Children of Incarcerated Caregivers

FEDERAL PRETRIAL TOOLKIT



FEDERAL SENTENCING TOOLKIT

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Who We Are

Children of Incarcerated Caregivers (CIC) advocates for laws, policies, and programs that support the best interests of minor children with parents involved in the criminal legal system. This summary demonstrates how courts can and should consider the impact on a defendant's children when the parent is facing pretrial detention. CIC recognizes that not every parent will be eligible for pretrial release and that it won't always be in a child's best interest to have their parent in the community. However, in the cases where imposing a community-based alternative to detention is within a judge's discretion and serves the best interests of the defendant's child/children, the information below provides a legal framework and social rationale for those decisions. CIC believes, and the research shows, that community-based alternatives to detention can support the needs of children while also benefiting society as a whole.

Introduction

This resource provides an overview of the law governing pretrial release in the federal criminal legal system and the relevance of family ties to the decision to detain a defendant pretrial.

The Bail Reform Act establishes a presumption of pretrial release that can only be overcome by a finding that no conditions would reasonably assure the appearance of the defendant or protect public safety. This finding must be made even in the select cases where presumption is flipped to a presumption of detention. Courts may only impose pretrial detention after an adversarial hearing where this finding is made, after a consideration of all relevant statutory factors, including family ties. In addition to the statutory mandate of the consideration of family ties, relevant research makes clear that caregiving responsibility decreases a defendant's risk of re-offending. Further, caregiving responsibility can increase a defendant's compliance with conditions, thus mitigating the possibility that pretrial detention is necessary to protect public safety or assure appearance. Research also makes clear that the incarceration of a parent is a traumatic event for a child and is classified as an Adverse Childhood Experience that can cause lasting harm into adulthood. Thus, in many cases, the pretrial detention of a caregiver may actually be harmful to the community, a harm that is caused by the incarceration of a legally innocent person. The presumption of innocence is the foundation of our criminal legal system and should always be taken into account at pretrial detention hearings, along with the constitutional limits on the bail amount. Recognizing these harms and constitutional principles, jurisdictions around the country, and the world, have begun to reform their pretrial detention policies in favor of pretrial release.

Explaining this law, research, and policy in more detail, this primer will (1) summarize the research indicating that parental responsibility increase a defendant's chance of success on pretrial release and the research on the harms of parental incarceration both generally and at the pretrial stage; (2) provide a detailed overview of the Bail Reform Act, the presumption of release, and federal detention hearings; (3) discuss how the research fits into the law and constitutional policies; and (4) provide an overview of the national and international movement towards more opportunities for pretrial release.

Parental Incarceration and Family Circumstances

The consequences of contact with the criminal legal system extend far beyond those who experience it firsthand. Incarceration produces traumatic ripple effects for the children and family members of incarcerated individuals, and these impacts may reverberate across generations.[1] Children of incarcerated parents are "hidden victims" of the criminal legal system and "collateral consequences" of criminal convictions.[2]

Specifically, the impacts of parental incarceration are significant, in part, because they are widespread and result in significant harm to criminal defendants' children and other family members. Parental incarceration is increasingly prevalent in the United States. Furthermore, parental incarceration adversely affects children and is associated with negative mental health experiences; behavioral issues, delinquency, and criminal conduct; substance abuse and other high-risk behaviors; negative physical health outcomes and limited healthcare access; inhibited educational readiness and attainment; social disadvantages and economic harms; displacement, homelife disruption, and impacts on relationships with peers and community engagement; and child parentification.

Moreover, family circumstances are relevant to a criminal defendant's recidivism risk and likelihood of rehabilitation and success in the community. Family circumstances protect

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[1] Abigail J. Anderson, Christopher C. Henrich & Sylvie Mrug, *Paternal Incarceration and Adolescent Delinquency: Role of Father Engagement and Early Child Behavior Problems*, 25 OFF. J. SOC'Y FOR PREVENTION RSCH. 1228, 1229 (2024), https://doi.org/10.1007/s11121-024-01734-2; Kristin Turney, *Stress Proliferation Across Generations? Examining the Relationship Between Parental Incarceration and Childhood Health*, 55 J. HEALTH & SOC. BEHAV. 302, 312–16 (2014), https://doi.org/10.1177/0022146514544173.

[2] PARTNERS FOR JUST., GENERATIONAL HARM: INCARCERATION'S IMPACT ON CHILDREN AND FAMILIES 1 (Mar. 2023), https://www.partnersforjustice.org/evidence/generational-harm (noting how children represent the legal system's "hidden victims"); Isabel Coronado, *We Are Not Collateral Consequences: Children of Incarcerated Parents*, NEXT100: CRIM. JUST. (Feb. 10, 2020), https://thenext100.org/we-are-not-collateral-consequences-children-of-incarcerated-parents/ ("Children are often thought of as collateral consequences to our parents' incarceration.").

criminal defendants against reoffending and provide a basis for motivation to change. Both actual and potential familial ties can support criminal defendants' success following their convictions.

Apart from superficial references to the unfortunate impact of incarceration on families and communities, the details of these effects are not often known, appreciated, or considered.

Parental Incarceration in the United States

Parental incarceration is no longer uncommon in the United States.[3] Over five million children in the United States have experienced the detention or incarceration of a parent at some point during their childhood.[4] By high school, one in seven students has experienced the detention or incarceration of a parent or guardian.[5] More than 220 thousand minor children have a parent in federal prison.[6] More than half of incarcerated individuals in federal prisons are parents to at least one minor child.[7] Approximately 13 percent of minor children with a parent in federal prison are under four years old, and around 20 percent are between 15 and 17 years old.[8] The average age of minor children with a parent in federal prison is 10 years old.[9] Considering how parental incarceration is highly prevalent in the United States, understanding the effects of the criminal legal system on criminal defendants' family members and specifically, their children, is paramount.

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[3] Julie Poehlmann-Tynan & Kristin Turney, *A Developmental Perspective on Children With Incarcerated Parents*, 15 CHILD DEVELOPMENT PERSPECTIVES 3, 3 (2021), https://doi.org/10.1111/cdep.12392.
[4] The Annie E. Casey Found., A Shared Sentence 2 (2016), https://assets.aecf.org/m/resourcedoc/aecf-asharedsentence-2016.pdf (estimating 5.1 million children); Nazgol Ghandnoosh, Emma Stammen & Kevin Muhitch, The Sent'g Project, Parents in Prison 1 (2021), https://www.sentencingproject.org/app/uploads/2022/09/Parents-in-Prison.pdf (estimating 5.2 million children).
[5] Elizabeth A. Swedo et al., Adverse Childhood Experiences and Health Conditions and Risk Behaviors Among High School Students—Youth Risk Behavior Survey, United States, 2023, 73 MORB. & MORTAL. WKLY. REP. 39, 46 (2024), http://dx.doi.org/10.15585/mmwr.su7304a5.
[6] Laura M. Maruschak, Jennifer Bronson & Mariel Alper, U.S. Dep't of Just., Bureau of Justice Statistics, Survey of Prison Inmates, 2016: Parents in Prison and Their Minor Children 2 (2021), https://bjs.ojp.gov/content/pub/pdf/pptmcspi16st.pdf.
[7] *Id.* at 1.
[8] *Id.* at 2.
[9] Id.

Harmful Impacts of Parental Incarceration

Parental incarceration is considered an Adverse Childhood Experience (ACE).[10] ACEs are potential traumatic events that occur in childhood and are known to affect well-being into adulthood.[11] Even if the incarceration occurs prior to early childhood, parental incarceration can have long-term adverse impacts on children.[12] Additionally, because women generally fulfill the role of primary caregiver, maternal incarceration can be especially harmful.[13] The extent of the harm caused by parental incarceration significantly depends on the children's current caregiver maintaining a relationship with the incarcerated parent.[14] When the relationship between the caregiver and the incarcerated parent is incongruous, children have an increased risk of aggression, anxiety, withdrawal, and poor social competence.[15]

Parental incarceration can have negative impacts in the following areas:

- **Mental Health:**
    - Children who live with a parent or caregiver who is subsequently incarcerated are especially vulnerable to experiencing "traumatic separation," which refers to the intense psychological distress a child undergoes specifically within the context of incarceration and is unique compared to other child trauma experiences characterized by ambiguity, uncertainty, and loss of a parent.[16] Even the incarceration of a nonresident parent may cause the child to experience traumatic separation.[17]

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[10] Centers for Disease Control and Prevention, *Preventing Adverse Childhood Experiences (ACEs): Leveraging the Best Available Evidence* 7, National Center for Injury Prevention and Control (2019), https://www.cdc.gov/violenceprevention/pdf/preventingACES.pdf.
[11] Id.
[12] Anderson, Henrich, & Mrug, *supra* note 1, at 1229.
[13] Joyce A. Arditti, Family Process Perspective on the Heterogeneous Effects of Maternal Incarceration on Child Wellbeing: The Trouble with Differences, 14 CRIMINOLOGY & PUB. POL'Y 169, 170 (2015), https://doi.org/10.1111/1745-9133.12117.
[14] *Cf. id.* at 146–48, 157.
[15] Ann Booker Loper & Caitlin Novero Clarke, Attachment Representations of Imprisoned Mothers as Related to Child Contact and the Caregiving Alliance: The Moderating Effect of Children's Placement with Maternal Grandmothers, 78 MONOGRAPHS SOC'Y RSCH. CHILD DEV. 41, 55 (2013), https://doi.org/10.1111/mono.12020.
[16] Joyce A. Arditti, *Child Trauma Within the Context of Parental Incarceration: A Family Process Perspective*, 4 J. FAM. THEORY & REV. 181, 195 (2012), https://doi.org/10.1111/j.1756-2589.2012.00128.x.
[17] Id.

- Parental incarceration increases a child's risk of depression, post-traumatic stress disorder, anxiety,[18] internalizing symptoms, self-injury, suicidal ideation, suicide attempts,[19] and antisocial problems.[20] Maternal incarceration, specifically, is also associated with high-risk behaviors including having sex for money[21] and self-harm.[22] One study found that the incarceration of a household member in childhood increased the likelihood of that child's later suicide attempt by 50 percent.[23]
- Parental incarceration is associated with the child having learning disabilities, ADD/ADHD, developmental delays, and speech or language problems, which are conditions some researchers believe are related to stress.[24]

- **Behavioral Issues and Contact with Criminal Legal System:**

  - Parental incarceration is correlated with an increased risk of physical aggression, attention problems, behavioral problems and school punishments, rule-breaking, all of which can come with an increased risk of arrest for children with an incarcerated parent.[25]

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[18] Rosalyn D. Lee, Xiangming Fang & Feijun Luo, The Impact of Parental Incarceration on the Physical and Mental Health of Young Adults, 131 PEDIATRICS 1188, 1191 (2013).
[19] Laurel Davis & Rebecca J. Shlafer, *Mental Health of Adolescents with Currently and Formerly Incarcerated Parents*, 54 J. OF ADOLESCENCE 120, 120–34 (2017).
[20] Joseph Murray & David P. Farrington, Parental Imprisonment: Effects on Boys' Antisocial Behaviour and Delinquency Through the Life-Course, 46 J. CHILD PSYCOL. & PSYCHIATRY 1269, 1269–78 (2005).
[21] Nia Heard-Garris et al., *Health Care Use and Health Behaviors Among Young Adults With History of Parental Incarceration*, 142 PEDIATRICS e20174314 (2018), https://publications.aap.org/pediatrics/article/142/3/e20174314/38619/Health-Care-Use-and-HealthBehaviors-Among-Young.
[22] Craig Cumming et al., *Maternal Incarceration Increases the Risk of Self-Harm but not Suicide: A Matched Cohort Study*, 32 EPIDEMIOLOGY & PSYCH. SCI. e33 (2023),https://pmc.ncbi.nlm.nih.gov/articles/PMC10227533/.
[23] Melissa T. Merrick et al., Unpacking the Impact of Adverse Childhood Experiences on Adult Mental Health, 69 CHILD ABUSE & NEGLECT 10, 10–19 (2017).
[24] Turney, *supra* note 1, at 311, 313–14.
[25] See Amanda Geller et al., Beyond Absenteeism: Father Incarceration and Child Development, 49 DEMOGRAPHY 49, 65–66 (2012); Wade C. Jacobsen, The Intergenerational Stability of Punishment: Paternal Incarceration and Suspension or Expulsion in Elementary School, J. RES. CRIME & DELINQ. (2019); SARA WAKEFIELD & CHRISTOPHER WILDEMAN, CHILDREN OF THE PRISON BOOM: MASS INCARCERATION AND THE FUTURE OF AMERICAN INEQUALITY (2014); Christopher Wildeman, Paternal Incarceration and Children's Physically

- Parental incarceration can also increase a child's risk of contact with the criminal legal system into adulthood[26] and is a risk factor for teen delinquency.[27]
    - Specifically, parental incarceration increased the risk of delinquency related to "violent, destructive, or aggressive behavior" more than "offending that has the potential to result in monetary gain."[28]
    - Children impacted by paternal incarceration are more likely to have early behavior problems, which subsequently poses a greater risk for teen delinquency.[29] At least one study has found that children of incarcerated mothers are more likely to be incarcerated as adults than children of incarcerated fathers.[30]
        - Children impacted by paternal incarceration are at an increased risk of arrest by age 25 and an increased risk of delinquent behavior in adolescence and young adulthood.[31] Moreover, the experience of maternal incarceration during childhood increased the odds of adult probation placement by 400 percent and the odds of having a criminal conviction by nearly 300 percent.[32]

Aggressive Behaviors: Evidence from the Fragile Families and Child Wellbeing Study, 89 SOC. FORCES 285, 285–309 (2010).

[26] Beth M. Huebner & Regan Gustafson, The Effect of Maternal Incarceration on Adult Offspring Involvement in the Criminal Justice System, 35 J. CRIM. JUST. 283, 283–96 (2007); Michael Roettger et al., Paternal Incarceration and Trajectories of Marijuana and Other Illegal Drug Use From Adolescence Into Young Adulthood: Evidence From Longitudinal Panels of Males and Females in the United States, 106 ADDICTION 121, 121–32 (2011).

[27] Lauren C. Porter & Ryan D. King, *Absent Fathers or Absent Variables? A New Look at Paternal Incarceration and Delinquency*, 52 J. RSCH. CRIME & DELINQ. 414, 433 (2015), https://doi.org/10.1177/0022427814552080.

[28] Id.

[29] Children whose fathers were incarcerated prior to their first year of life had increased behavior problems by age 5. Anderson, Henrich, & Mrug, *supra* note 1, at 1234.

[30] Danielle H. Dallaire*, Incarcerated Mothers and Fathers: A Comparison of Risks for Children and Families*, 56 FAM. RELS.: INTERDISC. J. APPLIED FAM. SCI. 440, 448 (2007), https://doi.org/10.1111/j.1741-3729.2007.00472.x.

[31] Michael E Roettger & Raymond R. Swisher, Associations of Fathers' History of Incarceration with Sons' Delinquency and Arrest Among Black, White, and Hispanic Males in the United States, 49 CRIMINOLOGY 1109, 1110 (2011), https://doi.org/10.1111/j.1745-9125.2011.00253.x.

[32] Huebner & Gustafson, *supra* note 26, at 283–96.

        - Parental incarceration causes emotional stress, acting out in response to other adverse experiences, and weakened parental attachment, all of which only further increase risk of teen delinquency.[33]
        - Children impacted by parental incarceration are at a greater risk of offending.[34]
        - Children impacted by parental incarceration who have low emotional independence are particularly more likely to engage in criminal activity as young adults.[35]
        - Parental incarceration is associated with child internalization of negative labels, such as being a troublemaker/partier. Children impacted by parental incarceration are more likely to experience this labelling, as well as more likely to perceive others as labelling them. Internalization of negative labels is associated with young adults' offending.[36]
    - Parental incarceration is also linked to more reported violence, anger, and rule violations than other incarcerated individuals.[37]
        - For children who experience parental incarceration and are subsequently incarcerated, their adjustment to incarceration is worse than other incarcerated individuals, as they reportedly experience more prison violence, anger, and rule violations.[38]

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[33] Porter & King, *supra* note 27.
[34] Vanessa Goodwin & Brent Davis, Australian Inst. Criminology, Crime Families: Gender and the Intergenerational Transfer of Criminal Tendencies 5 (2011), https://www.aic.gov.au/sites/default/files/2020-05/tandi414.pdf.
[35] Jessica G. Finkeldey et al., *An Exploratory Investigation of Parental Incarceration, Emotional Independence, and Adult Children's Criminal Activity*, 7 J. DEVELOPMENTAL & LIFE-COURSE CRIMINOLOGY 151, 167 (2021), https://doi.org/10.1007/s40865-021-00164-w [hereinafter "Finkeldey et al. (2021)"]; *see also* Jessica G. Finkeldey et al., *Identifying as a Troublemaker/Partier: The Influence of Parental Incarceration and Emotional Independence*, 29 J. CHILD & FAM. STUD. 802, 813 (2020), https://doi.org/10.1007/s10826-019-01561-y [hereinafter "Finkeldey et al. (2020)].
[36] Finkeldey et al. (2021), *supra* note 27, at 84.
[37] Caitlin M. Novero, Ann Booker Loper & Janet I. Warren, *Second-Generation Prisoners: Adjustment Patterns for Inmates with a History of Parental Incarceration*, 38 CRIM. JUST. & BEHAV. 761, 761–78 (2011).
[38] Id.

- **Substance-Abuse and High-Risk Behaviors:**

    - Young adults who have experienced parental incarceration can have an increased risk of substance-abuse issues, including cigarette smoking, alcohol abuse, and prescription drug abuse.[39]
    - Children who experience paternal incarceration are more likely to report using illegal drugs during their transition from adolescence to adulthood.[40]
    - Maternal incarceration is associated with high-risk behaviors including having sex in exchange for money.[41]

- **Physical Health Concerns:**

    - Recent parental incarceration is associated with a nearly 50% increase in early infant mortality.[42]
    - Parental incarceration is associated with increased risk of high cholesterol, asthma, migraines, HIV/AIDS, poor health,[43] obesogenic behaviors, drinking sugary drinks, smoking cigarettes, and having 10 or more sexual partners.[44]
    - Parental incarceration is associated with a doubled likelihood of children utilizing emergency room services rather than primary care and an increased risk of foregoing healthcare overall.[45]
    - Children of incarcerated parents are more likely to experience fair or poor overall health and a range of physical health conditions.[46]

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[39] Id.
[40] Roettger et al., *supra* note 26, at 121–32.
[41] Heard-Garris et al., supra note 21; see also N. Heard-Garris et al., Heard-Garris N, Winkelman TNA, Choi H, et al. Health Care Use and Health Behaviors Among Young Adults With History of Parental Incarceration. Pediatrics. 2018;142(3):e20174314, 143 Pediatrics e20190534 (2019), https://doi.org/10.1542/peds.2019-0534 [hereinafter "Heard-Garris et al., Correction"].
[42] Wakefield & Wildeman, *supra* note 25.
[43] Lee, Fang, & Luo, *supra* note 18, at 1191; Holly Ventura Miller & J.C. Barnes, *The Association Between Parental Incarceration and Health, Education, and Economic Outcomes in Young Adulthood*, 40 AM. J. CRIM. JUST. 765, 765–84 (2015).
[44] Heard-Garris et al., *supra* note 21.
[45] Id.
[46] Turney, *supra* note 1, at 314–15.

- Women who experienced parental incarceration have higher Body Mass Indexes than women who did not.[47]

- **Education:**

  - Parental incarceration can negatively impact educational readiness and attainment. One in three adults in the United States with less than a high school degree has experienced parental incarceration.[48] Parental incarceration is also associated with decreased education attainment in emergent adulthood, as well as significantly lower GPAs, lower levels of education achieved, lower levels of college completion,[49] more grade retention and high school dropout,[50] and greater unhappiness in school than peers.[51]
  - Paternal incarceration, in particular, is associated with decreased likelihood of college graduation and lower personal satisfaction with academic achievement, as children who have experienced paternal incarceration have a reduced likelihood of graduating from college as a young adult by 46 percent

[47] Michael E. Roettger & Jason D. Boardman, Parental Incarceration and Gender-Based Risks for Increased Body Mass Index: Evidence from the National Longitudinal Study of Adolescent Health in the United States, 175 J. EPIDEMIOLOGY 636, 636–44 (2012); see also Hedwig Lee et al., A Heavy Burden: The Cardiovascular Health Consequences of Having a Family Member Incarcerated, 104 AM. J. PUB. HEALTH 421, 421–27 (2014) (finding that the experience of family incarceration increases the likelihood of female obesity by 44 percent; increases the odds of women reporting poor or fair health by 200 percent; and the chances of heart attack or stroke for women with currently incarcerated family members is two-and-a-half times greater than women without currently incarcerated family members).
[48] Peter K. Enns et al., What Percentage of Americans Have Ever Had a Family Member Incarcerated?: Evidence from the Family History of Incarceration Survey (FamHIS), 5 SOCIUS: SOC. RES. DYNAMIC WORLD 1-45 (2019).
[49] Holly Foster & John Hagan, The Mass Incarceration of Parents in America: Issues of Race/Ethnicity, Collateral Damage to Children, and Prisoner Reentry, 623 ANNALS AM. ACAD. POL. & SOC. SCIENCE 179, 179–94 (2009); John Hagan & Holly Foster, Intergenerational Educational Effects of Mass Imprisonment in America, 85 SOC. EDUC. 259, 259–86 (2012).
[50] Christian Brown, Maternal Incarceration and Children's Education and Labor Market Outcomes, 31 LABOUR 43 (2017).
[51] Marcus Shaw, The Reproduction of Social Disadvantage Through Educational Demobilization: A Critical Analysis of Parental Incarceration, 27 CRITICAL CRIMINOLOGY 275-90 (2019).

and decreased self-reported satisfaction with personal educational attainment.[52]

- Parental incarceration is a significant predictor of teacher-reported internalizing and externalizing problems.[53]
- Experiencing maternal incarceration is associated with increased inattention, assertion problems, oppositional problems, and cooperation problems, as reported by teachers.[54]
- For boys who experience paternal incarceration by age five, there is an increased likelihood of placement in special education classes by age nine due to lower non-cognitive skills, including the ability to concentrate and emotionally self-regulate when entering school.[55]

- **Social and Economic Harms:**

  - Parents who were incarcerated during their children's youth have less education, fewer work hours, lower incomes, lower socioeconomic status, and receive more government assistance - leading their children to have less family social advantages than their peers.[56] Children experiencing parental incarceration are also more likely to be rated as aggressive by their peers.[57]

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[52] Miller & Barnes, *supra* note 43.
[53] Erin C. Casey, Rebecca J. Shlafer, & Ann S. Masten, *Parental Incarceration as a Risk Factor for Children in Homeless Families*, 64 FAM. RELS.: INTERDISC. J. APPLIED FAM. SCI. 490, 498 (2015), https://doi.org/10.1111/fare.12155.
[54] Christopher Wildeman & Kristin Turney, Positive, Negative, or Null? The Effects of Maternal Incarceration on Children's Behavioral Problems, 51 DEMOGRAPHY 1041, 1041–68 (2014).
[55] Anna R. Haskins, Unintended Consequences? Effects of Paternal Incarceration on Child School Readiness and Later Special Education Placement, 1 SOC. SCI. 141 (2014).
[56] Jean Kjellstrand & J. Mark Eddy, *Parental Incarceration During Childhood, Family Context, and Youth Problem Behavior Across Adolescence*, JOURNAL OF OFFENDER REHABILITATION, 50(1), 18–36, https://doi.org/10.1080/10509674.2011.536720.
[57] Danielle H. Dallaire & Janice L. Zeman, *Empathy as a Protective Factor for Children with Incarcerated Parents*, 78 MONOGRAPHS SOC'Y RSCH. CHILD DEV. 7, 22 (2013), https://doi.org/10.1111/mono.12018.

- Reduced economic contribution and other family strains,[58] as well as lower instrumental support,[59] exacerbate the economic and material[60] hardship experienced by children who are impacted by parental incarceration.
- Children impacted by parental incarceration exhibit decreased political participation and more distrust in the government as a result of the long-lasting consequences of parental incarceration.[61]

- **Housing and Family Disruption:**

  - Parental incarceration is associated with an increased risk of experiencing homelessness in childhood and adulthood,[62] and an increased risk of foster-care placement.[63]
  - Children impacted by maternal incarceration, in particular, are at a greater risk of being placed in foster care, orphanages, or other nonfamilial care situations.[64]
  - Children impacted by parental incarceration are less likely to demonstrate empathetic behaviors at home.[65]
  - Because the restructuring of children's homelife may result in a breakdown of the family unit and a depletion of emotional resources in the home,

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[58] Offira Schwartz-Soicher, Amanda Geller, & Irwin Garfinkel, *The Effect of Paternal Incarceration on Material Hardship*, 85 SOC. SERV. REV. 447, 447–78 (2011).
[59] Kristin Turney, Jason Schnittker, & Christopher Wildeman, *Those They Leave Behind: Paternal Incarceration and Maternal Instrumental Support*, 74 J. MARRIAGE & FAMILY 1149, 1149–65 (2012).
[60] Kristin Turney, The Consequences of Paternal Incarceration for Maternal Neglect and Harsh Parenting, 92 SOC. FORCES 1607, 1607–36 (2014).
[61] Hedwig Lee, Lauren C. Porter, & Megan Comfort, Consequences of Family Member Incarceration: Impacts on Civic Participation and Perceptions of the Legitimacy and Fairness of Government, 651 ANN. AM. ACAD. POL. SOC. SCI. 44, 44–73 (2014).
[62] Wakefield & Wildeman, *supra* note 25.
[63] Lauren E. Glaze & Laura M. Maruschak, U.S. Dep't of Justice, Bureau of Justice Statistics, Parents in Prison and Their Minor Children 5 (2008).
[64] Dallaire, *supra* note 30, at 448–49; *see also* Christopher A. Swann & Michell Sheran Sylvester, *The Foster Care Crisis: What Caused Caseloads to Grow*, 43 DEMOGRAPHY 309, 309–35 (2006) (finding the growth of female incarceration accounted for 31.1 percent of the growth in foster-care caseloads between 1985 to 2000 in the United States).
[65] Dallaire & Zeman, *supra* note 57, at 22.

children impacted by parental incarceration are likely to have less motivation and skills to reach out to others in prosocial, empathetic ways.[66]

- Maternal incarceration is associated with increases in rule-breaking behavioral problems at home, based on caregiver reports.[67]

- **Child Parentification:**

  - "Parentification" refers to when children assume developmentally inappropriate parent- or adult-like roles and responsibilities,[68] resulting in a sort of reversal of roles between parent and child.[69] ACEs, such as parental incarceration, prompt parentification.[70]
  - Parentification often occurs when a parent is unable to fulfill his or her role as a caregiver, forcing a child to step in and take care of younger siblings and other domestic labor; thus, the absence of a parent as a result of his or her incarceration may result in a child taking on more responsibility and lead to parentification.[71]
  - Because parentification also can occur when a parent relies on his or her child for comfort and reassurance during a difficult time, parental incarceration may lead to parentification when incarcerated parents rely on their children for emotional support.[72]

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[66] *Id.*
[67] Wildeman & Turney, *supra* note 54.
[68] Jacinda K. Dariotis et al., *Parentification Vulnerability, Reactivity, Resilience, and Thriving: A Mixed Methods Systematic Literature Review*, 20 INT'L J. ENVTL. RSCH. & PUB. HEALTH 6197 (2023), https://doi.org/10.3390/ijerph20136197; *see also* Ruziana Masiran et al., *The Positive and Negative Aspects of Parentification: An Integrated Review*, 144 CHILD. & YOUTH SERVS. REV. 106709 (2023), ("Parentification occurs when children are assigned excessive instrumental or emotional caregiving roles.").
[69] Mary West, *What to Know About Parentification*, MEDICAL NEWS TODAY (Apr. 29, 2022), https://www.medicalnewstoday.com/articles/parentification.
[70] Ray M. Merrill, *Adverse Childhood Experiences Promote Increased and Selective Caregiving in Adulthood*, 23 INT'L J. ENVTL. RSCH. & PUB. HEALTH 213 (2026), https://doi.org/10.3390/ijerph23020213.
[71] *Parentification Trauma: What it is and How to Heal*, CHARLIE HEALTH (Apr. 23, 2023), https://www.charliehealth.com/post/parentification-trauma-what-it-is-and-how-to-heal.
[72] *Id.*

- Parentification can lead to negative mental health outcomes, including feelings of anxiety, depression, low self-esteem, and psychological stress, as well as chronic stress and anxiety in adulthood.[73] These mental health experiences, in turn, increase the risk of developing physical health problems, such as heart disease and autoimmune disorders.[74]
- Imposter syndrome, which occurs when a person doubts their skills, knowledge, or talents, is a significant long-term effect of childhood parentification in adulthood.[75]
- Parentification also is associated with difficulty with boundary-setting and strong people-pleasing tendencies, which may lead to difficulty forming healthy relationships in adulthood.[76]
- Additionally, parentification is associated with being overly responsible and feeling guilty when failing to meet others' expectations.[77]
- Moreover, in households with multiple children, siblings of a parentified child may foster feelings of resentment towards their parentified sibling, leading to feelings of isolation and being without support.[78]
- Parentification also can significantly strain family dynamics.[79]
- Adults who were parentified during childhood or adolescence experience elevated levels of substance use, one or more eating disorders, symptoms of dissociation (such as losing track of time and forgetfulness), and symptoms of personality disorders, such as difficulty managing emotions or challenges relating to self-image.[80]

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[73] *Id.*; Masiran et al., *supra* note 68.
[74] *Parentification Trauma*, CHARLIE HEALTH, *supra* note 71.
[75] Masiran et al., *supra* note 68.
[76] *Parentification Trauma*, CHARLIE HEALTH, *supra* note 71; *see also* Masiran et al., *supra* note 68 (finding parentification to be associated with difficulty in future interpersonal relationships).
[77] *Parentification Trauma*, CHARLIE HEALTH, *supra* note 71.
[78] *Id.*
[79] *Id.*
[80] West, *supra* note 69.

- Research suggests that parentification may affect academic achievement[81] and that parentified children and teenagers have tendencies toward alcohol use disorder and perfectionism.[82]
- Importantly, parentification can significantly and negatively impact a parentified child's caregiving ability as an adult.[83]

Harmful Impacts of Pretrial Incarceration

In addition to these general harms of parental incarceration, pretrial detention, specifically, may have unique social costs that affect the family and children. The Supreme Court acknowledges as much in *Barker v. Wingo*:

"We have discussed previously the societal disadvantages of lengthy pretrial incarceration, but obviously the disadvantages for the accused who cannot obtain his release are even more serious. The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent. Finally, even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility."[84]

The Court's observations are further supported by research. For instance, one study indicates that pretrial detainees may have a higher risk of losing a family attachment.[85] Additionally, since pretrial detention is often of an indefinite length and detainees may be moved between facilities during this time, it can be especially hard for a detainee to communicate consistently, or at all,

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[81] Judyta Borchet et al., The Relations Among Types of Parentification, School Achievement, and Quality of Life in Early Adolescence: An Exploratory Study, FRONTIERS PSYCH. (Mar. 2021), https://doi.org/10.3389/fpsyg.2021.635171.
[82] Piotr Połomski et al., *Exploring Resiliency and Parentification in Polish Adolescents*, 18 INT'L J. ENVTL. RSCH. & PUB. HEALTH 11454 (2021), https://doi.org/10.3390/ijerph182111454.
[83] Masiran et al., *supra* note 68.
[84] Barker v. Wingo, 47 U.S. 514, 531–32 (1972).
[85] Sara Wakefield & Lars Hojsgaard Andersen, Pretrial Detention and the Costs of System Overreach for Employment and Family Life, 7 SOCIO. SCI. 342, 342 (2020).

with their children.[86] Lost contact with a parent can lock a child into immaturity and lead to rebellious behaviors and an increased risk of detachment disorders.[87] There also may be a higher incidence of failing to fully explain to children the true reason for the caregiver's absence during the pretrial detention period.[88] This can inhibit the child's ability to work through emotional issues linked to parent's absence and can play a role in a child's withdrawal, depression, or anti-social behavior.[89]

Globally, some children are even detained with a parent, especially when women are placed in pretrial detention.[90] This can interrupt the child's education and make it more different for him or her to return to school and later find employment.[91] Even when the child is not detained with the parent, the parent may lose their job and housing due to failure to pay rent during the period of pretrial detention, even if it is brief.[92] These disruptions to the stability of the family can have lasting effects on the child. All of this is true despite the fact that during the pretrial detention period, the caregiver remains presumed innocent of the crime with which they are charged.

People detained pretrial are also more likely to be convicted and receive a harsher sentence.[93] These correlations create a cycle where children of caregivers detained pretrial are then more likely to suffer from the harms discussed above regarding parental incarceration generally. Additionally, pretrial detention significantly impairs financial stability in the short term and long term due to the loss of employment, housing, and public benefits.[94] This financial instability will affect the defendant's children, and it rarely ends upon release; people detained pretrial are substantially less likely to be employed in the years following detention.[95] Thus, pretrial detention imposes unique harms to the child and the family.

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[86] Impacts of Pre-Trial Detention Procedures on Children with Parents in Conflict with the Law, Children of Prisoners Europe (2021).
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] Open Society Justice Initiative, *The Socioeconomic Impact of Pretrial Detention*, Open Society Foundations (2011).
[91] *Id.*
[92] *Id.*
[93] Leon Digard & Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, Vera Institute of Justice (2019).
[94] Anna Hall et al., Towards Safety, Liberty, and Equity: A Community-Centered Framework for Redesigning Minnesota's Pretrial System, MCJRC (2025).
[95] *Id.*

Family Circumstances as a Protective Factor

Family circumstances may be evidence of actual or potential protective factors against recidivism. The term "protective factor" is "an umbrella term that can encompass social, environmental, or psychological features that help to lower the risk of reoffending."[96] Research consistently shows that "family support is a powerful and substantively meaningful protective factor against recidivism."[97] Further, potential familial ties can also provide a social context that supports the transformation of identity and accordingly protects against recidivism.[98] Thus, actual and potential family circumstances are associated with a decreased likelihood of reoffending and increased odds of specific deterrence.

Family Circumstances as an Actual Protective Factor

As explained further below, family ties are a required consideration at detention hearings, and research supports the idea embedded in the Bail Reform Act that family ties and responsibilities, and parenting responsibilities in particular, increase a defendant's motivation for success on release and thus reduce his or her risk of reoffending. Although not in the pretrial context, research studies have shown that, for parents who are placed on probation rather than sent to prison, parenting is a salient part of their lives[99] and an especially powerful motivator to be successful on probation.[100] In one study, parents on probation put significant effort into being there for their children and overcame multiple challenges to be physically, emotionally, and financially invested in their children's lives.[101] Even in moments where trying to balance parenthood and probation caused significant stress, supervised parents maintained the perspective that parenthood and their children were positive influences and protective factors

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[96] ROSIE KITSON BOYCE & ALICE BETTERIDGE, DESISTANCE FROM CRIME: WORKING WITH PROTECTIVE FACTORS 2 (Aug. 2022), https://irep.ntu.ac.uk/id/eprint/48302/1/1728228_Kitson-Boyce.pdf; *see also* Stephane M. Shepherd, Stefan Luebbers & James R. O. Ogloff, *The Role of Protective Factors and the Relationship with Recidivism for High-Risk Young People in Detention*, 43 CRIM. JUST. & BEHAV. 863, 863 (2016), https://doi.org/10.1177/0093854815626489 (defining "protective factors" as "[i]tems that reduce the risk of offending" that also "largely entail the positive attributes and strengths of an individual").

[97] John H. Boman, IV & Thomas J. Mowen, *Building the Ties that Bind, Breaking the Ties that Don't*, 16 CRIMINOLOGY & PUB. POL'Y 753, 767 (2017), https://doi.org/10.1111/1745-9133.12307 (citing Carol Shapiro & Meryl Schwartz, *Coming Home: Building on Family Connections*, 5 CORR. MGMT. Q. 52, 52–61 (2001)).

[98] *Id.*

[99] Rebecca J. Shlafer et al., *Parents on Probation: Custody, Co-residence, and Care of Minor Children During Community Supervision*, 62 J. OFFENDER REHAB. 391, 394 (2023), https://doi.org/10.1080/10509674.2023.2246455.

[100] *Id.*

[101] *Id.* at 406.

for "surviving" probation and desisting from substance abuse.[102] Another study found that more routine parenting activities were associated with fewer probation and parole violations in the 18 months after starting supervision.[103] Research indicates that parenting responsibilities may function as a protective factor in preventing reoffending, particularly for women.[104] Moreover, the salient role of family does not diminish when individuals receive other forms of social support.[105]

Research on the role of family ties and responsibilities during reentry also suggests that parenting responsibilities and parent-child relationships lower the risk of recidivism. Parents who maintain relationships with their children during their incarceration have lower recidivism rates upon release.[106] Familial support is associated with job attainment, better health outcomes, and stronger emotional support during reentry.[107] Family relationships, and parent-child relationships in particular, are powerful motivators for successful rehabilitation,[108] providing a construct that discourages recidivism.[109] Family ties also deter reoffending by offering an additional level of supervision and accountability.[110] Familial and community support are critical

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[102] *Id.*
[103] Elizabeth A. Adams et al., *Women's Experience of Motherhood, Violations of Supervision Requirements and Arrests*, 57 BRIT. J. CRIMINOLOGY 1420, 1437 (2017), https://doi.org/10.1093/bjc/azw092.
[104] Elanie Rodermond et al., *Female Desistance: A Review of the Literature*, 13 EUR. J. CRIMINOLOGY 3, 15–16 (2016), https://doi.org/10.1177/1477370815597251 (literature review on the association between crime desistance and parenthood).
[105] Lin Liu, Patricia Becker & Thomas J. Mowen, *Social Support During Reentry: Family, Mentor, Religious, Parole Officer, and Social Service Roles*, 50 CRIM. JUST. & BEHAV. 1053, 1064 (2023), https://doi.org/10.1177/00938548231166154.
[106] LINDSEY CRAMER ET AL., URB. INST., PARENT-CHILD VISITING PRACTICES IN PRISONS AND JAILS: A SYNTHESIS OF RESEARCH AND PRACTICE 8 (2017), https://www.urban.org/sites/default/files/publication/89601/parent-child_visiting_practices_in_prisons_and_jails_0.pdf (noting how visits are important motivators for improving parent outcomes and how visits can motivate parents to comply with facility rules, leading to fewer disciplinary reports, and participate in correctional programming).
[107] *See* Thomas J. Mowen, Richard Stansfield & John H. Boman, IV, *Family Matters: Moving Beyond "If" Family Support Matters to "Why" Family Support Matters during Reentry from Prison*, 56 J. RSCH. CRIME & DELINQ. 483, 485 (2019), https://doi.org/10.1177/0022427818820902 (concluding that family support is associated with decreased recidivism, an increased likelihood of employment, and better health outcomes during the reentry process); DAVID B. MUHLHAUSEN, NAT'L INST. OF JUST., AN OVERVIEW OF OFFENDER RE-ENTRY 3 (2016), https://nij.ojp.gov/library/publications/overview-offender-reentry (finding that familial ties offer "the greatest tangible and emotional support" to individuals reentering the community following their incarceration).
[108] NEAL HAZEL ET AL., BEYOND YOUTH CUSTODY, THE ROLE OF FAMILY SUPPORT IN RESETTLEMENT: A PRACTITIONER'S GUIDE 2–4 (2016), https://www.beyondyouthcustody.net/wp-content/uploads/The-role-of-family-support-in-resettlement-a-practitioners-guide.pdf.
[109] *Id.* at 3.
[110] Boman & Mowen, *supra* note 97, at 755 (citing Bruce Western et al., *Stress and Hardship after Prison*, 120 AM. J. SOCIO. 1512, 1512–1547 (2015)).

for successful reentry,[111] but parenthood in particular offers a unique opportunity for responsibility, rehabilitation, and social support during reentry. For this reason, "fostering strong parent-child bonds should be a priority."[112]

Family Circumstances as a Potential Protective Factor

Close familial relationships are not necessary for family circumstances to function as a protective factor. Rather, even in the absence of close familial ties, family circumstances can influence recidivism rates as a potential protective factor. Family, and specifically children, are extremely strong motivators for change.[113] Parenthood is "a major turning point upon which people embark on a trajectory of crime desistance."[114] Parenthood is a strong motivating factor of desistance, and if individuals act on their desire to desist, their risk of recidivism will decrease.[115] Becoming a parent is a "key transition event" that may function as an "important catalyst" for making significant life changes,[116] but incorporating a parental role into routine offers an ongoing opportunity for a rehabilitative transformation. The decision to be a "good" parent necessitates the perception that offending and deviant behaviors are incompatible with the prosocial parental identity.[117] Thus, mere adoption of a parental identity is significant for desistance.[118] To embody a "good" parent, individuals are motivated to veer away from deviant

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[111] Simon D. Venema et al., *Fatherhood and Reoffending after Release from Prison: The Importance of Co-Residing with a Partner and Children*, 71 CRIME & DELINQ. 1462, 1481–82 (2025), https://doi.org/10.1177/00111287231193991 (finding that fathers who resided with a partner and children six months after release were significantly less likely to be reconvicted 18 months after release than nonfathers and fathers who did not reside with a partner and children); Liu, Becker & Mowen, *supra* note 105, at 1064 (finding that support from family members, parole officers, and social service agencies functioned as protective factors for reentry); Lin Liu & Christy A. Visher, *Decomposition of the Role of Family in Reentry: Family Support, Tension, Gender, and Reentry Outcomes*, 67 CRIME & DELINQ. 970, 984 (2021), https://doi.org/10.1177/0011128720987195 (describing family as "a social institution that keeps people from drifting—engaging in unruled and deviant behaviors").
[112] HAZEL ET AL., *supra* note 108, at 4.
[113] Tammy Rinehart Kochel & Edmund F. McGarrell, *Voices from Inside Focused Deterrence: Implications for Implementation*, 100 J. CRIM. JUST. 1, 7 (2025), https://doi.org/10.1016/j.jcrimjus.2025.102483 (finding that the top motivation for change was family (72 percent), and most notably offenders' children (44 percent)).
[114] Lin Liu & Susan L. Miller, Reclaiming Parenthood After Incarceration: The Nexus of Determination to Desist, Fulfillment of Parental Responsibilities, and Recidivism, 50 CRIM. JUST. & BEHAV. 870, 871 (2023), https://doi.org/10.1177/00938548231164965.
[115] *Id.*
[116] Peggy C. Giordano et al., *Parenthood and Crime: The Role of Wantedness, Relationships with Partners, and Ses*, 39 J. CRIM. JUST. 405, 405 (2011), https://doi.org/10.1016/j.jcrimjus.2011.05.006.
[117] *See* Ray Paternoster & Shawn Bushway, *Desistance and the Feared Self: Toward an Identity Theory of Criminal Desistance*, 99 J. CRIM. L. & CRIMINOLOGY 1103, 1120–21 (2009), https://www.jstor.org/stable/20685067.
[118] Liu & Miller, *supra* note 114, at 872.

lifestyles and themes of quick and easy money and the party life.[119] Instead, parenthood motivates individuals to find employment or other legal means of financial support and to stay away from drugs and alcohol.[120] Importantly, being a parent may be an important motivator to individuals with children of all ages, including adult children.[121]

Moreover, individuals adopt role expectations for parents, recognizing the need to be role models, providers, caregivers, and protectors of their children.[122] Parenthood requires nurturing children, financially providing for them, and being emotionally invested and involved in their lives.[123] The role expectations for parenthood may drive individuals to reshape their networks to include more family and to secure stable and legitimate work to financially support their children.[124] By making these changes in routines, individuals will have fewer opportunities to associate with criminal peers and engage in offending.[125] Some researchers have described this desire to desist associated with parenthood as opening a door to cognitive transformation.[126] Thus, probation officers and correctional staff can use a defendant's desire to take on a prosocial parental role as a "hook for change."[127]

Importantly, even emotionally strained family relationships may promote desistance through instrumental family support.[128] Thus, defendants' familial relationships characterized by stress

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[119] Ronet Bachman et al., *Desistance for a Long-Term Drug-Involved Sample of Adult Offenders: The Importance of Identity Transformation*, 43 CRIM. JUST. & BEHAV. 164, 167–68 (2016), https://doi.org/10.1177/0093854815604012.
[120] David J. Harding et al., *Making Ends Meet After Prison*, 33 J. POL'Y ANALYSIS & MGMT. 440, 462 (2014), https://doi.org/10.1002/pam.21741.
[121] *Id.*
[122] Liu & Miller, *supra* note 114, at 872.
[123] *See* William J. Doherty, Edward F. Kouneski & Martha F. Erickson, *Responsible Fathering: An Overview and Conceptual Framework*, 60 J. MARRIAGE & FAM. 277 (1998), https://doi.org/10.2307/353848; Chris Knoester & David J. Eggebeen, *The Effects of the Transition to Parenthood and Subsequent Children on Men's Well-Being and Social Participation*, 27 J. FAM. ISSUES 1532 (2006), https://doi.org/10.1177/0192513X06290802.
[124] Paternoster & Bushway, *supra* note 117.
[125] Derek A. Kreager, Ross L. Matsueda & Elena A. Erosheva, *Motherhood and Criminal Desistance in Disadvantaged Neighborhoods*, 48 CRIMINOLOGY 221, 224–25 (2010), https://doi.org/10.1111%2Fj.1745-9125.2010.00184.x.
[126] Peggy C. Giordano, Stephen A. Cernkovich & Jennifer L. Rudolph, *Gender, Crime, and Desistance: Toward a Theory of Cognitive Transformation*, 107 AM. J. SOCIO. 990 (2002), https://doi.org/10.1086/343191.
[127] Id. at 1000; see also Eric J. Wodahl, Thomas J. Mowen & Brett E. Garland, The Effect of Individual Characteristics and Supervision Experiences on the Perceived Quality of the Supervision Relationship, 32 CRIM. JUST. POL'Y REV. 523, 537–41 (2020), https://doi.org/10.1177/0887403420967070 (finding that family support effects the supervision relationship, and high-quality relationship between individuals on probation/parole and their supervising officers, together with family support, can reduce recidivism and increase compliance).
[128] Mowen, Stansfield, & Boman, IV, *supra* note 107 at 510–11.

and emotional turmoil may still protect against future criminality and promote successful rehabilitation.[129]

Overview of Federal Law Regarding Pretrial Release

Federal pretrial release is largely governed by the Bail Reform Act, codified at 18 U.S.C. § 3142, and the Eighth Amendment, which bans excessive bail. Federal judges may either release, or, after a hearing where the judge finds that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community," detain the accused person pending trial.[130] Although there is no unconditional right to release in the federal system, release should be denied only in rare cases.[131]

Presumption of Release

The Bail Reform Act presumes pretrial release and allows for pretrial detention only after a number of requirements have been satisfied. The Supreme Court highlighted as much when upholding the Act's constitutionality: "In our society liberty is the norm, and detention prior to trial…is the carefully limited exception."[132] Additionally, when drafting the Act, Congress emphasized that its purpose was to give courts "the power to deny release pending trial" to a "small but identifiable group of particularly dangerous defendants."[133] This purpose is also clear in the text of the statute.

At initial appearance, defendants are given a presumption of release under the Bail Reform Act.[134] The first subsection of the Act instructs that "the judicial officer shall issue an order that, pending trial, the person must be…released on personal recognizance or upon execution of an unsecured appearance bond."[135] Only if the judicial officer determines that release under these "presumptive minimal conditions" "will not reasonably assure the appearance of the person as

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[129] *Id.*
[130] 18 U.S.C. § 3142(e).
[131] United States v. Barnett, 986 F.Supp. 385 (1997) (collecting cases in support of this proposition).
[132] United States v. Salerno, 481 U.S. 739, 755 (1987); see also United States v. Holloway, 781 F.2d 124, 125 (8th Cir. 1986) ("Pretrial detention is to be the exception rather than the rule"); United States v. Orta, 760 F.2d 887, 891 (8th Cir. 1985) (en banc) ("The wide range of restrictions available ensures, as Congress intended, that very few defendants will be subject to pretrial detention.").
[133] *The Comprehensive Crime Control Act of 1983*, Senate Report No. 98-225, at 6–7 (Aug. 4, 1983).
[134] 18 U.S.C. § 3142(b)-(c).
[135] 18 U.S.C. § 3142(a)(1).

required or will endanger the safety of any other person or the community" shall release on conditions be ordered.[136] Even then, release conditions are limited to "the least restrictive further condition, or combination of conditions" to "reasonably assure the appearance of the person as required and the safety of any other person in the community.[137] Thus, the presumption is to impose only the minimal conditions of release required by 18 U.S.C. § 3142(b), and if further conditions are deemed necessary, they are to be narrowly tailored.

Only after considering these options and all alternatives to detention may the judicial officer order pretrial detention.[138] Additionally, pretrial detention may only be imposed after an adversarial hearing at which the judge finds that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community."[139] These detention hearings can only be held if one the seven factors described in § 3142(f) are met.[140] Every circuit to consider the issue has held that one of these factors must be proven at the initial appearance in order to temporarily detain a defendant pending a detention hearing.[141] If none of these factors are met, then a detention hearing is not available, so the defendant must be released.[142] The factors are as follows:

(A) a crime of violence, a violation of section 1591, or an offense listed in section 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed;
(B) an offense for which the maximum sentence is life imprisonment or death;
(C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;

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[136] 18 U.S.C. § 3142(c)(1).
[137] 18 U.S.C. § 3142(c)(1)(B).
[138] *Salerno*, 481 U.S. at 750; *see Holloway*, 781 F.2d at 125.
[139] 18 U.S.C. § 3142(e)(1).
[140] *See* 18 U.S.C. § 3142(f)(1); *Salerno*, 481 U.S. at 747 ("Detention hearings [are] available if" one of the seven (f) factors applies).
[141] United States v. Twine, 344 F.3d 987, 987 (9th Cir. 2003); United States v. Singleton, 182 F.3d 7, 9 (D.C. Cir. 1999); United States v. Byrd, 969 F.2d 106, 109 (5th Cir. 1992); United States v. Ploof, 851 F.2d 7, 11 (1st Cir. 1988); United States v. Friedman, 837 F.2d 48, 49 (2d Cir. 1988); United States v. Himler, 797 F.2d 156, 160 (3d Cir. 1986); *Orta*, 760 F.2d at 891 n.15.
[142] Federal Judicial Center, *The Bail Reform Act of 1984*, at 1 (4th ed. 2022), https://www.fjc.gov/sites/default/files/materials/57/The%20Bail%20Reform%20Act%20of%201984-Fourth%20Edition.pdf.

(D) any felony if such person has been convicted of two or more offenses described in subparagraphs (A) through (C) of this paragraph, or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; or

(E) any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm or destructive device (as those terms are defined in section 921), or any other dangerous weapon, or involves a failure to register under section 2250 of title 18, United States Code; or

…

(A) a serious risk that such person will flee; or

(B) a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.[143]

Caselaw has also placed limitations on how these factors apply. The first five factors, found in 18 U.S.C. § 3142(f)(1), must be formally charged against the defendant.[144] The final two factors, found in 18 U.S.C. § 3142(f)(2), require the judicial officer to make a specific finding on the record that one of those factors applies.[145]

In a certain subset of cases,[146] the presumption from § 3142(b) is flipped, and there is a rebuttable presumption that no condition or set of conditions will reasonably assure the safety of any other person or the community if the judicial officer finds that:

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[143] 18 U.S.C. § 3142(f)(1)(A)-E), (f)(2)(A)-(B).

[144] *The Comprehensive Crime Control Act of 1983*, Senate Report No. 98–225, at 21 (Aug. 4, 1983) ("The committee has determined that whenever a person is *charged* with one of these [§ 3142(f)(1)] offenses and the attorney for the Government elects to seek pretrial detention, a [detention] hearing should be held…"); *see also Salerno*, 481 U.S. at 755 ("The [BRA] authorizes the detention prior to trial of arrestees *charged* with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel." (emphasis added)).

[145] *See, e.g.*, *Himler*, 797 F.2d at 160 (defendant "may be detained only if the record supports a finding that he presents a serious risk of flight"); *Friedman*, 837 F.2d at 49 (court "must first determine by a preponderance of the evidence" that § 3142(f) is met before holding a detention hearing).

[146] *See* 18 U.S.C. § 3142(f)(1).

(A) the person has been convicted of a Federal offense that is described in subsection (f)(1) of this section, or of a State or local offense that would have been an offense described in subsection (f)(1) of this section if a circumstance giving rise to Federal jurisdiction had existed;
(B) the offense described in subparagraph (A) was committed while the person was on release pending trial for a Federal, State, or local offense; and
(C) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in subparagraph (A), whichever is later.[147]

There is also a rebuttable presumption "that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed:"

(A) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;
(B) an offense under section 924(c), 956(a), or 2332b of this title;
(C) an offense listed in section 2332b(g)(5)(B) of title 18, United States Code, for which a maximum term of imprisonment of 10 years or more is prescribed;
(D) an offense under chapter 77 of this title for which a maximum term of imprisonment of 20 years or more is prescribed; or
(E) an offense involving a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title.[148]

[147] 8 U.S.C. § 3142(e)(2).
[148] 18 U.S.C. § 3142(e)(3)(A)–(E).

The presumption of detention in these cases imposes a "limited" burden of production on the defense and creates a two-step inquiry.[149] First, the court must determine whether the defendant has sufficiently rebutted the presumption by producing evidence regarding one of the factors in § 3142(g).[150] Then, whether the defendant has rebutted the presumption or not, the court still must determine whether the government has satisfied the burden of proving that no condition or combination of conditions could "reasonably assure" appearance or public safety.[151]

Factors Considered in Pretrial Release

At detention hearings, the judge may also conclude that the defendant can safely be released pretrial under a certain set of circumstances. To make this determination, the judicial officer must consider the following factors:

> (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of section 1591, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;
> (2) the weight of the evidence against the person;
> (3) the history and characteristics of the person, including--
>> (A) the person'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

[149] United States v. Abad, 350 5.3d 793, 797 (8th Cir. 2003) (defendant "bears a limited burden of production - not a burden of persuasion - to rebut that presumption by coming forward with evidence he does not pose a danger to the community or a risk of flight.").
[150] "Any evidence favorable to a defendant that comes within a category listed in § 3142(g) can affect the operation of one or both of the presumptions, including evidence of their marital, family and employment status, ties to and role in the community, clean criminal record and other types of evidence encompassed in § 3142(g)(3)." United States v. Dominguez, 783 F.2d 702, 707 (7th Cir. 1986). *See, e.g.*, United States v. Jessup, 757 F.2d 378, 384, 389 (1st Cir. 1985) (requiring defendant to produce "some evidence"); United States v. Wilks, 15 F.4th 842, 846 (7th Cir. 2021) (the defense bears "a light burden of production" to rebut the presumption).
[151] *See Salerno*, 481 U.S. at 751; United States v. Abad, 350 F.3d 793, 797 (8th Cir. 2003); *Orta*, 760 F.2d at 891 n.17; *see also Wilks,* 15 F.4th at 847 ("an unrebutted presumption is not, by itself, an adequate reason to order detention").

(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. In considering the conditions of release described in subsection (c)(1)(B)(xi) or (c)(1)(B)(xii) of this section, the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.[152]

Thus, family and community ties are a required consideration in the pretrial release decision and can be a significant consideration in the decision to release a defendant pretrial.[153] Ties to the community can also be used to rebut the presumption of detention in 18 U.S.C. § 3142(e).[154]

Purpose of Pretrial Detention: Risk of Flight and Dangerousness

In addition to these factors that courts are required to consider at detention hearings, bail and pretrial detention must be tied to their respective purposes: preventing flight and ensuring

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[152] 18 U.S.C. § 3142(g)(1)–(4) (emphasis added).

[153] United States v. Knight, 636 F. Supp. 1462 (S.D. Fla. 1986) (holding that defendant that had lived in Miami his whole life, was married with two children, had never left the United States, and did not possess a passport should be released pretrial on drug conspiracy charges; defendant who was a small dealer with a likely substance abuse problem, no prior arrests, and strong community ties was not detainable pretrial); United States v. Giordano, 370 F. Supp. 2d 1256 (S.D. Fla. 2005) (holding that defendant who was married but had no other family nor children in the area, no prior arrests, and had evidence no intent to flee was not a serious flight risk and thus could not be detained pretrial); United States v. Jackson, 845 F.2d 1262 (5th Cir. 1988) (holding that defendant who had lived his entire life in Houston, was employed there, married, and a homeowner had successfully presented considerable evidence of his longstanding ties to the locality which rebuts the presumption in 3142(e)); United States v. Klein, 533 F. Supp. 3d 1 (D.D.C. 2021) (granting motion to revoke pretrial detention for January 6 participant who had lived in D.C. his whole life and had substantial family in the area along with other community ties); United States v. Ramos-Dominguez, 698 F. Supp. 3d 224 (D.P.R. 2023) (releasing defendant who was a lifelong resident of Puerto Rico, married with two young children, and lived near other family members).

[154] United States v. Jackson, 845 F.2d 1262, 1266 (5th Cir. 1988) ("Where the defendant has presented considerable evidence of his longstanding ties to the locality in which he faces trial…the presumption…has been rebutted.").

public safety. To overcome the presumption of release, most circuits require the government to prove by a preponderance of the evidence that the defendant poses a "serious risk of flight" and that there are no conditions under which the defendant can be released on bail which reasonably assure the appearance of the defendant.[155]

Although the bail amount must be related to flight risk, federal courts may also detain an accused person pretrial, without bail, on the basis of dangerousness. One important distinction here is that dangerousness cannot serve as a basis *to hold* a detention hearing; it is a consideration *during* a detention hearing.[156] In this case, the government must prove by clear and convincing evidence that there are no conditions under which the defendant can be released that would assure the safety of the community.[157] At detention hearings, both the defendant and the government may present witnesses and information in support of pretrial release.[158]

Successive Bail Arguments

In addition to the initial detention hearing, if circumstances have changed such that there is now more evidence to support a defendant's pretrial release, the court can reopen the hearing:

"The hearing may be reopened, before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue of whether there

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[155] United States v. Hinton, 113 F. App'x 76, 77 (6th Cir. 2004); United States v. Cisneros, 328 F.3d 610 (10th Cir. 2003); United States v. King, 849 F.2d 485 (11th Cir. 1988); United States v. Chimurenga, 760 F.2d 400 (2d Cir. 1985); United States v. Orta, 760 F.2d 887 (8th Cir. 1985); United States v. Xulam, 84 F.3d 441 (D.C. Cir. 1996).
[156] *See Twine*, 344 F.3d at 987 ("We are not persuaded that the [BRA] authorizes pretrial detention without bail based solely on a finding of dangerousness. This interpretation of the Act would render meaningless 18 U.S.C. § 3142(f)(1) and (2)."); United States v. Dillard, 214 F.3d 88, 96 (2d Cir. 2000) ("A defendant who is not eligible [for detention under § 3142(f)] must be released, notwithstanding alleged dangerousness."); *Byrd*, 969 F.2d at 110 ("[A] defendant's threat to the safety of other persons or to the community, standing alone, will not justify pre-trial detention."); *Ploof*, 851 F.2d at 12 (holding that when none of the "subsection (f)(1) conditions [are] met, pretrial detention solely on the ground of dangerousness to another person or to the community is not authorized"); *Friedman*, 837 F.2d at 49 ("[T]he [BRA] does not permit detention on the basis of dangerousness in the absence of risk of flight, obstruction of justice or an indictment for the offenses enumerated [in § 3142(f)(1)]."); *Himler*, 797 F.2d at 160 ("Any danger which [the defendant] may present to the community may be considered only in setting conditions of release.").
[157] 18 U.S.C. § 3142(f)(2); United States v. Bartlett, 731 F. Supp. 3d 836, 853 (E.D. Mich. 2024), *aff'd sub nom.* United States v. Semenchuk, No. 24-1405, 2024 WL 4751486 (6th Cir. Oct. 18, 2024).
[158] 18 U.S.C. § 3142(f)(2).

are conditions of release that will reasonably assure the appearance of such person as required and the safety of any other person and the community."[159]

While changed circumstances are a necessary condition to reopen a detention hearing, they are not always sufficient.[160] One well-established example of changed circumstances is the grant or denial of a suppression motion.[161] Although not truly a changed circumstance, successive bail hearings can incorporate arguments regarding the speedy trial right, such that lengthy periods of pretrial detention may eventually equal a denial of due process.[162] A majority of jurisdictions have held that a defendant may only file a motion to amend or revoke a detention order in the charging jurisdiction, and such decisions can likely only be reviewed by the same judge that gave the initial detention order.[163]

As discussed above, family ties are a required consideration at detention hearings and have a "material bearing" on the pretrial release decision. Family ties are therefore at least as relevant to the reconsideration of a detention order as they are to the initial detention decision, even if they are not the changed circumstance itself.[164]

Pretrial Services and Alternatives to Pretrial Detention

In addition to information presented at the detention hearing, the federal system has pretrial services that are authorized to collect defendants' information relevant to pretrial release, recommend conditions of release, and opine as to whether pretrial release would be sufficient to assure the defendant's appearance and public safety.[165] This information is summarized in a Pretrial Services Investigative Report–sometimes called a Bond Report–that is issued at the time of the initial appearance. Pretrial services are also responsible for the supervision of

[159] 18 U.S.C. § 3142(f)(2).
[160] United States v. Jalbert, 231 F. Supp. 2d 359 (D. Me. 2002).
[161] *See e.g.,* United States v. Wilder, 797 F. Supp. 3d 642 (S.D.W. Va. 2025); United States v. Peralta, 849 F.2d 625, 627 (D.C. Cir. 1988); United States v. Ausby, Cr. No. 72-67, 2019 WL 2452988, at *7 (D.D.C. June 11, 2019); United States v. Shareef, 907 F. Supp. 1481, 1483 (D. Kan. 1995); United States v. Barner, 743 F. Supp. 2d 225, 227 (W.D.N.Y. 2010).
[162] United States v. Archambault, 2002 DSD 34, 240 F. Supp. 2d 1082 (D.S.D. 2002).
[163] United States v. Manley, 659 F. Supp. 3d 15, 19-20 (D.D.C. 2023).
[164] United States v. Khanna, 703 F. Supp. 3d 1309 (N.D. Okla. 2023) (changed circumstance was evidence-based, but court factored in Khanna's strong family ties in its decision to release him).
[165] 18 U.S.C. § 3154(1).

defendants released pretrial and the facilitation of residential, substance use treatment, counseling, employment, medical, legal, or social services.[166]

In determining whether a defendant is a risk of flight or danger to the community, pretrial services uses the Pretrial Risk Assessment (PTRA), which is an actuarial assessment tool used to determine risk of failure to appear, new criminal arrests, or technical violations that might lead to revocation.[167] The factors considered by PTRA can largely be broken down into two categories: information about the defendant and information about the charge. A study was conducted to determine what factors are statistically significant predictors of pretrial risk for federal defendants. Nine factors were identified, including: pending charges, prior misdemeanor arrests, prior felony arrests, prior failures to appear, employment status, residence status, substance abuse type, primary charge category (i.e. felony or misdemeanor), and primary charge type (e.g. firearm, immigration, drug, etc.).[168] PTRA analyzes these factors and then produces a numerical estimation of a particular defendant's flight risk, on a scale of 1 to 5.[169] In this study, while only 27.9% of those who scored a 5 were released pretrial, those defendants still had an 84.5% success rate on pretrial release,[170] which empirically supports the legal mandate of a presumption of release.

Reducing the number of persons in federal detention, especially pretrial, has been an initiative of the federal courts in the last decade. In 2015, in response to rising national federal detention rates, the Pretrial Services Office of the U.S. Courts developed the Detention Reduction Outreach Program (DROP), which is a two-day series of meetings, trainings, and discussion between federal prosecutors, defenders, and judges.[171] Since 2015, DROP has been developed in 15 districts nationwide.[172] In the districts that have implemented DROP, officer

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[166] 18 U.S.C. § 3154(4)–(7).
[167] *Pretrial Risk Assessment*, UNITED STATES COURTS, https://www.uscourts.gov/about-federal-courts/probation-and-pretrial-services/evidence-based-practices/pretrial-risk-assessment.
[168] Marie VanNostrand, Ph.D. & Gena Keebler, Pretrial Risk Assessment in the Federal Court, UNITED STATES DEP'T. JUST. OFF. FED. DET. TR. (April 14, 2009).
[169] Id.
[170] Id.
[171] Federal Pretrial Release and the Detention Reduction Outreach Program (DROP), UNITED STATES COURTS, https://www.uscourts.gov/about-federal-courts/probation-and-pretrial-services/federal-probation-journal/2018/09/federal-pretrial-release-and-detention-reduction-outreach-program-drop.
[172] Thomas Cohen et. al, *Special Issue on Pretrial Services: Front-End Justice*, FEDERAL PROBATION (Sept. 2018), https://www.uscourts.gov/sites/default/files/fedprobation-sept2018_0.pdf.

recommendations for release have seen an overall increase, and several districts have made an effort to continue collaboration efforts even after the official DROP program is over.[173]

One alternative to detention that a judge can order is placement in a halfway house. In addition to the considerations listed above regarding pretrial release, judges may also take into account that halfway houses may cost less than detention, can reduce the expense to the district, reduce jail overcrowding, are not usually secure facilities, can help ensure a defendant is complying with release conditions and reduce violations, and may help support defendants.[174] Other alternatives to pretrial detention include pretrial diversion programs[175] and problem-solving courts that act on the front end of the criminal process.[176]

Importantly, alternatives to detention are not necessary in every case and in fact can be harmful. As explained above, the presumption under 18 U.S.C. § 3142 is for defendants to be released on *minimal conditions*. These "presumptive minimal conditions" include only that the defendant "not commit a Federal, State, or local crime during the period of release" and "cooperate in the collection of a DNA sample" if authorized by federal law.[177] Additionally, alternatives to detention actually decrease the likelihood of success on pretrial release for defendants who score a 1-2 on PTRA.[178] For those who score higher, alternatives to detention generally increase the likelihood of success on pretrial release, but the best practice is for the ordered alternative to be unique to the particular needs of each individual defendant, such as a substance abuse treatment program for a defendant who has a recent history of substance abuse.[179] Thus, while alternatives to detention can be helpful when utilized correctly, they are not required by the law when granting pretrial release and are not always necessary for a defendant's success on pretrial release.

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[173] Id.
[174] How Residential Reentry Centers Operate and When to Impose: Alternative to Pretrial Detention, UNITED STATES COURTS, https://www.uscourts.gov/about-federal-courts/probation-and-pretrial-services/evidence-based-practices/residential-reentry-centers-reference-guide/how-residential-reentry-centers-operate-and-when-impose#alternative_pretrial.
[175] United States Justice Manual 9-22.000 - Pretrial Diversion Program.
[176] *Problem-Solving Courts Toolkit,* UNITED STATES SENTENCING COMMISSION, https://www.ussc.gov/education/problem-solving-courts-toolkit.
[177] 18 U.S.C. § 3142(b).
[178] VanNostrand & Keebler, *supra* note 168.
[179] Id.

Policy Justifications for Considering Family Circumstances at the Pretrial Stage

As the previous sections have established, both law and empirical research support the idea that family ties are an important and relevant consideration when making pretrial detention hearings. The Bail Reform Act makes clear that pretrial detention is only available after the government has shown that no condition or set of conditions could reasonably assure the defendant's appearance or protect the public.[180] This set up of the burden of persuasion gives courts a wide latitude in considering whether a defendant's pretrial detention is actually necessary to protect public safety or assure appearance, including the consideration of whether pretrial detention would actually be more harmful to the community in a particular case due to the harm imposed on the family unit and children. Since pretrial detention can only be used for these purposes, the fact that parenting responsibility mitigates the risk of re-offending and increases compliance with conditions is a relevant consideration as to whether pretrial detention is actually necessary.

Moreover, the Constitution supports pretrial release when possible. People detained pretrial are still presumed innocent despite their detention. The presumption of innocence, as explained in more detail below, is the foundation of our criminal legal system and should always be taken into account during pretrial detention hearings. Finally, since pretrial detention and high bail amounts impose unique costs to the family due to financial strain, it is important to set bail no higher than necessary to assure appearance, as required by both the Constitution and the Bail Reform Act.

The Presumption of Innocence

The presumption of innocence is "that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'"[181] Pretrial detention is at odds with this bedrock principle. "Unless this right to bail before trial is reserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[182] If a monetary bail amount were fixed "as an assurance [the defendant] would

[180] 18 U.S.C. § 3142(e)(1).
[181] *In re* Winship, 397 U.S. 358, 363, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (quoting *xi*, 156 U.S. 432, 453, 15 S. Ct. 394, 39 L.Ed. 481 (1895)).
[182] Stack v. Boyle, 342 U.S. 1, 4, 72 S. Ct. 1, 3, 96 L.Ed. 3 (1951).

remain in jail, . . . [that would be] contrary to the whole policy and philosophy of bail."[183] The Supreme Court further emphasized the significance of the presumption of innocence before trial in *Bandy v. United States*, stating, "It would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom."[184] As discussed above, Congress enacted the Bail Reform Act with this bedrock principle in mind, intending that pretrial detention be used for only a small number of defendants.[185] To emphasize this, the final provision of the Act maintains: "Nothing in this section shall be construed as modifying or limiting the presumption of innocence."[186] Thus, the foundational principles of the criminal law support pretrial release when possible.

Improper Use of Bail

When released on conditions under 18 U.S.C. § 3142(c), one of the potential conditions is the forfeiture of property or money upon nonappearance, but financial conditions that would result in pretrial detention are barred; the bail amount set must be related to the purpose of assuring the defendant's presence.[187] The Eighth Amendment further bars bail amounts that "stagger the imagination" and thus "obviously amount to a denial of bail."[188] Studies have shown, however, that monetary bail is typically assigned without an assessment of the detainee's ability to pay,[189] despite the fact that pretrial detention is unconstitutional when based on financial status or any other reason other than public safety or court appearances.[190] Moreover, there is little evidence that money bail actually serves the statutory purposes of increasing public safety and court appearances.[191] Pretrial crime is rare. Studies from New Jersey, Washington, D.C., and New York City all found that the vast majority of defendants who were released pretrial were not re-arrested during the pretrial period.[192] Thus, constitutional law and empirical research also support pretrial release.

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[183] *Id.* at 6.
[184] Bandy v. United States, 82 S. Ct. 11, 13, 7 L. Ed. 2d 9 (1961) (citing Stack v. Boyle, 342 U.S. 1, 72 S. Ct. 1, 96 L. Ed. 3 (1951)).
[185] § 762 Release Prior to Conviction, 3B Fed. Prac. & Proc. Crim. § 762 (4th ed.).
[186] 18 U.S.C. § 3154(j).
[187] 18 U.S.C. § 3142, subds. (c)(1)(B)(xi)–(xii), (c)(2); *Stack v. Boyle*, 342 U.S. 1, 8, 72 S. Ct. 1, 96 L. Ed. 3 (1951).
[188] Carlisle v. Landon, 73 S. Ct. 1179, 1182, 97 L. Ed. 1642 (1953).
[189] Digard & Swavola, *supra* note 93.
[190] Stack v. Boyle, 342 U.S. 1, 8, 72 S. Ct. 1, 96 L. Ed. 3 (1951).
[191] Digard & Swavola, *supra* note 93.
[192] Hall et al., *supra* note 94.

The National and Global Movement Towards Considering Family Impact at the Pretrial Stage

Recognizing the harms experienced by children affected by parental incarceration, many jurisdictions across the United States and around the world have started to consider a defendant's familial circumstances, ties, and responsibilities in considering whether to detain a parent pretrial. In the United States, many jurisdictions have begun to reform their pretrial detention practices such as through cite and release policies, the elimination of cash bail, and by providing more pretrial support for defendants who are parents of minor children. Globally, the effects of parental detention have been recognized through pretrial diversion programs and mandatory considerations of a defendant's family circumstances. The global movement towards considering family impact at the pretrial stage demonstrates a national and international consensus that the adverse effects of parental incarceration should be mitigated to promote the best interests of children.

National Movement

Many jurisdictions have recognized that pretrial detention has become too pervasive of a practice and needs to be reformed. The Minnesota Justice Research Center, for example, recommends that police cite and release - rather than arrest and book - people accused of low-level crimes, given that the research suggests that this practice does not decrease court appearances or impair public safety.[193] When New Jersey eradicated cash bail, it also changed its cite and release policies to encourage the practice and decrease the number of pretrial detainees.[194] These policies are supported by the American Bar Association, which states in its standards on pretrial release that: "It should be the policy of every law enforcement agency to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law."[195]

Other jurisdictions in the United States also recognize the need for changes to their pretrial detention practices. For example, Illinois passed the Pretrial Fairness Act which requires a

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[193] *Id.* at 17.
[194] *Id.*
[195] American Bar Association, *ABA standards for criminal justice: Pretrial release* (3rd Ed., 2007), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf.

prompt detention hearing with counsel present, a clear and convincing evidence standard, discovery disclosure prior to the detention hearing, written judicial findings, and the right to appeal.[196] New York City's Mayor's Office of Criminal Justice is working with the Criminal Justice Agency to find alternatives to pretrial detention using transparency, expansive case management, evidence-based practices, and a comprehensive referral system of nonprofits and service organizations.[197] Also in New York City, the Legal Aid Society created the Women's Pretrial Release Initiative with the goal of reducing the number of women detained pretrial.[198] In Oklahoma, both Still She Rises, a pro bono defense office in Tulsa, and TEEM, a pretrial release initiative in Oklahoma City, are dedicated to meeting the pretrial needs of women and people who are low-income and unhoused, respectively.[199] These are just a few of the many efforts states are making to reform pretrial release.[200]

Along with recognizing the general need to change pretrial detention practices, jurisdictions have also begun to recognize the need to consider the best interests of the defendant's child before incarcerating a parent. Many states have created mitigation or diversion programs for caregivers of minor children at the sentencing phase,[201] and the movement towards implementing these laws at the pretrial stage is a necessary next step that states are beginning to recognize. In Illinois, for example, the Children's Best Interest Act states that one of its purposes is to "prevent unnecessary harm to children caused by separation from parents during pre-trial detention…".[202] Additionally, in California, the Primary Caregiver Diversion law allows for pretrial diversion.[203] Thus, the recognition that any period of incarceration can be harmful to a defendant's child and the need to consider this before detaining a parent is a growing movement.

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[196] 725 Ill. Comp. Stat. 5/110, 2025.
[197] *Alternatives to Incarceration*, Mayoral's Office of Criminal Justice, https://criminaljustice.cityofnewyork.us/programs/alternatives-to-incarceration/.
[198] Erica King et. al., *Gender Justice Pretrial Toolkit*, Center for Effective Public Policy (2024).
[199] *Id.*
[200] *State Pretrial Reforms*, Nat'l Ass'n. Crim. Def. L. (2020), https://www.nacdl.org/Content/Legislation-and-State-Practices (listing all of the state reforms).
[201] Ross Jackson & Nikki Pressley, Caregiver Mitigation and Diversion Programs: A Family-Centered Alternative to Incarceration, Right on Crime (2024).
[202] Illinois Public Act 101-0471 (HB2444).
[203] Cal. Penal Code § 1001.83, Ch. 2.9E (2019).

Global Movement

As with the national movement, one focus of the international movement towards reforming pretrial detention is decreasing the harm caused to children by the pretrial detention of a parent. For example, the United Nations Convention on the Rights of the Child declares that in all proceedings concerning children, the best interests of the child shall be a primary consideration.[204] Additionally, the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women offenders recognize the particular risk of abuse faced by women who are detained pretrial, and state that when making pretrial decisions for a pregnant woman or a child's sole or primary caretaker, non-custodial measures should be preferred whenever possible.[205]

Further, the Inter-American Commission on Human Rights (IACHR) has identified that "the arbitrary and illegal application of pretrial detention is a chronic problem in the region."[206] In a report studying this issue and providing recommendations, the IACHR emphasized the disproportionate negative impacts faced by women detained pretrial, including the severe consequences to children when the women are responsible for raising them.[207] In these situations, the closest relative becomes responsible for looking after the child, which can lead to separation of siblings, and in most cases, social services have to step in to provide support to the child.[208] This disruption to the child's life caused by the mother's incarceration renders the child vulnerable to poverty, marginalization, and neglect.[209] Because of these findings, the IACHR recommends that, in accordance with the best interests of the child, "judicial authorities should apply the criteria of necessity, proportionality, and reasonableness more strictly when they consider ordering the pretrial detention of people who are responsible for children and adolescents."[210]

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[204] G.A. Res. 44/25, art. 3, Convention on the Rights of the Child (Nov. 20, 1989).
[205] UN Bangkok Rules, Preliminary Observations, para 9.
[206] Sofia Gavan Puente, et al., Report on Measures Aimed at Reducing the Use of Pretrial Detention in the Americas, IACHR (2017).
[207] *Id.* at 125.
[208] *Id.* at 129.
[209] Id.
[210] Id.

United States courts, including the Supreme Court, have considered international law specifically in reference to the appropriateness of criminal punishments.[211] Thus, this movement provides further support for the importance of considering parental responsibility.

Addressing Common Concerns

1. Considering a defendant's children does not unfairly benefit parents.

A common objection to considering a defendant's children for pretrial release decisions is that this unfairly benefits parent-defendants. However, any "benefits" enjoyed by parent-defendants are not unfair because they arise from the parent-defendants' individual characteristics. Parents and caregivers are different for how their children and parenthood are salient parts of their lives.[212] Children are powerful motivators for successful rehabilitation[213] and compliance with conditions of supervised release.[214] Research shows that parents and caregivers who adopt/accept parental identities have lower recidivism rates.[215] Because children and parenthood positively affect a defendant's likelihood of rehabilitation and lower the likelihood of recidivism, these factors make parent-defendants unique in evaluating their history and characteristics to determine whether no condition or set of conditions will reasonably assure defendant's appearance or protect public safety.

2. Considering a defendant's child does not allow defendants to use their children as get-out-of-jail-free cards if judges consider their children during pretrial proceedings.

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[211] Coker v. Georgia, 433 U.S. 584, 596 n.10, 97 S. Ct. 2861, 2868 n.10 (1977) (explaining that "the climate of international opinion concerning the acceptability of a particular punishment" is "not irrelevant" to Eighth Amendment analysis); Graham v. Florida, 560 U.S. 48, 80, 130 S. Ct. 2011, 2032 (2010) (considering international law in interpreting the Eighth Amendment to determine whether sentencing a minor to life in prison without the possibility of parole constitutes cruel and unusual punishment).
[212] Shlafer et al., *supra* note 99.
[213] HAZEL ET AL., *supra* note 108.
[214] *See* Adams et al., *supra* note 103 (finding that more routine parenting activities were associated with fewer probation and parole violations in the 18 months after starting supervision).
[215] Liu & Miller, *supra* note 114, at 872; *see also* Rodermond et al., *supra* note 104 (literature review on the association between crime desistance and motherhood); Venema et al., *supra* note 111 at 1481–82 (finding that fathers who resided with a partner and children six months after release were significantly less likely to be reconvicted 18 months after release than nonfathers and fathers who did not reside with a partner and children).

A common concern regarding the consideration of a defendant's children during pretrial proceedings is that defendants will simply use their children as get-out-of-jail-free cards, even if they have no relationship with their children.[216] Even if this situation arises, defendants will not be successful so long as judges have sufficient information to evaluate the child-caregiver relationship. For this reason, it is crucial for judges to request this information, for probation officers to ask for this information when interviewing the defendant during pretrial evaluations, and for advocates to produce this information to supplement their legal arguments. Evaluating the actual facts related to the child-caregiver relationship, rather than considering the fact that a defendant has children to alone be a mitigating factor, will ensure that the best interests of the defendant's children are properly considered. Importantly, evidence of a defendant's desire to develop or strengthen a relationship with his or her children also is relevant to the judge's consideration because children and the parental role are strong motivators for change.[217] Thus, a defendant's desire to be more involved with his or her children or to develop or strengthen relationships with his or her children may indicate a lower likelihood of recidivism and a stronger likelihood of rehabilitation.[218] As such, this is an important consideration for evaluating the defendant's history and characteristics to determine whether no condition or set of conditions will reasonably assure defendant's appearance or protect public safety.

Conclusion

The preceding information showcases how children can be impacted by the pretrial detention of their caregivers and how courts have begun to recognize the need to consider this impact when making pretrial detention determinations regarding a parent of a minor child. CIC believes that this research shows how utilizing alternatives to pretrial detention when it is in the best interest of the child benefits not only the parties involved but also society as a whole, and we appreciate you taking the time to learn more about this important issue.

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[216] *See* Eleanor L. Bush, *Not Ordinarily Relevant? Considering the Defendant's Children at Sentencing*, 54 FED. PROB. 194, 20 (1990), https://www.ojp.gov/pdffiles1/Digitization/123145NCJRS.pdf (discussing considerations for scrutinizing circumstances in which a defendant may be invoking parenthood and the needs of their children "as a ploy to obtain leniency").
[217] *Accord* Liu & Miller, *supra* note 114, at 871.
[218] *See* Mowen, Stansfield, & Boman, IV, *supra* note 107.