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### Jail Suicide by Design

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# U.C.L.A. Law Review

## Jail Suicide by Design

David E. Patton & Fredrick E. Vars

### ABSTRACT

Jeffrey Epstein's death in the federal jail in downtown Manhattan was the result of a conspiracy. But the conspirators were not the Clintons, President Trump, or Prince Andrew. Instead, his death, like too many others, was the result of a longtime conspiracy of lawmakers and actors within the criminal legal system itself. Several features of our legal system seem almost designed to promote suicide in jail. This Article examines and proposes solutions to two of those features: (1) jail conditions are inhumane in part because inmates face often insurmountable obstacles to hold jailers accountable; and (2) high rates of pretrial detention put far too many people at risk.

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## INTRODUCTION

Jeffrey Epstein's death in the federal jail in downtown Manhattan was the result of a conspiracy. But the conspirators were not the Clintons, President Donald Trump, or Prince Andrew. Instead, his death, like too many other (lesser known) suicide victims, was the result of a longtime conspiracy of lawmakers and actors within the criminal legal system itself.

The leading cause of death in jails, where people are detained pretrial, is suicide. People incarcerated while awaiting trial are an astonishing six times more likely to die by suicide than people imprisoned after being convicted and sentenced.<sup>1</sup> Why such stark figures? They are the result of a toxic combination: deplorable jail conditions and too many jailed people. As this brief Article explains, the conditions are fostered by a lack of accountability for jailers and a broken bail system that detains far too many people.

One might expect conditions in jails, where people are held while awaiting trial, to be better than prisons, where people are sent to serve their time after conviction and sentencing. After all, people awaiting trial have been convicted of nothing. The purpose of their incarceration is expressly not punishment. Unlike prison, the purpose of pretrial detention is only to ensure a person's presence in court and the safety of the community.

And yet the reality is that jails are overwhelmingly more punitive than prisons nationwide (no easy feat given the miserable state of many prisons). Stories from around the country about shockingly inhumane jail conditions are legion. Consider Sacramento, California, where the local jail lacks basic medical or mental health care.<sup>2</sup> Or Cuyahoga County in Ohio, where people are served moldy food and sleep on floors in cells with broken toilets reeking of feces and urine.<sup>3</sup> Or Etowah County in Alabama, where the local sheriff got rich by depriving incarcerated people of food and embezzling the money that should have

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1. MARGARET NOONAN ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, MORTALITY IN LOCAL JAILS AND STATE PRISONS, 2000–2013 - STATISTICAL TABLES 13 tbl.8, 21 tbl.18 (Nat'l Crim. Justice Reference Serv. No. 248756, 2015), <https://www.bjs.gov/content/pub/pdf/mljsp0013st.pdf> [https://perma.cc/RTK3-QM5J].
  2. See Abbie Vansickle & Manuel Villa, *California's Jails Are So Bad Some Inmates Beg to Go to Prison Instead*, L.A. TIMES (May 23, 2019, 3:00 AM), <https://www.latimes.com/local/lanow/la-me-california-jails-inmates-20190523-story.html> [https://perma.cc/PB34-BF3P].
  3. See Elizabeth Noreika, *Cleveland Councilman Leads Rally Over Cuyahoga County Jail Conditions*, FOX8 (Aug. 9, 2019, 10:12 AM), <https://fox8.com/2019/08/08/cleveland-councilman-leads-rally-over-cuyahoga-county-jail-conditions> [https://perma.cc/4VGA-EZNY].

been spent on it.<sup>4</sup> Or Kemper County in Mississippi, where Robert Wayne Johnson, a 51-year-old married father of five, was sentenced in late 2017 to two days in jail for unpaid court fines and fees and inexplicably was held by jailers for fifty-two additional days until he was found hanging dead by his shoelaces.<sup>5</sup>

Life in the federal jails in New York City is no exception to the deplorable conditions found elsewhere. The Metropolitan Correction Center (MCC), where Epstein was held, is a miserable place.<sup>6</sup> Medical care is abysmal. Corrections Officers at both facilities—the Metropolitan Detention Center in Brooklyn, as well as the MCC—have committed egregious sexual assaults against inmates. The MCC is a cramped, vertical building with the only “outdoor” recreation located on the roof in a space covered by thick fencing that barely allows for a view of the sky.<sup>7</sup> The unit at the MCC where Epstein was housed, “9 South,” keeps people in small, virtually windowless cells for twenty-three hours a day.<sup>8</sup>

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4. See Connor Sheets, *Inside Etowah County Jail: ‘Nightmare’ Conditions May Have Helped Sheriff Buy Beach House*, AL.COM (Mar. 6, 2019), [https://www.al.com/news/birmingham/2018/03/inside\\_etowah\\_county\\_jail\\_nigh.html](https://www.al.com/news/birmingham/2018/03/inside_etowah_county_jail_nigh.html) [<https://perma.cc/LJF4-Z658>].
  5. Kim Bellware, *Sentenced to 2 Days But Held for 54: How One Man’s Jail Suicide Underscores Mississippi’s Mental Health Care Crisis*, WASH. POST (Oct. 16, 2019, 12:38 PM), <https://www.washingtonpost.com/nation/2019/10/16/sentenced-days-held-how-one-mans-jail-suicide-underscores-mississippis-mental-health-care-crisis> [<https://perma.cc/CL2P-4S54>]. The entire state of Mississippi is now under federal investigation following the deaths of at least fifteen incarcerated people in prisons and jails in just three months. Lici Beveridge, *15th State Inmate Dies Amid Mississippi Prison Crisis; Cause Under Investigation*, USA TODAY (Feb. 3, 2020, 6:30 PM), <https://www.usatoday.com/story/news/nation/2020/02/03/mississippi-prison-deaths-15th-inmate-dies-cause-under-investigation/4643280002> [<https://perma.cc/R83G-7U7X>]. A major part of the investigation is examining whether “there are adequate healthcare and suicide prevention services.” Associated Press, *Justice Department Investigates Mississippi Prisons After String of Deaths*, NBC NEWS (Feb. 5, 2020, 11:40 PM), <https://www.nbcnews.com/news/crime-courts/justice-department-investigates-mississippi-prisons-after-string-deaths-n1131191> [<https://perma.cc/RNM6-JNQN>]; see also Bellware, *supra*.
  6. See Lauren Aratani, *Rats and Raw Sewage: Jeffrey Epstein Jail Blighted by ‘Horrible’ Conditions*, GUARDIAN (Aug. 17, 2019, 2:00 AM), <https://www.theguardian.com/us-news/2019/aug/17/jeffrey-epstein-new-york-metropolitan-correctional-center-jail> [<https://perma.cc/EJ6N-XFT5>]; see also Nicole Einbinder, *Here’s What Conditions Are Like at the Prison Where Jeffrey Epstein Apparently Died by Suicide*, INSIDER (Aug. 12, 2019, 9:04 AM), <https://www.insider.com/conditions-prison-jeffrey-epstein-apparently-committed-suicide-metropolitan-correctional-center-2019-8> [<https://perma.cc/L6NN-C4L8>] (describing a 2018 investigation by Gothamist, which revealed “filthy conditions, vermin infestations, substandard medical care, and violence and abuse by guards” at the MCC).
  7. Greg Myre, *Justice Department Raises Questions About Jail Where Epstein Died*, NPR MORNING EDITION (Aug. 13, 2019, 5:00 AM), <https://www.npr.org/2019/08/13/750709305/justice-department-raises-questions-about-jail-where-epstein-died> [<https://perma.cc/WXU4-G65Z>].
  8. Ali Watkins et al., *Epstein Feared Misery of Jail in Final Days*, N.Y. TIMES (Aug. 18, 2019), at A1.

When these conditions are combined with the dangerously fragile mental state of people who have just been arrested,<sup>9</sup> high suicide rates are no surprise. Detention after arrest usually means someone is plucked from life, separated from family, and deprived of a job and a home—all on the same day. The despair can rival or exceed any of life's most difficult times, such as the unexpected death of a loved one or a devastating romantic breakup. Think about enduring one of those events while also suffering through the jail conditions described above.

Then consider that an estimated half of people in jails enter them suffering from a mental health disorder.<sup>10</sup> According to a recent report, the three largest psychiatric facilities in America are jails (in New York, Los Angeles, and Chicago).<sup>11</sup> As the journalist and author, Alisa Roth, described jail: "It's unpleasant, it's loud, it's claustrophobic. . . . You see people who are desperately sick. I mean, desperately sick."<sup>12</sup> She went on to describe a particular scene in the L.A. County jail when "corrections officers came out with a man who had been strapped into a wheelchair and was bleeding from his arm because he had scratched out a piece of his own flesh."<sup>13</sup>

It is well past time to fundamentally rethink pretrial detention. No one should be subjected to these conditions, especially not people who are presumed innocent and at great risk of self-harm.

This Article outlines two key reasons for high jail suicide rates: (1) miserable jail conditions persist because incarcerated people face often insurmountable obstacles to hold jailers accountable for suicide; and (2) high rates of pretrial detention put more people at risk. The solutions correspond to the problems: (1) remove the barriers to legitimate civil rights suits against the operators of jails, including by establishing the same negligence standard for jailers that applies to any commercial caretaker, abolishing qualified immunity, and repealing the Prison Litigation Reform Act; and (2) put far fewer people in jails to begin with.

## I. HORRENDOUS CONDITIONS IN JAIL: LIMITATIONS ON JUSTICE

Appalling conditions in jails is a key factor contributing to high rates of suicide by pretrial detainees. In 2014, the most recent year with available data, the

9. See Naomi F. Sugie & Kristin Turney, *Beyond Incarceration: Criminal Justice Contact and Mental Health*, 82 AM. SOC. REV. 719 (2017).

10. See Ailsa Chang, 'Insane': America's 3 Largest Psychiatric Facilities Are Jails, KCUR (Apr. 30, 2018, 5:01 PM), <https://www.kcur.org/2018-04-30/insane-americas-3-largest-psychiatric-facilities-are-jails#stream/0> [<https://perma.cc/4R6Z-7R6P>].

11. *Id.*

12. *Id.* (quoting Alisa Roth).

13. *Id.*

suicide rate in jail<sup>14</sup> was nearly four times higher than in the general population.<sup>15</sup> Half of jail suicides took place within nine or fewer days served.<sup>16</sup> In some notable cases, inmate-initiated litigation has had a strong impact, driving necessary reforms in some of the worst jails and prisons.<sup>17</sup> But the current state of the law makes it exceedingly difficult for people detained pretrial to successfully litigate jail conditions cases and thereby obtain much-needed relief for themselves and others. In particular, the low legal standard of care for jailers, qualified immunity, and the Prison Litigation Reform Act together function to insulate jail operators from accountability for inmate suicide and considerably limit the availability of judicial relief. Without legal liability, there is little incentive for reform.

#### A. Jailers' Legal Standard of Care

A good case could be made that jailers should be held to a higher legal standard of care than commercial caretakers like hospitals. Jailed people are detained involuntarily solely because they have been charged with a crime and cannot afford or have been denied bail. And they are almost by definition a high-risk group, far more likely than the general population to suffer from serious mental illness and substance abuse (with its attendant withdrawal symptoms after arrest).<sup>18</sup>

And yet not only are jailers not held to a higher standard, they are in fact held to a considerably lower one. A private hospital, for example, must exercise reasonable care to prevent suicide by a patient or else face tort liability. Courts find

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14. MARGARET E. NOONAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, MORTALITY IN LOCAL JAILS, 2000–2014 - STATISTICAL TABLES 6 tbl.4 (Nat'l Crim. Justice Reference Serv. No. 250169, 2016), <https://www.bjs.gov/content/pub/pdf/mlj0014st.pdf> [<https://perma.cc/QV29-RCM5>] (finding a suicide rate of 50 per 100,000 local jail inmates in 2014, the most recent year available).
  15. Suicide, NAT'L INST. MENTAL HEALTH, <https://www.nimh.nih.gov/health/statistics/suicide.shtml> [<https://perma.cc/RVD4-2WF8>] (last updated Apr. 2019) (finding a suicide rate of 13 per 100,000 individuals in the general population in 2014).
  16. NOONAN, *supra* note 14, at 12 tbl.10.
  17. See Daniel A. Farber, *Stretching the Adjudicative Paradigm: Another Look at Judicial Policy Making and the Modern State*, 24 LAW & SOC. INQUIRY 751, 754–56 (1999) (describing a landmark Arkansas case).
  18. See JENNIFER BRONSON ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DRUG USE, DEPENDENCE, AND ABUSE AMONG STATE PRISONERS AND JAIL INMATES, 2007–2009, at 1 fig.1, 16 tbl.17 (Nat'l Crim. Justice Reference Serv. No. 250546, 2017), <https://www.bjs.gov/content/pub/pdf/dudaspji0709.pdf> [<https://perma.cc/4963-EA6E>]; Henry J. Steadman et al., *Prevalence of Serious Mental Illness Among Jail Inmates*, 60 PSYCHIATRIC SERVS. 761, 761–62, 764 (2009) (showing that the prevalence rates of serious mental illness among jail inmates were 14.5 percent for men and 31.0 percent for women, *id.* at 764, based on data from 2002–2003 and 2005–2006, *id.* at 762).

defendant hospitals negligent and therefore liable in cases in which a patient's suicide was reasonably foreseeable and the hospital did not exercise reasonable care to prevent it.<sup>19</sup> Reasonableness is an objective standard.<sup>20</sup>

In contrast, in 1994 the U.S. Supreme Court announced in *Farmer v. Brennan*<sup>21</sup> that jailers are held to a subjective rather than objective standard.<sup>22</sup> To be liable under the Eighth Amendment for inhumane conditions, a prison official must know that the incarcerated person faces "a substantial risk of serious harm and disregard[] that risk by failing to take reasonable measures to abate it."<sup>23</sup> This subjective interpretation of the Eighth Amendment "deliberate indifference" standard is narrower than some earlier lower court interpretations. Those courts had held that jailers could be liable not just for inaction in the face of known risks, but also of risks obvious enough that the jailer's failure to appreciate them was reckless.<sup>24</sup> Notably, this was already a tougher standard to meet than mere negligence, but *Farmer* made it tougher still by requiring subjective awareness of risk.

Proving a subjective state of mind is difficult, so it should not be surprising that jailers have been less often held liable for inmate suicide in the years after *Farmer*. One study found that plaintiffs prevailed in 25 percent of jail and 45 percent of lock-up suicide cases in the fourteen years before *Farmer*.<sup>25</sup> Those success rates fell to 15 percent and 23 percent in the thirteen years after.<sup>26</sup>

## B. Qualified Immunity

Plaintiffs in inmate suicide cases face yet another hurdle: qualified immunity. Under the qualified immunity doctrine, state actors can only be liable if their conduct violated a statutory or constitutional right that was "clearly established" at the time of the incident.<sup>27</sup> In its first inmate suicide decision, *Taylor v. Barkes*,<sup>28</sup> the U.S. Supreme Court held that an incarcerated person's right to proper

19. See, e.g., *Miss. Dep't of Mental Health v. Hall*, 936 So. 2d 917, 923 (Miss. 2006); *Smith v. United States*, 437 F. Supp. 1004, 1010–11 (E.D. Pa. 1977).

20. E.g. *Stanphill v. Ortberg*, 129 N.E.3d 1167, 1177 (Ill. 2018).

21. 511 U.S. 825 (1994).

22. *Id.* at 839–40.

23. *Id.* at 847.

24. *Id.* at 836.

25. Darrell L. Ross, *Taylor v. Barkes: Liability Issues and Custodial Suicide*, 53 CRIM. L. BULL. 1234, 1242 tbl.1 (2017).

26. *Id.*

27. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); see also Venus Chui, *Correcting Correctional Suicide: Qualified Immunity and the Hurdles to Comprehensive Inmate Suicide Prevention*, 59 B.C. L. REV. 1397, 1403 (2018).

28. 575 U.S. 822 (2015).



implementation of adequate suicide prevention procedures was not clearly established in 2004.<sup>29</sup>

This obstacle may appear insurmountable, but it is not. First, a right to adequate screening and prevention may yet become clearly established.<sup>30</sup> Second, even if an adequate general process is not required, jailers may be liable for suicide by failing to take reasonable steps to mitigate the known risk with respect to a particular person.<sup>31</sup> Still, qualified immunity is a significant barrier to liability and thus reduces the incentive of jailers<sup>32</sup> to prevent suicide by shielding their acts and omissions from judicial remedy.<sup>33</sup>

### C. Prison Litigation Reform Act

One key legal obstacle contributing to the high jail suicide rate is the Prison Litigation Reform Act (PLRA).<sup>34</sup> Passed in 1996 as part of Newt Gingrich's Contract with America, the PLRA made it much more difficult for people in jails and prisons, both state and federal, to obtain judicial relief for poor conditions and mistreatment through a variety of provisions.<sup>35</sup> Followup studies have shown that the PLRA was very effective in curbing civil rights filings.<sup>36</sup>

Drastically fewer civil rights filings have resulted not just in fewer successful individual suits, but also fewer institution-wide court orders. The number of local jails remained basically constant between 1993 and 2006, but the proportion of jails under a court order fell from 18 percent to 11 percent.<sup>37</sup> The proportion of people in jail housed in facilities under a court order was less than half as many in 2006 (20 percent) compared to 1993 (46 percent).<sup>38</sup> Civil rights litigation plays an

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29. *Id.*

30. See *Braggs v. Dunn*, 257 F. Supp. 3d 1171, 1185 (M.D. Ala. 2017) ("Mental-health staff [in Alabama prisons] fail to use appropriate risk-assessment tools to determine suicide risk.").

31. Cf. *Colburn v. Upper Darby Twp.*, 946 F.2d 1017, 1023 (3d Cir. 1991) (explaining that prison has duty toward detainee with "particular vulnerability to suicide"), *affg* No. 86-2132, 1990 WL 74200 (E.D. Pa. May 31, 1990).

32. The government itself is insulated from liability by *Monell v. Department of Social Services*, 436 U.S. 658 (1978), in which the Court held that only violations caused by government policy or custom can ground a section 1983 claim against a government entity. *Id.* at 694.

33. Some states also provide immunity under state law for police officers working in jails. See, e.g., *Howard v. City of Atmore*, 887 So. 2d 201 (Ala. 2004).

34. 42 U.S.C. § 1997e (2018).

35. See Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 153–54 (2015).

36. *Id.* at 156, 158 fig.B (showing that, after the PLRA was passed in 1996, civil rights litigation filings and filing rates declined steeply in 1996 and 1997, and rates continued to shrink over the next decade before plateauing).

37. *Id.* at 169 tbl.8.

38. *Id.*

important role in improving and maintaining jail and prison conditions. “[I]ndividual inmate litigation prior to the PLRA had a real, though undeniably partial, tendency to pressure jail and prison authorities to comply with the (quite minimal) constitutional law of corrections.”<sup>39</sup>

The PLRA also hit people with mental illness particularly hard.<sup>40</sup> Mental healthcare in jail and prison is often nonexistent or woefully inadequate<sup>41</sup> while the percentage of incarcerated people with mental illness has skyrocketed since 1990.<sup>42</sup> And individuals with mental health problems are at relatively high risk of suicide.<sup>43</sup> Consequently, the increased difficulty of bringing litigation brought about by the PLRA has limited the ability of people with mental illness to seek improved conditions and treatment, which could otherwise reduce the suicide rates among this vulnerable segment of the jail population.

The reduction in jail orders has been particularly harmful, both by allowing poor conditions and by eliminating a pathway to pretrial release. “Because they so often included population caps, jail orders have been useful for administrators stuck with overcrowded facilities (which are dangerous for staff as well as for inmates), giving them new authority to release pretrial detainees whom they believe are not dangerous.”<sup>44</sup> Overcrowded, horrible conditions are a recipe for high suicide rates.<sup>45</sup>

## II. TOO MANY PEOPLE IN JAIL

There are also too many suicides in jail because there are too many people in jail. As discussed, pretrial detention is often deadly, and the overall trend (at least until quite recently) has been toward detaining more and more people each year. In every state that reports jail data to the Bureau of Justice Statistics, the number of

39. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1666 (2003).

40. See, e.g., *Developments in the Law—The Law of Mental Illness*, 121 HARV. L. REV. 1114, 1145–46 (2008).

41. See, e.g., *Braggs v. Dunn*, 257 F. Supp. 3d 1171, 1184–85 (M.D. Ala. 2017) (finding that Alabama failed to provide constitutionally adequate mental healthcare in prison); *Coleman v. Wilson*, 912 F. Supp. 1282, 1316 (E.D. Cal. 1995) (same).

42. Fredrick E. Vars & Shelby B. Calambokidis, *From Hospitals to Prisons: A New Explanation*, 102 CORNELL L. REV. ONLINE 101, 104 fig.1 (2017).

43. See, e.g., E. Clare Harris & Brian Barraclough, *Suicide as an Outcome for Mental Disorders: A Meta-Analysis*, 170 BRIT. J. PSYCHIATRY 205, 222 (1997).

44. Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 623 (2006).

45. To be clear, the PLRA is not the only factor contributing to awful jail conditions. The situation in the federal system is exacerbated by a structural conflict: The Bureau of Prisons operates under the Attorney General, who cannot very well sue himself for poor conditions. In contrast, the Attorney General can bring litigation against deficient state systems.

people in pretrial detention in jails rose substantially between 1978 and 2013.<sup>46</sup> The median state saw a 5.85-fold increase.<sup>47</sup> Each state is, of course, different and a comprehensive review is beyond the scope of this brief Article. It is also worth noting that a few states have recently adopted reforms designed to reduce pretrial detention, such as eliminating or reducing the use of cash bail.<sup>48</sup> But in some notable jurisdictions there has also been a backlash to these efforts, with vocal calls from some law enforcement groups to roll back reforms.<sup>49</sup>

In the federal system, the increase in the number of people detained pretrial in the past several decades is the combined result of a large expansion of federal prosecutions overall,<sup>50</sup> a shift in the type of cases prosecuted (most notably criminal prosecutions for immigration offenses such as illegally entering or reentering the country),<sup>51</sup> and a sharp rise in the rate of pretrial detention among

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46. See Joshua Aiken, *Era of Mass Expansion: Why State Officials Should Fight Jail Growth*, PRISON POL'Y INITIATIVE (May 31, 2017), [https://www.prisonpolicy.org/reports/jailsovertime\\_table\\_3.html](https://www.prisonpolicy.org/reports/jailsovertime_table_3.html) [<https://perma.cc/5TR9-4DU9>] (showing jail conviction status by state over time for every state except Alaska, Connecticut, Delaware, Hawaii, Rhode Island, and Vermont, which have combined prison and jail systems and therefore do not report jail data to the Bureau of Justice Statistics).
  47. See *id.* Using this data, we calculated the median increase in pretrial detainees across states as follows: For each state with available data, the percent pretrial was multiplied by total jail population to find the total pretrial population in 1978 and 2013. The pretrial population in 2013 was then divided by the pretrial population in 1978 to find the increase in pretrial detainees for each state.
  48. See SAMANTHA HARVELL ET AL., URBAN INST., REFORMING SENTENCING AND CORRECTIONS POLICY: THE EXPERIENCE OF JUSTICE REINVESTMENT INITIATIVE STATES 15 (2016), [https://www.urban.org/sites/default/files/publication/86691/reforming\\_sentencing\\_and\\_corrections\\_policy\\_3.pdf](https://www.urban.org/sites/default/files/publication/86691/reforming_sentencing_and_corrections_policy_3.pdf) [<https://perma.cc/88LK-QU9Z>] (describing reforms in Kentucky and Alaska in particular).
  49. See, e.g., Jesse McKinley, *The Bail Reform Backlash That Has Democrats at War*, N.Y. TIMES (Feb. 16, 2020), <https://www.nytimes.com/2020/02/14/nyregion/new-york-bail-reform.html> [<https://perma.cc/9F3B-YKRQ>] (discussing the opposition, including from law enforcement, to New York's new bail and discovery reform laws).
  50. Compare U.S. ATTORNEY'S OFFICE, U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' STATISTICAL REPORT: FISCAL YEAR 1984, at 1 (1984), [https://www.justice.gov/sites/default/files/usao/legacy/2009/07/31/STATISTICAL\\_REPORT\\_FISCAL\\_YEAR\\_1984.pdf](https://www.justice.gov/sites/default/files/usao/legacy/2009/07/31/STATISTICAL_REPORT_FISCAL_YEAR_1984.pdf) [<https://perma.cc/2RE8-F86C>] (showing 30,239 total criminal case filings in fiscal year 1984, including appeals), with U.S. ATTORNEY'S OFFICE, U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2018, at 4 tbl.1 (2018), <https://www.justice.gov/usao/page/file/1199336/download> [<https://perma.cc/GL84-6S7X>] (showing 64,222 total criminal case filings in fiscal year 2018, excluding appeals).
  51. THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRETRIAL DETENTION AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 1995–2010, at 2 (Nat'l Crim. Justice Reference Serv. No. 239673, 2013), <https://www.bjs.gov/content/pub/pdf/pdmfcd9510.pdf> [<https://perma.cc/VZ47-NGZN>] (describing the Bail Reform Act of 1984, 18 U.S.C. § 3141 (2018)). The study examined the increase for the period from 1995 to 2010 by case type. Although the pretrial detention rate increased for every major case category, the biggest contributor to the overall increase was vastly expanded criminal immigration enforcement. *Id.*

those prosecuted. The last factor, the growth in the rate of federal pretrial detention, can be traced to a very specific moment: passage of the Bail Reform Act of 1984 (BRA).<sup>52</sup> In the year before the act went into effect, 23.8 percent of federal criminal defendants were held before trial, either on pretrial detention or for inability to meet bail conditions.<sup>53</sup> In the year after passage, that number immediately jumped to 28.9 percent,<sup>54</sup> and, over the ensuing decades, climbed steadily to well over 70 percent in 2018 (Figure 1). Those steep increases occurred without a cash bail system—a cautionary tale for states considering bail reform. Two aspects of the BRA have been particularly responsible for the jump in the rate of pretrial detention: (1) a statutory presumption in favor of detention for a host of offenses, including many non-violent drug crimes, and (2) an emphasis on detaining people determined to be a “danger” based on an overly broad and vague standard.<sup>55</sup>

The presumption of detention for certain offenses has been particularly pernicious. Between 2006 and 2015, the presumption applied in 93 percent of all federal drug cases,<sup>56</sup> which themselves account for over a quarter of all federal criminal cases.<sup>57</sup> In any given year, at least 42 percent of all people charged with federal crimes are subject to a presumption of detention contributing heavily to an overall detention rate as high as 59 percent even after excluding immigration cases.<sup>58</sup> A recent study by the Probation and Pretrial Services Office of the U.S. Courts found that “the effect of the presumption on actual release rates . . . was

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at 3. In 1995, there were over 4400 defendants charged with immigration offenses; by 2010, that number had risen to over 34,000. *Id.* at 4 & fig.4. Pretrial detention in immigration cases is nearly automatic, generally above 90 percent. *Id.* at 3 tbl.1. Overall, the burgeoning immigration docket was responsible for 60 percent of the increase in defendants detained pretrial. *Id.* at 5 tbl.2. Expansions of other case categories account for another 25 percent. *Id.*

52. Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended at 18 U.S.C. §§ 3141–3150 (2018)).

53. STEPHEN KENNEDY & KENNETH CARLSON, U.S. DEP’T OF JUSTICE, PRETRIAL RELEASE AND DETENTION: THE BAIL REFORM ACT OF 1984, at 2 tbl.2 (Nat’l Crim. Justice Reference Serv. No. 109929, 1988), <https://www.bjs.gov/content/pub/pdf/prd-bra84.pdf> [<https://perma.cc/Z94B-NQR4>].

54. *Id.*

55. See generally *The Administration of Bail by State and Federal Courts: A Call for Reform: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 116th Cong. (2019) (written statement of Alison Siegler, Professor of Law, University of Chicago Law School) (detailing several ways that the Bail Reform Act is responsible for over-detention and recommending reforms).

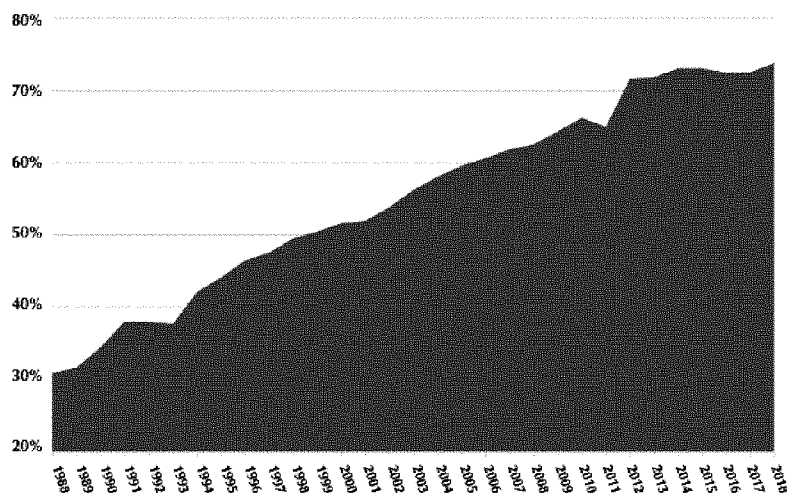
56. Amaryllis Austin, *The Presumption for Detention Statute’s Relationship to Release Rates*, FED. PROB., Sept. 2017, at 52, 55.

57. U.S. SENTENCING COMM’N, FISCAL YEAR 2018: OVERVIEW OF FEDERAL CRIMINAL CASES 4 (2019), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/FY18\\_Overview\\_Federal\\_Criminal\\_Cases.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/FY18_Overview_Federal_Criminal_Cases.pdf) [<https://perma.cc/2URT-NCMU>].

58. Austin, *supra* note 56, at 60.

most significant for low-risk defendants” and had a “negligible effect on the highest risk defendants.”<sup>59</sup> It concluded that the “presumption was a poorly defined attempt to identify high-risk defendants based primarily on their charge, relying on the [mistaken] belief that a defendant’s charge was a good proxy for that defendant’s risk.”<sup>60</sup> The application’s heavy impact in drug cases also means that it has a highly disproportionate impact on people of color: Approximately 75 percent of all people charged with federal drug crimes are Black or Hispanic (as defined by the U.S. Sentencing Commission).<sup>61</sup>

**Figure 1: Federal Pretrial Detention Rate**



Source: *Judicial Business of the United States Courts* and *AQUSC Decision Support System*

The BRA’s inclusion of the ill-defined authority to detain anyone who “will endanger the safety of any other person or the community” suffers flaws similar to the presumption: It sweeps far too broadly and disparately impacts racial minorities. Criminal history has been the most widely used proxy for future dangerousness, so higher detention rates flow for people with more contact with the court system. And as one scholar has explained: “While two defendants may

59. *Id.*

60. *Id.*

61. U.S. SENTENCING COMM’N, 2017 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at S-16 tbl.4 (2017), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/2017SB\\_Full.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/2017SB_Full.pdf) [<https://perma.cc/NKG6-AGCP>].

pose a similar crime risk, the defendant living in a heavily-policed minority neighborhood is likely to have a lengthier criminal record and thus a higher risk score than one who lives in a less heavily-policed neighborhood.”<sup>62</sup>

In the federal system, at each criminal history level—determined primarily by a person’s prior convictions—the pretrial detention rate increased between 1995 and 2010.<sup>63</sup> Yet the observed rate of misconduct during release has remained tiny. In 2010, 1 percent of defendants who were released pretrial failed to appear and 2 percent were rearrested for a felony.<sup>64</sup> These numbers strongly suggest that the vast majority of people detained pretrial are not dangerous or likely to miss court hearings. In commenting on the low rates of misconduct one expert noted: “What’s really remarkable is that this near-perfect compliance is seen equally in federal districts with very high release rates and those with very low release rates. So when release rates increase, crime and flight do not.”<sup>65</sup>

Of course, it is theoretically possible that the system is correctly identifying and detaining dangerous people, so that releasing them would rapidly increase the observed rate of violent misconduct. One can never know what a detained person would have done if released, but the best available evidence suggests that even people classified as particularly dangerous would be rearrested for a violent offense at extremely low rates. Since 2009, the federal Office of Pretrial Services has employed an actuarial risk assessment instrument, the Pretrial Risk Assessment instrument (PTRA). A recent examination of the PTRA revealed that only 2.9 percent of defendants in the highest risk category were arrested for a violent offense on release.<sup>66</sup> In other words, over 95 percent of the defendants considered most “dangerous” would not commit a violent crime on release.<sup>67</sup>

Many have observed that overuse of pretrial detention effectively flips the presumption of innocence, makes conviction more likely, and leads to a host of

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62. Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 328 (2018).

63. COHEN, *supra* note 51, at 6 tbl.3.

64. *Id.* at 8 tbl.4.

65. *The Administration of Bail by State and Federal Courts: A Call for Reform: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 116th Cong. 1 (2019) (testimony of Alison Siegler, Professor of Law, University of Chicago Law School) (footnote omitted).

66. Thomas H. Cohen & Christopher T. Lowenkamp, *Revalidation of the Federal PTRA: Testing the PTRA for Predictive Biases*, 46 CRIM. JUST. & BEHAV. 234, 245 tbl.2 (2019). The failure to appear rate among the “riskiest” defendants was similarly low (4.6 percent). *Id.*

67. We do not engage here in the debate about the wisdom of using actuarial risk assessment tools. Suffice it to say, there are compelling reasons not to use them. See, e.g., Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490 (2018).

negative postrelease outcomes.<sup>68</sup> Inflated rates of pretrial detention also condemn many more defendants to die by suicide in jail.<sup>69</sup>

### CONCLUSION

Jeffrey Epstein was not the most sympathetic suicide victim, but his case is the most visible tip of a massive iceberg. There are hundreds of largely invisible jail suicide victims each year. In almost every case, we can identify the mistakes, neglect, and mistreatment that contributed to the tragedy. What is underappreciated, however, are the systemic factors driving the jail suicide crisis. This Article laid bare two such factors: (1) overincarceration and (2) poor conditions resulting from severe limitations on litigation and a consequent lack of accountability.

These factors combine to help explain the historical trend in jail suicide rates. In the mid-1990s, the PLRA worsened jail conditions and *Farmer* reduced the liability of jailers for suicide. By reducing civil rights litigation, the PLRA also meant fewer constitutional protections would become “clearly established” such that jailers would lose qualified immunity for violating them. Pretrial detention rates continued to climb in the 1990s. These interrelated developments coincided with stalled progress in reducing jail suicide. The suicide rate in jail fell dramatically until the early 1990s.<sup>70</sup> The improvement stopped around the same time as Congress enacted the PLRA, the Supreme Court decided *Farmer*, and jails were flooded with too many pretrial detainees.

The steps to prevent suicide in individual cases are often obvious. Closer monitoring of suicidal people like Epstein would prevent many deaths. But systemic changes are needed to counteract the systemic failures that promote jail suicide. Specifically, jailers should be held just as accountable for suicide as other

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68. E.g., Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417 (2016).

69. Of course, some defendants would die by suicide outside of jail if released. Those released pretrial are probably at higher risk of suicide than the general population and perhaps even than detainees. Being charged with a crime is distressing, criminal defendants disproportionately suffer from mental health problems, and there are more accessible means to attempt suicide outside of jail. The rate of suicide among individuals on pretrial release has not been studied. Cf. James M. Byrne et al., *New Defendants, New Responsibilities: Preventing Suicide Among Alleged Sex Offenders in the Federal Pretrial System*, FED. PROB., Sept. 2009, at 40, 41 (“[E]stimates of the incidence of suicide among [the] state-level pretrial release population are not available . . . because the necessary research has not been done.”).

70. CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SUICIDE AND HOMICIDE IN STATE PRISONS AND LOCAL JAILS 1 (Nat’l Crim. Justice Reference Serv. No. 210036, 2005), <https://www.bjs.gov/content/pub/pdf/shsplj.pdf> [<https://perma.cc/MA78-LL8G>].

custodians by applying normal tort law principles and eliminating qualified immunity. Congress should repeal the PLRA to allow people to enforce their civil right to humane conditions in jail. And judges should dramatically scale back the overuse of pretrial detention. Correcting these defects must be part of any comprehensive effort to bring down the tragic death toll of suicide in jail.