

November 18, 2022

Dear Illinois General Assembly,

We are law professors and faculty from across Illinois, and we write to urge you to reject SB 4228, a SAFE-T Act trailer bill drafted by the Illinois State's Attorney Association. This bill is a dangerous attempt to undercut the Pretrial Fairness Act and increase incarceration in Illinois. Under the Pretrial Fairness Act, individuals charged with serious crimes can already be detained if they pose a flight risk or risk to public safety. The provisions included in SB 4228 would dramatically increase the number of people in jail by granting prosecutors and judges broad discretion to lock up people who are accused of only minor offenses—people who do not pose a risk of any immediate harm to anyone. Moreover, SB 4228 violates the Illinois Constitution by creating a presumption of detention, and raises serious due process concerns. Ultimately, SB 4228 would incarcerate even more people without trial, exacerbate existing racial disparities in the Illinois criminal legal system, and subject more people and families to the severe harms associated with pretrial incarceration.

Increased Discretion to Jail Innocent People: SB 4228 would allow prosecutors and judges to hold people in jail for extended periods of time, even though they have not been convicted of any crime and are accused only of misdemeanor or low-level status offenses. Under SB 4228, prosecutors would be empowered to ask a judge to jail any person, irrespective of the crime for which they are charged, an authority they do not have even under the current system. Under the current system, prosecutors do not have an unlimited ability to hold people “no bail”: instead, holding people without the possibility of monetary release is limited to only some serious charges¹. Having limits on which charges are eligible for pretrial jail is an essential check on prosecutorial power.

In addition, SB 4228 would allow prosecutors and judges broad discretion to lock up people in jail for indefinite periods, based on vague, broad standards that a person poses a general threat to the community. This stands in stark contrast to the Act's strict and clear requirement that a prosecutor must show that release would pose “a specific, real and present threat” to a person or persons. Taken together, the expansion of the number of charges eligible for detention and the weakening of the legal standards needed to prove dangerousness create a system where it is easier to jail more people than it is even under current law. These proposed amendments have the potential to dramatically increase the number of people detained pretrial, undermining the primary purpose of the Act.

Due Process Concerns: SB 4228 would deny people who are arrested the ability to meaningfully challenge the evidence against them, raising fundamental due process concerns. Specifically, SB 4228 would eliminate the Act's requirements that prosecutors must share with the defense the substance of any statement that the prosecutor intends to rely upon to detain a person in advance of the detention hearing. Instead, SB 4228 would allow prosecutors to rely on statements in detention hearings without first disclosing them to the defense. Without knowing the evidence against them, people who are legally presumed innocent cannot challenge the evidence being used to detain them, and their attorneys cannot meaningfully represent them in

¹ 725 ILCS 5/110-6.1.

detention proceedings. The Due Process Clause of the Fourteenth Amendment states that no state shall “deprive any person of life, liberty, or property, without due process of law.”² Due Process includes the right to challenge evidence.³ The language and effect of SB 4228 are in direct conflict with this right.

Furthermore, SB 4228 would also remove the ability of defense attorneys to question the use or weight of unlawfully obtained evidence in detention hearings. The bill seeks to remove the original protection included in the Act, that a “court may consider the admissibility of any evidence sought to be excluded” in a detention hearing. The bill also seeks to remove later references to the admissibility of evidence. The Illinois Constitution refers to the strength of evidence as part of the standard for determining when the denial of bail is permissible (“except where the proof is evident”),⁴ thereby demonstrating the importance of courts’ ability to consider all circumstances, including the admissibility of evidence, in detention proceedings. By eliminating the protection, SB 4228 risks running afoul of the Illinois Constitution and would only heighten the existing legal problems and structural inequalities associated with pretrial detention.

Unconstitutional Presumption of Detention: SB 4228 would create an unconstitutional presumption of detention in cases where, if the person who has been arrested is ultimately found guilty, a sentence of life imprisonment would be imposed. It is a fundamental violation of the presumption of innocence to make what someone is charged with the primary factor in whether they are jailed. Regardless of charge, every person should enjoy an equal presumption of innocence under the law. A presumption of detention in any case undeniably operates against the constitutional mandate for a presumption of innocence. Presumptions of detention are also unconstitutional under the Illinois Constitution.

The Illinois Supreme Court ruled in 2002, in People v. Purcell,⁵ that a similar presumption of detention in a past statute⁶ violated the Illinois Constitution. Section 9 of the Illinois Constitution states that “[a]ll persons shall be bailable except where the proof is evident or the presumption great.”⁷ The Illinois Supreme Court ruled that this provision created a rebuttable presumption that people accused of crimes are eligible for release, unless the *State* can show sufficient evidence that the person who has been arrested should be denied their constitutional right. In other words, the State, not the accused person, must bear the burden of proving that jail is necessary. Much like the presumption at issue in Purcell, SB 4228 places the burden on the arrested person to overcome the presumption of detention. This would give broad discretion to prosecutors to seek detention, far beyond what the law currently grants. In doing so, SB 4228 violates the constitutional right to bail, a bedrock principle of presumption of innocence.

² U.S. Const. amend. XIV

³ Piazza v. New Albertsons, Inc., 2020 WL 5511518, at *1 (N.D. Ill. September 14, 2020) (citing Mullins v. Direct Digital, LLC, 795 F.3d 654, 669 (7th Cir. 2015))

⁴ Ill. Const. 1970, art. I, § 9.

⁵ 201 Ill.2d 542 (2002)

⁶ 725 ILCS 5/110-4(b)

⁷ Ill. Const. 1970, art. I, § 9.

Legal Harm, Collateral Consequences, and Success of Pretrial Release: We have long known the human harms associated with unnecessary pretrial detention. SB 4228 would exacerbate racial disparities in Illinois jails. Research confirms that the kind of broad prosecutorial and judicial discretion contained in SB 4228 would disproportionately impact Black and brown people. Studies show that in large urban areas, Black individuals who are arrested are over 25% more likely to be held pretrial than their white counterparts; young Black men, specifically, are 50% more likely to be detained than white people.⁸ Brown people are also significantly more likely to be detained pretrial than their white counterparts.⁹ In Illinois specifically, in 2017, Black people constituted 49% of the jail population despite making up only 15% of the state population.¹⁰

As law professors and legal professionals, we have seen firsthand how pretrial detention harms people's legal outcomes later in their cases. Pretrial detention produces wrongful convictions, coerces more people into unfair plea deals, and leads to longer sentences. Research shows that pretrial detention significantly increases the probability of conviction, including convicting people who may be factually innocent through guilty pleas.¹¹ Indeed, one study found that detained individuals plead guilty nearly three times faster than people who are released pretrial.¹² In addition, the guilty pleas agreed to by people in custody result in longer sentences than pleas by individuals who remain free.¹³

Pretrial detention also produces devastating collateral consequences to individuals, their families, and communities. On average, people experience 34 days of pretrial detention in Illinois, with many jailed for far longer.¹⁴ The inability to work and pay bills for over a month inevitably leads to a loss of employment and housing, rendering detained individuals without means of survival upon release. Moreover, more than half the people held pretrial are parents of young children.¹⁵ Parental detention causes financial hardships on families, leaving many without any means of support, forces children into the foster care system, and traumatizes

⁸ Prison Policy Initiative, "How race impacts who is detained pretrial," Wendy Sawyer, October 2019, https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/.

⁹ *Id.* ("Across the country, Black and brown defendants are at least 10-25% more likely than white defendants to be detained pretrial or to have to pay money bail.").

¹⁰ Vera Institute of Justice, "Incarceration Trends in Illinois," December, 2019, <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-illinois.pdf>

¹¹ American Economic Review, "The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges," Will Dobbie, Jacob Goldin, and Crystal S. Yang, February 2018, <https://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.20161503>; The Journal of Law and Economics, "The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments," Emily Leslie and Nolan G. Pope, August 2017, http://econweb.umd.edu/~pope/pretrial_paper.pdf.

¹² Criminal Justice Policy Review, "Do Detainees Plead Guilty Faster? A Survival Analysis of Pretrial Detention and the Timing of Guilty Pleas," Nick Petersen, April 2019, <https://journals.sagepub.com/doi/abs/10.1177/0887403419838020>.

¹³ Journal of Law and Economics, "The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments," Emily Leslie and Nolan G. Pope, August 2017, http://econweb.umd.edu/~pope/pretrial_paper.pdf, at 548.

¹⁴ Loyola University Chicago Center for Criminal Justice Research, "Individuals Held in Pretrial Detention and Under Pretrial Supervision in the Community," David Olson, Don Stemen, and Branden DuPont, June 2022, <https://loyolaccj.org/pfa/blog/pfa-jail>.

¹⁵ Prison Policy Initiative, "How does unaffordable money bail affect families?" Wendy Sawyer, August 2018, <https://www.prisonpolicy.org/blog/2018/08/15/pretrial/>.

children due to the effects of family separation, on par with divorce, domestic violence, and abuse.¹⁶

Finally, pretrial release reforms are overwhelmingly successful. After Cook County implemented GO18.8A, which created a presumption of release without monetary bail for the large majority of people arrested in Cook County, there was no statistically significant increase in the likelihood of released individuals being charged with new alleged criminal activity, including new violent crime.¹⁷ Similar legislation in New Jersey, Washington D.C., New Mexico, and New York has yielded similar results,¹⁸ all while saving millions in taxpayer dollars.¹⁹

Supporting SB 4228 or the individual measures within it means supporting mass incarceration and the violation of individual rights. In addition to the many constitutional and legal issues the SB 4228 raises, the bill would exacerbate the very racial inequities the Pretrial Fairness Act intended to curb and would expand pretrial detention instead of shrinking it. As law professors and legal scholars,²⁰ we urge you to reject SB 4228.

Sincerely,

Craig B. Futterman
Clinical Law Professor, University of Chicago Law School

Herschella Conyers
Clinical Law Professor, University of Chicago Law School

Sonja Starr,
Julius Kreeger Professor of Law & Criminology, University of Chicago Law School

Dr. Jessica Bird
Assistant Professor, University of Illinois Chicago School of Law

Marc D. Falkoff
Professor of Law, Northern Illinois University College of Law

Kim D. Ricardo

¹⁶ Annie E. Casey Foundation, “A shared sentence: the devastating toll of parental incarceration on kids, families and communities,” April 2016, <https://assets.aecf.org/m/resourcedoc/aecf-asharedsentence-2016.pdf>.

¹⁷ Safety and Justice Challenge, “Dollars and Sense in Cook County: Examining the Impact of General Order 18.8A on Felony Bond Court Decisions, Pretrial Release, and Crime,” Don Stemen and David Olson, November 2020, <https://www.safetyandjusticechallenge.org/wp-content/uploads/2020/11/Report-Dollars-and-Sense-in-Cook-County.pdf>, at p. 10-11.

¹⁸ Pretrial Fairness, “Get the Facts,” <https://pretrialfairness.org/get-the-facts/>.

¹⁹ A study by the Vera Institute of Justice found that New York’s decreased jail population saved \$638 million annually. Vera Institute of Justice, “The Cost of Incarceration in New York State: How Counties Outside New York City Can Reduce Jail Spending and Invest in Communities,” Lauren Jones, Sandra van den Heuvel, and Amanda Lawson, January 2021, <https://www.vera.org/downloads/publications/the-cost-of-incarceration-in-new-york-state.pdf>.

²⁰ **Signatories speak for themselves as individuals. Institutional affiliations and titles are for purposes of identification only.**

Associate Dean for Experiential Education (Interim), University of Illinois, Chicago School of Law

Dean A. Strang

Distinguished Professor in Residence, Loyola University Chicago School of Law

Erica Zunkel

Clinical Professor of Law, University of Chicago Law School

Paul Cain

Clinical Professor of Law, Northern Illinois University

Anna-Marie Marshall

Associate Professor, University of Illinois College of Law

Aziz Huq

Frank and Bernice J. Greenberg Professor of Law, University of Chicago Law School

Darryl Li

Assistant Professor of Anthropology; Associate Member of the University of Chicago Law School

A. Naomi Paik

Associate Professor, Criminology, Law, & Justice and Global Asian Studies, University of Illinois, Chicago

Nicole Hallett

Clinical Professor of Law, University of Chicago Law School

Jesse Cheng

Assistant Professor, DePaul University College of Law

Evan Bernick

Assistant Professor of Law, Northern Illinois University College of Law

Jonathan Masur

John P. Wilson Professor of Law, University of Chicago Law School

Manoj Mate

Associate Professor of Law, DePaul University College of Law; Faculty Director, Racial Justice Initiative

Nathan Fleming

Racial Justice Fellow, DePaul College of Law

Steven A. Drizin

Clinical Professor of Law, Northwestern University School of Law

Matt Epperson

Associate Professor, University of Chicago, Crown Family School of Social Work, Policy, and Practice