Bowman & Van Brunt 2018).

Bail Reforms as a Strategy Against Mass Incarceration

To those caught inside the system and those working from the outside, the current bail procedure is highly concerning. Through these pretrial procedures, criminal defendants often find themselves at the mercy of a judge's cursory decision or a jurisdiction's preset bail schedule (Weldon 2018). A bail schedule is a list of fixed monetary amounts bail must be set at for certain categories of crime. Neither option offers a better and more just decision for the defendant's case. The system frequently pressures judges to make decisions without the proper time or resources to consider the nuances of the case, and bail schedules skip the case's details altogether (Weldon 2018). There also exists no system of accountability for the judges to explain their decisions, permitting many judges to set bail amounts regardless of the defendant's case detail or character (Rahman 2019; Weldon 2018). The new and ongoing "third" wave of bail reform is primarily driven by these concerns of the concrete harm and inefficiency of commercial bail (Bowman & Van Brunt 2018; Rahman 2019). Existing literature emphasizes how "the myth that perpetuates the money bail system - that having a financial stake in one's case will guarantee that people come back to court and mitigate any public safety concerns - is unfounded and unsupported by the reality of how money bail works" (Rahman 2019). People, even politicians from all sides of the political spectrum, are recognizing that this model of bail perpetuates an "antiquated pretrial system" which has not changed for over 30 years, marking a shift from the rhetoric and beliefs that dominated the "tough on crime" and "war on drugs" era (Rahman 2019).

Yet, the bail industry and pretrial policies constitute an extremely complex system in which reformers must consider several factors: current cultural, economic, and political dynamics of the institution of bail and pretrial system, as well as ideas that have historically upheld practices of bail and mass incarceration in this country (Beckett et al. 2016; Bowman & Van Brunt 2018; Hood & Schneider 2019). There is no doubt that mass incarceration is a racialized phenomenon, and reformers must address the cultural linkage between blackness, poverty, and crime for any changes to be successful (Beckett et al. 2016; Bowman & Van Brunt 2018; Hood & Schneider 2019). There is a wider recognition that the discriminatory effects of bail are not solely a socio-economic phenomenon but that it also displays systemic racism as the majority of people impacted by bail and pretrial detention are poorer people of color. Politics, at all levels, play a huge role in shaping the decisions of local politicians and government workers regarding pretrial policies in their localities; elected officials control the passage of laws that "set bail schedules, regulate the commercial sale of bail bonds, or affect the funding of pretrial service agencies that facilitate the use of nonfinancial release", all of which may be subject to pro-business partisan politics (Hood & Schneider 2019). In this, the bail industry is directly linked to economic conditions as well. Without considering the various aspects of the dominant "systemic inertia" of bail and mass incarceration, activists risk reproducing them in the new system and policies they create, thus achieving only "hollow victories" like the previous waves of bail reform (Bowman & Van Brunt 2018).

Because of the extreme complexity of the bail system in relation to mass incarceration, there is no wide consensus on the path of action reformers should take in combating this issue (Weldon, 2018). However, there are three common proposed paths of action in the existing literature on what activists should focus on changing: imprecise bail hearings and fixed bail

schedules, a prolonged bail appeals process, and lack of accountability for judges' decisions regarding bail amounts (Bowman & Van Brunt 2018; Weldon 2018). This third-wave of bail reform also focuses on strengthening alternatives to bail in securing appearance on future court dates, such as the implementation of text or phone call reminders, at-home confinement, drug treatment, job assistance, and courthouse childcare to name a few (Bowman & Van Brunt 2018). Although there remains disagreement about which aspect of the bail system to tackle first, there is a wider consensus that whatever reforms are enacted must be "mandatory and enforceable"; recent literature emphasizes the robust spirit in third-wave activists to achieve concrete change where "pretrial liberty actually is the norm" (Bowman & Van Brunt 2018). It has been noted, however, that current bail reforms may be framed in a way that appeals more to conservative, economically minded politicians, such as to reduce state expenses on pretrial detention rather than to achieve a more equitable system (Beckett et al. 2016). Regardless of how it is framed, it is undeniable the "widespread revulsion toward the unnecessary cruelty of a system that depends far too heavily on incarceration" fueling the bail reform movement today (Bowman & Van Brunt 2018).

Theoretical Lens: Path Dependence and the Power Elite

Path dependence theory of politics offers a helpful lens through which we could understand persisting institutional dynamics over time, especially when looking at mass incarceration in the United States. Path dependency depends upon processes of increasing returns that cause certain decisions and actions to become a self-reinforcing patterned dynamic over time (Pierson 2000). As increasing returns build in an institution, the cost of exiting from the chosen path rises, making it considerably more difficult to switch to alternative paths. These repeating dynamics of collective action cause "organizations have a strong tendency to persist once they

are institutionalized", even through major social, economic, or political changes over time (Pierson 2000). In a path-dependent institution, basic perspectives on politics are generally firm as political actors have strong incentives to stay on the chosen path (Pierson 2000). This contributes to the "institutional stickiness" of broader organizational action, as well as the "cognitive stickiness" in individual decision-makers (Schneider 2006).

Further literature has conceptualized institutional path dependence as a "tapering social process" with three distinct phases, thus distinguishing this theory from others of systemic inertia and persistent organizational structures (Sydow et al. 2009). In fact, this literature understands path dependence to be more like "specific constellations" that require certain features (Sydow et al. 2009). This tapering social process includes the preformation phase, the formation phase, and the lock-in phase. The first phase, the preformation phase, is always characterized by a broad scope of potential actions and implies an initial set of choices. However, certain decisions made in the first phase may result in an emerging and self-reinforcing dominant action pattern that marks the entrance into phase two, the formation phase. In this second phase, the range of alternative choices becomes progressively smaller and the path chosen begins to solidify. The third phase is organizational lock-in, in which the dominant action pattern gains a "deterministic character" (Sydow et al. 2009). In this phase, path dependence often renders the system inefficient in its ability to adopt new and better alternatives as even new incomers to the institution cannot help but reproduce the chosen actions (Sydow et al. 2009).

Pretrial policies and practices provide an interesting case of potential path dependency as these are primarily tied to local politics rather than federal politics and can vary greatly across state lines. However, even though the decision-making actors in pretrial and bail systems are different in each locality and state, research has found that "even decentralized, discretionary

policy areas exhibit path dependency" (Schneider 2006). This is likely due to the "sustained consensus" that has dominated views on criminal justice policy for decades which provides increasing returns across several institutional settings (Schneider 2006). Increasing returns in path dependence has four major features (Pierson 2000): unpredictability (many potential outcomes), inflexibility (adherence to a pattern), nonergodicity (small events can have large effects), and potential path inefficiency (generates lower pay-offs than alternatives in the long-run). It is important to note that history, or sequence of events, is crucial to the establishment of institutional path dependency as these events kickstart the self-reinforcing patterns (Pierson 2000; Schneider 2006).

The power elite theory often works in tandem with the path dependence theory of politics as it sheds light on the powerful decision-makers linked to the major political, economic, and military institutions of modern society that constitute the primary means of power (Domhoff 2012; Mills 1956). C. Wright Mills describes the power elite as those "in positions to make decisions having major consequences" (1956). Power, in this case, means the ability to actualize one's will and achieve the desired outcomes, and no one can truly acquire this power without access to the major institutions (Domhoff 2012; Mills 1956). The power elite essentially controls the ways organizations run and decide the paths of action taken. However, their rule tends to exacerbate the hierarchical structures of organizations as they continue to amass more power individually. Thus, the rule of the elite tends to magnify the negative effects of the powerless, rendering it almost impossible for the lower classes to participate in any sort of decision-making (Domhoff 2012). At this point, the hierarchy becomes embedded within the institution, "even if many people resent it and others organize themselves to try to win control of top positions from the current rulers" (Domhoff 2012). In this, it is clear how the rule of the power elite may lead to

institutional path dependency. Reform or abolitionist efforts must then consider not only methods of path-breaking as a way to end path dependency, but also the deeper power dynamics surrounding elite decision-makers that lead to the establishment of the path-dependent pattern in the first place.

Although there is a wide body of research and literature on the issue of mass incarceration, there is a notable gap concerning the role and effect that jail, bail, and pretrial policies have on upholding this discriminatory institution. There is even less research on modern-day attempts to change the pretrial system or this current "third-wave" of bail reform. This paper seeks to address the gap in the literature by constructing a deeper, more holistic comprehension of the underlying economic, political, socio-cultural, and historical dynamics surrounding recent unsuccessful efforts to reform the institution of bail and pretrial services. It will do so through the complementary lenses of the power elite and path dependence theory of politics, striving to better understand the forces either working against current organized movements or aiding in the persistence of commercial bail in pretrial policies and practices. In doing so, this paper will create a more nuanced understanding of contemporary dynamics around criminal justice reform, and perhaps offer a new way to conceptualize future actions.

Methodology

This paper strives to answer one key research question: what are the underlying dynamics surrounding unsuccessful commercial bail reform efforts in liberal state legislatures today? In order to determine these dynamics, it will conduct a comparative study of two cases — California and New York — that demonstrate the current affairs of the "third-wave" of bail reform. Certain key terms must be defined for the purposes of this research paper. Commercial bail reform efforts are defined to be any political reform attempts to change the policies

pertaining to the practice of monetary bail in the pretrial services of a state's criminal justice system. Unsuccessful reform efforts are understood to be reform attempts that have either (1) been voted against and beaten in state elections or (2) undergone rollbacks in current state legislatures. This paper only looks at recent and current commercial bail reform attempts, meaning that both the cases included have occurred within the past 3 years or are ongoing today.

The two cases chosen for further study in the paper are the states of California and New York as they offer interesting insight into the plight of bail reform both as states in their rights as well as in relation to each other. Both states have predominantly liberal state legislatures in which the governor, state senate majority, and state house majority are all controlled by the Democratic National Committee in 2022 (Kaiser Family Foundation). Not only are California and New York controlled by a democratic majority, but they also have strong liberal reputations in the United States that extend outside the state borders. According to the 2018 Gallup poll, California and New York fall within the top ten most liberal states in America (Jones 2019). Historically, there has been a clear division in regards to the political party's platforms on crime and criminal justice reform. The Republican party, with politicians from Ronald Reagan to Donald Trump, has a reputation for their "tough-on-crime" rhetoric and policy positions that have played key roles in the development of the War on Drugs and the issue of mass incarceration (Campbell & Schoenfeld 2013). Whereas the Democratic Party, with politicians from Jimmy Carter to Bernie Sanders, has generally taken on softer views on crime that seek to redirect people away from the carceral system. This is not to say that Democratic political leaders have never engaged in "tough-on-crime" policies, particularly when President Bill Clinton passed the 1994 Crime Bill which exacerbated mass incarceration (Campbell & Schoenfeld 2013). However, the distinction between the two political approaches to criminal

justice reform is generally accepted to be that the GOP is harsher on criminal justice reform while the DNC is for more liberal criminal justice reform (Campbell & Schoenfeld 2013). Therefore, it would be logical to assume that liberal states, such as California and New York, that are controlled by a democratic majority would pass liberal bail reforms more easily than states with a Republican majority. Finally, these two states are ideal cases for this study as they both face current bail reform efforts. They are some of the first states in the country with reform efforts focused on completely eliminating cash bail in certain scenarios, from replacing it with risk assessments to abolishing it for all low-level crimes and misdemeanors. However, the bail reforms in California and New York have yet to be fully successful and still face a lot of controversies. If these two states are ruled by a democratic majority, why is it not a landslide win for these bail reforms initiated by the democratic party? Additionally, it remains important to note that the reform efforts in California and New York are not the same and vary regarding the purpose and minutiae of the bills themselves. Even though both states face bail reform, the bills themselves are still unique to the context of the state.

Data for this paper will be gathered from bills and legislation, news articles, official voter guides, policy reports, public opinion polls, news articles, court cases, law reviews, nonprofit mission statements, policy updates and legislative agendas, blog posts, and budget reports. Because bail reform in California and New York are still distinct from each other, data gathered for each case will not necessarily be the same. As such, this paper will be unable to directly compare the data from New York to the data from California. To accommodate this restriction, the analysis of these cases will primarily be a thematic comparison of general patterns that arise in each state. Based on the literature review, the data gathered must look at the current economic, political, and socio-cultural dynamics of the proposed bail reforms. Some guiding questions I

used to uncover these dynamics include: who is funding the campaign in favor of these reforms? Against these reforms? What is the fiscal impact of these bills? Are there any financial stakes in the passing or blocking of bail reform? Who proposed these reforms and why? Likewise, what incentives exist for actors to resist or oppose reform? Who crafted the bills and what do they say? When and where did these reform efforts gain momentum? What is the involvement or opinion of nonprofits and grassroots organizations regarding the proposed bail reforms? How are these efforts addressing the ideas that historically upheld the practices of bail? How does this current "third-wave" of bail reform differ from the past two waves? Are these efforts addressing the link between racism and bail? This data will be analyzed through the theoretical lens of the power elite and institutional path dependence. With this in mind, this paper seeks to determine if the power elite influences the persistence of bail in pretrial systems, who the power elite are, and how they influence different structures and institutions concerning pretrial policies and bail. It will strive to discover if the California and New York state legislatures exhibit traits of path dependency within the bail bond industry, taking into consideration anything from signs of cognitive stickiness to indicators of potential stages of path dependency. Lastly, this paper will study the differences between the current third wave of bail reform and previous waves, looking to see if the ongoing reform efforts adequately address the ideas that have historically upheld the institution of bail.

Data: SB 10 and Prop 25 in California

The proposed bail reform in California that would change the pretrial release system was encapsulated in Senate Bill 10 (SB-10). This bill was introduced into the state legislature in 2016 by its lead sponsor Senator Robert Hertzberg (D-18) and finalized in 2018, moving forward to

pass in both the state assembly and senate and then signed into law by then Governor Jerry Brown (Ballotpedia). This law essentially changes California's "money-based system to a risk-based release and detention system", which will utilize risk assessments in lieu of commercial bail (Judicial Council of California). When enacted, SB-10 will impact both state and local costs, although to what extent remains unknown. The new system would affect state and local tax revenues, as well as increase the workload in state trial courts as they would be responsible for both implementing risk assessments and supervising those released pretrial (Legislative Analyst's Office). However, opponents of this bill achieved a referendum on SB-10 that blocked the bill from going to effect in October 2019. The Replace Cash Bail with Risk Assessments Referendum is most known as Proposition 25, which was scheduled to appear on the California ballot for the 2020 election period. A "yes" vote on Prop 25 would restore SB-10 into effect, whereas a "no" vote on Prop 25 would repeal SB-10. After a heated campaign period by committees both in support and in opposition of the bill, Prop 25 lost in the 2020 election, effectively repealing SB-10 in state law (Statement of the Vote).

The case of California proves interesting as the party partisanship lines were not as clear as one would have expected in regards to the politics of Prop 25 on the ballot. The major supporters of Prop 25 included the California democratic party, Governor Gavin Newsom, and some political organizations such as the Action Now Initiative and the League of Women Voters of California. However, the major opposers of Prop 25 and SB-10 include not only the California Republican party and prominent commercial bail associations, but also reputable left-leaning advocacy organizations as well, such as the ACLU, California NAACP State Conference, and Human Rights Watch. In the Californians Against the Reckless Bail Scheme campaign (a.k.a. No on Prop 25), two sides that are often in opposition to each other, one side with more conservative

and pro-business interests and the other with more progressive interests, actually work together against the instatement of SB-10 into state law. Bail companies, such as the American Bail Coalition, Golden State Bail Agents, and California Bail Agents Association, initially led the effort against SB-10 by gathering signatures to place a referendum on the bill. The financial stakes bail industries have in blocking this bail reform is undeniable; a legislative analyst office found that in 2018, the bail industry in California "issued some $6 billion in bail bonds and collected about $560 million in bail bond fees" (McGreevy 2020). On the other hand, organizations like the ACLU, NAACP, and Human Rights Watch oppose Prop 25 because they disagree with the replacement of commercial bail with risk assessments which would likely exacerbate racial inequities in the criminal justice system. A report from the Public Policy Institute of California found that BIPOC individuals are more likely to be held for risk assessment than other racial groups, and implementing risk assessments in pretrial services is unlikely to address the longstanding inequities of the system (Harris & Lofstrom 2020). There was clear tension amongst these actors in the No on Prop 25 campaign as each side has different motivating interests that inherently do not support the core values of the other side but still work together against SB-10.

The election results detailing the revocation of SB-10 do not indicate the end of pretrial and bail reform. This issue has since gone to the California courts. *In re Humphrey* (2018), the CA Court of Appeals ruled that "a defendant may not be imprisoned solely due to poverty", thus requiring courts to consider the defendant's ability to pay when deciding a bail amount (*In re Humphrey*, 2018). There is also a class-action lawsuit filed by the law firm Edelson PC against some of the largest bail bond companies in California, Aladdin Bail Bonds and All-Pro Bail Bonds. The plaintiff argues that these bond companies violated consumer protection law when

they entered into bail bond contracts with people without providing state-mandated notices that clarify the obligations of the co-signers, and they seek to void existing contracts and achieve monetary restitution for those who have co-signed these contracts (Harvin 2022). These cases demonstrate an alternative avenue that bail reform can take through the courts after the unsuccessful efforts in state legislation.

Table 1 — Senate Bill 10 & Prop 25 in California

Election Results (Complete Statement of Vote, November 3, 2020)

YES	**NO**
No. of Votes: 7,232,380 *Percentage*: 43.59%	*No. of Votes:* 9,358,226 *Percentage*: 56.41%

Campaign Finances

End Predatory & Unfair Money Bail PAC *(Yes on Prop 25)*	***Californian's Against Reckless Bail Scheme*** *(No on Prop 25)*
❖ *TOTAL:* $15,301,459.78 ➢ *CASH:* $14,983,723.32 ➢ *IN-KIND*: $317,736.46 ❖ *Top Donors* ➢ Connie E. Ballmer ➢ Steven A. Ballmer ➢ Patty Quillin ➢ Action Now Initiative ➢ Quinn Delaney ($500,000.00) ➢ SEIU California State Council ➢ Tom Steyer	❖ *TOTAL:* $11,263,271.66 ➢ *CASH:* $11,130,252.15 ➢ *IN-KIND:* $133,019.51 ❖ *Top Donors:* ➢ Triton Management Services, LLC ➢ Bankers Insurance Company ➢ AIA Holdings Inc. ➢ Lexington National Insurance Corporation ➢ American Surety Company

Key Supporters & Opposers

Supporters:
- California Democratic Party
- Governor Gavin Newsom (D)
- California Teachers Association
- Action Now Initiative
- California Medical Association
- Democracy for America
- League of Women Voters of California

Opposers:
- Republican Party of California
- American Bail Coalition
- California Bail Agents Association
- Golden State Bail Agent's Association
- ACLU of Southern California
- California NAACP State Conference
- Human Rights Watch

News Article Coverage & Statements

➢ "We will not be joining the bail industry's efforts, but we are not fighting for SB 10," he **[John Raphling, Human Rights Watch Senior Researcher]** said. "We have a different vision of how to reform the pretrial detention system." (Ulloa 2019 - LA Times)

➢ "Make no mistake, the bail industry is not interested in equal justice or equal protection under the law, they are seeking to turn back the clock to protect their bottom line. Furthermore, any implicit or explicit suggestion that the ACLU stands with or supports the bail industry is patently false." (**ACLU Statement by Abdi Soltani**, 2018)

➢ "This bill unfortunately is going to lead to people being held in preventive detention based on government's assessment of who's risky and who's scary," says **Robin Steinberg, CEO of the Bail Project**. "That's a terrifying idea," she says, warning of "a pretrial services industrial complex that will inevitably grow to become a massive governmental administration." (White 2018 - Politico)

➢ State bail bonds industry representatives say the law will kill their industry and have vowed to fight it. Said **David Quintana, a lobbyist for the California Bail Agents Association**: "You don't eliminate an industry and expect those people to go down quietly," he said. "Every single weapon in our arsenal will be fired." (Bizjak et al. 2018 - Sac Bee)

➢ **Jeff Clayton, executive director of the American Bail Coalition**, said his group is expecting the expecting to spend anywhere between $5 million and $15 million on the referendum campaign and called on critics to focus on eliminating a law that allows judges and prosecutors to "lock up whoever they want without bail." (Salonga 2019 - Mercury News)

➢ Now the post-Proposition 25 strategizing begins: Referendum supporters are trying to figure out ways to tactically chip away at cash bail; progressive civil rights groups want to see a whole-hog replacement; and bail agents are hunkering down, knowing this won't be the last attack against the industry. (Rodd 2020 - Capradio)

Court Cases

➢ ***In re Humphrey* (2018)**
   ○ "This requirement is implicit in the principles we have discussed—that a defendant may not be imprisoned solely due to poverty and that rigorous procedural safeguards are necessary to assure the accuracy of determinations that an arrestee is dangerous and that detention is required due to the absence of less restrictive alternatives sufficient to protect the public."

- ➢ ***Edelson PC v All-Pro Bail Bonds Inc.*** **(2022)**
  - "Edelson PC is currently prosecuting proposed class action lawsuits against Aladdin Bail Bonds and All-Pro Bail Bonds on behalf of people who did not receive the legally required notice when they were asked to cosign a bail bond under a payment plan." (Edelson PC)
  - "The filings seek to void existing contracts and seek restitution in the form of refunds for people who've co-signed bail bond contracts without getting state-mandated notices that make clear what that obligation entails." (Harvin 2020 - KQED

Data: 2019 Bail Reform Law of New York

In New York, the 2019 Bail Reform Law proposed to radically change pretrial policy by eliminating bail for all misdemeanors and nonviolent felony cases, stating "in all such cases, except where another type of securing order is shown to be required by law, the court shall release the principal pending trial on the principal's own recognizance, unless it is demonstrated and the court makes an individualized determination that the principal poses a risk of flight to avoid prosecution" (New York Code § 510.10.). Additionally, this law requires judges to take into consideration the defendant's ability to pay in cases that do qualify for bail. It is important to note that his reform gained momentum in the New York State Legislature after the tragic story of Kalief Browder, a teenager who committed suicide after being detained in Rikers Island for three years because he couldn't pay his $3000 bail amount. One article in the New York Magazine even stated that Browder's death "supercharged" the reform (Prater 2022). Several politicians in the years leading up to the passage of the bill, including former governor Andrew Cuomo and Mayor Bill de Blasio, frequently cited his name in their reasoning: "Kalief Browder did not die in vain" (Farias 2015; Rahman 2019). The New York Democratic Party passed this bail reform as soon as they gained control over the governorship, state senate, and state assembly in 2018. This was immensely supported by various advocacy nonprofit groups in the state and was lauded "national victory" (Gronewald & Durkin 2022).

However, almost immediately after its enactment, the state Republican party launched a repeal campaign to roll back a lot of the initial provisions made in the 2019 Bail Reform. Here is where bail reform efforts in New York clearly differed from California. In New York, the partisan lines were much more clear as bail reform became a democrat vs. republican issue. This call for rollbacks was led by newly elected New York City Mayor Eric Adams, a democratic moderate who beat other democratic progressive in the previous election (Gronewald & Durkin 2022). Mayor Adams and New York Republicans argued this bill was a danger to public safety, calling upon the state to allow judges "to consider the 'dangerousness' of a defendant in determining bail restrictions" (Campbell 2022). The repeal campaign seized onto a recent uptick in violent crime in the state as well, building a narrative in popular media that the 2019 Bail Reform Law is directly responsible for this increase in violent crime. Replacing Cuomo following his resignation, Governor Kathrine Hochul faced extreme pressure from both political parties, as Democrats refused to roll back any of the provisions in the bill and Republicans attacked her for allowing crime to spike under the bail reform law. Much to the dismay of several nonprofit advocacy organizations and the New York Democratic Party, the Republican Party was ultimately successful in their repeal campaign through Governor Hochul's "10-point public safety plan", a compromise that effectively rolled back the ground-breaking provisions included in the initial bill (Gelardi et al. 2022). Hochul's compromise "would make it easier for judges to impose cash bail on repeat offenders and those considered a danger to the community" (Campbell 2022).

Table 2 — 2019 Bail Reform Law in New York

Momentum for Bail Reform
➢ "But it was supercharged following the 2015 death of **Kalief Browder**, who was detained on Rikers Island as a teenager for three years because his family was unable to pay his $3,000 bail." (Prater 2022 - NY Mag)

- "In January 2018, Governor Andrew Cuomo declared in his State of the State address, "**Kalief Browder did not die in vain**," as he announced a set of reforms to the existing bail statute that would mandate release for most misdemeanors and nonviolent felonies and reserve bail only for the more serious cases, including domestic violence and violent felonies." (Rahman 2019 - Vera Institute for Justice)
- "In addressing **Browder's death**, Mayor Bill de Blasio this week attempted to grapple with that reality, but he only focused on two areas: reforming the bail system and Rikers Island. And he did so with the usual platitudes. He said **Browder "did not die in vain**," that his case was an **"eye-opener,"** and that all of it was **"very, very painful."**(Farias 2015 - NY Mag)

News Article Coverage — Tensions between Parties

- "Fixing New York's bail requirements was hailed as a national victory after Democrats regained dual majorities in the state Senate in 2019. A series of reforms, which included banning cash bail for all but the most violent felonies, were signed into law as a symbol of what the party could do united in power for the first time in years." **(Gronewald & Durkin 2022 - Politico)**
- "Legislative leaders have made it clear they have no intention of rolling back the hard-won reforms of 2019. Hochul, who is mounting a run this year for a full term as governor, has been attacked by Republicans and moderate Democrats for not doing more to tamp down a persistent spike in crime in New York City and elsewhere." **(Campbell 2022 - Gothamist)**
- Assembly Speaker Carl Heastie of the Bronx, who hails from the same borough as Browder, said he no longer believes the debate is centered around the policy itself. "I know our opponents are going to say: They are being soft on crime; they don't care about victims. That's all bullshit," Heastie said. "We care about having safe communities, and I hate when people try to politicize these things."**(Gronewald & Durkin 2022- Politico)**
- "We write to express significant concerns regarding the prospect of our constituents being forced to endure another year of the lawlessness and disorder created by New York State's failed bail reform law. In the face of incriminating data and growing calls on both sides of the aisle to address these dangerous standards, it is past time for your Administration to take the lead and call on the state legislature to make common sense reforms to ensure public safety." **(Republicans letter to Gov. Hochul 2022)**
- "Republican State Senator James Tedisco also railed against the new reforms and issued a document on his letterhead titled "Cash Bail 'Reform' Eliminations" with a list of alleged crimes where defendants "must be released from custody." The list of dozens of offenses starts with manslaughter in the second degree and includes failure to register as a sex offender." **(Chang 2020 - Gothamist)**

Republican's Narrative of "Public Safety"

- "Since then, Republicans and some more-moderate Democrats – including Adams – have seized on a recent increase in violent crime to push for changes, arguing the state should allow judges to consider the "dangerousness" of a defendant in determining bail restrictions." **(Campbell 2022 - Gothamist)**
- "The new law also corresponded with a swell of anxiety and fear stemming from several high-profile anti-Semitic attacks, including the stabbing of five Hasidic Jews at a rabbi's home in Monsey, N.Y…But the rise in anti-Semitic attacks should not be used to justify changes to the bail reform law, said Abby Stein of Jews for Racial and Economic Justice." **(Mays & Mckinley 2020 - NY Times)**

- “Many police lead-ers and some politi-cians have been against these bail reforms from the start. Now, amid a new legis-lat-ive session, the law has come under renewed scru-tiny as crit-ics seek to blame it for recent increases in viol-ent crime, which rose nation-wide in 2020 and 2021 as the pandemic gripped the nation and ravaged the economy.” **(Grawert & Kim 2022 - Brennan Center for Justice)**
- “Considering that rearrest rates are even worse in New York City, it is unsurprising that newly elected Mayor Eric Adams and Police Commissioner Keechant L. Sewell have both identified reforms to New York’s bail laws as a key component to making the city safe.” **(Republicans letter to Gov. Hochul 2022)**

Statements from Nonprofits & Advocacy Organizations

- “The bail reform law recognizes that detaining someone pretrial doesn’t make us safer – access to mental health services, family support, employment, and housing are what actually address the root causes of harm and prevent crime. Bail reform must be fully and justly implemented.“ **(Jim Anderson; Vice President, Citizen Action of New York)**
- **“**After years of using my brother’s name in an attempt to address the systemic injustices that led to his tragic death, New York State passed a budget that reneges on every promise they made to ensure pretrial justice…To exploit Kalief’s story, coming from the grave where he and our mother rest—yet pass this legislation—is an insult and a mockery of justice. We are once again caught in a vicious cycle where families like ours that are not financially capable of making bail will continue to suffer. More innocent people will be subjected to the same harsh treatment my brother experienced, with untold consequences…This rollback was not about facts or rational debate—it was about politics. Our legislative leaders made clear that they ultimately believed saving a few electoral seats was more important than saving thousands of lives.” **(Akeem Browder 2020 - Kalief Browder Foundation)**
- “These bail rollbacks do little more than further criminalize poverty — throwing people in jail pre-trial on petty theft charges,” said Scott Levy, managing director of policy at *The Bronx Defenders.”* **(Campbell 2022 - Gothamist)**

Analysis and Discussion

The conceptual framework is divided into three main sections: the power elite, path dependence, and the historic/cultural reasoning for bail. Looking first in regards to the power elite theory, C. Wright Mills defines the power elite as those “in positions to make decisions having major consequences”, in which power is the ability to realize one’s will and achieve a desired outcome (1956). An important aspect of the power elite is the ability to exercise control over society’s major political, economic, and military institutions. Employing this reasoning, the data suggests that the power elite did have influence in both cases of bail reform in California and New York. In California, the power elite is the bail companies. The bail industry

demonstrated power over major institutions through their repeal campaign, gathering over 40,000 signatures to achieve the referendum and funneling millions of dollars into their campaign. The language in the data regarding their campaign were that these bail companies were "hunkering down" and "fighting for their survival". In a statement to the Sacramento Bee, a bail agent even said, "you don't eliminate an industry and expect those people to go down quietly" (Bizjak et al. 2018). The California bail industry was able to achieve their goal through their campaign and effectively repeal the proposed reform from state law, thus displaying their status as the power elite. In New York, the data indicates the power elite to be the Republican Party. Even though New York is a democratic majority, it is evident in the discourse and turn of events regarding bail reform that the democratic party was unable to fully actualize their will and goals in the 2019 law. Instead, the republican party exercised control over major institutions to attain their desired goal of repealing parts of the reform. The republican party effectively blocked out the smaller nonprofits and advocacy groups from the decision-making process, built a narrative in the media that helped gain popular support for their goals, and even swayed democratic moderates to their side as well. In the case of New York, the data shows how the Republican party was able to do what the Democratic party could not, thus solidifying their role as the power elite in the rollbacks of the 2019 Bail Reform Law.

In regards to the potential path dependence of the institution of bail, Pierson (2008) identifies four main characteristics: unpredictability (demonstrates the beginning of the tapering process), inflexibility (adherence to a pattern), nonergodicity (small events can have large effects), and potential path inefficiency (generates lower pay-offs than alternatives in the long-run). According to the gathered data, the institutions of bail in California and New York fail to demonstrate strong signs of these qualities in order to be characterized as path dependent. In the

broader picture, there has not been a strict adherence to a pattern over the past 60 years or so when the first bail reform wave began. Rather, the history of pretrial policies and bail reform in the United States can be characterized as having a lot of variation. The first wave of bail reform in the 1960s differs greatly from the second wave of bail reform in the 1980s. Whereas the Bail Reform Act of 1966 focused on pretrial liberty and minimizing pretrial detention, the Bail Reform Act of 1984 focused on public safety and expanding pretrial detention. This current third wave of bail reform is marked by another shift in focus from the previous waves wherein the main goal is to completely eliminate the cash bail bond industry and make pretrial liberty the norm. Although the third wave of bail reform is more similar to the first wave of bail reform, they are still distinct from each other. This variation is not indicative of a path-dependent institution in "organizational lock-down" (Sydow et al. 2009). Therefore, the institution of bail in these cases fails to have qualities of unpredictability, inflexibility, and potential path inefficiency. In regards to nonergodicity, it is worth noting the data does not suggest the institution of bail has passed a critical juncture event that triggers the development along a certain path and its mechanisms of reproduction (Pierson 2008). Within the conceptualization of path dependence as a "tapering social process", there is little to indicate this institution has passed into the second or third phase, meaning the institution of bail is still characterized by a broad scope of potential action in phase one (Sydow et al. 2009). There seems to be no persistent decision-making pattern, and this is evident both historically throughout the waves of bail reform as well as individually in each of the cases. The proposed bail reform in California was drastically different from the proposed bail reform in New York. The data demonstrates the wide variety of action being taken currently, even amongst just two states. Pretrial rights and the practice of bail in the United States still have a lot of ambiguity, particularly in the lack of

explicit language, that allows for a diverse array of actions to be taken, both in how states decide to employ bail in their penal codes to how advocacy groups choose to organize against it. Therefore, the theory of path dependence does not offer a proper framework through which to view this issue as practices of bail have not been distinctly institutionalized throughout the United States.

The last aspect of the conceptual framework concerns the ideas that have historically upheld the practice of cash bail in the U.S. criminal justice system, specifically the cultural linkages between blackness, poverty, and crime in American society. Does the current reform efforts in California and New York adequately address bail as a racialized phenomenon and not simply a socio-economic phenomenon? According to the body of data collected, neither case has been successful at addressing the historical ideas employed to justify the practice of bail as it operates in the United States. The data showcases how California and New York approached this aspect of bail differently. In California, the group advocating to reform the pretrial system by replacing bail with risk assessments did not mention the racialized aspects of this issue at all in their arguments to the public to vote yes on Prop 25. On the other hand, the repeal campaign led by the bail companies and advocacy groups centered race and racism in their reasoning against risk assessments. In this, it becomes evident how the proposed bail reform in SB-10 and Prop 25 failed to address bail as a racialized phenomenon because it argued to utilize risk assessments instead, which studies have found to also be racially discriminatory. In contrast, New York's 2019 Bail Reform Law was centered upon the racist implications of bail from the beginning. The tragic death of Kalief Browder was a driving force of this bail reform, and the law took into account the needs of Black and Brown communities acutely affected by this practice. The New York bail reform did not seek to replace commercial bail with risk assessments but rather

eliminated completely all misdemeanors and nonviolent offenses. However, the provisions in the 2019 Bail reform that addressed the linkages between Blackness, poverty, and crime were repealed from state law, thus nullifying any advancements the bill offered. Although race has been included in the discussion around bail reform in both cases, neither has been fully successful at achieving concrete change on this front.

Conclusion

Movements against mass incarceration in the United States cannot be successful without addressing the inherent harm in the system of commercial bail. While there are ongoing efforts against the injustices of the bail industry, none have been successful thus far. This research sought to explore the underlying dynamics surrounding current bail reform movements, looking to better understand the present-day barriers to achieving substantial change. The data gathered from the two case studies of California and New York demonstrate the complexities of bail reform today; efforts in the current third wave of reform still remain dependent upon state contexts and vary greatly from each other. Organized movements must address several economic, political, socio-cultural, and historical factors to be successful, yet the efforts highlighted in this research failed to sustainably address such factors. The power elite in each case, the California bail industry and New York Republican party, displayed strong influence over society through their repeal campaigns, illustrating that the power elite does not have to be extremely big or super visible to be effective. As the power elite was able to block reforms initiated by the democratic party in states controlled by democratic legislatures, these cases suggest that the movement cannot solely rely upon the might of a political party to pass a bail reform law.

Both the bail reform efforts in California and New York failed to have a strong, common vision of alternatives to the system which led to a lack of momentum for the movement. The research suggests that this is one of the main reasons for the reform efforts' failures. Movements going forward must do the work of reimagining not only the bail system, but the U.S. Criminal Justice system overall to figure out what the common end goal is. This vision is essential to movements for change as it helps to clarify the necessary institutions for creating a positive and sustainable peace within society. Without a clear objective, the most a movement for change can achieve is a negative peace through the cessation of violence. However, the argument can be made that the reforms highlighted in this research do not even attain a negative peace since risk assessments are still considered to be a form of violence. This begs the question: should movements focus on reforming or abolishing the system? Can reforms adequately address the harm and injustices of bail and mass incarceration, or will it simply transform the violence into another form of violence? These are essential questions that social movements against the U.S. carceral system need to consider going forward.

Grassroots organizing models prove particularly useful in current and future social movements in regard to the criminal justice system as it centers the experiences of the communities most impacted by the operation of bail. Each case study in this research demonstrates a different change model, with California utilizing more of a top-down method of change and New York relying upon a bottom-up model. California's Democratic party did not collaborate with the nonprofit advocacy groups in the state, which resulted in a disconnect about what people wanted in the reform law. Therefore, several prominent left-leaning advocacy groups campaigned against the reform bill introduced by the democratic officials. However, New York's initial bail reform law was grounded in the voices of nonprofit advocacy groups from the

start as Browder's death kickstarted the movement. Because of this, the reform took into account the needs of the community, seeking to completely eliminate bail for certain cases instead of replacing it with something else. New York's 2019 Bail Reform law would have been ground-breaking had those essential provisions not been repealed. In this, it becomes apparent how grassroots models of organizing better advocate for holistic solutions that are sustainable to the communities most affected by injustice in the system.

It remains important to acknowledge the limitations of this research. This methodology is qualitative in nature, and qualitative research is always subject to the bias of the researcher. It is also impossible to have collected every single primary source regarding bail and bail reforms in California and New York. Because of restraints on time, labor, and resources, this paper was only able to gather data from what was publicly available on the internet. Although this research sought to collect a well-rounded variety of data, it is entirely possible to have missed key documents. This means that the data cannot be statistically representative of the conclusions this paper has drawn.

More research is needed to further understand current social movements for bail reform and the forces working against them. Future research can continue where this paper ends and look deeper into how a state's particular history impacts the bail reform introduced in modern-day society. As the current third wave of bail reform is still in its early beginning, future researchers can monitor where these current reform efforts will go. Will this third wave of bail reform culminate into another federal bill like the previous waves? Another wide gap in the literature on bail and the criminal justice system is the lack of a gendered lens on these issues. Specifically, how does bail impact women, particularly women of color, in jail and the carceral system overall? This research is essential as the movement against mass incarceration cannot be

successful without addressing its impacts on women. Other areas of research include the factors that influence the public's perception of bail and the resulting impact on bail reform movements, as well as further understanding of path dependence in local vs. federal institutions. Can seemingly distinct state legislatures exhibit path dependence in the same, interconnected institution? How does path dependence work in a decentralized system of localities under a federal institution? Future research in this field is critical to building a positive peace in society with regard to the criminal justice system, and it must continue to explore the complexities of the system, its effects, and the organized movements against it within modern-day society.

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