

# Out of the Closet, In on Bail

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## ABSTRACT

*This Article examines the disproportionate impact of bail practices on the LGBTQ community. This is the first law review article to examine the American pretrial detention system from an LGBTQ perspective.*

*Part I introduces the experiences of LGBTQ defendants in pretrial detention and contextualizes the need for my original research. Part II provides the findings of my research, a comprehensive survey of bail statutes and laws across 52 jurisdictions (50 states, D.C., and Federal Courts). My analysis identifies key factors that judges commonly consider when ordering pretrial detention—such as familial relationships and community ties, residence, employment, criminal records, failures to appear, history of substance use, and mental health—that disproportionately disadvantage LGBTQ individuals due to systemic discrimination. The Article examines case studies to illustrate the bail factors’ problems in practice, with a particular focus on Layleen Xtravaganza Cubilette-Polanco’s experience.*

*After presenting this novel data, Part III offers recommendations for bail reform through an LGBTQ lens, aiming to address disparities and promote equitable practices. By shedding light on how existing bail frameworks are impacted by and further exacerbate marginalization, this Article seeks to influence the broader bail reform movement. It additionally aims to provide judges and other pretrial detention decision-makers with critical insights for making more informed and fair decisions when LGBTQ defendants appear before them.*

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## I. INTRODUCTION

As a former public defender for nearly a decade, I have advocated for thousands of individuals facing criminal charges. Initially, as a staff attorney at The Bronx Defenders’ Criminal Defense Practice, I represented a diverse range of clients, most of whom were straight and cisgender. Over time,

I transitioned to specializing in the defense of lesbian, gay, bisexual, transgender, and queer (LGBTQ) individuals in criminal cases, driven by the unique challenges and systemic oppression this community faces within the criminal legal system.

During my time working with LGBTQ clients, specifically, I witnessed the inadequacy of conventional arguments used by defense attorneys in bail hearings.<sup>2</sup> Standard arguments, such as clients being rooted in their community, having stable housing, consistent employment, familial and community support, and access to resources to help them return to court, were not applicable to many of my LGBTQ clients. These arguments often did not reflect my clients' realities. Due to disproportionate discrimination, my clients lacked access to these normative justifications for pretrial release. It became evident that the pretrial detention criteria courts use—or are mandated to consider—often fail to account for the systemic barriers that LGBTQ people face.

As my research findings demonstrate, courts and other pretrial detention decision-makers typically consider several factors when determining an individual's pretrial detention status, including: (1) familial relationships or community ties; (2) residence or housing stability; (3) employment; (4) mental health, reputation, or character; (5) history of substance use; (6) criminal record; (7) prior failures to appear in court; and (8) the nature of the current offense or likely sentence. I hypothesize that LGBTQ individuals are systematically disadvantaged in each of these areas, leading to a higher likelihood of pretrial detention.<sup>3</sup>

As a career criminal justice reform advocate focused on improving the experiences of LGBTQ individuals within the criminal legal system, I grappled with whether I should write this Article. I was concerned that raising this issue might be misconstrued as arguing that LGBTQ individuals are less likely to return to court due to the discrimination they face and, therefore, should be detained pretrial. However, raising this issue may help judges and other decision-makers<sup>4</sup> within the criminal legal system to recognize that the lack of access to resources among LGBTQ individuals specifically—and marginalized populations more broadly—and their potential inability

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<sup>2</sup> A “[b]ail hearing[.]” also referred to as an “arraignment” or “first appearance,” is “a court hearing where a person charged with a crime is initially brought before a judge or magistrate, typically after they have been arrested. The person charged with a crime is made aware of the charges against them, and the judge or magistrate may assign bail, appoint an attorney, or schedule future court dates. In some jurisdictions, but not everywhere, arraignment . . . occurs at first appearance and defense counsel is provided.” THE BAIL PROJECT, *GLOSSARY OF BAIL-RELATED TERMS* 5 (2024), [https://bailproject.org/wp-content/uploads/2024/06/the\\_bail\\_project\\_bail\\_glossary.pdf](https://bailproject.org/wp-content/uploads/2024/06/the_bail_project_bail_glossary.pdf) [<https://perma.cc/79KG-968D>].

<sup>3</sup> This is a hypothesis because there is not yet available data on this issue.

<sup>4</sup> Other decision-makers in this context include actors such as prosecutors, providers of alternatives to incarceration, and law enforcement members such as police, correction staff, and parole officers.

to meet traditional bail criteria stems from systemic discrimination. Ideally, this heightened awareness would then lead judges to consider the pervasive and underlying discrimination when making pretrial detention decisions and more frequently grant pretrial release.

Over the past decade, much attention has been paid to the problems of pretrial detention systems in the United States.<sup>5</sup> However, research and scholarship on the pretrial detention of LGBTQ individuals is lacking.<sup>6</sup> The tragic death of Layleen Xtravaganza Cubilette-Polanco—a transgender woman who died in 2019 at the infamous Rikers Island jail facility, after being held on \$500 cash bail—highlighted the urgent need for greater focus on this issue, particularly through an LGBTQ lens.<sup>7</sup>

Part I of this Article explores how the various factors commonly used in pretrial detention decisions disproportionately disadvantage LGBTQ individuals, making them more likely to be incarcerated pretrial. Part II presents the findings of my novel research, analyzing bail laws across 52 jurisdictions—all 50 states, the District of Columbia, and the federal court system—and highlighting which jurisdictions incorporate these factors in their pretrial detention criteria. This Article primarily focuses on statutory law but also considers relevant caselaw. For ease of reference and as a visual aid, Appendix A provides a table that organizes bail factors by jurisdiction.<sup>8</sup> This Article also traces Layleen’s and other LGBTQ individuals’ experiences to illustrate how these factors can adversely operate in practice.<sup>9</sup>

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<sup>5</sup> Allie Preston, *The Case for Cash Bail Reform*, CTR. FOR AM. PROGRESS (Aug. 9, 2023), <https://www.americanprogress.org/article/the-case-for-cash-bail-reform> [<https://perma.cc/BS9E-RS3B>]; Nicole Zayas Manzano, *The High Price of Cash Bail*, A.B.A.: HUM. RTS. MAG. (Apr. 12, 2023), <https://www.americanbar.org/groups/crsj/resources/human-rights/archive/high-price-cash-bail> [<https://perma.cc/3RFN-54VG>]; Tana Ganeva, *The Fight to End Cash Bail*, 17 STAN. SOC. INNOVATION REV. 18 (2019).

<sup>6</sup> COLIN DOYLE, CHIRAAG BAINS & BROOKS HOPKINS, HARV. L. SCH. CRIM. JUST. POL’Y PROGRAM, BAIL REFORM: A GUIDE FOR STATE AND LOCAL POLICYMAKERS 7 (2019), <https://static.prisonpolicy.org/scans/Harvard%20Guide%20to%20Bail%20Reform.pdf> [<https://perma.cc/256Q-YAZB>] (citing JASON LYDON WITH KAMARIA CARRINGTON, HANA LOW, REED MILLER & MAHSA YAZDY, COMING OUT OF CONCRETE CLOSETS: A REPORT ON BLACK & PINK’S NATIONAL LGBTQ PRISONER SURVEY 24 (2015)).

<sup>7</sup> Rosen Goldensohn & Reuven Blau, *Questions Over Why Layleen Polanco Was Jailed Amid \$500 Bail*, THE CITY (June 11, 2019), <https://www.thecity.nyc/2019/06/11/questions-over-why-layleen-polanco-was-jailed-amid-500-bail> [<https://perma.cc/F3UN-K5MQ>].

<sup>8</sup> Bail factors, also referred to as “bail risk factors,” are “various characteristics and circumstances . . . that are considered when determining pretrial release and the conditions of that release.” LESLIE PETIS, R. ST. INST., NAVIGATING BAIL REFORM IN AMERICA: A STATE-BY-STATE OVERVIEW 3 (2024), <https://www.rstreet.org/wp-content/uploads/2024/03/FINAL-r-street-policy-study-no-300-Mar-2024.pdf> [<https://perma.cc/57NC-U44S>].

<sup>9</sup> By sharing part of Layleen’s story, I hope to shed light on the injustices she faced. My analysis is based on my interpretation of court records and trial court transcripts. While unsealed court records are technically “public records,” they are not readily accessible to the average layperson seeking to investigate a case. I spent hundreds of dollars to obtain court transcripts and records, a luxury many people cannot afford. I also spent days waiting in courthouses and months calling and emailing court reporters and clerks without receiving responses. The time, effort, and resources required to navigate these bureaucratic systems are beyond what most people have access to. Although I had the privilege and resources to conduct this investigative

Finally, this Article provides recommendations for reforming the pretrial detention process to avoid reliance on factors rooted in discrimination.

The American pretrial detention system has long been recognized as a significant contributor to the coercive nature of the plea-bargaining system.<sup>10</sup> People held in pretrial detention are often pressured to accept plea deals, even if they are innocent, to avoid prolonged detention or the uncertainty of a trial.<sup>11</sup> For LGBTQ people this consequence is particularly severe.

One of the first transgender clients I represented, whom I will call Ms. D, was a very young Black woman incarcerated while awaiting trial. She was being held in one of the men's jails on Rikers Island, where she experienced extreme violence, including rape. Ultimately, these traumatic experiences led her to plead guilty to a felony charge to secure immediate release. Although she had a strong defense and a good chance of winning at trial, she couldn't bear the thought of spending another day at Rikers Island facing such violent abuse.

This conviction gave Ms. D a felony record and classified her as a violent predicate.<sup>12</sup> Due in large part to her unstable housing, lack of familial support, deteriorating mental health, and struggles with drug addiction, she was arrested several more times after this conviction. Consequently, she was subject to mandatory minimum sentencing laws, which forced her to spend even more time in men's jails and prisons and endure years of further abuse.

I share Ms. D's story because it vividly illustrates the oppressive nature of pretrial detention for LGBTQ individuals. Pretrial detention makes our plea-bargaining system coercive *for everyone*, as people often plead guilty to crimes they did not commit or crimes they have a valid defense for, in exchange for immediate release or a sentence of time served. Evidence shows that people detained pretrial are more likely to serve prison sentences, receive longer sentences, and face more future arrests than people

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work, it is important to highlight that if it was extremely challenging for someone with my positionality and expertise, it would likely feel impossible for the average person. This underscores our criminal legal system's lack of transparency and accountability, and the falsehood of "public records."

<sup>10</sup> See, e.g., Amy E. Lerman, Ariel Lewis Green & Patricio Dominguez, *Pleading for Justice: Bullpen Therapy, Pre-Trial Detention, and Plea Bargains in American Courts*, 68 CRIME & DELINQ. 159 (2021); HALLIE RYAN, UNEQUAL JUSTICE: MOBILIZING THE PRIVATE BAR TO FIGHT MASS INCARCERATION 49, 56 (2015), <https://lawyerscommittee.org/wp-content/uploads/2015/07/0553.pdf> [<https://perma.cc/J6EV-FRHA>].

<sup>11</sup> Nazish Dholakia, *How the Criminal Legal System Coerces People into Pleading Guilty*, VERA INST. JUST. (Apr. 4, 2024), <https://www.vera.org/news/how-the-criminal-legal-system-coerces-people-into-pleading-guilty> [<https://perma.cc/M28N-JSNT>].

<sup>12</sup> The "predicate status" label refers to a legal status given to a person with a prior criminal conviction. A "violent predicate" status refers to someone whose prior conviction was for a crime classified as "violent." A predicate status is a potential sentencing enhancement. Some jurisdictions use similar but not interchangeable phrases, such as "career offender," "habitual offender," "persistent offender," "prior offender," or "repeat offender." See, e.g., U.S. SENTENCING COMM'N, QUICK FACTS ON CAREER OFFENDERS (2025), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Career\\_Offender\\_FY14.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY14.pdf) [<https://perma.cc/4KRC-X3CJ>]; N.Y. PENAL LAW § 70.04; 18 U.S.C. § 924(e).

who are released pretrial.<sup>13</sup> For LGBTQ individuals, particularly transgender and gender non-conforming people, this coercion is exacerbated by the disproportionately high rates of abuse they face during incarceration. For example, according to a recent survey of 280 transgender people incarcerated in state prisons across 31 states, “more than half (53 percent) of respondents reported experienc[ing] a nonconsensual sexual encounter during their current sentence,”<sup>14</sup> “nearly 90 percent of respondents had spent time in solitary confinement,”<sup>15</sup> and, “of respondents who sought medication to support gender transition in prison, 53 percent were unable to access it.”<sup>16</sup> Indeed, Executive Order 14168, signed by President Trump on January 20, 2025, prohibits transgender people incarcerated in federal jails from being housed in alignment with their gender identity and requires federal jails and prisons to refuse gender-affirming care to transgender people in their custody.<sup>17</sup> This severe mistreatment makes individuals even more desperate to be released from jail, further exacerbating the pressure to plead guilty to crimes for which they would likely be acquitted.<sup>18</sup>

Layleen Xtravaganza Cubilette-Polanco was impacted by the coercive nature of the American plea-bargaining system as well. On September 11, 2018, Layleen was arrested and charged with False Personation for the second time within a six-month period.<sup>19</sup> The judge remanded<sup>20</sup> her to custody

<sup>13</sup> JOCELYN SIMONSON, RADICAL ACTS OF JUSTICE: HOW ORDINARY PEOPLE ARE DISMANTLING MASS INCARCERATION 19 (2023) (referencing Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017); Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1417-25 (2017)).

<sup>14</sup> KELSIE CHESTNUT & JENNIFER PEIRCE, VERA INST. ADVANCING TRANSGENDER JUSTICE: ILLUMINATING TRANS LIVES BEHIND AND BEYOND BARS 10–11 (2024), <https://vera-institute.files.svcdn.com/production/downloads/publications/advancing-transgender-justice.pdf> [<https://perma.cc/6ZJA-HVND>].

<sup>15</sup> *Id.* at 9.

<sup>16</sup> *Id.* at 10.

<sup>17</sup> Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, 90 Fed. Reg. 8615 (Jan. 30, 2025); Deborah Lolai, *The Crisis of Incarcerated Transgender People: A Call to Action for the Judiciary, Prosecutors, and Defense Counsel*, N.Y. L. J. (Jan. 27, 2025), <https://www.law.com/newyorklawjournal/2025/01/27/the-crisis-of-incarcerated-transgender-people-a-call-to-action-for-the-judiciary-prosecutors-and-defense-counsel/?slreturn=20250201-45443> [<https://perma.cc/K68Y-E3NE>].

<sup>18</sup> See generally D Dangaran, Student Note, *Abolition as Lodestar: Re-Thinking Prison Reform from a Trans Perspective*, 44 HARV. J. L. & GENDER 161 (2021) (discussing the disproportionate violence trans people face in prison); see also Lolai, *supra* note 17.

<sup>19</sup> Complaint, *People v. Cubilette*, No. CR-14916-18 (N.Y. City Ct. Yonkers 2018); Complaint, *People v. Cubilette*, No. CR-8597-18 (N.Y. City Ct. Yonkers 2018). Layleen’s arrest and prosecution for “false personation” was an injustice in and of itself that I address below in the subsection, “Criminal Record.”

<sup>20</sup> In the context of pretrial detention, “remand” refers to returning the defendant to custody without the possibility of posting bail. *Remand*, THOMSON REUTERS (May 17, 2024), [https://uk.practicallaw.thomsonreuters.com/9-505-2602?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/9-505-2602?transitionType=Default&contextData=(sc.Default)) [<https://perma.cc/5LA7-7SAJ>] (last visited Oct. 5, 2025). When a person is remanded, there is no amount of bail money or conditions that would allow them to be released pretrial.

on an older case and set bail at \$1,000 on the remaining dockets.<sup>21</sup> Layleen was consequently incarcerated pretrial until October 22, 2018. On that date, she pled guilty to False Personation, which she was not guilty of and which she could have subsequently sued the city over. Consistent with the reason many defendants plead guilty to crimes they are not guilty of, Layleen pled guilty to this charge because she had already served her sentence of 60 days during her pretrial detention<sup>22</sup> and because pleading guilty on that date meant she would be released immediately.<sup>23</sup>

While there is little to no empirical research on the pretrial detention of LGBTQ individuals, specifically,<sup>24</sup> a substantial body of research demonstrates the pervasive discrimination faced by LGBTQ individuals in the United States in a number of areas. Significant research has demonstrated how some of the most marginalized members of the LGBTQ community, such as transgender, gender non-conforming, non-binary, and intersex (TGNCNBI) individuals, LGBTQ people of color, and LGBTQ individuals living in poverty are discriminated against in crucial areas such as family ties,<sup>25</sup> housing,<sup>26</sup> education,<sup>27</sup> healthcare,<sup>28</sup> employment,<sup>29</sup> and the criminal legal system.<sup>30</sup>

Legal scholar and LGBTQ advocate Chinyere Ezie coined the phrase “discrimination-to-incarceration pipeline” to describe how “discrimination and societal exclusion thrust [LGBTQ people of color] into poverty and homelessness before funneling them into the system of mass incarceration

<sup>21</sup> Transcript of Arraignment, *People v. Cubilette*, N.Y. City Ct. Yonkers (2018) (Nos. CR-14916-18, CR-08597-18, 18-0259, 17-2930-S, CR-06413-17, and CR-03423-18).

<sup>22</sup> In some jurisdictions, including New York, a person can satisfy their sentence if they serve a specific percentage of it.

<sup>23</sup> See Transcript of Plea, Sentence, *People v. Cubilette*, N.Y. City Ct. Yonkers (2018) (Nos. CR-14916-18, 18-0259, and 17-2930-S), at 6-7.

<sup>24</sup> DOYLE et al., *supra* note 6.

<sup>25</sup> SANDY E. JAMES, JODY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET & MA'AYAN ANAFI, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 64–79 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [<https://perma.cc/QQE5-FEHN>]; see U.S. Dep't of Hous. & Urb. Dev., *An Estimate of Housing Discrimination Against Same-Sex Couples* (2013), <https://www.huduser.gov/portal/publications/HDS-LGBT.html> [<https://perma.cc/737G-P6EV>] (last visited Oct. 5, 2025) (discussing obstacles to housing for same-sex couples).

<sup>26</sup> JAMES et al., *supra* note 25, at 175.

<sup>27</sup> *Id.* at 130.

<sup>28</sup> *Id.* at 94.

<sup>29</sup> *Id.* at 139.

<sup>30</sup> See generally Jordan Grasso, Stefan Vogler, Emily Greytak, Casey Kindall & Valerie Jenness, POLICING PROGRESS: FINDINGS FROM A NATIONAL SURVEY OF LGBTQ PEOPLE'S EXPERIENCES WITH LAW ENFORCEMENT (2024), <https://assets.aclu.org/live/uploads/2024/04/ACLU-Policing-Progress.pdf> [<https://perma.cc/B7ZC-BCLE>] (last visited Oct. 5, 2025) (analyzing surveys of LGBTQ+ people's interactions with law enforcement); see also Somjen Frazer, Richard Saenz, Andrew Aleman & Lauren Laderman, PROTECTED AND SERVED? THE EXPERIENCES OF LGBTQ+ PEOPLE IN THE CRIMINAL LEGAL SYSTEM (2023), <http://protectedandserved.org/2022report-full-report> [<https://perma.cc/A4MH-QVVY>] (last visited Oct. 5, 2025).

for ‘crimes’ of survival.”<sup>31</sup> In her work, Ezie analyzes the “pernicious ways that trans people—particularly people of color—experience discrimination in a manner that precipitates poverty, homelessness, and criminalization,”<sup>32</sup> highlighting various “discrimination push factors” such as familial rejection, anti-trans discrimination and harassment in schools, employment discrimination, housing discrimination and insecurity, barriers to access to healthcare, and anti-trans violence.<sup>33</sup>

The discrimination-to-incarceration pipeline is deeply intertwined with the majority of bail factors considered in pretrial detention determinations across many jurisdictions in the United States. A key determinant of the outcome of a criminal case lies in whether the defendant remains incarcerated or not while their case is pending.<sup>34</sup> This critical decision has far-reaching implications for the accused. When a person is detained pretrial, they often face significant challenges in mounting an effective defense,<sup>35</sup> such as limited access to defense counsel, difficulty gathering evidence, restricted communication with witnesses, and a decline in mental health and overall well-being. In contrast, people released pretrial have greater opportunities to actively participate in their defense by, for example, having greater access to their defense counsel; physically participating in the defense investigation;<sup>36</sup> giving press interviews and shaping their own public narrative;<sup>37</sup> and

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<sup>31</sup> Chinyere Ezie, *Dismantling the Discrimination to Incarceration Pipeline for Trans People of Color*, 19 UNIV. ST. THOMAS L. J. 277, 278 (2023).

<sup>32</sup> *Id.* at 279.

<sup>33</sup> *Id.*

<sup>34</sup> See Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 225 (2018); CHRISTOPHER LOWENKAMP, THE HIDDEN COSTS OF PRETRIAL DETENTION REVISITED (2022); LAUREN AND JOHN ARNOLD FOUNDATION, *Pretrial Criminal Justice Research* (2013), [https://cjcc.doj.wi.gov/sites/default/files/subcommittee/LJAF-Pretrial-CJ-Research-brief\\_FNL.pdf](https://cjcc.doj.wi.gov/sites/default/files/subcommittee/LJAF-Pretrial-CJ-Research-brief_FNL.pdf) [<https://perma.cc/8SQ4-TCJA>] (last visited Oct. 5, 2025); James C. Oleson, Marie VanNostrand, Christopher T. Lowenkamp, Timothy P. Cadigan & John Wooldredge, *Pretrial Detention Choices and Federal Sentencing*, 78 FED. PROB. 12, 13 (2014) (“[P]retrial detention was the strongest predictor of incarceration in the model, even after controlling for legal (e.g., offense seriousness and criminal history) and extralegal variables (e.g., race, gender, and age.”)); TANYA COKE, CRIMINAL JUSTICE IN THE 21ST CENTURY: ELIMINATING RACIAL AND ETHNIC DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM 14 (2013) (“[O]ne of the greatest determinants of outcomes in misdemeanor and felony cases is whether the defendant was detained pretrial.”).

<sup>35</sup> Paul Heaton, Sandra G. Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017).

<sup>36</sup> An example of this would include visiting the scene of the alleged crime with their attorney and guiding them in what to look for.

<sup>37</sup> See, e.g., The Associated Press, *Jury Finds Karen Read Not Guilty of Second-Degree Murder, Guilty of Drunk Driving in Boyfriend Death*, FOX10 NEWS (June 18, 2025), [https://www.fox10tv.com/2025/06/18/jury-reaches-verdict-karen-read-murder-trial-over-death-boston-police-boyfriend/?fbclid=IwQ0xDSwLAjCdleHRuA2F1bQIXMQABHh7ICEKb\\_A812o4wP9O9u1cNTsqTnZCnFNu3iBsqkc5sy3evxv2dTbSFCdI1\\_aem\\_SwiKF-zQQJgW9w4zhgUUEQ#81sfywa4ibpa91m0saq1k7lwuou4pzdc](https://www.fox10tv.com/2025/06/18/jury-reaches-verdict-karen-read-murder-trial-over-death-boston-police-boyfriend/?fbclid=IwQ0xDSwLAjCdleHRuA2F1bQIXMQABHh7ICEKb_A812o4wP9O9u1cNTsqTnZCnFNu3iBsqkc5sy3evxv2dTbSFCdI1_aem_SwiKF-zQQJgW9w4zhgUUEQ#81sfywa4ibpa91m0saq1k7lwuou4pzdc) [<https://perma.cc/26ZW-BPSY>] (last visited Oct. 5, 2025) (quoting Boston University Law School Lecturer and Clinical Instructor Shira Diner as saying that “[t]he criminal legal system is full of inequities, and the fact that

preparing for court appearances in ways one cannot while incarcerated.<sup>38</sup> In other words, pretrial detention, a major influence on how a criminal case is resolved,<sup>39</sup> depends heavily on factors that severely disadvantage areas in which LGBTQ people are already likely at a severe disadvantage due to pervasive discrimination.

## II. SURVEY FINDINGS: BAIL FACTORS AND DISCRIMINATORY IMPACT IN 52 JURISDICTIONS

Each subsection below will address a specific bail factor or group of related bail factors widely used across jurisdictions in the United States. The primary reason for focusing on these bail factors is their common usage. Indeed, model statutes published in proposed bail reform legislation, developed by experts and advocates, encourage states to adopt guidelines for pretrial detention decision-makers to consider these factors.<sup>40</sup> However, these factors are directly linked to discrimination against LGBTQ people. Some bail factors, such as “employment,” clearly reflect the historical struggles faced by the LGBTQ community. The disparate impact of others, like “failures to appear,” may not be as obvious, but they are no less discriminatory. In each subsection, I will briefly describe the discrimination LGBTQ people face in that area. I will then present the outcomes of my research, including the number of jurisdictions that incorporate each bail factor into pretrial detention determinations to gain a more accurate understanding of how many jurisdictions are relying on these problematic factors to make pretrial detention determinations. This Article raises a critical question that needs to be grappled with: should pretrial decision-makers hold a bail factor against an individual when the underlying drivers of that factor, such as unstable housing and employment, may impact that individual’s ability to return to court but are in reality the result of discrimination?

I would be remiss not to acknowledge the broader harm the bail factors listed below can cause due to their inherent bias in favor of those with certain forms of privilege, and their inherent bias against people living in

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the defendant in this case was able to post bail and wasn’t held in custody while the case was pending made a huge difference . . . She was able to work directly with her lawyers in a way that people can’t from behind bars. She was able to give interviews and craft a public narrative that a person without means would be unable to do. All of that work helped contribute to the verdict, and that is a privilege that most people charged with second-degree murder do not have”).

<sup>38</sup> *Pretrial Release*, NAT’L ASS’N PRETRIAL SERVS. AGENCIES (2021), <https://napsa.memberclicks.net/release> [<https://perma.cc/75NE-8AHN>] (last visited Oct. 5, 2025).

<sup>39</sup> Crim. Just. Section, *Standard 10-1.1: Purposes of the Pretrial Release Decision*, AM. BAR. ASS’N [https://www.americanbar.org/groups/criminal\\_justice/resources/standards/pretrial-release/](https://www.americanbar.org/groups/criminal_justice/resources/standards/pretrial-release/) [<https://perma.cc/6LEZ-2K3X>] (last visited Oct. 5, 2025).

<sup>40</sup> DOYLE et al., *supra* note 6, at 30.

poverty,<sup>41</sup> people of color,<sup>42</sup> people living with disabilities,<sup>43</sup> and undocumented people—including cisgender and heterosexual people. While my analysis focuses specifically on these bail factors through an LGBTQ lens, further research must also critically examine their application in a broader context.

### A. *Familial Relationships or Community Ties*

Systemic marginalization is especially evident in the lived experiences of LGBTQ youth, who often experience family rejection based on their sexual orientation or gender identity. As of 2018, 20% of the homeless youth population in the United States identifies as LGBTQ.<sup>44</sup> A national survey found that the primary reason for this disproportionately high representation is familial rejection,<sup>45</sup> which often results in many LGBTQ children being kicked out of their homes or running away from their homophobic or transphobic family members.<sup>46</sup> LGBTQ individuals who face familial rejection often experience a form of broader exclusion, being ostracized not only by relatives, but also by their wider communities. This is especially true in communities unified by religious beliefs or deeply rooted conservative, homophobic, or transphobic values. As a result, the loss extends beyond the immediate family—it often means the loss of an entire social and cultural support network.<sup>47</sup>

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<sup>41</sup> LÉON DIGARD & ELIZABETH SWAVOLA, *JUSTICE DENIED: THE HARMFUL AND LASTING EFFECTS OF PRETRIAL DETENTION* (2019), <https://vera-institute.files.svcdcdn.com/production/downloads/publications/Justice-Denied-Evidence-Brief.pdf> [https://perma.cc/5Q5A-TPEV]; Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time*, PRISON POL'Y INITIATIVE (May 10, 2016), <https://www.prisonpolicy.org/reports/incomejails.html> [https://perma.cc/8VF4-SLE2]; Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L. ECON. & ORG. 511, 512 (2018).

<sup>42</sup> Wendy Sawyer, *How Race Impacts Who Is Detained Pretrial*, PRISON POL'Y INITIATIVE (Oct. 9, 2019), [https://www.prisonpolicy.org/blog/2019/10/09/pretrial\\_race/](https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/) [https://perma.cc/BF5L-ST8X].

<sup>43</sup> Margo Schlanger, Elizabeth Jordan & Roxana Moussavian, *Ending the Discriminatory Pretrial Incarceration of People with Disabilities: Liability under the Americans with Disabilities Act and the Rehabilitation Act*, 17 HARV. L. & POL'Y REV. 231, 233 (2022).

<sup>44</sup> M.H. MORTON, G.M. SAMUELS, A. DWORSKY & S. PATEL, *MISSSED OPPORTUNITIES: LGBTQ YOUTH HOMELESSNESS OR AT RISK OF BECOMING HOMELESS* (2018), <https://www.chapinhall.org/wp-content/uploads/VoYC-LGBTQ-Brief-FINAL.pdf> [https://perma.cc/AWX6-B3YE].

<sup>45</sup> LAURA E. DURSO & GARY J. GATES, *SERVING OUR YOUTH: FINDINGS FROM A NATIONAL SURVEY OF SERVICES PROVIDERS WORKING WITH LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH WHO ARE HOMELESS OR AT RISK OF BECOMING HOMELESS* (2015), <https://williams.institute.law.ucla.edu/wp-content/uploads/Serving-Our-Youth-Update-Jun-2015.pdf> [https://perma.cc/Y2RG-ZZA4].

<sup>46</sup> *Id.*

<sup>47</sup> *See, e.g.*, ISAAC NAMDAR, *IN THIS DAY AND AGE?!: A COMMUNITY AT THE CROSSROADS OF RELIGION AND HOMOSEXUALITY* (2012) (telling the story of Dr. Namdar's unexpected outing as a gay man within his insular Iranian Jewish community of primarily first-generation immigrants leading to a harsh backlash and efforts to excommunicate him); ABBY CHAVA

In the context of pretrial detention decisions, specifically, judges and other decision-makers often view familial and community ties as indicators of support that can help ensure the defendant will return to court.<sup>48</sup> Based on my experience as an advocate, before 2018, when the Raise the Age law went into effect in New York and prevented 16- and 17-year-olds from being charged as adults in criminal court, judges frequently refused to release defendants who did not have a parent or guardian present in the courtroom. This practice disproportionately affected LGBTQ youth, who were often estranged from their parents, guardians, and community members, effectively guaranteeing their pretrial incarceration on Rikers Island and other jail facilities, while their straight and cisgender counterparts were more likely to be released to their parents, guardians, or community members.

Familial relationships and community ties are often grouped together in bail statutes because they are closely related concepts. In her Article, *Dividing Bail Reform*, Professor Shima Baradaran Baughman discusses the differing ways pretrial decision-makers interpret community and family ties.<sup>49</sup> She references a recent California study, for example, where judges indicated “a factor that significantly impacted their decision to release a defendant is her community ties, specifically whether the defendant has family present in the courtroom, whether they appear to be a ‘good family,’ and whether the defendant has kids or employment.”<sup>50</sup> However, it is crucial to recognize the distinction between the two. Familial relationships typically refer to connections with one’s family of origin, such as parents, grandparents, spouses, children, and siblings. In contrast, community ties encompass a broader network, including connections to faith communities, neighbors, coworkers, and friends.

The lack of familial ties and relationships is not only experienced by LGBTQ individuals as youth; it often persists into adulthood, as many never repair these strained relationships.<sup>51</sup> Adult LGBTQ defendants often lack the traditional “family ties” that courts consider in bail hearings. This absence makes it difficult to demonstrate a connection to their community, responsibilities as a caretaker, and overall accountability. Persistent familial and community estrangement can therefore make consideration of familial

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STEIN, BECOMING EVE (2019) (telling the story of Abby Stein’s coming out as transgender and her departure from the insular ultra-Orthodox Hasidic community).

<sup>48</sup> Dan Markel, Jennifer M. Collins & Ethan J. Leib, *Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147, 1165 (2007).

<sup>49</sup> See Shima Baradaran Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 1000-02 (2020).

<sup>50</sup> *Id.* at 1001 (referencing Sarah Ottone & Christine S. Scott-Hayward, *Pretrial Detention and the Decision to Impose Bail in Southern California*, 19 CRIMINOLOGY, CRIM. JUST., L. & SOC’Y 24, 35 (2018)).

<sup>51</sup> Fern Schumer Chapman, *New Study Finds Half of LGBTQ+ Are Estranged from Family*, PSYCHOL. TODAY (Oct. 10, 2023), <https://www.psychologytoday.com/us/blog/brothers-sisters-strangers/202310/new-study-finds-half-of-lgbtq-are-estranged-from-family> [https://perma.cc/WT44-DELB].

and community ties disproportionately harmful to LGBTQ defendants in pretrial detention determinations.<sup>52</sup>

Because many LGBTQ individuals have lost or strained relationships with their families and communities of origin, the concept of “chosen family” is particularly significant for this population. “Chosen family” refers to individuals—who are not necessarily biological or legal relatives—whom one chooses to love and care for, forming reciprocal, familial-like bonds.<sup>53</sup> It remains unclear whether courts and other decision-makers in pretrial detention processes would interpret “chosen family” as equivalent to “family” when considering these factors. Given the prevalence of chosen family and community, pretrial decision-makers should place equal value on relationships formed through chosen family or new community connections—not just biological or legal ties.<sup>54</sup>

Additionally, whereas supportive family and community members of individuals incarcerated pretrial often rally together to raise the necessary funds to secure their release, LGBTQ individuals are less likely to have support systems from which they could raise bail funds.<sup>55</sup> This disparity is one of the primary reasons for the creation of LGBTQ-specific bail funds, such as the LGBTQ Freedom Fund,<sup>56</sup> and the Tallahassee Bail Fund.<sup>57</sup>

In her Article, *Bail Nullification*, Professor Jocelyn Simonson introduces the concept of “bail nullification,” drawing a powerful parallel between jury nullification in criminal trials and the act of community bail funds posting bail for someone.<sup>58</sup> In both cases, community members assert their collective dissent against systems or situations they view as unjust, reclaiming agency through their action.<sup>59</sup> Professor Simonson’s framing challenges traditional understandings of community and family by highlighting how community bail funds disrupt the assumption that only close personal ties justify posting bail.

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<sup>52</sup> See discussion *infra* Section III(A)(2)(a) (providing recommendations to address family bonds fractured by homophobia and transphobia).

<sup>53</sup> See KATH WESTON, FAMILIES WE CHOOSE (1997); see also Nina Jackson Levin, Shanna K. Kattari, Emily K. Piellusch & Erica Watson, “We Just Take Care of Each Other”: Navigating ‘Chosen Family’ in the Context of Health, Illness, and the Mutual Provision of Care Amongst Queer and Transgender Young Adults, 17 INT’L. J. ENV’T. RSCH. & PUB. HEALTH 19 (2020).

<sup>54</sup> See discussion *infra* Section III(A)(2)(a) (providing recommendations to address the family and community ties bail factors when those bonds have been fractured by homophobia and transphobia).

<sup>55</sup> See CTR. AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, UNJUST: HOW THE BROKEN CRIMINAL JUSTICE SYSTEM FAILS LGBT PEOPLE OF COLOR 26 (2016), <https://www.lgbtmap.org/file/lgbt-criminal-justice-poc.pdf> [<https://perma.cc/UZR6-5LC4>].

<sup>56</sup> LGBTQ FREEDOM FUND, <https://www.lgbtqfund.org> [<https://perma.cc/P34D-PF8X>] (last visited Sep. 18, 2025).

<sup>57</sup> Tallahassee Bail Fund v. Marshall, 717 F. Supp. 3d 1201 (N.D. Fla. 2024).

<sup>58</sup> See Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 587 (2017).

<sup>59</sup> *Id.*

Critics of bail funds often argue that these organizations undermine the intended purpose of bail by lacking a personal connection to the defendant. The prevailing logic is that if there is no personal stake—no “skin in the game”—the released individual has little incentive to return to court, since they have no obligation to the person or entity that posted their bail. This assumption rests on the belief that meaningful relationships, such as family or community members, must be based on personal knowledge or connection. However, this narrow definition of community is at odds with the lived experience of LGBTQ individuals and other marginalized groups. For many in these communities, bonds of solidarity are not formed through biological or traditional ties, but through shared struggle, mutual support, and collective identity. The frequent use of terms like “family” and “community” within LGBTQ circles reflects a broader, more inclusive understanding; one in which connection is defined not by proximity or relation, but by resilience and common purpose.

Of the 52 jurisdictions surveyed, at least 45 have statutes or caselaw mandating or permitting the consideration of an individual’s familial relationships or community ties when determining pretrial detention.<sup>60</sup> Among the remaining seven states, California,<sup>61</sup> West Virginia,<sup>62</sup> and Wisconsin<sup>63</sup> do not have laws that explicitly allow these factors to be considered. Although not specifically mandating such considerations, Georgia,<sup>64</sup> Louisiana,<sup>65</sup> and New Hampshire<sup>66</sup> have statutes with broad language that could implicitly include them. For instance, Georgia’s statute allows judges to consider “[a]ny other factor the court deems appropriate;”<sup>67</sup> Louisiana’s statute requires the consideration of “[a]ny other circumstances affecting the probability of the defendant’s appearance;”<sup>68</sup> and New Hampshire’s statute allows judges to evaluate “any relevant factor.”<sup>69</sup> Before bail reform in 2020, New York’s statute explicitly required the consideration of family and community ties.<sup>70</sup>

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<sup>60</sup> Those jurisdictions include Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, the District of Columbia, Federal Courts, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wyoming. See Appendix A for relevant laws in each jurisdiction.

<sup>61</sup> CAL. PENAL CODE § 1275 (Deering 2015); CAL. PENAL CODE § 1318.1 (Deering 1981).

<sup>62</sup> W. VA. CODE § 62-1C-1a (2021).

<sup>63</sup> WIS. STAT. § 969.01 (2023); WIS. CONST. art. I, § 8.

<sup>64</sup> GA. CODE ANN. § 17-6-1 (2024).

<sup>65</sup> LA. CODE CRIM. PROC. ANN. art. 316 (2017); LA. CODE CRIM. PROC. ANN. art. 320 (2024).

<sup>66</sup> N.H. REV. STAT. ANN. § 597:2 (2020).

<sup>67</sup> GA. CODE ANN. § 17-6-1 (2024).

<sup>68</sup> LA. CODE CRIM. PROC. ANN. art. 316 (2017).

<sup>69</sup> N.H. REV. STAT. ANN. § 597:2 (2020).

<sup>70</sup> N.Y. CRIM. PROC. LAW § 510.30 (LexisNexis 2019), *amended by* N.Y. CRIM. PROC. LAW § 510.10 (LexisNexis 2023).

Although the statute has since been revised to focus on the individual's "activities and history," defense attorneys often argue that family and community ties fall under this category.

Ultimately, the statutory consideration of family and community ties may disadvantage LGBTQ individuals who have been rejected by legal relatives. Consequently, although there may be space for one's chosen family to be considered within statutes, the ubiquity of this bail factor likely predisposes marginalized LGBTQ individuals to a greater risk of prolonged detention.

### B. Residence

One of the strongest predictors of the discrimination-to-incarceration pipeline for LGBTQ individuals is homelessness. In *City of Grants Pass v. Johnson*,<sup>71</sup> the United States held that it is not a violation of the Eighth Amendment's prohibition against cruel and unusual punishment to criminalize homelessness.<sup>72</sup> In its amicus brief, the Center for Constitutional Rights powerfully described how criminalizing homelessness would have a disproportionate impact on LGBTQ communities due to the pervasive discrimination these communities face in obtaining housing.<sup>73</sup>

As discussed above, LGBTQ youth experience homelessness at an alarming rate, but homelessness among LGBTQ adults—particularly transgender adults—is staggering as well. According to the 2015 U.S. Transgender Survey, 16% of transgender respondents owned their homes in contrast to 63% of the population. Nearly 30% of transgender respondents had experienced homelessness at some point in their lives, nearly 23% experienced a form of housing discrimination over the past year, and 70% who stayed in a shelter in the past year reported being mistreated because of their transgender identity.<sup>74</sup>

This crisis of homelessness is a direct result of housing discrimination. The Williams Institute published a report in 2020 synthesizing the discrimination LGBT people face in obtaining housing.<sup>75</sup> The report found, among other things, that LGBT adults "face challenges in accessing homeless shelters and services, such as harassment and violence, staff who are

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<sup>71</sup> 603 U.S. 520 (2024).

<sup>72</sup> *Id.* (holding that the enforcement of ordinances prohibiting sleeping or camping in public spaces by unhoused people does not violate the Eighth Amendment's prohibition against cruel and unusual punishment, even when the city has a shortage of shelter beds, so long as such enforcement targets conduct of camping, not the status of homeless, and does not involve criminal penalties solely for being homeless; the Court emphasized that cities retain authority to regulate public spaces and maintain public health and safety).

<sup>73</sup> Brief for Ctr. for Constitutional Rts. et al. as Amici Curiae Supporting Respondents, *City of Grants Pass v. Johnson*, 603 U.S. 520 (2024) (No. 23-175), 2024 WL 1513018.

<sup>74</sup> JAMES et al., *supra* note 25, at 176.

<sup>75</sup> See Adam Romero, Shoshana K. Goldberg & Luis A. Vasquez, *LGBT People and Housing Affordability, Discrimination, and Homelessness*, WILLIAMS INST., UCLA SCH. L. (2020).

not equipped to appropriately serve LGBT people, and sex-segregated facilities in which transgender people are housed according to their sex assigned at birth (which leads many transgender people to go unsheltered instead).<sup>76</sup> Furthermore, “LGBT people face widespread harassment and discrimination by housing providers, who, for example, studies have shown are less likely to respond to rental inquiries from same-sex couples and are more likely to quote male same-sex couples higher rents than comparable different-sex couples” (citations omitted).<sup>77</sup>

Pretrial decision-makers often view stable housing as a predictor of a person’s likelihood to return to court.<sup>78</sup> The general rationale is that the more stability one has in their life, the more they can be trusted to fulfill their court obligations.<sup>79</sup> Unhoused people are understandably concerned with survival. Maintaining the organization and scheduling needed to ensure court appearances is challenging when one may not know where they will sleep, use a restroom, or eat, all while facing the threat of violence for living authentically. Yet, people without stable housing can still consistently return to court.

Of the 52 jurisdictions surveyed, at least 45 have bail statutes or caselaw that explicitly permit or mandate the consideration of a person’s residence, length of time at that residence, or housing status in determining pretrial detention.<sup>80</sup> Among the remaining jurisdictions, four—Louisiana,<sup>81</sup> Utah,<sup>82</sup> Georgia<sup>83</sup> and Rhode Island<sup>84</sup>—include “catchall” provisions that allow for the consideration of any relevant or appropriate factors, which would likely encompass a person’s residence because it is generally accepted that a lack of stable housing often makes court attendance more challenging.<sup>85</sup> Notably,

<sup>76</sup> *Id.* at 4.

<sup>77</sup> *Id.*; see also discussion *infra* Section III(A)(2)(b) (providing recommendations to address the LGBTQ housing insecurity crisis).

<sup>78</sup> Kareem Butler, *Criminalizing Despair: The Intersections of Pretrial Incarceration and Housing Insecurity*, CHI. APPLESEED CTR. FOR FAIR CTS. (Apr. 28, 2023), <https://www.chicagoappleseed.org/2023/04/28/criminalizing-despair-the-intersections-of-pretrial-incarceration-and-housing-insecurity> [<https://perma.cc/5D7F-A8SZ>].

<sup>79</sup> See *id.* (discussing the rationale of considering housing stability as a variable in risk assessment tools for pretrial detention determinations).

<sup>80</sup> Those jurisdictions include Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, the District of Columbia, Federal Courts, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, and Wyoming. See Appendix A for relevant laws in each jurisdiction.

<sup>81</sup> LA. CODE CRIM. PROC. ANN. art. 316 (2017); LA. CODE CRIM. PROC. ANN. art. 320 (2024).

<sup>82</sup> UTAH CODE ANN. § 77-20-205 (LexisNexis 2024); UTAH CODE ANN. § 77-20-202 (LexisNexis 2024).

<sup>83</sup> GA. CODE ANN § 17-6-1 (2024).

<sup>84</sup> 12 R.I. GEN. LAWS § 12-13-1.3 (2023).

<sup>85</sup> Notably, “the Homeless Court,” a specialty or problem-solving court meant to hear cases where the defendant is unhoused, was created in response to this barrier. See Kathleen Coffey,

New Hampshire amended its bail statute in 2019 to explicitly prohibit the consideration of homelessness as a factor in assessing an individual's "dangerousness" for pretrial detention.<sup>86</sup> Lastly, in New York, a person's residence was explicitly considered in bail determinations until bail reform in 2020, which revised the statute to allow consideration only of a person's "activities and history."<sup>87</sup> Despite this change, in my experience, defense attorneys in New York continue to argue for bail based on a person's residence, reasoning that it can be considered part of their "activities and history."<sup>88</sup>

The crisis of homelessness among LGBTQ adults and teenagers reflects widespread prejudice. Although unstable housing may impact an individual's ability to return to court, its inclusion as a bail factor perpetuates the discrimination-to-incarceration pipeline. Adopting New Hampshire's approach of forbidding homelessness as a factor in assessing "dangerousness" could ameliorate the harsh impact of pretrial detention determinations on LGBTQ people.

### C. Employment

LGBTQ people also face overwhelming employment discrimination. Employment discrimination, particularly against transgender individuals, remains pervasive despite some local and state anti-discrimination statutory protections<sup>89</sup> and the 2020 landmark Supreme Court decision in *Bostock v. Clayton County*, which held that Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on sexual orientation or gender identity.<sup>90</sup>

According to a report by The Williams Institute in 2021, "[o]ver one in four (29.8%) LGBT employees reported experiencing at least one form of employment discrimination (being fired or not hired) because of their sexual orientation or gender identity at some point in their lives."<sup>91</sup> Notably, "[t]ransgender employees were also significantly more likely to experience discrimination based on their LGBT status than cisgender LGB employees:

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*Homeless Court: The Court of Second Chances*, BOS. BAR ASS'N (July 8, 2015), <https://boston-bar.org/journal/homeless-court-the-court-of-second-chances/> [<https://perma.cc/8X4R-9RY7>].

<sup>86</sup> N.H. REV. STAT. ANN. § 597:2 (2020).

<sup>87</sup> N.Y. CRIM. PROC. § 510.10 (LexisNexis 2023).

<sup>88</sup> *Id.*

<sup>89</sup> Brad Sears, Christy Mallory, Andrew R. Flores & Kerith J. Conron, *LGBTQ People's Experiences of Workplace Discrimination and Harassment* 4, WILLIAMS INST., UCLA SCH. OF L. (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-Discrimination-Sep-2021.pdf> [<https://perma.cc/7NC7-M3UT>].

<sup>90</sup> 590 U.S. 644 (2020).

<sup>91</sup> Sears et al., *supra* note 89, at 2.

nearly half (48.8%) of transgender employees reported experiencing discrimination (being fired or not hired) based on their LGBT status compared to 27.8% of cisgender LGB employees. More specifically, over twice as many transgender employees reported not being hired (43.9%) because of their LGBT status compared to LGB employees (21.5%).<sup>92</sup> This rampant employment discrimination has been widely cited as the reason a significant percentage of transgender women are compelled to engage in sex work and other criminalized economies for survival.<sup>93</sup>

Courts and other pretrial decision-makers often view gainfully employed individuals as responsible and capable of appearing in court. This places LGBTQ people at a significant disadvantage, as a large percentage of this community experiences workplace discrimination and a resulting lack of gainful employment.

This dynamic is evident in Layleen Xtravaganza Cubilette-Polanco's experiences with significant employment discrimination, which led her to trade sex for income.<sup>94</sup> In the podcast *Afterlives*, journalist, activist, and author Raquel Willis presented a series of episodes offering a thorough investigative account of Layleen's story.<sup>95</sup> In the second episode, Layleen's sister and activist<sup>96</sup> Melania Brown shared an example of employment discrimination that Layleen experienced. "There was a for-hire sign out, so Layleen walked in, filled out the application, and felt like she had the job until [. . .] she gave them her I.D., which was not changed yet [and then] they said 'well, we're not hiring'."<sup>97</sup>

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<sup>92</sup> *Id.*

<sup>93</sup> Kevin L. Nadal, Kristin C. Davidoff & Whitney Fujii-Doe, *Transgender Women and the Sex Work Industry: Roots in Systemic, Institutional, and Interpersonal Discrimination*, 15 J. TRAUMA & DISSOCIATION 169 (2014). See also discussion *infra* Section III(A)(2)(c) (providing recommendations to address LGBTQ employment discrimination); Teresa Rainey & Elliot E. Imse, *Qualified and Transgender: A Report on Results of Resume Testing for Employment Discrimination Based on Gender Identity*, D.C. OFFICE OF HUM. RTS. 7 (2015), [https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/QualifiedAndTransgender\\_FINAL\\_110215.pdf](https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/QualifiedAndTransgender_FINAL_110215.pdf) [<https://perma.cc/4ZVL-MVB7>].

<sup>94</sup> Raquel Willis, *AFTERLIVES: THE LAYLEEN POLANCO STORY: To Survive*, (iHeart Radio, Nov. 21, 2023), <https://www.iheart.com/podcast/1119-afterlives-the-layleen-po-127683074/episode/episode-2-to-survive-129856934> [<https://perma.cc/F67L-YM6T>].

<sup>95</sup> Raquel Willis, *AFTERLIVES: THE LAYLEEN POLANCO STORY: Introducing: Afterlives: The Layleen Polanco Story* (iHeart Radio, Nov. 7, 2023) <https://www.iheart.com/podcast/1119-afterlives-the-layleen-po-127683074/episode/introducing-afterlives-the-layleen-polanco-story-127683079/> [<https://perma.cc/ZFJ6-GD8U>].

<sup>96</sup> Melania Brown, *Ban Solitary Confinement in New York City Now*, N.Y. DAILY NEWS (Sep. 28, 2022), <https://www.nydailynews.com/2022/09/28/ban-solitary-confinement-in-new-york-city-now/> [<https://perma.cc/XGF6-42DH>].

<sup>97</sup> Raquel Willis, *AFTERLIVES: THE LAYLEEN POLANCO STORY: To Survive*, at 03:24 (iHeart Radio, Nov. 21, 2023) <https://www.iheart.com/podcast/1119-afterlives-marsha-p-johns-127683074/episode/episode-2-to-survive-129856934/#transcription> [<https://perma.cc/F67L-YM6T>]; <https://www.afterlivespod.com/> [<https://perma.cc/FN3X-ZZVQ>].

During an arraignment in Yonkers Criminal Court on August 18, 2017, the judge directly asked Layleen a series of questions on the record to determine her “stability.”<sup>98</sup> The following is an excerpt from the transcript:

The Court: Is she working anywhere? [. . .] Are you working anywhere? What do you do in spending your days? Do you work?

Do you work?

The Defendant: Yeah, I’m a transexual escort.

The Court: What was it again?

The Defendant: Escort.

The Court: Escort. Okay. Do you live with anybody?

The Defendant: No.

The Court: You’re home alone?

The Defendant: Yeah.

The Court: Okay. So you live in -- how long have you lived in Yonkers?

The Defendant: My whole life.

The Court: Your whole life?

The Defendant: Yeah, I came here when I was 2.

The Court: Okay. So but you’ve been at this address only about seven months?<sup>99</sup>

This line of questioning demonstrates the emphasis that courts often place on what they consider “stability” to encompass, including several of the problematic bail factors, such as employment, housing, and family and community ties. Moreover, the transcript provides a window into Layleen’s life and struggles, including her disclosure to the court that she was, in fact, a sex worker. Ms. Brown relayed that Layleen considered sex work to be a straightforward way of making money after experiencing repeated incidents of employment discrimination.<sup>100</sup> Notably, because sex work is criminalized, the Court disregarded the possibility that Layleen’s source of income would, if anything, empower her to return to court.

Of the 52 jurisdictions surveyed, 45 have bail statutes or caselaw that explicitly require or allow consideration of a person’s employment status, employment location, or length of employment in determining pre-trial detention.<sup>101</sup> Among the remaining jurisdictions, three states include

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<sup>98</sup> Transcript of Arraignment at 3-5, *People v. Cubilette*, No. 17-2930 (N.Y. City Ct. Yonkers Aug. 18, 2017).

<sup>99</sup> *Id.* at 4.

<sup>100</sup> Willis, *supra* note 97, at 04:04.

<sup>101</sup> Those jurisdictions include Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, the District of Columbia, Federal Courts, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wyoming. See Appendix A for relevant laws in each jurisdiction.

“catchall” language in their bail statutes. In Louisiana, judges must consider “[a]ny other circumstances affecting the probability of [a] defendant’s appearance,”<sup>102</sup> likely encompassing employment status. In New Hampshire, judges may consider “any relevant factor,”<sup>103</sup> also likely including employment status. In Georgia, judges must consider “[a]ny other factor the court deems appropriate,” which may well also include employment status.<sup>104</sup>

Two states—California<sup>105</sup> and Wisconsin<sup>106</sup>—do not have laws explicitly requiring or permitting the consideration of employment status in bail determinations. In New York, employment status was explicitly considered until bail reform in 2020, which amended the statute to focus on a person’s “activities and history.”<sup>107</sup> Anecdotally, as with several of the other factors, defense attorneys in New York continue to use employment-based arguments when favorable to their client, reasoning that it falls under “activities and history.” In West Virginia, while employment status is not an explicit statutory factor for pretrial detention, it can be a condition of pretrial release.<sup>108</sup> The statute allows for the court to require “[t]he person charged [ . . . ] [to] [m]aintain employment, or, if unemployed, actively seek employment” as a condition of release.<sup>109</sup>

Nearly every jurisdiction provides a vehicle for employment to be considered, yet over 40% of transgender employees report not being hired because of their identity.<sup>110</sup> Judicial assumptions that unemployment equates to unreliability may result in harsher outcomes for people whose unemployment status is a result of discriminatory hiring practices. This bail factor is especially cyclical since pre-trial detention not only increases the likelihood of a criminal conviction, but it also reduces the chances of securing employment once released.<sup>111</sup>

#### D. *Criminal Record*

An individual’s criminal record is the second-most common bail factor in the 52 jurisdictions surveyed, with 50 jurisdictions considering the factor. *Lawrence v. Texas*, which declared anti-sodomy laws—laws criminalizing consensual sex between two people assigned male at birth—unconstitutional,

<sup>102</sup> LA. CODE CRIM. PROC. ANN. art. 316 (2017).

<sup>103</sup> N.H. REV. STAT. ANN. § 597:2 (2020).

<sup>104</sup> GA. CODE ANN. § 17-6-1 (2024).

<sup>105</sup> CAL. PENAL CODE § 1275 (Deering 2015).

<sup>106</sup> WIS. STAT. § 969.01 (2023).

<sup>107</sup> N.Y. CODE CRIM. PROC. § 510.10 (LexisNexis 2023).

<sup>108</sup> W. VA. CODE § 62-1C-1a (2021).

<sup>109</sup> *Id.*

<sup>110</sup> Sears, *supra* note 89, at 2.

<sup>111</sup> Dobbie et al., *supra* note 34, at 225-27, 235.

was decided only two decades ago.<sup>112</sup> In other words, it was legal for states to arrest and convict people who were assigned male at birth for having consensual sex with one another as recently as 2003.

Before then, the additional criminalization of transgender and gender non-conforming people largely occurred through laws prohibiting cross-dressing. Many jurisdictions passed laws and ordinances criminalizing wearing makeup or clothing associated with another sex, for example.<sup>113</sup> These laws and ordinances were challenged by criminal defendants beginning in the 1960s through litigation.<sup>114</sup> As criminal defendants were successfully arguing that such bans were unconstitutional in their criminal cases, affirmative civil litigation began to emerge challenging their constitutionality as well.<sup>115</sup> However, in recent years, states have once again attempted to re-criminalize transgender people and drag performers by passing anti-drag legislation under the guise of “protecting children.”<sup>116</sup> As of June 2025, two states, Montana and Tennessee, have enacted legislation explicitly restricting drag performances, although both laws are currently unenforceable due to a federal court order and federal court decision, respectively.<sup>117</sup> Both cases remain in active litigation, however.<sup>118</sup> Moreover, as of June 2025, four states have enacted legislation that bans “adult” performances, which could be construed to encompass drag performances.<sup>119</sup> These states are Arkansas, Florida, North Dakota, and Texas, although the laws in Florida and Texas are also currently unenforceable due to ongoing litigation.<sup>120</sup>

In her dissenting opinion in *United States v. Skrmetti*, Justice Sotomayor notes that “transgender people have long been subject to discrimination in healthcare, employment, and housing, and to rampant harassment and physical violence.”<sup>121</sup> Justice Sotomayor continues by explaining that transgender people have historically been subject to *de jure* discrimination through “cross-dressing bans, police brutality, and anti-sodomy laws.”<sup>122</sup>

<sup>112</sup> 539 U.S. 558 (2003).

<sup>113</sup> Kate Redburn, *Before Equal Protection: The Fall of Cross-Dressing Bans and the Transgender Legal Movement, 1963–86*, 41 LAW & HIST. REV. 679, 687 (2023).

<sup>114</sup> *Id.* at 681.

<sup>115</sup> *Id.*

<sup>116</sup> Jose Soto, *Fighting Back Against Anti-Drag Bills*, HUM. RTS. CAMPAIGN, EQUAL. MAG. (2023), <https://www.hrc.org/magazine/2023-spring/fighting-back-against-anti-drag-bills> [<https://perma.cc/ELD4-FZ9K>].

<sup>117</sup> *Restrictions on Drag Performances*, MOVEMENT ADVANCEMENT PROJECT, [https://www.lgbtmap.org/equality-maps/criminaljustice/drag\\_restrictions](https://www.lgbtmap.org/equality-maps/criminaljustice/drag_restrictions) [<https://perma.cc/PQ7F-JGPA>] (last visited June 7, 2025).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *United States v. Skrmetti*, 145 S. Ct. 1816, 1881 (2025) (Sotomayor, J., dissenting).

<sup>122</sup> *Id.*; see also Redburn, *supra* note 113, at 685, 687; ANNA LVOVSKY, VICE PATROL 29, 108 (U. Chi. Press 2021); WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 328-37 (Harv. U. Press 1999) (cataloging state consensual sodomy laws, 1610–1988).

This criminalization of LGBTQ people—particularly transgender and gender non-conforming individuals—has not always been as clear-cut as laws explicitly prohibiting their existence, behavior, or expression. While it is evident that cross-dressing bans and anti-sodomy laws criminalize LGBTQ individuals, there are also more subtle and insidious ways in which these individuals have historically been victims of police harassment, abuse, and discriminatory enforcement.<sup>123</sup> According to Professor Valena Beety, people at the intersection of identities such as genderqueer and transgender “face the most hostility and controlling behavior from law enforcement, and highest rates of incarceration.”<sup>124</sup> Even for alleged minor misdemeanors, this population is one that is “tagged, documented, and controlled by the criminal legal system.”<sup>125</sup> One of the most common examples of invidious discriminatory enforcement is the targeting of transgender people for prostitution-related offenses.<sup>126</sup> While it is true that many transgender women and gender non-conforming individuals are forced into sex work in response to extreme employment discrimination, this does not justify the discriminatory profiling and targeting of these individuals by law enforcement.<sup>127</sup> Such targeting undermines the ability of transgender people to participate fully in society and reinforces harmful stereotypes.

As an example, Layleen was charged in 2017 with prostitution for allegedly agreeing to engage in sexual activity in exchange for monetary payment from an undercover NYPD officer.<sup>128</sup> The account provided in the criminal complaint indicates that an undercover officer specifically targeted Layleen and set her up for arrest, merely for resorting to what she perhaps felt was her only viable employment option.<sup>129</sup> This 2017 prostitution charge would have ripple effects for years to come: As discussed below, when setting bail at \$500 in 2019 for both this 2017 case and a subsequent one, the judge justified the bail amount in both cases on Layleen’s failures to appear in the 2017 matter.<sup>130</sup>

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<sup>123</sup> See generally JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, QUEER (IN) JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES (Boston: Beacon Press 2011) (documenting the historical and contemporary patterns of state violence and criminal legal system bias targeting LGBTQ people, especially transgender and gender non-conforming people, through both explicit laws and discretionary practices of law enforcement, corrections, prosecutors, judges, and other actors in the criminal legal system).

<sup>124</sup> VALENA BEETY, MANIFESTING JUSTICE: WRONGLY CONVICTED WOMEN RECLAIM THEIR RIGHTS 33 (2022).

<sup>125</sup> *Id.*

<sup>126</sup> While the word “prostitution” is generally not preferred by sex work advocates, and the preferred language is generally understood to be “sex work,” I use the word “prostitution” when referring to an actual charge, offense, or conviction for purposes of clarity.

<sup>127</sup> See discussion *infra* Section III(A)(2)(d) (providing recommendations to address underlying anti-LGBTQ discrimination reflected in criminal records).

<sup>128</sup> Complaint, *People v. Cubilette*, No. 2017NY049849 (N.Y. Cnty. Ct. 2017).

<sup>129</sup> *Id.*

<sup>130</sup> Transcript of Arraignment at 5, *People v. Cubilette*, No. CR-013173-19NY (N.Y. Cnty. Ct. Apr. 16, 2019).

This pattern of policing and prosecution, wherein people like Layleen are criminalized for engaging in survival-based behaviors, must be understood within the broader legal context that enabled such targeting. One such law, which exemplified this systemic criminalization, was New York's Penal Law Section 240.37.<sup>131</sup> In 2021, New York repealed this law, which had criminalized "loitering for the purposes of engaging in a prostitution offense."<sup>132</sup> Commonly referred to as the "Walking While Trans Ban,"<sup>133</sup> this law had notoriously been enforced by the NYPD in a discriminatory manner, particularly against transgender women of color.<sup>134</sup> Under the repealed statute, NYPD officers often arrested transgender women simply for standing in a public place, making the unfounded assumption that they were attempting to engage in sex work solely based on their gender identity.<sup>135</sup> In 2016, a federal lawsuit challenging the constitutionality of Section 240.37 was filed.<sup>136</sup> Because the case was settled, the Court did not resolve the constitutional questions raised in the lawsuit.<sup>137</sup> The New York State legislature did ultimately repeal the statute, however, because of the years-long campaign led by directly impacted community organizers and movement lawyers shedding light on its blatantly discriminatory enforcement.<sup>138</sup> Section 240.37 is but one example of many laws across the country that criminalize sex work and that are used to target transgender and gender non-conforming people.

Beyond prostitution-related offenses, many other criminal laws have also been misused to target LGBTQ individuals, particularly transgender people. One common example is the misuse of laws related to "False Personation." In New York, for instance, a person is guilty of False Personation when, "after being informed of the consequences of such act, he or she knowingly misrepresents his or her actual name" with the "intent to prevent such police officer or peace officer from ascertaining such information."<sup>139</sup>

<sup>131</sup> See *Transgressive Policing: Police Abuse of LGBTQ Communities of Color in Jackson Heights*, MAKE THE ROAD N.Y. (Oct. 2012), [https://maketheroadny.org/wp-content/uploads/2018/02/MRNY\\_Transgressive\\_Policing\\_Full\\_Report\\_10.23.12B.pdf](https://maketheroadny.org/wp-content/uploads/2018/02/MRNY_Transgressive_Policing_Full_Report_10.23.12B.pdf) [<https://perma.cc/6X7H-WJQV>].

<sup>132</sup> N.Y. PENAL LAW § 240.37 (repealed 2021).

<sup>133</sup> *Assembly Passes Repeal of the Walking While Trans Ban*, SPEAKER'S PRESS RELEASES NEW YORK STATE ASSEMBLY (Feb. 2, 2021), <https://nyassembly.gov/Press/?sec=story&story=95254> [<https://perma.cc/7DXP-TLYQ>].

<sup>134</sup> MOGUL et al., *supra* note 123, at 919.

<sup>135</sup> See Karen Struening, *Walking While Wearing a Dress: Prostitution Loitering Ordinances and the Policing of Christopher Street*, 3 STAN. J. CRIM. L. & POL'Y 16, 16 (2016).

<sup>136</sup> *D.H. v. City of New York*, 309 F. Supp. 3d 52 (S.D.N.Y. 2018).

<sup>137</sup> *D.H. v. City of New York*, No. 16-cv-07698-PKC-KNF (S.D.N.Y. Apr. 11, 2019) (stipulation and order of dismissal with prejudice).

<sup>138</sup> Majority Press, *Senate to Repeal 'Walking While Trans' Law*, NYSENATE.GOV (Feb. 2, 2021), <https://www.nysenate.gov/newsroom/press-releases/2021/senate-repeal-walking-while-trans-law> [<https://perma.cc/CDS3-NAUW>].

<sup>139</sup> N.Y. PENAL LAW § 190.23 (McKinney 1998).

An example of the misuse of this law can be seen in the story of my former client, Linda Dominguez.<sup>140</sup> Ms. Dominguez is a transgender woman who, at the time of her arrest, had already gone through the legal process to change her name. In 2018, however, she was arrested by the NYPD and then charged by the Bronx D.A.'s office with False Personation for providing the NYPD officer who stopped her with both her dead name and her new legal name, all in an effort to simply explain her legal name change to the officer.<sup>141</sup> To make matters worse, members of the NYPD mocked and harassed her while she was in their custody.<sup>142</sup> In a video produced by the New York Civil Liberties Union about her case, Ms. Dominguez shared, "in the precinct I saw them mock me ... '[t]hat's a man, that's not a man, what's that?' I went through so much trauma being arrested in this way. It really was a horrible experience. I was about to take my own life."<sup>143</sup>

Ms. Dominguez's story exemplifies the challenges faced by transgender people when navigating legal and societal systems that often fail to accommodate their identities as well as the animus of much of law enforcement towards the transgender community. By arresting and charging Ms. Dominguez simply for providing both names, the NYPD and the Bronx District Attorney's Office essentially penalized her for being honest and navigating a complex societal reality as a transgender person. Such charges further stigmatize transgender people like her by criminalizing the very process of asserting their identities. These charges send a message that even when individuals follow legal protocols to update their identity documents, they remain at risk of being mischaracterized and punished. It would be absurd if someone undergoing a legal name change for other reasons—such as marriage—were then arrested for attempting to clarify their identity during the transitional period. No one would expect to be criminalized for such innocuous behavior. At best, the discriminatory treatment of Ms. Dominguez reflects a lack of understanding or empathy for the lived experiences of transgender people. At worst, her arrest reflects a hatred of transgender people.

While Ms. Dominguez's criminal charges were ultimately dismissed, many other transgender people have been convicted of False Personation under similar circumstances. During my research into Layleen's case, for example, one of the most troubling discoveries that I made involved the charges stemming from Layleen's criminal cases in Yonkers, New York.

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<sup>140</sup> Deborah Lolai, *Letter to the Editor, Treatment of Transgender People in Custody Must Improve*, N.Y. L. J. (Feb. 8, 2019), <https://www.law.com/newyorklawjournal/2019/02/08/treatment-of-transgender-people-in-custody-must-improve/?sreturn=20240627090313> [<https://perma.cc/F7FX-WTGZ>].

<sup>141</sup> Complaint at 9-11, *Dominguez v. City of New York*, No. 20841/2019E (N.Y. Sup. Ct. Bronx Cnty. Jan. 22, 2019).

<sup>142</sup> Lolai, *supra* note 140.

<sup>143</sup> N.Y.C.L. Union, "False Personation", at 1:00 (YouTube, Jan. 22, 2019), [https://www.youtube.com/watch?v=a1s\\_8fDwK6g](https://www.youtube.com/watch?v=a1s_8fDwK6g) [<https://perma.cc/SW2G-JHTU>].

In two of those five cases, Layleen faced charges of False Personation.<sup>144</sup> In one of them, the Criminal Complaints stated, “[t]he defendant[] . . . misrepresented his name . . . [S]pecifically, when asked for the name on his government-issued identification, defendant stated that his name was ‘Lilly Cubilette.’ When asked again for his name, defendant reiterated his name was ‘Lilly Cubilette.’”<sup>145</sup> Based on this criminal complaint, it is clear that the officer misgendered Layleen, refusing to see her as a woman and regarding her name with suspicion. Layleen was convicted of False Personation and sentenced to 60 days in jail for simply answering the question, “what is your name?” as a transgender woman.<sup>146</sup>

When I was investigating Layleen’s case in my research for this article, I initially went to Yonkers Criminal Court with the intention of requesting the court transcripts from all of Layleen’s arraignment proceedings, expecting solely to be analyzing how problematic bail factors were used in the bail determinations in her cases. I was not expecting to uncover the False Personation charges. Layleen’s case was widely publicized—there were numerous media publications, protests organized by the broader bail reform and LGBTQ rights advocacy communities, a report published by the NYC Board of Correction following an investigation,<sup>147</sup> a report published by the Bronx County District Attorney’s Office,<sup>148</sup> and much more. However, my discovery of the False Personation charges begs the question: if such extensive coverage did not uncover the full injustice she faced, what is the true magnitude of abuse against LGBTQ people in the criminal legal system in the vast majority of cases that do not receive the same attention as Layleen’s case did?

Layleen’s story is not an isolated incident; it reflects broader systemic patterns that funnel LGBTQ individuals into the criminal legal system. The discrimination-to-incarceration pipeline increases the likelihood of having a criminal record. Employment discrimination forces individuals into criminalized economies, such as sex work and selling drugs.<sup>149</sup> Experiencing

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<sup>144</sup> Complaint, *People v. Cubilette*, No. CR-8597-18 (N.Y. City Ct. Yonkers 2018); Complaint, *People v. Cubilette*, No. CR-14916-18 (N.Y. City Ct. Yonkers 2018).

<sup>145</sup> Complaint, *People v. Cubilette*, No. CR-8597-18 (N.Y. City Ct. Yonkers 2018).

<sup>146</sup> Transcript of Plea, Sentence at 4, *People v. Cubilette*, No. CR-14916-18, 17-2930, 18-1734, 18-0259 (N.Y. City Ct. Yonkers, Oct. 22, 2018).

<sup>147</sup> Kate McMahon, *The Death of Layleen Xtravaganza Cubilette-Polanco, 1991-2019*, N.Y.C. Bd. CORR. (June 23, 2020), [https://www.nyc.gov/assets/boc/downloads/pdf/Reports/BOC-Reports/2020.06\\_Polanco/Final\\_Polanco\\_Public\\_Report\\_1.pdf](https://www.nyc.gov/assets/boc/downloads/pdf/Reports/BOC-Reports/2020.06_Polanco/Final_Polanco_Public_Report_1.pdf) [<https://perma.cc/5MKM-C9JU>].

<sup>148</sup> Public Integrity Unit, *Report of the Investigation into the Death in Custody of Layleen Polanco*, OFFICE OF THE BRONX DIST. ATT’Y, (June 4, 2020), <https://www.bronxda.nyc.gov/downloads/pdf/annual-reports/polanco-report-.pdf> [<https://perma.cc/WQ9E-KHNG>].

<sup>149</sup> CTR. FOR CONST. RTS. ET AL., REPORTING ON THE HUMAN RIGHTS OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER INDIVIDUALS IN THE CHANGING WORLD OF WORK, SUBMITTED TO U.N. WORKING GROUP ON DISCRIMINATION AGAINST WOMEN AND GIRLS (Sep. 1, 2019), <https://cjrjustice.org/genderjusticeintl> [<https://perma.cc/EC8R-N4WB>].

homelessness due to family rejection or housing discrimination makes a person much more vulnerable to police contact and engaging in criminalized behaviors to survive, such as stealing food or using public transportation without paying the fare.<sup>150</sup> LGBTQ people often face violations of parole, probation, and plea agreements rooted in homophobia and transphobia, leading them back into cycles of criminalization and incarceration.<sup>151</sup> Whether through discriminatory criminal laws, biased policing targeting LGBTQ people, discriminatory enforcement of laws, or the effects of the discrimination-to-incarceration pipeline, LGBTQ individuals are more likely to be criminalized than their similarly situated straight and cisgender counterparts.

I highlight these examples of unjust criminalization of LGBTQ people to emphasize that LGBTQ individuals are more likely to have criminal records than their straight and cisgender counterparts. When a person appears before a judge or other pretrial decision-maker, already having a criminal record places them at a significant disadvantage.

In a survey of 52 jurisdictions, 50 explicitly allow or mandate that pretrial detention decision-makers consider an individual's criminal record.<sup>152</sup> The remaining two jurisdictions—Georgia and New Hampshire—both incorporate flexible “catchall” phrases into their bail statutes. Specifically, Georgia's statute obligates judges to consider “[a]ny other factor the court deems appropriate,”<sup>153</sup> while New Hampshire permits judges to evaluate “any relevant factor,”<sup>154</sup> which likely includes a person's criminal record.

The consideration of one's criminal record is thus likely part of every pretrial bail determination across the country, even though, as in Layleen's case, criminal records are often the result of discriminatory laws and policing.

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<sup>150</sup> Cf. Christina Sewell, *Policing Poverty at the Turnstile*, SCH. INT'L & PUB. AFFS., COLUM. UNIV. (Nov. 3, 2020), <https://www.sipa.columbia.edu/news/policing-poverty-turnstile> [<https://perma.cc/YM7N-WTW6>]; Christopher Mayer & Jessica Reichert, *The Intersection of Homelessness and the Criminal Justice System*, ILL. CRIM. JUST. INFO. AUTH., CTR. FOR JUST. RSCH. & EVALUATION 7 (July 9, 2018), [https://researchhub.icjia-api.cloud/uploads/Homelessness\\_PDF-191011T20092064.pdf](https://researchhub.icjia-api.cloud/uploads/Homelessness_PDF-191011T20092064.pdf) [<https://perma.cc/7RCV-8QTF>].

<sup>151</sup> NAT'L CTR. FOR TRANSGENDER EQUAL., LGBTQ CRIMINAL JUSTICE REFORM 4 (2018), [https://transequality.org/sites/default/files/docs/resources/LGBTQ\\_Criminal\\_Justice\\_Reform.pdf](https://transequality.org/sites/default/files/docs/resources/LGBTQ_Criminal_Justice_Reform.pdf) [<https://perma.cc/U2Q4-4FBH>].

<sup>152</sup> Those jurisdictions include Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, the District of Columbia, Federal Courts, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. See Appendix A for relevant laws in each jurisdiction.

<sup>153</sup> GA. CODE ANN. § 17-6-1 (2024).

<sup>154</sup> N.H. REV. STAT. ANN. § 597:2 (2020).

*E. Failures to Appear*

“Failure to appear” refers to a situation in which a person fails “to attend a scheduled court [appearance] as required by court order, potentially leading to legal consequences such as an arrest.”<sup>155</sup> This is one of the most challenging bail factors to argue against, because the logic goes that if someone has already missed court appearances in the past, they are more likely to miss them in the future.<sup>156</sup>

However, anti-LGBTQ discrimination could cause a defendant to fail to appear in court in at least two different ways. First, having directly experienced violence, harassment, bias, prejudice or other forms of oppression by the court system and its representatives, an individual may be unwilling to return to a place that has already caused them significant harm. Second, suffering from a general lack of stability and security in one’s life due to systemic discrimination more broadly may also hinder one’s ability to ensure attendance at scheduled court appearances.<sup>157</sup>

A growing body of scholarship is exploring the consequences of mandatory court appearances. In her Essay, *The Cost of Showing Up*, Professor Lauren Roberts highlights the significant burdens and punitive effects associated with mandatory in-person appearances in criminal court—particularly on low-income individuals and communities—without serving a meaningful purpose.<sup>158</sup> Building on this, I contend that for LGBTQ individuals, these harmful and destabilizing effects are even more pronounced.

Layleen’s story is particularly pertinent when discussing failures to appear. As noted by the Bronx District Attorney’s Office in their *Report of the Investigation into the Death in Custody of Layleen Polanco*, in “nearly all of her cases, Ms. Polanco bench warranted<sup>159</sup> multiple times. Her rap sheet shows five failures to appear as well.”<sup>160</sup> While these findings may be accurate, it is also crucial to recognize that Layleen likely faced transphobia in every interaction she had with the criminal legal system—from her lawyers, judges, and court officers to the arresting officers and alternative-to-incarceration programs.

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<sup>155</sup> PETIS, *supra* note 8, at 3.

<sup>156</sup> There is a body of research exploring the nuances of the correlation between prior and future failures to appear. See Marian Gewirtz, Anisa Stechert & Dalia Sharps, *From the Archives: The Pattern of Failures to Appear*, N.Y.C. CRIM. JUST. AGENCY (Mar. 20, 2023), <https://www.nycja.org/justice-in-practice/from-the-archives-the-pattern-of-failures-to-appear> [<https://perma.cc/Y8WF-CA5B>].

<sup>157</sup> See discussion *infra* Section III(A)(2)(e) (providing recommendations to address the underlying sources of discrimination that contribute to failures to appear in court).

<sup>158</sup> Lauren Roberts, *The Cost of Showing Up*, 120 NW. U. L. REV. ONLINE 1 (2025).

<sup>159</sup> A bench warrant is issued by the court when a defendant in a criminal case fails to appear for a mandatory court appearance. The warrant authorizes law enforcement to produce the defendant involuntarily. This is precisely what happened in Layleen’s case.

<sup>160</sup> OFFICE OF THE BRONX DIST. ATT’Y, *supra* note 148, at 4 n.3.

For example, one of the most common forms of harm towards transgender defendants like Layleen is the use of their deadnames and incorrect pronouns in case documents and court appearances. This issue has arisen almost every time I have represented a transgender person in a criminal case. In each of Layleen's criminal cases, for instance, her deadname was used on the criminal complaint. At each court appearance, the court officer called Layleen's case on to the record using her deadname in open court, where dozens of members of the public may have been present. Even after Layleen's death, she was deadnamed by the Bronx District Attorney's office in their original *Report of the Investigation into the Death in Custody of Layleen Polanco*.<sup>161</sup>

On at least two separate occasions in court, Layleen's own lawyer referred to her using he/him pronouns throughout her court appearance.<sup>162</sup> On January 11th, 2019, for example, Layleen was arraigned in a new case for allegedly having been in possession of a gravity knife.<sup>163</sup> During the bail application portion of the proceeding, Layleen's defense attorney stated, "Your honor, as to bail, *he's* charged with possession of a gravity knife, a 'B' non-violent felony [sic]. My client resides . . . with *his* family, *his* mother specifically. *He's* 27 years old. I have a phone number where *he* can be reached. *He's* single, doesn't have any children. Basically *he* was born and raised in the City of Yonkers. I'm unaware of the facts of *his* arrest. The complaint seems to indicate *he* was simply in possession of this, not using it."<sup>164</sup> Layleen was thus misgendered by her own attorney at least ten times.

In another example, on March 19th, 2019, Layleen was involuntarily returned on a warrant in Bronx County arising out of her 2017 New York County prostitution case.<sup>165</sup> She had made contact with an NYPD officer when she received a summons for an open container.<sup>166</sup> The officer arrested her and brought her to court in the Bronx to address both matters.<sup>167</sup> Her defense attorney misgendered her at least 17 times during this latter court appearance.<sup>168</sup> I was especially surprised to see the name of the attorney on

<sup>161</sup> Raquel Willis, AFTERLIVES: THE LAYLEEN POLANCO STORY: *Not Resting In Peace*, at 36:07 (iHeart Radio, Dec. 12, 2023), <https://www.iheart.com/podcast/1119-afterlives-the-layleen-po-127683074/episode/episode-5-not-resting-in-peace-135073799> [<https://perma.cc/F67L5V9M-T6RHF67L-YM6T>].

<sup>162</sup> Transcript of Arraignment at 2, *People v. Cubilette*, CR-0344-19 (N.Y. City Ct. Yonkers Jan. 11, 2019) (No. 17-2930).

<sup>163</sup> The prohibition on possession of a gravity knife, a device often carried for protection, was repealed by the New York state legislature in May of 2019. *See* 2019 N.Y. Sess. Laws Ch. 34 (A. 5944) (McKinney).

<sup>164</sup> Transcript of Arraignment at 2, *People v. Cubilette*, CR-0344-19 (N.Y. City Ct. Yonkers Jan. 11, 2019) (No. 17-2930) (emphasis added).

<sup>165</sup> Transcript of Arraignment at 2, *People v. Cubilette*, No. 2017NY049849 (N.Y. Sup. Ct. Bronx Cnty., Mar. 19, 2019).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *See id.* at 2-3.

this particular transcript because he is a former colleague of mine, an excellent attorney, and someone I have co-counseled multiple cases with, cases in which we represented transgender clients, specifically. I know that he was not intending to cause any harm; he is a dedicated advocate for transgender clients. I have no idea how Layleen presented on that day, perhaps causing the attorney to make incorrect assumptions about her gender identity. Additionally, I don't know how much time the attorney had to speak with her prior to the court appearance, given the brief nature of this one-time representation.<sup>169</sup> However, none of that mitigates the harm that his misgendering of Layleen most likely caused her in the moment, nor the longer-term repercussions of that harm.

Research shows that being deadnamed and misgendered has a detrimental long-term impact on a transgender person's mental health and well-being, leading to chronic stress, depression, anxiety, low self-worth, and even suicidal ideation and behavior.<sup>170</sup> Knowing that their deadname will be called out in a public courtroom, potentially outing them as transgender and jeopardizing their safety, is enough in-and-of-itself to deter many transgender people from returning to court.<sup>171</sup> During both of those appearances, Layleen endured the suffering of being misgendered in handcuffs, likely while simultaneously experiencing fear and uncertainty about her pretrial detention status.

According to the arraignment transcript from the 2019 case—during which Layleen died in pretrial incarceration—the presiding judge cited Layleen's prior failures to appear in her 2017 case as justification for setting bail at \$500 in both cases. After hearing arguments from both the prosecution and defense, the judge stated: “The problem is on the Part C case. . . . She was given a DAT and warranted. And then subsequent to that, on that case alone she warranted one, two, three, four, five, six, seven, eight times on one case. So bail is set . . . at \$500 . . . .”<sup>172</sup> While I cannot know for certain why Layleen had so many prior failures to appear, I suspect that they were due to either the harm caused to her by the legal system in the past or to unstable life circumstances resulting from her struggles with societal discrimination more broadly.

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<sup>169</sup> From my personal experience working in the Bronx, the standard practice for representing clients facing an involuntary return on a warrant consists of speaking to the client for only a few minutes in open court. This conversation occurs in very close proximity to the same police officer who arrested them and brought them into court. These conditions are not conducive to having a meaningful conversation about a client's gender identity in a safe or confidential environment.

<sup>170</sup> See Andrea Rice, *What Is Deadnaming?*, PSYCH CENT. (Nov. 16, 2021), <https://psychcentral.com/health/deadnaming#gender-affirmation> [<https://perma.cc/PQ4W-T45F>].

<sup>171</sup> See *id.*; Mackenzie O'Connell, *What's in a [Dead] Name?*, 33 U. FLA. J.L. & PUB. POL'Y 445, 459 (2023).

<sup>172</sup> Transcript of Arraignment at 4-5, *People v. Cubilette*, No. 2017NY049849 (N.Y. Crim. Ct. N.Y. Cnty. Apr. 16, 2019).

As Layleen’s cases illustrate, a prior failure to appear is typically taken very seriously as a bail factor in determining whether someone will be detained pretrial. Moreover, because a failure to appear usually also leads to the issuance of a bench warrant, if the defendant has any interaction with law enforcement that prompts running their name through a warrant search system,<sup>173</sup> then the bench warrant will likely lead to the defendant’s arrest and involuntary production in court.

Furthermore, some states criminalize failures to appear by subjecting individuals to additional bail-jumping charges once they have been returned to court.<sup>174</sup> In other words, people who fail to make one or more court appearances merely due to past discriminatory harms caused by the legal system or their life circumstances may nonetheless face additional criminal charges on those non-appearance grounds alone.<sup>175</sup> This punitive approach fails to account for the reasons behind their absence. This practice highlights concerns raised in Professor Lauryn P. Gouldin’s Article, *Defining Flight Risk*, where she argues for a crucial distinction between individuals who actively attempt to flee prosecution and those who are at risk of non-appearance due to instability or hardship.<sup>176</sup> Professor Gouldin contends that these two groups pose different kinds of risks and should be treated differently—a nuance the current system ignores.<sup>177</sup> In a survey of 52 jurisdictions, 47 have laws that explicitly require or permit pretrial detention decision-makers to consider a defendant’s history of failing to appear in court.<sup>178</sup> Among the remaining states, Georgia,<sup>179</sup> Indiana,<sup>180</sup> Kentucky,<sup>181</sup> Louisiana,<sup>182</sup> and New Hampshire<sup>183</sup> include broad “catchall” provisions in their bail statutes that mandate the consideration of all relevant information,

<sup>173</sup> Brendan D. Roediger, *Abolish Municipal Courts: A Response to Professor Natapoff*, 134 HARV. L. REV. F. 213, 224 (2021) (discussing the use of outstanding warrants as a justification for police misconduct, elaborating “even the most egregiously pretextual and unlawful traffic stop will likely end with a ‘wanted person’ being taken into custody.”).

<sup>174</sup> See Aleksandrea E. Johnson, *Decriminalizing Non-Appearance in Washington State: The Problem and Solutions for Washington’s Bail Jumping Statute and Court Nonappearance*, 18 SEATTLE J. SOC. JUST. 433 (2020).

<sup>175</sup> *Id.*

<sup>176</sup> See Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 683, 729-37 (2018).

<sup>177</sup> *Id.*

<sup>178</sup> Those jurisdictions include Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, the District of Columbia, Federal Courts, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. See Appendix A for relevant laws in each jurisdiction.

<sup>179</sup> GA. CODE ANN. § 17-6-1 (2024).

<sup>180</sup> IND. R. CRIM. P. 2.6.

<sup>181</sup> KY. REV. STAT. ANN. § 431.525 (2011).

<sup>182</sup> LA. CODE CRIM. PROC. ANN. art. 316 (2017).

<sup>183</sup> N.H. REV. STAT. ANN. § 597:2 (2020).

which typically encompasses previous court appearances—a factor widely regarded as highly significant in these decisions. Kentucky’s bail statute, specifically, states that the court “shall consider [. . .] the defendant’s reasonably anticipated conduct if released,”<sup>184</sup> which would arguably include past failures to appear. Notably, Florida’s bail statute goes even further and stipulates stringent conditions: any defendant who fails to appear on a required court date but later voluntarily appears or surrenders is ineligible for a recognizance bond.<sup>185</sup> Moreover, a Florida defendant who fails to appear and is subsequently arrested cannot even qualify for a recognizance bond or any bond involving less than a \$2,000 monetary commitment or double the original bond’s value, whichever is higher.<sup>186</sup>

A prior failure to appear is thus detrimental to defendants’ prospects of pretrial release in most states, even though there are infinite reasons a defendant may not feel safe returning to court. The trauma and discomfort of returning to court is only magnified for transgender people who risk being deadnamed, outed in public, and having their very identities invalidated.

#### F. History of Substance Use

As of 2021, LGBTQ individuals are at a “significantly elevated risk of addiction compared to the general U.S. adult population.”<sup>187</sup> It is commonly understood that people often use alcohol and drugs to cope with stress. As discussed above, LGBTQ individuals experience disproportionately high levels of stress, when compared to their straight and cisgender counterparts.<sup>188</sup> These heightened stress levels are due in no small part to the significant discrimination LGBTQ individuals face, and they help explain why higher levels of alcohol and substance use are seen within the LGBTQ community.<sup>189</sup> Minority stress of this kind includes “both structural and

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<sup>184</sup> KY. R. CRIM. P. 4.16 (2025).

<sup>185</sup> FLA. STAT. § 903.046 (2021).

<sup>186</sup> *Id.*

<sup>187</sup> Ryan Ruppert, Shanna K. Katari & Steve Sussman, *Prevalence of Addictions Among Transgender and Gender Diverse Subgroups*, 18 INT. J. ENVIRON. RES. & PUB. HEALTH 8843, 8843 (2021).

<sup>188</sup> Ryan Ruppert, Shanna K. Katari & Steve Sussman, *Prevalence and Co-Occurrence of Addictions Among Sexual Minority Subgroups*, 1 ANNALS LGBTQ PUB. & POPULATION HEALTH 210, 240 (2020).

<sup>189</sup> Brian A. Rood, Sari L. Reisner, Francisco I. Surace, Jae A. Puckett, Meredith R. Maroney & David W. Pantalone, *Expecting Rejection: Understanding the Minority Stress Experiences of Transgender and Gender-Nonconforming Individuals*, 1 TRANSGENDER HEALTH 151, 162 (2016); Margaret M. Paschen-Wolff, Avery DeSousa, Emily Allen Paine, Tonda L. Hughes & Aimee N.C. Campbell, *Experiences of and Recommendations for LGBTQ+-Affirming Substance Use Services: An Exploratory Qualitative Descriptive Study with LGBTQ+ People Who Use Opioids and Other Drugs*, 19 SUBST. ABUSE TREATMENT, PREVENTION, & POL’Y 2, 18 (2024); Ruppert et al., *supra* note 187, at 8455.

interpersonal stigma, prejudice, discrimination, violence, and trauma.”<sup>190</sup> According to the Center for American Progress, as of 2012, “it is estimated that between 20 percent to 30 percent of gay and transgender people abuse substances, compared to about 9 percent of the general population.”<sup>191</sup> Those higher rates of substance use are driven by daily battles with discrimination and stigma, which lead gay and transgender individuals to turn to tobacco, alcohol, and other substances as coping mechanisms.<sup>192</sup>

Even more problematic is the fact that most substance abuse treatment programs, especially residential ones, have historically failed to be inclusive of TGNCNBI people and LGBTQ people more broadly.<sup>193</sup> These programs often do not address LGBTQ-specific needs, such as housing individuals in gender-aligned facilities or rooms, providing access to safe restrooms and showers, offering gender-affirming healthcare, and adequately addressing discrimination and harassment from staff and other participants.<sup>194</sup> Such failures in basic inclusivity and cultural competency create a hostile environment in which most LGBTQ people cannot survive, let alone heal. Since these treatment programs are often an ordered condition of pretrial release, their systemic flaws and barriers to meaningful treatment lead many TGNCNBI participants to violate their conditions of release, making pretrial detention even more likely.<sup>195</sup>

Layleen’s experience underscores the consequences of these systemic failures in access to treatment and support, particularly for TGNCNBI individuals navigating both the criminal legal system and untreated trauma or substance abuse. At least two of Layleen’s criminal cases involved charges for possession of a controlled substance.<sup>196</sup> Additionally, in two other cases, Layleen’s attorney made an effort to persuade the judge not to issue a bench warrant when Layleen failed to appear in court, precisely because Layleen had either been hospitalized for substance use or was in the middle of a drug treatment program.<sup>197</sup> While I cannot confirm Layleen’s substance use

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<sup>190</sup> NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, UNDERSTANDING THE WELL-BEING OF LGBTQI+ POPULATIONS 8 (2020).

<sup>191</sup> Jerome Hunt, *Why the Gay and Transgender Population Experiences Higher Rates of Substance Use Prejudice*, CTR. FOR AM. PROGRESS 1 (Mar. 9, 2012), [https://cdn.americanprogress.org/wp-content/uploads/issues/2012/03/pdf/lgbt\\_substance\\_abuse.pdf](https://cdn.americanprogress.org/wp-content/uploads/issues/2012/03/pdf/lgbt_substance_abuse.pdf) [<https://perma.cc/RR78-S8GL>].

<sup>192</sup> *Id.*

<sup>193</sup> Paschen-Wolff et al., *supra* note 189, at 8.

<sup>194</sup> *Id.* at 10, 17.

<sup>195</sup> See discussion *infra* Section III(A)(2)(f) (providing recommendations to increase accessibility to substance use treatment programs).

<sup>196</sup> Misdemeanor Information, *People v. Cubilette*, No. 18-0259 (N.Y. City Ct. Yonkers Jan. 24, 2018); Misdemeanor, *People v. Cubilette*, No. 2017NY049849 (N.Y. Crim. Ct. N.Y. Cty. Sep. 21, 2017).

<sup>197</sup> Transcript of Calendar Call at 2:16-25, *People v. Cubilette*, No. 2017NY049849 (N.Y. Crim. Ct. N.Y. Cty. June 19, 2018); Transcript of Calendar Call at 2:3-10, *People v. Cubilette*, No. 2017NY049849 (N.Y. Crim. Ct. N.Y. Cty. Jul. 31, 2018).

with her directly, it is certainly a possibility that she may have been using substances as a coping mechanism for her “daily battles with discrimination and stigma.”<sup>198</sup>

As demonstrated by Layleen’s story, a history of substance use—like the other bail factors already discussed—is problematic when applied to members of the LGBTQ community. This is because LGBTQ individuals are more likely to have a history of such use or abuse to self-medicate and cope with their exposure to regular individual and systematic discrimination and harassment.<sup>199</sup> This history can be used against LGBTQ individuals in the pretrial detention determination process without the judge ever considering the underlying reasons for that history.

Of the 52 jurisdictions surveyed, 19 jurisdictions explicitly permit or require decision-makers to consider a person’s history of substance use or their willingness to submit to drug testing as a factor in their pretrial detention determination.<sup>200</sup> Seven jurisdictions that do not explicitly mention substance use do have a “catchall” consideration if relevant, including Georgia,<sup>201</sup> Indiana,<sup>202</sup> Mississippi,<sup>203</sup> Nevada,<sup>204</sup> New Hampshire,<sup>205</sup> Oregon,<sup>206</sup> and Virginia.<sup>207</sup> Wisconsin<sup>208</sup> and West Virginia,<sup>209</sup> which do not explicitly allow or require substance use to be considered as a factor in determining pretrial detention status, do allow courts to make substance abuse treatment programming a condition of release.

Twenty-two other jurisdictions have bail statutes that do not explicitly require or permit pretrial detention decision-makers to consider a person’s history of substance use or have “catchall” provisions.<sup>210</sup> At least three states have caselaw allowing for consideration of substance use when making pretrial detention determinations, including Minnesota (on a case-by-case

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<sup>198</sup> See Hunt, *supra* note 191, at 1.

<sup>199</sup> See Ruppert et al., *supra* note 188, at 210-11.

<sup>200</sup> Those jurisdictions include Alabama, Arizona, California, the District of Columbia, Federal Courts, Illinois, Louisiana, Massachusetts, Michigan, New Jersey, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Utah, Washington, and Wyoming. See Appendix A for relevant laws in each jurisdiction.

<sup>201</sup> GA. CODE ANN. § 17-6-1 (2024).

<sup>202</sup> IND. CODE ANN. § 35-33-8-3.8 (LexisNexis 2017).

<sup>203</sup> MISS. CODE ANN. § 99-5-11 (2023).

<sup>204</sup> NEV. REV. STAT. ANN. § 178.4853 (2023).

<sup>205</sup> N.H. REV. STAT. ANN. § 597:2 (2020) (amended in 2019 to say substance use in and of itself cannot be used to determine “dangerousness”).

<sup>206</sup> OR. REV. STAT. § 135.230 (2024).

<sup>207</sup> VA. CODE ANN. § 19.2-121 (2022).

<sup>208</sup> WIS. STAT. § 969.01 (2023).

<sup>209</sup> W. VA. CODE § 62-1C-1a (2021).

<sup>210</sup> Those jurisdictions include Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Iowa, Kansas, Maine, Maryland, Missouri, Nebraska, New York, North Dakota, Ohio, South Carolina, South Dakota, Texas, West Virginia, and Wisconsin. See Appendix A for relevant laws in each jurisdiction.

basis),<sup>211</sup> Montana (if courts find it relevant),<sup>212</sup> and Vermont (may consider substance use as factor).<sup>213</sup>

Thus, although only 19 jurisdictions explicitly name substance use as a factor in determining pretrial detention, 29 more provide a vehicle for it to be considered. The higher rates of substance use in LGBTQ populations may also therefore disproportionately affect LGBTQ individuals in their pretrial bail determinations.

### G. Mental Health, Reputation, or Character

Research shows that LGBTQ individuals are significantly more likely to experience mental health conditions, including substance use disorders.<sup>214</sup> According to NAMI, “LGBTQ+ adults are more than twice as likely as heterosexual adults to experience a mental health condition, [and] transgender individuals are nearly four times as likely as cisgender individuals . . . to experience a mental health condition.”<sup>215</sup> Common factors that can trigger or worsen mental health issues include coming out, familial rejection, substance use, trauma, homelessness, discrimination, harassment, and inadequate mental healthcare.<sup>216</sup>

Layleen’s family shared that she was diagnosed with schizophrenia and hospitalized at several points in her life, including not long before her incarceration at Riker’s Island,<sup>217</sup> which some have referred to as the largest mental health provider in NYC,<sup>218</sup> with more than half of its population

<sup>211</sup> State v. Martin, 743 N.W.2d 261, 267 (Minn. 2008) (considering substance use to be a factor assessed on a case-by-case basis only).

<sup>212</sup> Mont. Code Ann. § 46-9-109 (West).

<sup>213</sup> State v. Blaisdell, 311 A.3d 156, 160-61 (Vt. 2023) (holding that judges may consider substance use as factor in making bail determinations); see also VT. STAT. ANN. tit. 13, § 7554 (“In determining whether the defendant presents a risk of flight from prosecution, the judicial officer shall consider, in addition to any other factors . . .”).

<sup>214</sup> Bastian Rosner, Jessica Neicun, Justin C. Yang & Andres Roman-Urrestarazu, *Substance Use Among Sexual Minorities in the US – Linked to Inequalities and Unmet Need for Mental Health Treatment? Results from the National Survey on Drug Use and Health (NSDUH)*, 135 J. PSYCHIATRIC RSCH. 107, 108 (2021).

<sup>215</sup> National Alliance on Mental Illness, *LGBTQ+*, <https://www.nami.org/your-journey/identity-and-cultural-dimensions/lgbtq/> [<https://perma.cc/4TQ4-8BXE>] (last visited Feb. 1, 2025).

<sup>216</sup> *Id.*; see also discussion *infra* Section III(A)(2)(g) (providing recommendations to address disproportionately high rates of poor mental health among LGBTQ individuals).

<sup>217</sup> Raquel Willis, AFTERLIVES: THE LAYLEEN POLANCO STORY: *All That Is On Rikers*, at 16:02 (iHeart Radio, Nov. 28, 2023), <https://www.iheart.com/podcast/1119-afterlives-marsha-p-johns-127683074/episode/episode-3-all-that-is-on-131610208/> [<https://perma.cc/ZA8Z-PUPM>].

<sup>218</sup> Annie McDonough, *Mental Health Care on Rikers: New York’s Largest Psychiatric Provider*, CITY & STATE NEW YORK (Sep. 30, 2022), <https://www.cityandstateny.com/policy/2022/09/mental-health-care-rikers-new-yorks-largest-psychiatric-provider/377870/> [<https://perma.cc/VF9C-TVA5>].

having a mental health diagnosis.<sup>219</sup> According to the Board of Correction's report on the circumstances of Layleen's death, Layleen was experiencing what appeared to be a serious mental health breakdown during her period of incarceration.<sup>220</sup> The following paragraph from the report describes Layleen's mental health condition during that time:

On May 15, in THU New Admissions, Ms. Polanco declined to come out of her cell for breakfast or services. When she eventually came out at medication time, she refused to take her medication and began rolling around on the floor in the dayroom, talking to herself, and growling. The officer assigned to that unit wrote her a referral to Mental Health (her second in two days), circling the following behavioral traits on the Department's Referral of Inmates to Mental Health Services Form: "showing radical changes in behavior;" "expressing a desire to commit suicide and/or attempting suicide;" "frequent displays of shouting, crying and/or screaming;" "having hallucinations/delusions (seeing objects or hearing voices that do not exist);" "showing poor personal hygiene or appearance, doesn't shave wash or change clothes, etc.;" "being alarmed (frightened) or in a state of panic;" and "any unusual action or behavior that should be brought to the attention of the Mental Health Staff." In the notes section, the officer wrote "inmate randomly crying, shouting." After lunch, Ms. Polanco charged at the officer with her fist out, striking the officer's arm. Mental Health then initiated a formal transfer of Ms. Polanco to Elmhurst Hospital, indicating as the basis for the referral that she was highly assaultive and required a higher level of care.<sup>221</sup>

It is evident that Layleen was struggling with her mental health during her incarceration and likely before. Like many other LGBTQ individuals, Layleen was a survivor of significant discrimination and violence, which can take a tremendous toll on mental health. This all begs the question: is it acceptable for the state to consider a factor like mental health—which disproportionately impacts the most marginalized people—when determining pretrial detention?

Of the 52 jurisdictions surveyed, 46 explicitly permit or require pretrial detention decision-makers to consider a person's mental health, reputation, or character as a factor in their pretrial detention determination.<sup>222</sup>

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<sup>219</sup> See Jan Ransom & Amy Julia Harris, *How Rikers Island Became New York's Largest Mental Institution*, N.Y. TIMES (Dec. 29, 2023), <https://www.nytimes.com/2023/12/29/nyregion/nyc-rikers-homeless-mental-illness.html> [<https://perma.cc/B3SL-F9S3>].

<sup>220</sup> See McMahon, *supra* note 147, at 5.

<sup>221</sup> *Id.* at 5.

<sup>222</sup> Those jurisdictions include Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, the District of Columbia, Federal Courts, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi,

Two jurisdictions—California<sup>223</sup> and New York<sup>224</sup>—do not explicitly mention these factors. However, the New York bail statute states that the court must consider a person’s “activities and history” in determining their pretrial detention status, which could be construed to include their mental health, reputation, or character. Five states—Georgia,<sup>225</sup> Indiana,<sup>226</sup> Louisiana,<sup>227</sup> New Hampshire,<sup>228</sup> and Oregon<sup>229</sup>—have “catchall” provisions in their state bail statutes allowing or requiring the consideration of any relevant factors. In Texas, caselaw allows for the requirement that a defendant submit to psychological testing as a condition of release, if the condition is (1) reasonable, (2) secures the defendant’s appearance at trial, and (3) is related to the safety of the alleged victim or the community.<sup>230</sup>

The abhorrent conditions that transgender individuals face while in confinement exacerbate pre-existing mental health conditions, and nearly every one of these statutes constructs an apparatus for those struggles to be used against the defendant.

#### *H. Nature of Current Offense or Likely Sentence*

The nature of the current offense and the likely sentence are two separate bail factors but are often considered together. The former involves the factual allegations and criminal charges of the present case, while the latter refers to the potential penalty if convicted of that charge. These bail factors are complex and can be challenging to understand. Without first recognizing the history of LGBTQ criminalization, it can be even more challenging to critically assess the use of these bail factors in practice.

As discussed in the “criminal record” section, LGBTQ individuals have historically been, and continue to be, criminalized in ways that their straight and cisgender counterparts are not. This criminalization can stem from charges that should never have been brought, such as those for “false personation,” or from charges related to criminalized work that TGNCNBI individuals feel forced into due to employment discrimination. Additionally, self-defense and the act of surviving physical violence are also criminalized.

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Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. See Appendix A for relevant laws in each jurisdiction.

<sup>223</sup> CAL. PENAL CODE § 1275 (Deering 2015); CAL. PENAL CODE § 1318.1 (Deering 1981).

<sup>224</sup> N.Y. CODE CRIM. PROC. LAW § 510.10 (LexisNexis 2023).

<sup>225</sup> GA. CODE ANN. § 17-6-1 (2024).

<sup>226</sup> IND. CODE ANN. § 35-33-8-3.8 (LexisNexis 2017); IND. R. CRIM. P. 2.6.

<sup>227</sup> LA. CODE CRIM. PROC. ANN. art. 316 (2017); LA. CODE CRIM. PROC. ANN. art. 320 (2024).

<sup>228</sup> N.H. REV. STAT. ANN. § 597:2 (2020).

<sup>229</sup> OR. REV. STAT. § 135.230 (2024).

<sup>230</sup> *Ex parte Blair*, 2006 Tex. App. LEXIS 9331, at \*4 (Tex. App. 2006); *Ex parte Alders*, 2020 Tex. App. LEXIS 7846, at \*5 (Tex. App. 2020).

Too often, in my experience, LGBTQ individuals face charges that are therefore linked to their identity in one way or another.

The “likely sentence” factor is justified by the belief that if someone faces a lengthy prison term for the current charge, they are less incentivized to return to court and more likely to attempt to evade prosecution. The dilemma with consideration of this factor is the presence of mandatory minimum laws, which require judges to impose a minimum sentence when a defendant has prior convictions.<sup>231</sup> All 52 jurisdictions studied in this survey currently have mandatory minimum laws.<sup>232</sup> This is particularly problematic for LGBTQ individuals, who are more likely to have been unjustly charged and convicted in the past, and consequently more likely to be subject to mandatory minimums if and when they are charged again.

For example, my former client, “Ms. D,” discussed above, pled guilty to felony assault despite having a strong defense had the case gone to trial. As a transgender woman experiencing sexual assault and other forms of violence in the men’s jail at Rikers Island, she accepted the plea deal because it would secure her immediate release from these deplorable conditions. This was her first arrest, but like many others subjected to our coercive plea-bargaining system, she was desperate to get out of jail and saw the plea as her only option. She was ultimately arrested again for a subsequent incident closely linked to her struggles with mental health and substance abuse, and due to mandatory minimum laws, she served several years in a men’s prison as a result of her conviction.

Of the 52 jurisdictions surveyed, all but one require or allow consideration of the nature of the current offense or the likely sentence in determining pretrial detention.<sup>233</sup> The one remaining jurisdiction, New Hampshire, does not enumerate specific bail factors but generally permits consideration of “any relevant factors,”<sup>234</sup> which likely includes the nature of the current offense or the likely sentence. The nature of the current offense and likely sentence are often treated as neutral and rational components of pretrial detention decisions. They operate within a criminal legal system that often

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<sup>231</sup> Each jurisdiction has its own mandatory minimum laws, which specify how they would apply to individuals. See Jeffery Todd Ulmer, Megan Kurlychek & John H. Kramer, *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. RSCH. CRIME & DELINQ. 427 (2007).

<sup>232</sup> See Ashley Nellis, *How Mandatory Minimums Perpetuate Mass Incarceration and What to Do About It*, THE SENTENCING PROJECT (Feb. 14, 2024), <https://www.sentencingproject.org/fact-sheet/how-mandatory-minimums-perpetuate-mass-incarceration-and-what-to-do-about-it> [https://perma.cc/X83X-6SLH].

<sup>233</sup> Those jurisdictions include Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, the District of Columbia, Federal Courts, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. See Appendix A for relevant laws in each jurisdiction.

<sup>234</sup> N.H. REV. STAT. ANN. § 597:2 (2020).

fails to account for the structural inequities LGBTQ individuals face. When applied without contextual understanding, these factors risk reinforcing patterns of identity-based discrimination.

### III. RECOMMENDATIONS

Over the decade of representing LGBTQ people in criminal cases, I've become all too familiar with the pervasive nature of anti-LGBTQ discrimination within our pretrial detention system. Yet, despite this experience, I remain disturbed by how deeply ingrained this bias is in statutes across the country. The scale and subtlety of discrimination reveals a systemic but unacknowledged injustice. It is sobering to consider the countless LGBTQ people throughout history who have suffered unjustly at the hands of pretrial decision-makers. This inequity demands urgent action. Below, I outline a series of recommendations that I believe would serve as meaningful first steps toward addressing and rectifying the ongoing harm faced by LGBTQ communities across the country.

In their article, *Abolition as Lodestar: Rethinking Prison Reform from a Trans Perspective*, Professor D Danganan, expanding on the concept of “non-reformist reforms,”<sup>235</sup> describes the different categories of interventions as “carceral, non-carceral, de-carceral, and transformative.”<sup>236</sup> Professor Danganan equates carceral interventions with prison or criminal justice reform. They are interventions that may improve the experiences of individuals navigating carceral systems but also reinforce those systems.<sup>237</sup> An example of a carceral intervention would be creating a transgender unit within a jail or prison to address the dilemma of safe placements for transgender people who are incarcerated.<sup>238</sup> Non-carceral interventions are ones that improve the experiences of individuals within the carceral systems without reinforcing those systems, such as requiring prison staff to use correct names for transgender people in their custody.<sup>239</sup> De-carceral interventions would move us closer to achieving abolition, such as closing down a jail or prison.<sup>240</sup> Transformative Justice is a practice of addressing harm without using the criminal legal system at all.<sup>241</sup> These categories provide a useful framework for analyzing the recommendations outlined below.

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<sup>235</sup> See Amna A. Akbar, *Non-Reformist Reforms and Struggles Over Life, Death, and Democracy*, 132 YALE L.J. 2360 (2023).

<sup>236</sup> Danganan, *supra* note 18, at 172 n.63.

<sup>237</sup> *Id.* at 201.

<sup>238</sup> *Id.* at 202.

<sup>239</sup> *Id.* at 204.

<sup>240</sup> *Id.* at 206.

<sup>241</sup> See generally Reina Sultan, *How Transformative Justice Responds to Violence Without the Carceral System*, TRANSFORMHARM.ORG, [https://transformharm.org/tj\\_resource/how-transformative-justice-responds-to-violence-without-the-carceral-system/](https://transformharm.org/tj_resource/how-transformative-justice-responds-to-violence-without-the-carceral-system/) [perma.cc/MT9X-UNRE] (last visited June 7, 2025) (describing transformative justice as processes “which have roots in

In defining these interventions, Professor Dangaran asserts that advocates in various parts of the LGBTQ rights movements should consider all the available tools and strategies for social change.<sup>242</sup> I agree with this assertion and have thus set forth a broad range of recommendations. I divide my recommendations into two main categories. The first category is “transformative recommendations.” Transformative recommendations propose significant reforms to the system and have the potential to address inequities on a deep, structural level. These recommendations aim to create substantial changes that go beyond surface-level reforms, directly targeting the root causes of discrimination.

The second category is “essential baseline recommendations.” These are essential measures that should be implemented, at the very least, as an acknowledgment of the discrimination and harm created by the current pretrial detention system. While these steps are not intended to overhaul the system, they do represent initial, incremental progress toward meaningful change.

My first recommendation—abolishing pretrial detention—falls under the umbrella of a “transformative” intervention, as it fundamentally challenges and seeks to dismantle a deeply entrenched pillar of the carceral system. The categorization of my second recommendation, addressing the symptoms of pervasive anti-LGBTQ discrimination, is more nuanced. It could be labelled as “transformative,” depending on the lens through which it is viewed. From the perspective of LGBTQ rights, for example, it could represent a transformative intervention. However, from the perspective of abolitionism, the recommendation could be seen as merely “non-carceral” or even “carceral.” By improving the conditions and outcomes for LGBTQ people within the existing framework, it could inadvertently reinforce the legitimacy of the current problematic bail factors and, by extension, the legitimacy of the pretrial detention system as a whole.

My final series of recommendations—the “essential baseline recommendations”—would likely be categorized as “carceral” reforms by most scholars, as they strengthen and resource the current carceral system in an attempt to mitigate harm to LGBTQ people. This dynamic highlights the complexities and tensions inherent in pursuing reforms that address immediate harm while operating in a system that many argue must be dismantled entirely. My “essential baseline recommendations” include conducting research on the pretrial detention of LGBTQ individuals, creating and supporting bail funds for LGBTQ individuals, investing in LGBTQ-affirming pretrial services, improving training of various actors in the criminal legal

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indigenous practices, [and] model a different set of skills and principles for approaching harmful and dangerous situations”). *See also* MARIAME KABA, WE DO THIS ‘TIL WE FREE US 148, 148-49 (Tamara K. Nopper ed., 2021).

<sup>242</sup> Dangaran, *supra* note 18, at 201.

system, and a series of amendments to bail statutes that would mitigate the harm LGBTQ individuals face.

### A. Transformative Recommendations

#### 1. Abolishing Pretrial Detention

The most effective and inclusive approach to addressing the inequities inherent in our pretrial detention system—impacting not only LGBTQ defendants but all marginalized groups—is to eliminate pretrial detention.<sup>243</sup> Prison abolition—and abolition of smaller parts of the broader carceral system—has increasingly gained traction as a guiding framework for reimagining and transforming the criminal legal system.<sup>244</sup> It calls for the dismantling of carceral systems and building support in its place.<sup>245</sup> While this Article highlights the disproportionate effects of pretrial detention on the LGBTQ community, it is essential to recognize that pretrial detention has long been a profoundly oppressive mechanism affecting numerous marginalized communities, particularly communities of color and poor communities.<sup>246</sup> The broader injustice of the pretrial detention system itself cannot be denied. It is a structure that inherently favors individuals with financial resources, enabling them to secure their freedom pending trial, while those without such resources remain incarcerated. This disparity creates a system in which wealthier defendants are significantly more likely to achieve favorable outcomes than their less affluent counterparts. Indeed, even when the factors influencing pretrial detention decisions are unrelated to a defendant's financial means, the ability to pay bail remains the ultimate determinant of freedom. This inequity is only further compounded when the criteria

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<sup>243</sup> See Justine Olderman, *No More Pretrial Punishment*, THE INQUEST (Jan. 16, 2025), <https://inquest.org/no-more-pretrial-punishment> [<https://perma.cc/77DX-LRY3>].

<sup>244</sup> See, e.g., René Reyes, *Abolition Constitutionalism and Non-Reformist Reform: The Case for Ending Pretrial Detention*, 53 CONN. L. REV. 667 (2021) (making the case for elimination of pretrial detention via state constitutions).

<sup>245</sup> See generally Dan Berger, Mariame Kaba, and David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), <https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration> [[perma.cc/QNK9-V57U](https://perma.cc/QNK9-V57U)] (explaining the role of abolitionists in criminal justice reform efforts); Angela Y. Davis, *Slavery, Civil Rights, and Abolitionist Perspectives Toward Prison*, in ARE PRISONS OBSOLETE? (2003) (exploring the relationship between historical expressions of racism and the role of the modern prison system); Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES MAG. (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html> [[perma.cc/44P7-MG9T](https://perma.cc/44P7-MG9T)] (making the case for prison abolition).

<sup>246</sup> See, e.g., Natasha Brown, *Innocent Until Proven Guilty: Unless You're Poor. Righting a Systemic Wrong Under the Pretrial Fairness Act*, 57 UIC L. REV. 291, 295 (2024); *Ending Cash Bail Keeps Families Together, Communities Safe and Strong*, SHRIVER CTR. ON POVERTY L. (June 3, 2004), <https://www.povertylaw.org/article/ending-cash-bail-keeps-families-together/> [[perma.cc/V5Q5-ZGUF](https://perma.cc/V5Q5-ZGUF)] (last visited Sep. 27, 2025); ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 19, 20-23 (2018).

for these decisions explicitly rely on access to resources such as stable housing and employment, reinforcing systemic disadvantages for marginalized populations.

In her Article, *Eliminating Pretrial Detention*, Professor Shima Baradaran Baughmann argues that bail reform efforts do not decrease the number of people detained pretrial, but make matters worse.<sup>247</sup> She advocates for a near complete abolition of pretrial detention, wherein 90% of defendants would be released without a hearing by a presumption of release. The underlying prediction is that such an approach would better protect public safety by increasing pretrial liberty and individual well-being.<sup>248</sup> In her Article, *Undoing the Bail Myth: Pretrial Reforms to End Mass Incarceration*, Insha Rahman argues for bail pretrial reform using a similar approach—releasing the majority of people incarcerated pretrial by “legislat[ing] away discretion” and “mandating release for the vast majority of offenses.”<sup>249</sup>

A critic of this recommendation might argue that this Article highlights a particular set of problematic bail factors considered within the pretrial detention system and that, therefore, the logical solution would be to eliminate those specific bail factors from pretrial detention decisions, rather than dismantling the entire pretrial detention system. However, I contend that this approach would not be effective. If legislatures across the country were genuinely interested in addressing these problematic bail factors, they would likely attempt to replace them with similarly vague or overly broad criteria, as evidenced by New York State’s bail reform legislation in 2020.<sup>250</sup> As discussed earlier, this legislation simply substituted the explicitly problematic bail factors with the term “activities and history,” a nebulous phrase that could conceivably encompass all the same problematic considerations, albeit in a less overt manner. This example demonstrates the potential for such incremental reforms to perpetuate the very issues they aim to solve, underscoring the need for more comprehensive solutions. Moreover, many of the bail factors now recognized as problematic were originally introduced in the 1960s, 1970s, and 1980s as part of bail reforms intended to make pretrial decisions more equitable.<sup>251</sup> Their persistence and harmful effects today underscore a deeper truth: that reforming individual components of a system built on structural inequality may be insufficient. In other words,

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<sup>247</sup> Shima Baradaran Baughmann, *Eliminating Pretrial Detention*, 104 B.U. L. REV. 1669, 1727-28 (2024).

<sup>248</sup> *Id.* at 1728.

<sup>249</sup> Insha Rahman, *Undoing the Bail Myth: Pretrial Reforms to End Mass Incarceration*, 46 FORDHAM URB. L.J. 845, 875 (2019).

<sup>250</sup> Daniel Chasin, *Two Steps Forward, One Step Back: How New York’s Bail Reform Saga Tiptoes Around Addressing Economic Inequality*, 43 CARDOZO L. REV. 273, 290, 303 (2022).

<sup>251</sup> See JEFRI WOOD, THE BAIL REFORM ACT OF 1984 23-24 (4th ed. 2022); TIMOTHY R. SCHNACKE, MICHAEL R. JONES & CLAIRE M.B. BROOKER, *The History of Bail and Pretrial Release*, PRETRIAL JUST. INST. (2010).

we may not be able to reform our way out of a system that is fundamentally rooted in discrimination.

## 2. *Addressing the Symptoms of Pervasive Anti-LGBTQ Discrimination*

Another transformative reform would involve addressing the symptoms of pervasive anti-LGBTQ discrimination and thereby enhancing access to the resources considered in many of the bail factors. This section evokes Ruth Wilson Gilmore's statement that "abolition is not absence, it is presence," and underscores the need to not only eliminate carceral systems, but also to build supports within communities.<sup>252</sup> The following sections will examine each category of bail factors in detail, highlighting specific challenges and potential solutions.

### a. *Familial Relationships and Community Ties*

Prescribing solutions to address family and community bonds fractured by homophobia and transphobia is inherently challenging because every family is unique, with varying needs and circumstances. Numerous factors influence family dynamics related to gender and sexual orientation, including but not limited to, religious beliefs and practices, cultural traditions, immigration status, socioeconomic class, race, generational trauma, and educational background.<sup>253</sup> While many families may struggle to accept a family member's sexual orientation, gender identity, or expression, there is no universal solution to this challenge.<sup>254</sup> Families often need time and space to process these issues in ways that align with their own experiences and values. Rather than prescribing rigid "fixes," research supports personalized, ongoing engagement that takes into account a family's specific belief systems, histories, and readiness for change.<sup>255</sup>

That said, there are steps we can take as a society to support families struggling with acceptance and make the process easier. Expanding access to educational and peer support resources for families open to challenging their beliefs or learning more about LGBTQ individuals is essential. Supporting organizations like PFLAG,<sup>256</sup> which produces educational materials for straight and cisgender family members about LGBTQ people and connects people to identity-specific supportive organizations, is critical.

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<sup>252</sup> Ruth Wilson Gilmore, *Making Abolition Geography in California's Central Valley*, FUNAMBULIST MAG. (Dec. 20, 2018), <https://thefunambulist.net/magazine/21-space-activism/interview-making-abolition-geography-california-central-valley-ruth-wilson-gilmore> [perma.cc/5FA6-ZLNT].

<sup>253</sup> MICHAEL C. LASALA, COMING OUT, COMING HOME 216-229 (2010).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> PFLAG, <https://pflag.org> [<https://perma.cc/P8UK-ZLC3>] (last visited Jan. 29, 2025).

Increasing the visibility of LGBTQ people through media, education, and public discourse is another vital strategy for fostering social acceptance and empathy. A growing body of research highlights the media's powerful influence on public attitudes towards queer communities.<sup>257</sup> As renowned film critic Roger Ebert observed, "movies are like a machine that generates empathy."<sup>258</sup> Just as media can foster understanding, it can also perpetuate harm when misused. Freddy McConell, in his review of the documentary, *Disclosure*, reflects on this dynamic, noting that the "cognitive distance" between transgender and cisgender people is not the cause of negative portrayals in media.<sup>259</sup> Rather, he argues that "the distance that persists today is the inevitable, cumulative effect of the bizarre and terrible stories cis people have told or controlled about trans people [in the media]."<sup>260</sup> In other words, repeated misrepresentations have shaped a distorted public consciousness over time. Thus, accurate and affirming LGBTQ representation in media is not merely about inclusion—it is a powerful tool to shift cultural narratives, foster empathy, and open hearts and minds, especially within families grappling with acceptance.

However, current efforts to suppress LGBTQ representation threaten these goals. The recent surge in book bans, curriculum restrictions, and legislation targeting LGBTQ+ content in schools and libraries poses a direct threat to inclusion, education, and the well-being of LGBTQ youth. According to PEN America's 2025 report on book bans, during the 2023-2024 school year 25% of all banned titles included LGBTQ+ people or characters.<sup>261</sup> The American Library Association reported that the top two most frequently challenged books in 2024 included *Gender Queer* by Maia Kobabe and *All Boys Aren't Blue* by George M. Johnson.<sup>262</sup> According to the Movement Advancement Project, as of July 2025, 19 states have at least one LGBTQ-specific censorship law,<sup>263</sup> and 12 states explicitly censor

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<sup>257</sup> See Gabby Gonta, Shannon Hansen, Claire Fagin & Jennevieve Fong, *Changing Media and Changing Minds: Media Exposure and Viewer Attitudes Towards Homosexuality*, 5 PEPP. J. COMM. 'N RSCH. 28 (2017).

<sup>258</sup> Freddy McConnell, 'Tough but Profoundly Cathartic': Can Disclosure Change Trans Representation on Screen?, *GUARDIAN* (July 7, 2020), <https://www.theguardian.com/tv-and-radio/2020/jul/07/disclosure-trans-tv-film-representation-netflix> [<https://perma.cc/TMN7-VWFL>].

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> Cover to Cover: An Analysis of Titles Banned in the 23-24 School Year, PEN AMERICA (2025), <https://pen.org/report/cover-to-cover/#heading-9> [<https://perma.cc/HG7H-FMFT>] (last visited Jul. 23, 2025).

<sup>262</sup> *Top 10 Most Challenged Books of 2024*, AM. LIBR. ASS'N (2025), <https://www.ala.org/bbooks/frequentlychallengedbooks/top10> [<https://perma.cc/4KP5-GKX7>] (last visited Jul. 23, 2025).

<sup>263</sup> *Equality Maps: LGBTQ Curricular Laws*, MOVEMENT ADVANCEMENT PROJECT (2025), [https://www.lgbtmap.org/equality-maps/curricular\\_laws#:~:text=%20State%20law%20explicitly%20censors%20discussions%20of,\(36%20states%20%2C%205%20territories%20+%20D.C.\)](https://www.lgbtmap.org/equality-maps/curricular_laws#:~:text=%20State%20law%20explicitly%20censors%20discussions%20of,(36%20states%20%2C%205%20territories%20+%20D.C.)) [<https://perma.cc/JHW9-W9ZB>].

discussion of LGBTQ people or issues throughout the school's curricula ("Don't Say Gay" bills). Resisting policies and legislation that promote censorship in books, media, and classroom discussions will be crucial in fostering understanding and inclusion.

*b. Residence*

The housing crisis in America is not a new issue, nor is it one that solely affects the LGBTQ community. However, as discussed earlier, LGBTQ individuals are disproportionately impacted by unstable housing and homelessness due to pervasive discrimination. We are therefore facing an LGBTQ housing insecurity crisis that requires action on several fronts.

First, access to public and affordable housing options must be significantly expanded. Second, meaningful measures must be taken to address discrimination by landlords, shelters, and housing programs. Currently, even in progressive cities with comprehensive anti-discrimination policies, LGBTQ individuals continue to face rampant bias. In New York City, for example, a 2017 survey conducted by the Comptroller's office found that 18% of LGB respondents and 38% of TGNC respondents had experienced homelessness.<sup>264</sup> While the percentage of the city's total population made up by LGBO ("other sexual orientation") people is only 9.2%, transgender people is a shockingly low 0.6%.<sup>265</sup> We need accessible mechanisms—beyond filing complaints with Human Rights Commissions—to hold landlords, shelter staff, and program administrators accountable for discriminatory practices. Without such mechanisms, even the most robust anti-discrimination policies will remain unenforced.

While we work toward systemic solutions, it is crucial to establish more LGBTQ-specific shelters and housing programs for both youth and adults. These initiatives will provide much-needed safe and affirming spaces for LGBTQ individuals experiencing housing insecurity. For example, the Housing First approach, first developed by Dr. Sam Tsemberis in 1992 in NYC, addresses the basic needs of unhoused individuals by providing safe and stable housing with no strings attached.<sup>266</sup> Unlike traditional models, this approach does not impose conditions beyond those required of any standard renter.<sup>267</sup> The premise is that stable housing creates the foundation for

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<sup>264</sup> CITY OF N.Y. OFF. OF THE COMPTROLLER, BUREAU OF POL'Y & RSCH., NEW RESULTS OF A SURVEY OF LGBTQ NEW YORKERS (2017), [https://comptroller.nyc.gov/wp-content/uploads/documents/Results\\_of\\_a\\_Survey\\_of\\_LGBTQ.pdf](https://comptroller.nyc.gov/wp-content/uploads/documents/Results_of_a_Survey_of_LGBTQ.pdf).

<sup>265</sup> N.Y. STATE DEP'T OF HEALTH, SEXUAL ORIENTATION AND GENDER IDENTITY: DEMOGRAPHICS AND HEALTH INDICATORS NEW YORK STATE ADULTS, 2019-2020 (2022), [https://www.health.ny.gov/statistics/brfss/reports/docs/2022-16\\_brfss\\_sogi.pdf](https://www.health.ny.gov/statistics/brfss/reports/docs/2022-16_brfss_sogi.pdf).

<sup>266</sup> See *Housing First: A Review of the Evidence*, EVIDENCE MATTERS (U.S. DEP'T HOUS. & URB. DEV. SPRING/SUMMER 2023), <https://archives.huduser.gov/portal/periodicals/em/spring-summer-23/highlight2.html> [<https://perma.cc/G6TW-6GXW>].

<sup>267</sup> *Housing First*, NAT'L ALL. TO END HOMELESSNESS (Mar. 20, 2022), <https://endhomelessness.org/resource/housing-first> [<https://perma.cc/9GFL-PPLS>].

individuals to address other challenges they may be facing, such as medical, behavioral, or mental health issues. Participation in any programming or services is entirely voluntary, ensuring that individuals retain autonomy over their lives. Many studies have shown that meeting basic housing needs first empowers individuals to gradually focus on personal growth and improving other aspects of their lives.<sup>268</sup> Housing is perhaps the single most impactful bail factor in pretrial detention determinations, influencing nearly all other areas of discrimination and bail factors discussed.

*c. Employment*

Although Title VII of the Civil Rights Act prohibits discrimination based on sexual orientation or gender identity,<sup>269</sup> such discrimination remains alarmingly prevalent<sup>270</sup> and is expected to intensify as the Trump Administration takes active steps to undermine these protections.<sup>271</sup> This gap between legal protections and lived experiences underscores the need for stronger enforcement mechanisms. Filing complaints with regulatory bodies often proves insufficient due to delay, limited oversight, and lack of transparency in outcomes. To ensure justice and accountability, additional streamlined mechanisms are essential. For example, establishing dedicated LGBTQ ombudsman programs within labor departments or creating independent agencies specializing in investigating LGBTQ employment discrimination could provide more accessible, efficient recourse.

Moreover, systemic solutions must address the barriers that disproportionately impact LGBTQ individuals, particularly individuals facing compounding forms of marginalization (e.g., being formerly incarcerated, experiencing homelessness, or being part of a racial or ethnic minority). One critical strategy is to invest in LGBTQ-focused, culturally competent job training and readiness programs. These programs should be designed with a holistic understanding of the unique challenges faced by LGBTQ individuals, particularly those reentering society after incarceration. Trainings should not only provide technical skills but also include support services such as resume building, interview preparation, and mentorship opportunities from LGBTQ professionals.

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<sup>268</sup> *Id.*; see also *Data Visualization: The Evidence on Housing First*, NAT'L ALL. TO END HOMELESSNESS (May 25, 2021), <https://endhomelessness.org/resource/data-visualization-the-evidence-on-housing-first> [<https://perma.cc/55JV-HEYE>] (hover over visualization for cited studies).

<sup>269</sup> Sears et al., *supra* note 89, at 13.

<sup>270</sup> See Brad Sears, Neko Michelle Castleberry, Andy Lin & Christy Mallory, *LGBTQ People's Experiences of Workplace Discrimination and Harassment*, WILLIAMS INST., UCLA SCH. OF L. (Aug. 2024), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-Discrimination-Aug-2024.pdf> [<https://perma.cc/W2UJ-7HTR>].

<sup>271</sup> Press Release, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Removing Gender Ideology and Restoring the EEOC's Role of Protecting Women in the Workplace* (Jan. 28, 2025), <https://www.eeoc.gov/newsroom/removing-gender-ideology-and-restoring-eeocs-role-protecting-women-workplace> [<https://perma.cc/A9PQ-PJUQ>].

In addition to job readiness programs, expanding access to educational opportunities is vital. GED programs, vocational training, and higher education pathways must be more accessible to LGBTQ individuals, particularly those who have faced systemic barriers to education earlier in life. Accessibility in this context means ensuring programs are free or affordable and that they offer safe, affirming environments where LGBTQ individuals feel welcomed and respected. This could include hiring LGBTQ staff, offering gender-neutral facilities, and incorporating LGBTQ issues into educational curricula.

To further support LGBTQ individuals in their job search, additional resources such as career counseling, networking opportunities, and connections to LGBTQ-friendly employers should be made widely available. Without accessible pathways to economic opportunity, LGBTQ individuals are more likely to remain vulnerable to cycles of poverty and discrimination. By combining robust accountability measures, targeted job training, and accessible education, we can create a framework that not only protects LGBTQ individuals in the workplace but also empowers them to thrive economically and socially.

#### *d. Criminal Record*

Below I include two main approaches to addressing the underlying anti-LGBTQ discrimination reflected in criminal records. The first is a systemic approach focused on repealing existing laws that explicitly criminalize or disproportionately impact LGBTQ individuals. Examples include decriminalizing activities such as sex work, drug possession, sleeping in public, and other offenses often referred to as “crimes of poverty.” This systemic strategy also involves preventing the passage of new legislation that further criminalizes LGBTQ people.<sup>272</sup>

The second approach operates at the individual level, addressing cases directly within the pretrial detention determination process. This requires all actors involved—judges, prosecutors, defense counsel, and others—to critically examine the circumstances surrounding an LGBTQ individual’s criminal record. Key questions to consider include: Was this criminal conviction a product of the discrimination-to-incarceration pipeline? Has this person had adequate support to avoid entanglement with the criminal legal system? Was anti-LGBTQ bias a motivating factor in law enforcement’s actions during this arrest or prior arrests? Would this individual have been treated more favorably by any actors in the criminal legal system if they were a straight, cisgender person? If the answer to any of these questions is “yes,” it is incumbent upon these actors to highlight this information and explain

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<sup>272</sup> See H.B. 3817, 89th Gen. Assemb., Reg. Sess. (Tex. 2025), for a proposed legislation that would, if enacted, make it a felony for a transgender person to make a written or verbal representation to a governmental entity or to an employer that their sex is different than their sex assigned at birth.

its significance to those making pretrial detention decisions. By addressing these systemic and individual-level factors, we can begin to mitigate the disproportionate criminalization of LGBTQ people.

*e. Failures to Appear*

As discussed above, two primary sources of discrimination contribute to failures to appear in court: (1) the systemic discrimination that creates instability in the lives of LGBTQ individuals, making it difficult for them to meet commitments like returning to court; and (2) the direct discrimination and violence LGBTQ individuals face within the criminal legal system during the pendency of their cases, particularly in court settings.

The first source of discrimination can be addressed by reducing inequities in housing, employment, family ties, criminal records, mental health, and substance misuse. Addressing these areas would help create a foundation of stability, reducing barriers to court attendance.

The second source of discrimination requires a critical examination of how LGBTQ individuals—especially those perceived as LGBTQ—are treated at every stage of the criminal legal system.<sup>273</sup> Courts and public defender offices should conduct surveys of LGBTQ defendants to gather insights about their experiences with various actors in the system, including law enforcement, judges, court staff, security personnel, prosecutors, defense attorneys, probation officers, pretrial service agencies, and other service providers. These surveys should ask respondents about instances of mistreatment or bias during interactions with the criminal legal system and solicit recommendations for reform.

By gaining a clearer understanding of the type and extent of mistreatment faced by LGBTQ defendants, stakeholders in the criminal legal system will be better equipped to develop and implement measures to prevent future discrimination and ensure fair treatment for LGBTQ individuals.

*f. History of Substance Use*

As discussed above, many LGBTQ individuals misuse substances as a means of coping with trauma and the life challenges they face. The disproportionately high rates of addiction and substance misuse within the LGBTQ community are not reflective of inherent issues within the community itself. Instead, they point to systemic challenges and societal barriers that uniquely impact LGBTQ individuals. Addressing substance misuse within this community therefore requires a holistic approach, tackling the root causes of discrimination and marginalization across all areas of life, including housing, employment, healthcare, and family support.

In addition, a more targeted recommendation involves addressing the pervasive anti-LGBTQ discrimination within substance abuse treatment

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<sup>273</sup> CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, UNJUST: HOW THE BROKEN CRIMINAL JUSTICE SYSTEM FAILS LGBT PEOPLE OF COLOR (2016), <https://www.lgbt-map.org/file/lgbt-criminal-justice-poc.pdf> [<https://perma.cc/C9VG-ET3D>].

programs and service providers. Many treatment programs fail to offer culturally competent, affirming care to LGBTQ individuals, creating barriers to access and fostering environments where clients feel unsafe or unwelcome. To begin remedying this issue, providers should be mandated to undergo comprehensive LGBTQ cultural competency training to ensure that their services are inclusive and affirming.

Further, treatment programs must be equipped to meet the unique needs of LGBTQ individuals. This includes offering gender-affirming health-care, providing safe and affirming spaces for individuals to receive care, and addressing the intersecting challenges of trauma, discrimination, and mental health struggles. Creating these affirming environments is critical to increasing accessibility and effectiveness for LGBTQ individuals seeking help.

Finally, broader efforts are needed to increase the availability of affordable and accessible treatment options tailored specifically to LGBTQ individuals. Funding should be allocated to develop and expand programs designed with this community in mind, including support groups and recovery spaces reserved for LGBTQ individuals. By addressing both the systemic discrimination that fuels substance misuse and the specific barriers within treatment programs, we can begin to create a more supportive and effective framework for combating addiction in LGBTQ communities.

*g. Mental Health*

Similarly, the poor mental health of many LGBTQ individuals stems from systemic inequities, societal stigma, and the marginalization faced by LGBTQ communities. Addressing poor mental health among these communities requires adopting similar recommendations to those proposed for addressing substance use.

Mental health professionals must be equipped with the training, resources, and awareness necessary to recognize and address the unique challenges faced by LGBTQ individuals. For example, mental health providers should be trained to understand how discrimination, rejection, and minority stress impact mental well-being. Furthermore, it is critical that providers create affirming and inclusive environments that validate the identities of LGBTQ individuals, reduce the stigma around seeking mental health support, and foster trust in therapeutic relationships.

Additionally, systems-level reforms are essential to ensure access to culturally competent care. This includes advocating for policies that expand mental health resources for LGBTQ communities, integrating anti-discrimination measures into healthcare frameworks, and promoting education on the intersections of identity, mental health, and systemic bias. By implementing these measures within mental health care, we can more effectively address the pervasive discrimination that exacerbates mental health challenges for LGBTQ individuals.

### B. Essential Baseline Recommendations

In the absence of comprehensive reforms and large-scale reforms, it is nonetheless possible to implement more attainable, incremental measures that may begin to mitigate the discriminatory impact of pretrial detention on LGBTQ defendants. These targeted recommendations, while limited in scope, represent pragmatic starting points for addressing this issue.

#### 1. *The Need for Research*

Research on the pretrial detention of LGBTQ individuals is lacking. While recent years have seen important strides in studying the conditions of confinement faced by LGBTQ people, there is still a pressing need to examine the specific impact of pretrial detention on this vulnerable population. Key questions remain unanswered, such as the percentage of LGBTQ individuals detained pretrial relative to their population in the general public, the articulated reasons provided by the judicial system for their detention, and the effects of pretrial detention on the progression and outcomes of LGBTQ individuals' criminal cases and lives.

Understanding these dynamics is critical, as pretrial detention can profoundly shape the trajectory of an individual's criminal case and their life. For LGBTQ individuals, who already face disproportionate targeting by law enforcement and systemic bias within the criminal justice system, pretrial detention may amplify existing inequities. Additionally, the broader ripple effects of these outcomes—such as their impact on mental health, employment opportunities, housing stability, and future interactions with the criminal legal system—must be thoroughly studied. By addressing these research gaps, scholars, policymakers, and advocates can gain a clearer picture of the challenges LGBTQ people face during the pretrial stage of their cases and develop targeted reforms to reduce the resulting harms.

#### 2. *Creating and Supporting Bail Funds for LGBTQ People*

Grassroots efforts to confront the inequities of the criminal legal system have increasingly focused on the role of community-led interventions in challenging pretrial detention. In her insightful book, *Radical Acts of Justice: How Ordinary People Are Dismantling Mass Incarceration*, Professor Jocelyn Simonson dedicates a chapter titled “Community Bail Funds” to exploring the history, use, and challenges of these grassroots initiatives.<sup>274</sup> Community bail funds, often organized by local activists and advocates, have long served as a powerful tool for resisting the oppressive and coercive impact of the pretrial detention system on marginalized communities

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<sup>274</sup> See SIMONSON, *supra* note 13, at 19.

across the United States.<sup>275</sup> Professor Simonson highlights the critical role these funds play in countering systemic injustice while shedding light on the obstacles they face in their fight for equity and fairness.<sup>276</sup>

Bail funds have historically been organized in both informal and formal ways. Informally, they often consist of community members pooling resources to secure the release of one or more individuals from jail.<sup>277</sup> Formally, they operate as structured organizations dedicated to the mission of bailing people out of jail. The concept behind bail funds is rooted in the idea of sustainable and radical mutual aid.<sup>278</sup> The money used to post bail can be reused to help others, provided the individuals return to court as required and the bail amount is not forfeited.<sup>279</sup>

We must expand the number of such bail funds specifically dedicated to supporting LGBTQ individuals. Historically, only a limited number of bail funds have prioritized bailing out LGBTQ people, despite the unique vulnerabilities they face. As Professor Simonson explains, many bail funds intentionally avoid selective practices in determining who is deserving of being bailed out based on factors such as the specific criminal charges an individual faces, their history of court appearances, or the level of external support they may or may not maintain.<sup>280</sup> However, numerous bail funds do prioritize individuals based on identity, recognizing the disproportionate harm faced by certain populations during incarceration.<sup>281</sup>

This prioritization is in part rooted in an understanding of systemic inequities: some groups, like LGBTQ individuals, are at a greater risk of harm while detained and have been historically targeted by law enforcement. This targeting has resulted in their overrepresentation within the criminal legal system. Because LGBTQ individuals face heightened risks of violence and abuse during incarceration, their release from pretrial detention should be an urgent and essential focus for bail funds. By increasing the number of bail funds that specifically address the needs of LGBTQ people, we can better address these disparities and protect a highly vulnerable population. Examples of bail funds which historically have exclusively served or prioritized LGBTQ people include the Lorena Borjas Community Fund<sup>282</sup> and the Emergency Release Fund,<sup>283</sup> both of which are based in New York City,

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<sup>275</sup> *Id.* at 16-51.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 20.

<sup>278</sup> *See id.*

<sup>279</sup> *Id.* at 18.

<sup>280</sup> *Id.* at 19.

<sup>281</sup> *See id.* at 22-24.

<sup>282</sup> *See* Masha Gessen, *Remembering Lorena Borjas, The Mother of a Trans Latinx Community*, *THE NEW YORKER* (Apr. 2, 2020), <https://www.newyorker.com/news/postscript/remembering-lorena-borjas-the-mother-of-a-trans-latinx-community> [<https://perma.cc/RP79-YHQ3>].

<sup>283</sup> EMERGENCY RELEASE, <https://www.emergencyrelease.org/> [<https://perma.cc/N393-YEDJ>] (last visited Jan. 29, 2025).

and the latter of which was created in direct response to Layleen's death on Riker's Island.<sup>284</sup>

These efforts are not without significant challenges. As Professor Simonson highlights, the work of bail funds "create[s] an instant rupture in the workings of the system" and "eviscerate[s] the judicial power to incarcerate someone pending trial via exploitation of [their] poverty and [their] race."<sup>285</sup> Professor Simonson's observation is exemplified by Bronx Supreme Court Judge Ralph Fabrizio's frustration with The Bronx Freedom Fund. In 2009, the Fund posted bail for a 20-year-old Latino immigrant who was being held in pretrial detention on bail Judge Fabrizio had set at \$3,000. Judge Fabrizio was surprised to see William Miranda in street clothes, without handcuffs, on his next court appearance.<sup>286</sup> Judge Fabrizio didn't like what he heard about The Bronx Freedom Fund bailing out Mr. Miranda.<sup>287</sup> He began an investigation into The Bronx Freedom Fund, over the objection of The Bronx Defenders, which was representing Mr. Miranda in his criminal case.<sup>288</sup> Rather than allow the Fund to continue its work, Judge Fabrizio shut it down, ruling that its operation violated New York's insurance mandate.<sup>289</sup>

Maryland's bail statute provides another example of how statutory restrictions can limit the operations of bail funds. The statute mandates that the individual posting bail must have a personal relationship with the defendant. Specifically, it requires "execution of unsecured bonds by the defendant and an uncompensated surety who (i) has a verifiable and lawful personal relationship with the defendant, (ii) is acceptable to the judicial officer, and (iii) is willing to execute such a bond in an amount specified by the judicial officer."<sup>290</sup> This provision effectively excludes organizations like bail funds from acting as sureties, thereby restricting their ability to assist defendants who lack personal connections that are willing or able to post bail on their behalf.

Until pretrial detention is eliminated nationwide, state legislatures should enact laws that support and empower bail funds rather than impose restrictions on their operations. For example, after being shut down, The Bronx Freedom Fund was able to resume its work three years later, following

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<sup>284</sup> Reuven Blau, *Layleen Polanco's Death Inspires Bail Fund for Transgender Inmates*, THE CITY (Sep. 6, 2019), <https://www.thecity.nyc/2019/09/06/layleen-polanco-s-death-inspires-bail-fund-for-transgender-inmates/> [<https://perma.cc/55R7-SNSM>]; see also Matt Baume, *New Yorkers Establish Bail Fund to Rescue Trans Women From Jail*, OUT (Sep. 6, 2019), <https://www.out.com/transgender/2019/9/06/new-yorkers-establish-bail-fund-rescue-trans-women-jail> [<https://perma.cc/KST4-29CG>].

<sup>285</sup> Simonson, *supra* note 58, at 33.

<sup>286</sup> Nick Pinto, *Making Bail Better*, VILL. VOICE (Oct. 10, 2012), <https://www.villagevoice.com/making-bail-better/> [<https://perma.cc/F9FW-S4TW>].

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* (citing *People v. Miranda*, No. 012208C209, 2009 WL 2170254, at \*1 (Bronx Cty. Sup. Ct. June 22, 2009)).

<sup>290</sup> MD. CODE ANN., CRIM. PROC. § 4-216.1.

the passage of legislation in New York that permitted “charitable bail organization[s]” to operate under specific conditions.<sup>291</sup> These conditions included eligibility requirements based on the charges faced by individuals, as well as limitations on the maximum bail amounts that could be posted.<sup>292</sup> While these new measures provided a pathway for the fund to continue its efforts, they also highlight the continuing need for broader legislative support to ensure bail funds can function effectively in combating the injustices of the pretrial detention system.

### 3. *Investing in Pretrial Services*

Investing in pretrial services that provide meaningful support and stability—such as case management, access to essential resources like shelter, food, and phones, and referrals to mental health, medical, and substance abuse treatment—is a foundational reform that some states have already begun to implement. However, even in jurisdictions where such services are available, LGBTQ individuals often encounter systemic barriers that hinder their ability to benefit from them. These barriers stem from a lack of understanding and responsiveness to the unique challenges faced by LGBTQ communities, such as discrimination, stigma, and a heightened risk of poverty, homelessness, and violence. To maximize the effectiveness of pretrial services, it is essential to make them accessible, inclusive, and affirming of LGBTQ identities and experiences.

This requires integrating LGBTQ-affirming practices into the design and delivery of pretrial services. For instance, service providers must be trained to recognize and address the specific needs of LGBTQ individuals, such as ensuring that housing referrals prioritize safety and affirmation of gender identity and sexual orientation. Similarly, case managers should be equipped to connect individuals facing food insecurity to resources that do not perpetuate discrimination or exclusion.

By adopting an inclusive approach, pretrial services can become a powerful mechanism to address broader systemic inequities. For example, connecting an LGBTQ individual experiencing homelessness to stable and affirming housing can mitigate the risks that contribute to justice system involvement, such as survival crimes or exposure to unsafe environments. Similarly, addressing food insecurity can reduce the stressors that often exacerbate challenges to attending court appearances.

Ultimately, while this recommendation is perhaps the most “reformist reform,” integrating LGBTQ-affirming practices into pretrial services not only improves outcomes for LGBTQ individuals but also strengthens the overall goals of bail reform by addressing the root causes of justice system involvement.

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<sup>291</sup> N.Y. INS. LAW § 6805 (Consol. 2012).

<sup>292</sup> *Id.*

#### 4. *Training Criminal Legal System Actors*

Robust training programs should be implemented for defense attorneys, prosecutors, judges, and other key actors involved in pretrial detention decision-making. It is essential that all actors in this process gain a comprehensive understanding of the unique challenges faced by LGBTQ individuals. Without this knowledge, systemic biases and misunderstandings may persist, perpetuating inequities in the criminal legal system and beyond.

Training for the legal professionals, including judges, prosecutors, and defense attorneys, is often limited to basic LGBTQ cultural competency topics, such as appropriate use of honorifics, pronouns, and names. While such measures are crucial for fostering respectful courtroom environments, they are insufficient on their own. Comprehensive training should also encompass the historical and structural dimensions of discrimination and violence that LGBTQ communities have and continue to face, including state-sanctioned marginalization and criminalization. Understanding this historical context is essential, as its enduring effects continue to shape the lived experiences of LGBTQ individuals in the criminal legal system. These legacies manifest in patterns of bias, differential treatment, and procedural and substantive inequities that are directly relevant to contemporary courtroom dynamics, legal decision-making, and case outcomes. Equipping judges, attorneys, and court staff with this broader socio-historical awareness is crucial for promoting justice and mitigating harm.<sup>293</sup>

Defense attorneys, in particular, play a crucial role in advocating for their LGBTQ clients and must be equipped with the tools to sensitively ask the right questions during initial client interviews. These questions should go beyond basic legal inquiries to uncovering potential barriers their clients face, such as discrimination, homelessness, history of trauma, and lack of access to affirming resources. Additionally, defense attorneys need to be trained on how to effectively frame these issues when engaging with prosecutors and judges. For instance, they must be able to highlight the ways in which systemic inequities, rather than their client's personal shortcomings, may have contributed to their client's arrest.

This is not a topic that can be intuitively understood without proper education or lived experience. Comprehensive training should include both foundational knowledge about LGBTQ identities and lived realities, as well as strategies for applying this knowledge in legal practice. By fostering empathy and awareness among legal professionals, these trainings can help ensure that pretrial detention decisions are made with fairness and an understanding of the unique vulnerabilities faced by LGBTQ individuals.

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<sup>293</sup> See NAT'L LGBTQ+ BAR ASS'N & FOUND., *LGBTQ+ INCLUSION FROM THE BENCH: A BEST PRACTICES GUIDE FOR JUDGES* (2025), <https://lgbtqbar.org/wp-content/uploads/sites/6/sites/8/2025/06/LGBTQ-Bench-Guide-FINAL-June-2025-v1.pdf> [<https://perma.cc/C5H3-X4Z6>] for an example of a more comprehensive bench guide.

### 5. Amendments to Bail Statutes

For jurisdictions not ready to undertake a complete legislative overhaul of their bail systems, making incremental amendments to existing bail statutes can be a practical starting point. The following sections provide examples of minor but impactful changes that could benefit LGBTQ individuals and other marginalized populations disproportionately affected by current bail practices and pretrial detention considerations.

#### a. Reducing the Number of Bail-Eligible Offenses

Reducing the number of bail-eligible offenses is one effective way to address the inequities perpetuated by the pretrial detention system. This approach reduces the number of cases in which individuals are subjected to pretrial detention based on their inability to pay bail, ensuring that fewer people are incarcerated simply because of their financial circumstances. By narrowing the scope of offenses for which bail can be requested, jurisdictions can shift their focus to non-monetary alternative considerations and better prioritize fairness in the pretrial process.

This recommendation is neither new nor untested. Many jurisdictions have experimented with similar bail reforms, demonstrating their feasibility and potential impact. For example, one of the most transformative aspects of New York's 2020 bail reform law, prior to its subsequent rollback, was the statute's strict limitations on the types of charges for which prosecutors could request bail.<sup>294</sup> These limitations drastically reduced the number of people detained pretrial and proved particularly effective in addressing disparities in how bail was adjudicated.<sup>295</sup> The law explicitly curtailed judicial discretion in low-level and non-violent offenses, which, for example, mitigates racial bias in pretrial detention decisions. Early data showed declines in jail populations, especially among racial minorities.<sup>296</sup>

Illinois offers another example of such bail reform. The Safety Accountability, Fairness, and Equity-Today ("SAFE-T") Act, which went into effect in 2023, abolished the use of cash bail statewide.<sup>297</sup> One of the

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<sup>294</sup> See Brianna Seid, *The Facts on Bail Reform in New York: How Pretrial Detention and Release Works Now*, BRENNAN CTR. FOR JUST. (Mar. 13, 2024), <https://www.brennancenter.org/our-work/research-reports/facts-bail-reform-new-york-how-pretrial-detention-and-release-works-now> [https://perma.cc/D8XB-ZUTF].

<sup>295</sup> Peter Mayer, *Justice, Safety, and Prosperity: New York's Bail Reform Success Story*, FWD. US (Feb. 27, 2023), <https://www.fwd.us/news/new-york-bail-reform-success-story/> [https://perma.cc/F3Q9-MQHE].

<sup>296</sup> Alissa Pollitz Worden, Morgan Madison, James Miller, Beau Holladay, Kaitlin Moloney & Jules Caruso, *Evaluating Bail Reform in New York's Justice Courts*, FINN, at 15-16 (Jan. 2024), [https://datacollaborativeforjustice.org/wp-content/uploads/2023/12/Finn\\_Final\\_Bail\\_Reform\\_Report.pdf](https://datacollaborativeforjustice.org/wp-content/uploads/2023/12/Finn_Final_Bail_Reform_Report.pdf) [https://perma.cc/TN5Q-AZFV].

<sup>297</sup> Jessica Reichert, Aaron Zivic & Karen Sheley, *The 2021 SAFE-T Act: ICJIA Roles and Responsibilities*, ILL. CRIM. JUST. INFO. AUTH. (July 15, 2021), <https://icjia.illinois.gov/research-hub/articles/the-2021-safe-t-act-icjia-roles-and-responsibilities> [https://perma.cc/53LP-F7UC].

most notable changes was not only the elimination of bail-eligible offenses, but also the elimination of certain arrest-eligible offenses.<sup>298</sup> Under the Act, entire categories of lower-level offenses may now be addressed through citations rather than custodial arrests.<sup>299</sup> Cook County had already begun reducing its reliance on cash bail beginning in 2017 and collected data on how this shift impacted court appearances and public safety.<sup>300</sup> When comparing the data in the year before the SAFE-T Act took effect to the year after, the county reported an increase in court appearance rates and a decrease in crimes committed by individuals released pretrial.<sup>301</sup>

While many bail reform advocates argue that all misdemeanors and non-violent felonies should be ineligible for pretrial detention, I would take this a step further. I believe that certain charges categorized as “*violent felonies*” should also be excluded, particularly when these charges have historically been weaponized to unjustly target marginalized communities.

For example, charges such as assault or resisting arrest are often applied subjectively and disproportionately against Black and brown individuals.<sup>302</sup> In many of these cases, the so-called “violence” may have occurred in the context of self-defense, mental health crises, or simply because of mischaracterized encounters with law enforcement. Professor Leigh S. Goodmark has extensively documented how survivors of gender-based violence—especially women of color, queer and trans people, and those living in poverty—are frequently criminalized for acts of self-defense or survival.<sup>303</sup> In her work on criminalized survivors, Professor Goodmark highlights how the legal system often misinterprets acts of protection or resistance as aggression, leading to assault or attempted murder charges against individuals who are, in fact, victims.<sup>304</sup>

Many of these so-called “violent” charges occur in contexts of prolonged trauma, coercive control, and systemic neglect—and yet the bail system treats them as inherently dangerous or as flight risks. Automatically

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<sup>298</sup> See 725 ILL. COMP. STAT. 5/109-1; *Cash Bail Changes - 2023 Safe-T Act*, ILL. LEGAL AID ONLINE (Oct. 5, 2025), <https://www.illinoislegalaid.org/legal-information/cash-bail-changes-2023-safe-t-act> [https://perma.cc/X2MK-4GZV].

<sup>299</sup> *Id.*

<sup>300</sup> CIR. COURT OF COOK CNTY., *Loyola Study Confirms That Bail Reforms Increase Equal Justice, Do Not Increase Crime* (Nov. 19, 2020), <https://www.cookcountycourt.org/news/loyola-study-confirms-bail-reforms-increase-equal-justice-do-not-increase-crime> [https://perma.cc/M8UL-M7BB].

<sup>301</sup> Joe Tabor, *Safe-T Act Year 1: Fewer Cook County Defendants Detained, Downstate Illinois Adjusts*, ILL. POL’Y (Sep. 17, 2024), <https://www.illinoispolicy.org/safe-t-act-year-1-fewer-cook-county-defendants-detained-downstate-illinois-adjusts/> [https://perma.cc/DK8M-M76K].

<sup>302</sup> See Robert Lewis & Noah Veltman, *Resisting Arrest in Black and White*, WNYC NEWS (Dec. 12, 2014), <https://www.wnyc.org/story/resisting-arrest-black-white/> [https://perma.cc/GLN5-QSLC].

<sup>303</sup> LEIGH S. GOODMARK, *IMPERFECT VICTIMS* (2023).

<sup>304</sup> *Id.*

excluding individuals from pretrial release based solely on the label of a “violent felony” ignores these nuances and reinforces structural inequities.

*b. Including Exceptions for Discrimination*

Additionally, legislatures should amend bail statutes that require or permit consideration of problematic factors. These amendments would create an exception for consideration of a given bail factor when the circumstances otherwise relevant to that factor arise from discrimination. For instance, if a defendant was convicted of false personation solely because of her transgender identity, this statutory exception would ensure that the criminal record factor, or at least that specific conviction, is not used against the defendant. As an example, one of Alabama’s current bail statutes states in relevant part:

In considering whether there are any conditions or combination of conditions that would reasonably ensure the defendant’s appearance in court or protect the safety of the community and of any person, the court shall consider all of the following factors: . . .

c. The history and characteristics of the defendant, including, but not limited to the defendant’s character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings, and whether, at the time of the current offense, the defendant was on probation, parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense.<sup>305</sup>

To mitigate harm, an exception could be added to such a statute with the following language: “In considering whether there are any conditions or combination of conditions that would reasonably ensure the defendant’s appearance in court or protect the safety of the community and of any person, the court shall consider all of the following factors,”<sup>306</sup> *unless any of the defendant’s individual circumstances related to the following factors are a result of bias or discrimination against a class of which the defendant is a member, in which case it shall either not be considered, or shall be considered favorably towards the defendant* (italicized for emphasis).

One might argue that the proposed exception risks being applied too broadly, as virtually all bail factors are shaped by systemic inequities that disproportionately affect marginalized individuals, not exclusively those identifying as LGBTQ. However, the application of such an exception could be narrowly tailored, requiring demonstrable evidence that the defendant’s individual circumstances are directly attributable to discrimination based on membership in a protected or historically marginalized class. For instance,

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<sup>305</sup> ALA. CODE § 15-13-3 (2022).

<sup>306</sup> *Id.*

it would be insufficient for a defendant to simply assert “I am unemployed because I am transgender.” Rather, the defendant would need to present specific evidence, such as testimony indicating that the prospective employer asked inappropriate or discriminatory questions during an interview that targeted their gender identity, to substantiate the claim of discrimination.

This amended language would help ensure that discriminatory or biased circumstances are either not unfairly used against defendants or are even used in the defendants’ favor during pretrial bail determinations.

*c. Including a Least Restrictive/Least Onerous Conditions Requirement*

Policymakers seeking to make their bail statutes more just should amend them to include language that limits the use of pretrial detention or other onerous conditions to the “*least restrictive conditions*” necessary to reasonably ensure a defendant’s return to court. The term “*least restrictive conditions*” refers to “the principle of imposing the minimum necessary conditions or limitations on a defendant’s freedom while reasonably ensuring their appearance in court and/or upholding safety to the public.”<sup>307</sup> The term “*least onerous conditions*” refers to “the requisite of imposing the least burdensome conditions on a defendant’s release to reasonably ensure their court appearance and/or uphold public safety.”<sup>308</sup>

While the definitions of the terms “*least restrictive conditions*” and “*least onerous conditions*” may differ slightly, their practical effect is the same: ensuring that pretrial conditions or detention are as minimal and non-burdensome as possible while still achieving the necessary goals of court appearance and compliance. Currently, 23 out of the 52 jurisdictions surveyed contain a “*least restrictive conditions*” requirement in their statutes.<sup>309</sup> At present, 7 out of the 52 surveyed jurisdictions include a “*least onerous conditions*” requirement.<sup>310</sup>

In the remaining 21 jurisdictions which do not include a “*least restrictive*” or “*least onerous*” standard, 20 use broader language, requiring that the conditions imposed by judges be “reasonably necessary,” “necessary to,” or “reasonably related to,” ensuring the defendant’s return to court.<sup>311</sup> This sweeping language grants courts and other pretrial decision-makers significantly more discretion, allowing them to impose conditions that may be

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<sup>307</sup> See PETIS, *supra* note 8, at 3.

<sup>308</sup> *Id.*

<sup>309</sup> These jurisdictions include Alabama, Alaska, Colorado, Connecticut, Delaware, the District of Columbia, Federal Courts, Hawaii, Illinois, Maine, Massachusetts, Missouri, Montana, Nevada, New Jersey, New Mexico, Ohio, Tennessee, Texas, Vermont, Washington, West Virginia, and Wyoming. See Appendix A for relevant laws in each jurisdiction.

<sup>310</sup> These jurisdictions include Arizona, Kentucky, Maryland, Mississippi, Nebraska, Oregon, and Rhode Island. See Appendix A for relevant laws in each jurisdiction.

<sup>311</sup> These jurisdictions include Arkansas, California, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, New Hampshire, New York, North Carolina, North Dakota, Pennsylvania, South Carolina, South Dakota, Utah, Virginia, and Wisconsin. See Appendix A for relevant laws in each jurisdiction.

inappropriate or overly restrictive of defendants' liberty. Only Oklahoma provides no direction whatsoever on the limitations of bail conditions.<sup>312</sup> Absent such clear limits, bail statutes enable excessive pretrial detention that disproportionately impacts vulnerable populations such as the LGBTQ community.

*d. Making Consideration of Problematic Bail Factors Optional*

If a jurisdiction is not ready to eliminate bail entirely, making the consideration of such bail factors optional rather than mandatory is a minimal yet meaningful amendment to bail statutes. Policymakers could effectuate this change by simply amending the relevant statutory language from “*shall* consider [insert discriminatory bail factor]” to “*may* consider [insert discriminatory bail factor]” (italicized for emphasis). While this amendment would not eliminate entirely the possibility of discrimination, it does give pretrial decision-makers the discretion to disregard them.

As Professor Gouldin suggests, an alternative or complementary strategy would be to refine certain bail factors—such as failures to appear—by making them more specific and narrowly defined.<sup>313</sup> Rather than treating all missed court dates as equal, this strategy would require courts to distinguish between willful evasion and non-appearance due to various circumstances. Narrowing the definition of this bail factor would help prevent overbroad and punitive pretrial detention decisions.

However, as with any discretionary system, this approach carries the risk of inconsistent application, potentially leading to disparate treatment of defendants. Such variability could inadvertently result in another form of discrimination, depending on how effectively or ineffectively discretion is exercised across different cases.

*e. Adding “Attempt” as an Alternative*

Another way to mitigate the harm caused by discriminatory bail factors is to incorporate language in the bail statutes that accounts for a defendant's efforts, successful or not, to meet the conditions required by these factors. For example, in jurisdictions where bail statutes consider whether a defendant has stable housing, an amendment could allow defendants to receive the same favorable consideration from the judge if they have been actively working to secure stable housing (and have not yet done so). This approach acknowledges and credits defendants' efforts, rather than penalizing them for circumstances often beyond their control. This principle could be extended to a bevy of other factors, such as community ties, housing or residence, employment, education, mental health care, and substance abuse treatment. By recognizing proactive efforts in these areas, courts can make

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<sup>312</sup> OKLA. STAT. tit. 22, § 1105 (2021).

<sup>313</sup> See Gouldin, *supra* note 176, at 687.

more equitable determinations that reflect a defendant's circumstances and intent.

One could argue that housing stability and other bail factors are not primarily intended to reward individuals who express a willingness to return to court, but rather to serve as mechanisms that increase the likelihood of their actual return. Nonetheless, from a justice-oriented perspective, it is necessary to acknowledge and accept a degree of risk. While intent may not be a perfect predictor of future compliance, it remains a meaningful and practically useful proxy in assessing the likelihood of a defendant's return to court.

However, this approach may be challenging to apply to certain bail factors, such as family ties, criminal history, prior failures to appear, and the nature of the charges and likely sentence, as these factors are typically more static or at least less subject to improvement through individual effort. Nonetheless, implementing this statutory change where applicable could reduce the discriminatory impact created by consideration of certain bail factors.

This recommendation could also present significant challenges, as it forces the victims of discrimination to subject themselves to further harm to show that they are actively trying to meet the conditions required by a given factor. For instance, consider a Black transgender woman who has been consistently applying for jobs but faces repeated rejections due to transphobia from potential employers. Under this amendment, she would still be expected to continue her efforts, even though doing so would expose her to ongoing discrimination and trauma.

While some individuals in such situations may have the resilience to persist in their job searches, others may understandably choose not to endure further distress. It is crucial to recognize that this choice is both reasonable and valid. Penalizing individuals for prioritizing their well-being over continuing a potentially harmful effort perpetuates injustice and fails to address the root causes of their challenges. Any policy change or amendment must carefully consider these nuances to avoid inadvertently exacerbating the harm it seeks to mitigate.

*f. Adding a Requirement that Judges Articulate and Consider the Potential Individualized Harm of Incarceration*

A powerful amendment to bail statutes would require that pretrial detention decision-makers—most often judges—articulate and thoughtfully consider the potential individualized impact of incarceration on the defendant. The following is draft language jurisdictions should consider using in such amendments: “Before ordering pretrial detention, the court shall articulate on the record the potential individualized impact of incarceration on the defendant, including but not limited to: physical health risks; disruption of employment, housing, education, or caretaking obligations; heightened vulnerability due to their age, health, disability, gender identity, gender

expression, sexual orientation, or other identity; and potential exposure to violence while in custody.”

In March 2018, Philadelphia’s progressive prosecutor Larry Krasner issued a memorandum to his staff at the Philadelphia District Attorney’s Office, requiring Assistant District Attorneys making sentencing recommendations to “calculate the cost of that imprisonment (an estimated \$42,000 per inmate per year), state it aloud in court, and explain the ‘unique benefits’ of the punishment.”<sup>314</sup> I remember reflecting on the potentially transformative impact of this practice at the time it was announced. So much of the harm caused by the criminal legal system persists because people simply do not see it. When someone is about to be sentenced, the stakes are incredibly high—often everything they have worked for their entire lives is on the line. Practices such as Krasner’s add an additional step before those individuals lose what is at stake. They introduce a rare pause for intentionality in a process that often feels mechanical and detached.

Larry Krasner’s approach did not require judges or prosecutors to articulate and consider the potential harm to the defendant, but it did require prosecutors to articulate the financial cost of incarcerating the defendant. By forcing prosecutors and judges to confront the stark financial costs of incarceration, his directive introduced a moment of reckoning: “*Is this worth it?*” It served as a small but impactful disruption in the mechanics of mass incarceration.

My proposed amendment aims to create a similar pause for judges during pretrial decisions. By requiring them to explicitly consider and articulate the individualized harm incarceration could cause, it forces these judges to engage in a moment of reflection: “*Is it worth it?*” Such a requirement therefore has the potential to inject humanity and critical thinking into a system often driven by routine and repetition, ultimately fostering more thoughtful and equitable outcomes.

#### 6. *Cautionary Note on Pretrial Algorithms and Risk Assessment Tools*

Although algorithmic risk assessment tools are often promoted as neutral alternatives to human discretion in bail determinations, scholars have shown that these systems frequently reproduce the very biases they are designed to eliminate.<sup>315</sup> As Professor Sandra G. Mayson argues in *Bias In*,

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<sup>314</sup> Jennifer Gonnerman, *Larry Krasner’s Campaign to End Mass Incarceration*, NEW YORKER (Oct. 22, 2018), <https://www.newyorker.com/magazine/2018/10/29/larry-krasners-campaign-to-end-mass-incarceration> [<https://perma.cc/LJ7D-Y2U9>].

<sup>315</sup> See Nicol Turner Lee, Paul Resnick & Genie Barton, *Algorithmic Bias Detection and Mitigation: Best Practices and Policies to Reduce Consumer Harms*, BROOKINGS (2025), <https://www.brookings.edu/articles/algorithmic-bias-detection-and-mitigation-best-practices-and-policies-to-reduce-consumer-harms/> [<https://perma.cc/2P98-9Z4Z>]; Molly Glass, *Algorithms Were Supposed to Reduce Bias in Criminal Justice—Do They?*, BOSTON UNIV. (2025), <https://www>.

*Bias Out*, predictive algorithms do not operate in a vacuum; they are trained on historical data generated by deeply discriminatory systems.<sup>316</sup> Thus, any patterns of over-policing, prosecutorial discretion, or judicial decision-making that disproportionately targeted marginalized populations are effectively encoded into the algorithms themselves.<sup>317</sup> Professor Ngozi Okidegbe similarly cautions against the myth of algorithmic objectivity, contending that these tools often obscure the operation of structural inequality by dressing up biased outputs in the language of scientific neutrality.<sup>318</sup>

While much of the existing research and scholarship centers on racial bias, it is critical to extend this critique to LGBTQ individuals, who also have a documented history of disproportionate and discriminatory contact with the criminal legal system. The data used to train these tools likely reflects, for example, patterns of policing that target LGBTQ people, higher rates of homelessness or unemployment due to discrimination, and prior failures to appear stemming from fear of mistreatment. As such, algorithmic pretrial tools may not only fail to correct existing inequities—they risk codifying and perpetuating them under the guise of fairness. A truly equitable approach to pretrial justice must reckon with the historical and ongoing marginalization of LGBTQ individuals rather than allowing it to be silently embedded in algorithmic decisions.

#### IV. CONCLUSION

My hope is that this Article will serve as a catalyst for reforming—and ultimately ending—the American pretrial detention system, which causes significant harm to defendants and perpetuates particularly acute inequity for LGBTQ people. The criminal legal system’s disproportionate impact on the LGBTQ community is not a new phenomenon. Indeed, it has been a defining aspect of the community’s oppression throughout history.

This Article, while the first legal article to analyze the specific impact of our pretrial detention system on LGBTQ people, addresses only one aspect of the broader injustices inflicted by the criminal legal system on this community. The harms caused by the pretrial detention system are emblematic of a much larger pattern of discrimination and systemic oppression that touches every stage of the criminal legal process.

Even so, the impact of pretrial detention is profound. It is widely recognized as one of the most important factors influencing the trajectory and

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bu.edu/articles/2023/do-algorithms-reduce-bias-in-criminal-justice/ [https://perma.cc/56YR-7PX4]; Sarah Picard, Matt Watkins, Michael Rempel & Ashmini Kerodal, *Beyond the Algorithm: Pretrial Reform, Risk Assessment, and Racial Fairness*, CTR. FOR COURT INNOVATION (2025), [https://www.innovatingjustice.org/wp-content/uploads/2019/07/Beyond\\_The\\_Algorithm.pdf](https://www.innovatingjustice.org/wp-content/uploads/2019/07/Beyond_The_Algorithm.pdf) [https://perma.cc/LNT6-KXQ5].

<sup>316</sup> See Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2263-67 (2019).

<sup>317</sup> *Id.*

<sup>318</sup> See Ngozi Okidegbe, *Discredited Data*, 107 CORNELL L. REV. 2007, 2018-20 (2022).

outcome of a criminal case.<sup>319</sup> The consequences of that outcome then ripple across every facet of a person's life, leaving lasting scars. For LGBTQ people, these consequences are only magnified, and make the need for reform all the more urgent.

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<sup>319</sup> See Dobbie et al., *supra* note 34.

## V. APPENDIX A

**Table 1: Which bail factors are considered by each jurisdiction?**

	<b>Family Ties</b>	<b>Residence</b>	<b>Employment</b>	<b>Crim. Record</b>	<b>Failure to Appear</b>	<b>Substance Use</b>	<b>Mental Health</b>
<b>Alabama</b> Ala. Code § 15-13-3; Ala. R. Crim. P. 7.2.	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>Alaska</b> Alaska Stat. § 12.30.011.	Yes	Yes	Yes	Yes	Yes	No	Yes
<b>Arizona</b> Ariz. Rev. Stat. § 13-3967; Ariz. R. Crim. P. 7.2.	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>Arkansas</b> Ark. R. Crim. P. 9.2; Ark. R. Crim. P. 8.5.	Yes	Yes	Yes	Yes	Yes	No	Yes
<b>California</b> Cal. Penal Code § 1275; Cal. Penal Code § 1318.1.	No	Yes	No	Yes	Yes	Considered for condition of release	No
<b>Colorado</b> Colo. Rev. Stat. § 16-4-103.	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>Connecticut</b> Conn. Gen. Stat. § 54-63b.	Yes	No	Yes	Yes	Yes	No	Yes
<b>Delaware</b> 11 Del. Code § 2105.	Yes	Yes	Yes	Yes	Yes	No	Yes
<b>Florida</b> Fla. Stat. § 903.046; Fla. R. Crim. P. 3.131.	Yes	Yes	Yes	Yes	Yes	No	Yes
<b>Georgia</b> Ga. Code Ann. § 17-6-1.	Catchall for "any other factor"	Catchall for "any other factor"	Catchall for "any other factor"	Catchall for "any other factor"	Catchall for "any other factor"	Catchall for "any other factor"	Catchall for "any other factor," and considered via caselaw

	<b>Family Ties</b>	<b>Residence</b>	<b>Employment</b>	<b>Crim. Record</b>	<b>Failure to Appear</b>	<b>Substance Use</b>	<b>Mental Health</b>
<b>Hawaii</b> Haw. Rev. Stat. § 804-9; Haw. Rev. Stat. § 804-9.5.	Yes	Yes	Yes	Yes	Yes	No	Yes
<b>Idaho</b> Id. R. Crim. P. 46.	Yes	Yes	Yes	Yes	Yes	No	Yes
<b>Illinois</b> 725 Ill. Comp. Stat. § 5/110-6.1; 725 Ill. Comp. Stat. § 5/110-5.	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>Indiana</b> Ind. R. Crim. P. 2.6; Ind. Code Ann. § 35-33-8-3.8.	Yes, via caselaw	Yes, via caselaw	Yes, via caselaw	Yes, via caselaw	Catchall for "other relevant factors"	Catchall for "other relevant factors"	Catchall for "other relevant factors"
<b>Iowa</b> Iowa Code § 811.2.	Yes	Yes	Yes	Yes	Yes	No	Yes
<b>Kansas</b> Kan. Stat. Ann. § 22-2802.	Yes	Yes	Yes	Yes	Yes	No	Yes
<b>Kentucky</b> Ky. Rev. Stat. Ann. § 431.520; Ky. R. Crim. P. 4.16; Ky. Rev. Stat. Ann. § 431.525.	"Marital status" considered via caselaw	Yes, via caselaw	Yes, via caselaw	Yes	Catchall for "reasonably anticipated conduct"	Considered for condition of release	Yes
<b>Louisiana</b> La. Code Crim. Proc. Ann. Art. 316; La. Code Crim. Proc. Ann. Art. 320.	Catchall for "any other circumstances"	Catchall for "any other circumstances"	Catchall for "any other circumstances"	Yes	Catchall for "any other circumstances"	Yes	Catchall for "any other circumstances"
<b>Maine</b> Me. Stat. tit. 15, § 1026.	Yes	Yes	Yes	Yes	Yes	No	Yes

	<b>Family Ties</b>	<b>Residence</b>	<b>Employment</b>	<b>Crim. Record</b>	<b>Failure to Appear</b>	<b>Substance Use</b>	<b>Mental Health</b>
<b>Maryland</b> Md. Code Ann., Crim. Proc. § 4-216.1.	Yes	Yes	Yes	Yes	Yes	No	Yes
<b>Massachusetts</b> Mass. Gen. Laws ch. 276, § 57; Mass. Gen. Laws ch. 276, § 58; Mass. Gen. Laws ch. 276, § 58A.	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>Michigan</b> Mich. Comp. Laws Serv. § 6.106; Mich. Comp. Laws Serv. § 765.6.	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>Minnesota</b> Minn. R. Crim. P. 6.02.	Yes	Yes	Yes	Yes	Yes	Considered via caselaw	Yes
<b>Mississippi</b> Miss. Code Ann. § 99-5-11.	Yes	Yes	Yes	Yes	Yes	Catchall for “any other factors”	Yes
<b>Missouri</b> Mo. Sup. Ct. R. 33.01; Mo. Rev. Stat. § 544.453.	Yes	Yes	Yes	Yes	Yes	No	Yes
<b>Montana</b> Mont. Code Ann. § 46-9-301; Mont. Code Ann. § 46-9-109.	Yes	Yes	Yes	Yes	Considered via caselaw	Considered via caselaw	Yes
<b>Nebraska</b> Neb. Rev. Stat. § 29-901.01.	Yes	Yes	Yes	Yes	Yes	No	Yes
<b>Nevada</b> Nev. Rev. Stat. Ann. § 178.4853; Nev. Rev. Stat. Ann. § 178.498.	Yes	Yes	Yes	Yes	Yes	Catchall for “any other factors”	Yes



	<b>Family Ties</b>	<b>Residence</b>	<b>Employment</b>	<b>Crim. Record</b>	<b>Failure to Appear</b>	<b>Substance Use</b>	<b>Mental Health</b>
<b>Rhode Island</b> R.I. Super. R. Crim. P. 46; 12 R.I. Gen. Laws § 12-13-1.3.	Yes	Catchall for “any other factors”	Yes	Yes	Yes	Catchall for “any other... condition”	Yes
<b>South Carolina</b> S.C. Code Ann. § 17-15-30; S.C. Code Ann. § 22-5-510.	<i>May</i> consider	<i>May</i> consider	<i>May</i> consider	Yes	<i>May</i> consider	No	<i>May</i> consider
<b>South Dakota</b> S.D. Codified Laws § 23A-43-4.	Yes	Yes	Yes	Yes	Yes	No	Yes
<b>Tennessee</b> Tenn. Code Ann. § 40-11-115; Tenn. Code Ann. § 40-11-118.	Considered for bail amount, but not release	Yes	Yes	Yes	Yes	Yes	Yes
<b>Texas</b> Tex. Code Crim. Proc. Ann. art.17.15.	Considered via caselaw	Considered via caselaw	Considered via caselaw	Yes	Yes	No	Caselaw is split on consideration
<b>Utah</b> Utah Code Ann. § 77-20-205; Utah Code Ann. § 77-20-202.	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>Vermont</b> Vt. Stat. Ann. tit. 13, § 7554c; Vt. Stat. Ann. tit. 13, § 7554.	Yes	Yes	Yes	Yes	Yes	Yes, via caselaw	Yes
<b>Virginia</b> Va. Code Ann. § 19.2-120; Va. Code Ann. § 19.2-121.	Yes	Yes	Yes	Yes	Yes	Catchall for “all relevant information”	Yes

	<b>Family Ties</b>	<b>Residence</b>	<b>Employment</b>	<b>Crim. Record</b>	<b>Failure to Appear</b>	<b>Substance Use</b>	<b>Mental Health</b>
<b>Washington</b> Wash. Super. Ct. Crim. R. 3.2; Wash. Rev. Code Ann. § 10.21.050.	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>Washington, D.C.</b> D.C. Code § 23-1303; D.C. Code § 23-1322.	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>West Virginia</b> W. Va. Code § 62-1C-1a.	No	Yes	Not considered as a bail factor, but as a condition of release	Yes	Yes	Not considered as a bail factor, but as a condition of release	Yes
<b>Wisconsin</b> Wis. Stat. § 969.01; Wis. Const. art. I, § 8.	No	Yes	No	Yes	Yes	Not considered as a bail factor, but as a condition of release	Yes
<b>Wyoming</b> Wyo. R. Cr. P. 46.1.	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>Federal</b> 18 U.S.C. § 3141; 18 U.S.C. § 3142.	Yes	Yes	Yes	Yes	Yes	Yes	Yes

<sup>[1]</sup> New Hampshire amended its bail statute in 2019 to say that homelessness in and of itself cannot be used to determine “dangerousness.”

<sup>[2]</sup> North Carolina considers “whether the defendant is intoxicated to such a degree that he would be endangered by being released without supervision.”

