

A photograph of a brick building at night. A prominent sign on the right side of the building reads "BAIL BOND" in large, illuminated red letters. Below the sign, a red door is open, revealing a dark interior. To the right of the door, a window displays a neon sign that says "BAIL BOND OPEN". The building has several windows, some of which are dark, suggesting it is nighttime. The overall scene is lit with a warm, orange-red glow from the signs and streetlights.

A Right to Liberty:

REFORMING
JUVENILE
MONEY BAIL

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In certain states
and U.S. territories,
after an arrest
— wrongful or not —
a child's ability to go
home depends on their
ability to post bail.

Introduction

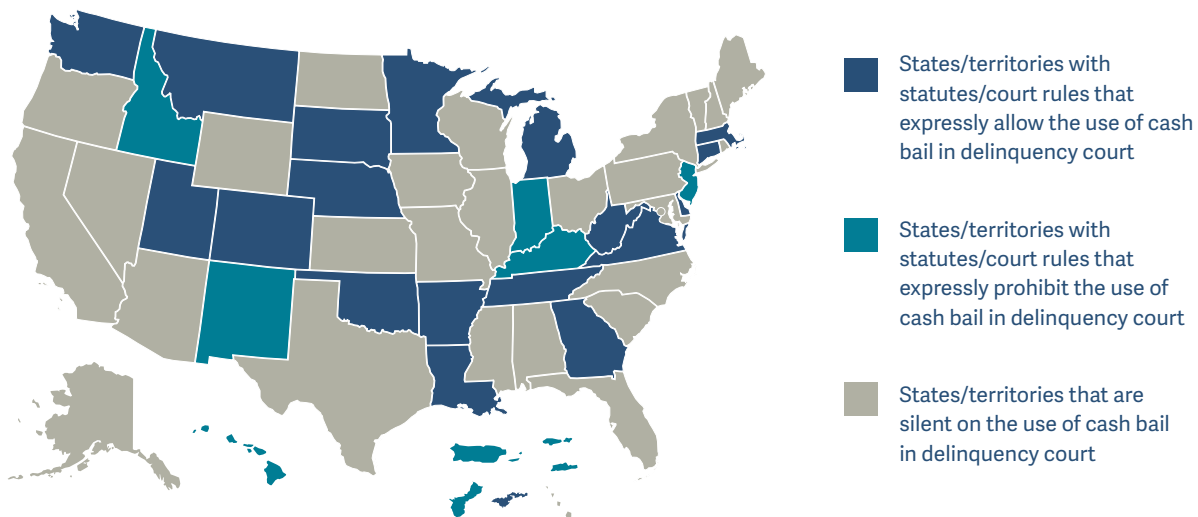
According to the United States Supreme Court:

The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty.¹

At its essence, money bail is a mechanism for ensuring a right to liberty. It provides for release, preserves the presumption of innocence by preventing any infliction of punishment on the accused prior to conviction, and allows the accused to assist in their defense through the identification of evidence and witnesses and their unhampered access to counsel.² At its

origin in common law, bail was a pledge or assurance to return to court and was not necessarily financial, though money bail was not uncommon.³ Whatever its terms, bail is designed to “address a single question: which conditions of release, if any, would ensure the defendant’s appearance for trial.”⁴ The use of money bail in the criminal legal system—as one option of conditional release—was established for the sole purpose of ensuring the accused’s presence in court. However, when the bail amount is set at a figure higher than the amount reasonably calculated to fulfill this purpose, it is deemed excessive under the Eighth Amendment.⁵ It is under these circumstances that money “bail has become a vehicle for systemic injustice,” resulting in thousands of persons being kept in jail for weeks or months following arrest—though not yet proven guilty—only because “they cannot afford to pay for their freedom.”⁶

As of February 2019, 19 states have statutes or court rules that expressly allow for children facing charges in delinquency court to be released from detention on bail.



1 *Stack v. Boyle*, 342 U.S. 1, 7 (1951).

2 *Id.* at 3-9.

3 PRETRIAL JUSTICE INST., *THE HISTORY OF BAIL AND PRETRIAL RELEASE 6* (2010), https://b3cdn.net/crjustice/2b990da76de40361b6_rzm6ii4zp.pdf.

4 Zina Makar, *Displacing Due Process*, 67 DEPAUL L. REV. 425, 437 (2018); 18 U.S.C.A § 3142(b), (c)(1)(A)-(B) (West 2008).

5 *United States v. Motlow*, 10 F.2d 657, 659 (7th Cir. 1926).

6 Testimony by Attorney General Robert F. Kennedy on *Bail Legislation: Hearing Before the Subcomms. On Constitutional Rights and Improvement in Judicial Machinery of the Sen. Jud. Comm.*, 88th Cong. 63-65, <https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-04-1964.pdf>

Advocates have initiated a national dialogue on the unjust nature of money bail in the criminal legal system in order to push for reform. However, discussions on the use of money bail in the juvenile legal system have been lacking. Unfortunately, little if anything has been written on state laws governing bail in delinquency proceedings, and even less is known about how such laws are put into practice at the local level or how money bail practices impact youth and their families in the juvenile legal system.

As of April 2019, 19 states⁷ have statutes or court rules that expressly allow for children facing charges in delinquency court to be released from detention on bail.⁸ In nine states, the use of bail in juvenile court is prohibited by statute or court rule.⁹ In the remaining 28 states, statutes and court rules neither authorize nor prohibit the use of bail in juvenile court.¹⁰ In some such states, there is precedential case law holding that youth do not have a right to release on bail.¹¹

- 7 The term “state[s]” is inclusive of American Samoa; District of Columbia, Northern Mariana Islands, Puerto Rico, Guam, and the U.S. Virgin Islands.
- 8 AM. SAMOA CODE ANN. § 45.0210(g) (“Nothing in this section shall be construed as denying a child the right to bail”); ARK. CODE ANN. § 9-27-326(e)(3) (West 2009) (allowing for bail if the court “determines that only a money bond will ensure the appearance of the juvenile”); COLO. REV. STAT. ANN. § 19-2-509(4) (West 2016) (providing that the judge or magistrate should use criteria set forth in the adult criminal code to determine a child’s bail and release conditions); CONN. GEN. STAT. ANN. § 46b-133(b) (West 2018) (A “judge may admit the child to bail”); DEL. CODE ANN. tit. 10, § 1005(b)(2) (West 1995) (A judge “may require the child to furnish reasonable cash or property bail”); GA. CODE ANN. § 15-11-507(a) (West 2014) (“All children alleged to have committed a delinquent act shall have the same right to bail as adults”); LA. CHILD CODE ANN. art. 823(A) (West 1992) (A “child shall have a right to bail for release from custody prior to adjudication”); MASS. GEN. LAWS ANN. ch. 119 § 67(b) (West 2018) (“Nothing contained in this section shall prevent the admitting of such child to bail in accordance with law.”); MICH. COMP. LAWS ANN. § 712A.17(3) (West 1999) (“A parent, guardian, or other custodian of a juvenile held under this chapter has the right to give bond or other security for the appearance of the juvenile”); MINN. R. JUV. DELINQ. 5.04 subd. 5(A) (2016) (The court may “require the parent(s), legal guardian, legal custodian or child to post bail”); MONT. CODE ANN. § 41-5-323 (West 1997) (“A youth placed in detention or shelter care may be released on bail”); NEB. REV. STAT. ANN. § 43-253(5) (West 2018) (“The court may admit such juvenile to bail by bond in such amount and on such conditions and security as the court . . . shall determine”); OKLA. STAT. tit. 10A, § 2-2-101(B) (2017) (“A reasonable bond for release shall be set”); S.D. CODIFIED LAWS § 26-7A-52 (1991) (providing that a child may give “bond or other security for the child’s appearance before the court”); TENN. CODE ANN. § 37-1-117(a)(2) (West 2016) (“The court, in its discretion, may release the child on an appearance bond”); UTAH CODE ANN. § 78A-6-113 (13) (West 2018) (providing that provisions of law regarding bail are not applicable to children except: (1) when a youth is a nonresident; or (2) when a youth who receives a citation willfully fails to appear in court); VA. CODE ANN. § 16.1-248.1(A) (West 2011) (providing that a child shall be immediately released “either on bail” or other conditions); WASH. REV. CODE ANN. § 13.40.040(5) (West 2002) (providing that a child may be released “upon posting a probation bond”); W. VA. CODE ANN. § 49-4-701(g) (West 2016) (“A juvenile is entitled to be admitted to bail or recognizance in the same manner as an adult”).
- 9 19 GUAM CODE ANN. § 5111(d) (“Provisions regarding bail shall not be applicable to children detained”); HAW. REV. STAT. ANN. § 571-32(h) (West 2009) (“Provisions regarding bail shall not be applicable to children detained in accordance with this chapter”); IDAHO JUV. R. 23 (2018) (“There is no right to bail for a juvenile”); IND. CODE § 31-37-6-9 (West 1997) (“A child may not be released on bail”); KY. REV. STAT. ANN. § 610.190(1) (West 2015) (“The law relating to bail shall not be applicable to children”); N.J. STAT. ANN. § 2A:4A-40 (West 1983) (providing that all rights guaranteed to criminal defendants shall be applicable to children “except the right to indictment, the right to trial by jury and the right to bail”); N.M. STAT. ANN. § 32A-2-14(M) (West 2009) (“A child held in a juvenile facility designated as a place of detention prior to adjudication does not have a right to bail”); P.R. LAWS ANN. tit. 34 § 2210 (West 1986) (“Provisions with respect to bail shall not be applicable to the minors”); V.I. CODE ANN. tit. 5, § 2514(e) (West 1983) (“Bail shall not be applicable to children”).
- 10 These states are: Alabama; Alaska; Arizona; California; District of Columbia; Florida; Illinois; Iowa; Kansas; Maryland; Maine; Mississippi; Missouri; Nevada; New Hampshire; New York; North Carolina; North Dakota; Northern Mariana Islands; Ohio; Oregon; Pennsylvania; Rhode Island; South Carolina; Texas; Vermont; Wisconsin; and Wyoming. It is unknown whether there is existing case law that interprets adult bail statutes as being applicable to delinquency cases.
- 11 For instance, the Court of Appeals of Kansas found that the an absolute right to bail is inconsistent with the Juvenile Code because “[r]elease as of right . . . may interfere with the protection or care required in some cases, and availability of freedom should not turn on the ability of the child or his family to purchase it.” *Pauley v. Gross*, 574 P.2d 234, 240 (Kan. Ct. App. 1977). A Rhode Island Supreme Court case held that young people held pending delinquency proceedings are not entitled to bail under the State Constitution. *See Morris v. D’Amario*, 416 A.2d 137 (R.I. 1980).

Our Study

(see Appendix A for a full account of our methods)

The National Juvenile Defender Center (NJDC) performed a qualitative study to better understand bail practices in juvenile courts at the local level, and to ensure juvenile money bail is included in the national movement on bail reform. NJDC emailed an electronic survey to a select number of juvenile defenders from all 50 states, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands,¹² and conducted follow-up phone interviews with defenders who identified their state as expressly allowing the use of money bail and/or identified their state as utilizing bail practices in delinquency court. While not an exhaustive survey of youth bail practices across each state, the themes that emerged from these surveys and interviews provide important insight into the court systems that require some of society's most vulnerable children to pay money in exchange for their freedom. We learned that bail is used with shocking regularity in juvenile courts, not as a mechanism for ensuring that young people have a right to liberty, but as a means of ensuring that youth are kept behind bars without any finding of guilt.

¹² No survey was sent to American Samoa or the Northern Mariana Islands.

Key Findings

From this effort, five key findings came to light:

1. Where bail is a legal “right,” it is often not a reality
2. Courts regularly impose unaffordable bail on youth
3. Courts too often impose bail as a means of ensuring detention
4. Bail frequently encourages youth to plead guilty and waive their trial rights
5. Bail contributes to the disproportionately high number of youth of color being detained

1

Where Bail Is a “Right,” It Is Often Not a Reality

In each state where bail is either prohibited or simply not provided for by statute or rule, interviews and surveys indicated that bail is not imposed on children in delinquency proceedings. Among the 19 states where bail is expressly permitted in juvenile court, in practice, defenders in 13 states reported that bail is imposed on children and their families with varying frequency.¹³ In the remaining six states where bail is permitted, the practice is unclear and revealed several scenarios. Defenders interviewed reported that juvenile courts in Connecticut do not use bail, although authorized to do so by statute. In Minnesota, one juvenile defender stated that bail is not used, while another noted that, on rare occasions, bail is imposed on youth over age 18 who are on juvenile probation. In Tennessee, defenders from the same county disagreed about whether bail is an option in juvenile court. Even within the same courthouse, judges and attorneys are not always clear as to what the law allows. This creates arbitrary practices in which bail is considered for some youth, but not others.¹⁴ In Virginia, defenders surveyed had never heard of youth bail being used in the state, but court personnel and detention facility staff confirmed that it exists in some jurisdictions. Disagreement among surveyed defenders about bail practices in states where youth bail is statutorily authorized was not uncommon, suggesting that the use of bail in delinquency courts can vary widely from court to court and may be more widespread than some defenders are aware.

The statutes authorizing bail have many variations. Some are straightforward and treat bail issues the same for children and adults, often identifying bail as a “right” for children, without regard to whether children should be treated differently and extended a presumption of release *without* bail conditions. Survey responses and interviews revealed that many children, for a variety of reasons, are denied meaningful access to bail, even in states where the law explicitly entitles them to bail as a right. For example, Georgia’s statute says, “All children alleged to have committed a delinquent act shall have the same right to bail as adults.”¹⁵ Yet, the two juvenile defenders from Georgia surveyed reported that in their jurisdictions, juvenile court judges do not advise children of their statutory right to bail.

In states that consider juvenile court bail a right, before the question of whether a child can afford to pay their bail can be addressed, the court must first determine whether there is even legal justification for detaining the child.¹⁶ If not, the child should be released without any bail consideration. If the court has legal justification to detain the child, the child then has a right to have the judge determine whether release would nonetheless be appropriate if monetary bail would ensure the child’s return to court at a later date.

13 In some states where bail is statutorily authorized, it is seldom used, such as Arkansas, Minnesota, Tennessee, and Virginia. It is unknown if bail is imposed with varying frequency in American Samoa; data was not available at the time of this publication.

14 One Tennessee attorney reported that when she requested bail for a young client, her judge told her “We don’t do that here.” Other attorneys in that same courthouse report having bail granted in their juvenile cases.

15 GA. CODE ANN. § 15-11-507 (West 2014).

16 See, e.g., GA. CODE ANN. §§ 17-6-1(e) (West 2018); 15-11-507.

Georgia defenders surveyed reported that if the right to bail is discussed in delinquency court, it is raised by an attorney making a last-ditch effort to secure release for a child who the court has already ordered be detained. They explained that they are reluctant to raise the issue because, by arguing for bail, they risk having the court impose a bail that is unaffordable for the child and their family. And while being held on bail is an identical outcome to being detained without bail—because the child is not released in either case—a child held with unpaid bail set can be denied the right to an expedited trial that is available to a child detained without bail because the child is not considered to be on detention status.¹⁷ According to Georgia defenders interviewed, this risk does not make bail a viable option for most of their low-income clients.

Children in Oklahoma face obstacles if they exercise the option of release on bail due to a rule that deems any child who posts bail ineligible for a public defender. This places families in a practical dilemma to choose whether to pay for their child’s release and go without counsel, or leave the child in detention to ensure they get a lawyer.

Children in Oklahoma also face obstacles should they exercise the option of release on bail. There, defenders report that any child who posts bail is deemed ineligible for a public defender. While a defender surveyed reported that the rule is reportedly not enforced in delinquency court as consistently as it is in criminal court, the rule presumes that because a family is able to get enough money together to ensure their child’s release that they also have sufficient funds to hire a lawyer for the duration of the case. If that is not the case, it places a family in a practical dilemma. The family must choose whether to pay for their child’s release and go without counsel or leave the child in detention to ensure they get a lawyer.

As reported by multiple defenders in states where bail is expressly allowed, children are denied meaningful access to bail due to inconsistent practices by courts. This results in a denial of access to counsel for some, and pretrial detention for many. The intent behind bail is to safeguard a right to liberty, not to incur debt in exchange for release.¹⁸ In a juvenile legal system premised on rehabilitation, the youth has a right to release when doing so does not endanger the public. Otherwise, predicating release on the ability to pay a bail puts a price on public safety and ensures that economically disadvantaged youth are locked up simply because of their inability to pay. As such, the “right” to release predicated on bail is a right only for those with financial means.

17 See GA. CODE ANN. § 15-11-582(a) (West 2014) (“If an alleged delinquent child is in detention, the hearing shall be held no later than ten days after the filing of the delinquency petition. If a child is not in detention, the hearing shall be held no later than 60 days after the filing of such petition”).

18 *Stack*, 342 at 7.



2

Courts Regularly Impose Unaffordable Bail on Children

Generally, the amount of bail imposed on a child is a matter of pure judicial discretion. Though several states' statutes provide a list of factors the court must consider in determining the amount of bail—such as the nature and circumstances of the alleged offense and the financial ability of the child to post the bail¹⁹—most juvenile defenders surveyed indicated that bail amounts largely “depend on the judge.” This balance between allegation and financial means is often not well-defined by statute and does not readily reflect the extent to which a presiding judge and a child's family may have different concepts of what “financial ability” means in practice. While many reported that a judge's decision commonly rests upon the severity of the charges, the child's delinquency history, and any past failures to appear (FTA) at scheduled court hearings,

several defenders surveyed asserted that judges set bail in amounts deliberately aimed at keeping children in detention. Three defenders pointed to a variety of inconsistencies they saw in how bail amounts are set, particularly between different judges, different counties, or even by the same judge between similarly-charged children. Our survey results suggest courts impose bail that children cannot afford to pay in at least 11 of the 19 states that expressly allow for bail,²⁰ despite statutory language in seven of them that requires the court to consider the financial ability of the youth or their family to post bail when determining its amount.²¹ Defenders surveyed report that children continue to be detained because they cannot meet the bail bill in those jurisdictions.

Even seemingly low bail amounts – amounts as low as \$75 could be difficult for a family to post – resulted in the pretrial detention of children from families unable to pay. One defender noted: If “they can never pay it, there might as well be no [bail].”

19 See, e.g., LA. CHILD CODE ANN. art. 824 (West 1992); GA. CODE ANN. § 17-6-1(e)(2) (West 2018).

20 It is unknown if unaffordable bail is imposed in American Samoa, Arkansas, and Virginia; data was not available at the time of this publication.

21 GA. CODE ANN. § 17-6-1(e)(2)(A) (“When determining bail . . . the court shall consider the accused's financial resources”); LA. CHILD CODE ANN. art. 824(4) (In determining the amount of bail, the court should consider “[t]he financial ability of the child and family to post money bail”); MASS. GEN. LAWS ch. 276 § 57 para. 2 (West 2018) (The person authorized to take bail shall take into consideration “the person's financial resources and financial ability to give bail”); MONT. CODE ANN. § 46-9-301(6) (West 2013) (Bail must be reasonable in amount and the amount must be “considerate of the financial ability of the accused”); VA. CODE ANN. § 19.2-121 (West 1999) (“The judicial officer shall take into account . . . the financial resources of the accused or juvenile and his ability to pay bond”); W. VA. CODE ANN. § 62-1C-3 (West 1965) (“The amount of bail shall be fixed by the court or justice with consideration given to . . . his financial ability”).

Defenders surveyed offered many examples of high bail amounts, such as in Washington, where “kids are held on \$100,000 with no discussion of ability to pay,” or in Georgia where a child was recently held on a \$20,000 property bond. In seven states, defenders surveyed indicated that courts impose bail in excess of \$10,000 to secure a child’s release. In Oklahoma, the only state reported to use a bail schedule in delinquency court, amounts range from \$500 to \$25,000, based solely on the charges and whether the child has a FTA history. While defenders across states that use money bail provided numerous examples of much higher bail, the most common range cited by defenders was \$100 to \$500. Defenders in four states indicated that courts set bail lower than \$100. However, the vast majority of defenders surveyed reported that even seemingly low bail amounts resulted in the pretrial detention of children from families unable to pay. They noted that amounts as low as \$75 could be difficult for a family to post. In the words of a Michigan defender, “[If] they can never pay it, there might as well be no [bail].”

Additionally, in most states, children can be released on bail through the use of a commercial surety, commonly known as a bail bondsman. To be bailed by a commercial surety, children and their families are required to pay a nonrefundable fee that typically equals 10% of the total bail amount imposed. This fee is never returned, regardless of whether the child returns to court or the case is ultimately dismissed.

Children who are held on unaffordable bail are effectively jailed because freedom is unaffordable.

All defenders surveyed reported that children are regularly detained prior to trial because courts set bail at amounts that children cannot afford to pay. Children who are held on unaffordable bail are effectively jailed because freedom is unaffordable. Commercial sureties are then allowed to exploit a family’s inability to pay the full amount of bail. Families are forced to pay nonrefundable fees so their children can return home, stay in school, and avoid well-established harms of detention.²² A system that incarcerates children based solely on their inability to pay inherently discriminates against children from economically disadvantaged families and children of color.

22 RICHARD A. MENDEL, THE ANNIE E. CASEY FOUND., MALTREATMENT OF YOUTH IN U.S. JUVENILE CORRECTIONS FACILITIES: AN UPDATE (2015), <https://www.ncmhjj.com/wp-content/uploads/2015/07/aecf-maltreatmentyouthuscorrections-2015.pdf>; BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES (2006), http://www.justicepolicy.org/uploads/justicepolicy/documents/dangers_of_detention.pdf; Bruce Western & Katherine Beckett, *How Unregulated Is the U.S. Labor Market? The Penal System as a Labor Market Institution*, 104 Am. J. Soc. 1030, 1048 (1999), <http://www.nyu.edu/gsas/dept/politics/seminars/western.pdf>; RICHARD MENDEL, THE ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION (2011), <http://www.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf>.

Statutes that expressly allow the use of cash bail in delinquency court:

Statutes that prohibit the use of cash bail in delinquency court:

AMERICAN SAMOA

AM. SAMOA CODE ANN. § 45.0210(g) (“Nothing in this section shall be construed as denying a child the right to bail”)

ARKANSAS

ARK. CODE ANN. § 9-27-326(e)(3) (West 2009) (allowing for bail if the court “determines that only a money bond will ensure the appearance of the juvenile”)

COLORADO

COLO. REV. STAT. ANN. § 19-2-509(4) (West 2016) (providing that the judge or magistrate should use criteria set forth in the adult criminal code to determine a child’s bail and release conditions)

CONNECTICUT

CONN. GEN. STAT. ANN. § 46b-133(b) (West 2018) (A “judge may admit the child to bail”)

DELAWARE

DEL. CODE ANN. tit. 10, § 1005(b) (2) (West 1995) (A judge “may require the child to furnish reasonable cash or property bail”)

GEORGIA

GA. CODE ANN. § 15-11-507(a) (West 2014) (“All children alleged to have committed a delinquent act shall have the same right to bail as adults”)

LOUISIANA

LA. CHILD CODE ANN. art. 823(A) (West 1992) (A “child shall have a right to bail for release from custody prior to adjudication”)

MASSACHUSETTS

MASS. GEN. LAWS ANN. ch. 119 § 67(b) (West 2018) (“Nothing contained in this section shall prevent the admitting of such child to bail in accordance with law.”)

MICHIGAN

MICH. COMP. LAWS ANN. §712A.17(3) (West 1999) (“A parent, guardian, or other custodian of a juvenile held under this chapter has the right to give bond or other security for the appearance of the juvenile”)

MINNESOTA

MINN. R. JUV. DELINQ. 5.04 subd. 5(A) (2016) (The court may “require the parent(s), legal guardian, legal custodian or child to post bail”)

MONTANA

MONT. CODE ANN. § 41-5-323 (West 1997) (“A youth placed in detention or shelter care may be released on bail”)

NEBRASKA

NEB. REV. STAT. ANN. § 43-253(5) (West 2018) (“The court may admit such juvenile to bail by bond in such amount and on such conditions and security as the court . . . shall determine”)

OKLAHOMA

OKLA. STAT. tit. 10A, § 2-2-101(B) (2017) (“a reasonable bond for release shall be set”)

SOUTH DAKOTA

S.D. CODIFIED LAWS § 26-7A-52 (1991) (providing that a child may give “bond or other security for the child’s appearance before the court”)

TENNESSEE

TENN. CODE ANN. § 37-1-117(a)(2) (West 2016) (“The court, in its discretion, may release the child on an appearance bond”)

UTAH

UTAH CODE ANN. § 78A-6-113 (13) (West 2018) (providing that provisions of law regarding bail are not applicable to children except: (1) when a youth is a nonresident; or (2) when a youth who receives a citation willfully fails to appear in court)

VIRGINIA

VA. CODE ANN. § 16.1-248.1(A) (West 2011) (providing that a child shall be immediately released “either on bail” or other conditions)

WASHINGTON

WASH. REV. CODE ANN. § 13.40.040(5) (West 2002) (providing that a child may be released “upon posting a probation bond”)

WEST VIRGINIA

W. VA. CODE ANN. § 49-4-701(g) (West 2016) (“A juvenile is entitled to be admitted to bail or recognizance in the same manner as an adult”)

GUAM

19 GUAM CODE ANN. § 5111(d) (“provisions regarding bail shall not be applicable to children detained”)

HAWAII

HAW. REV. STAT. ANN. § 571-32(h) (West 2009) (“Provisions regarding bail shall not be applicable to children detained in accordance with this chapter”)

IDAHO

IDAHO JUV. R. 23 (2018) (“There is no right to bail for a juvenile”)

INDIANA

IND. CODE § 31-37-6-9 (West 1997) (“A child may not be released on bail”)

KENTUCKY

KY. REV. STAT. ANN. § 610.190(1) (West 2015) (“The law relating to bail shall not be applicable to children”)

NEW JERSEY

N.J. STAT. ANN. § 2A:4A-40 (West 1983) (providing that all rights guaranteed to criminal defendants shall be applicable to children “except the right to indictment, the right to trial by jury and the right to bail”)

NEW MEXICO

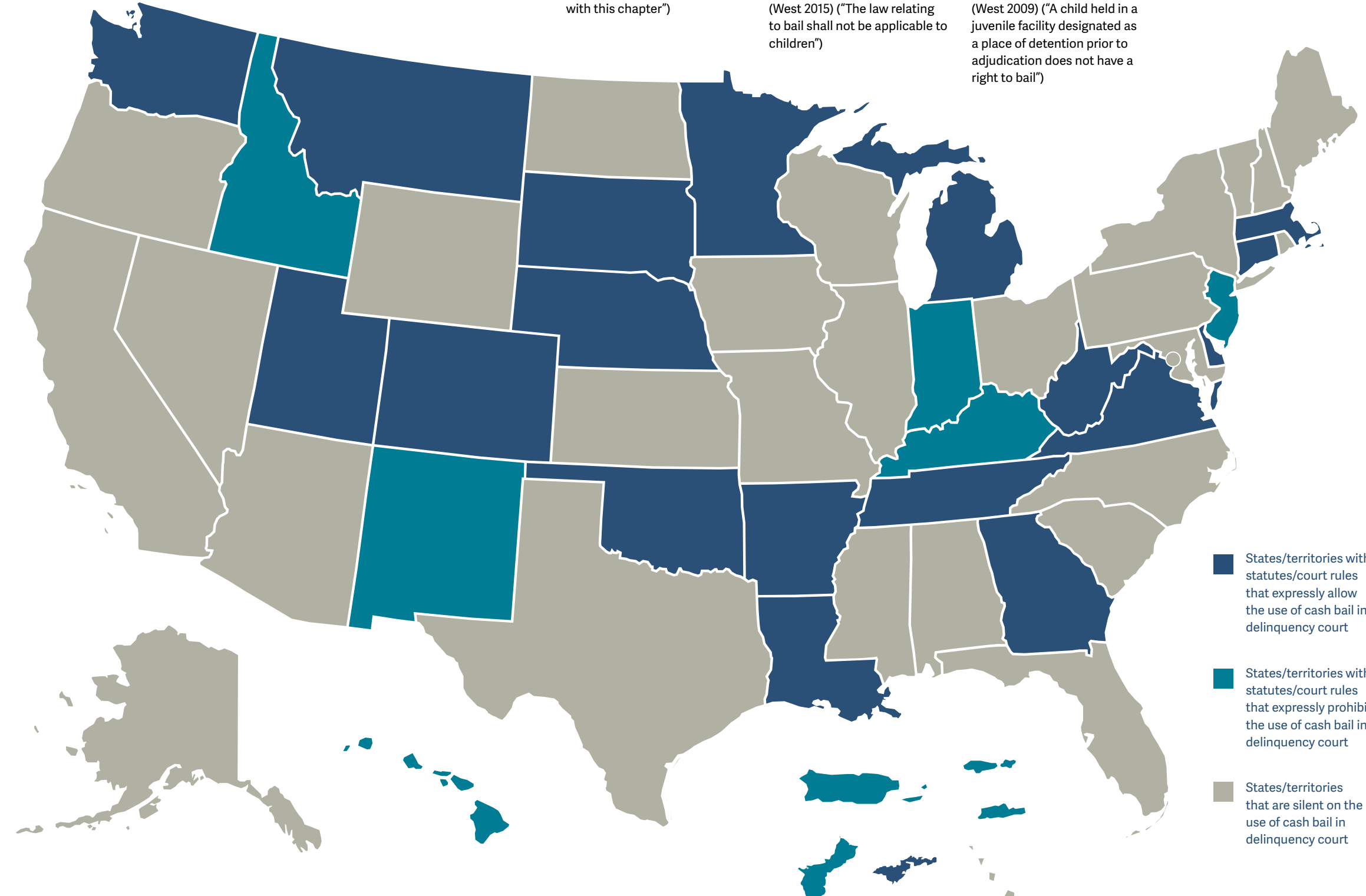
N.M. STAT. ANN. § 32A-2-14(M) (West 2009) (“A child held in a juvenile facility designated as a place of detention prior to adjudication does not have a right to bail”)

PUERTO RICO

P.R. LAWS ANN. tit. 34 § 2210 (West 1986) (“provisions with respect to bail shall not be applicable to the minors”)

U.S. VIRGIN ISLANDS

V.I. CODE ANN. tit. 5, § 2514(e) (West 1983) (“Bail shall not be applicable to children”)



- States/territories with statutes/court rules that expressly allow the use of cash bail in delinquency court
- States/territories with statutes/court rules that expressly prohibit the use of cash bail in delinquency court
- States/territories that are silent on the use of cash bail in delinquency court

3

Courts Routinely Use Bail to Detain Children

Defenders in eight of the states surveyed reported that rather than setting bail to facilitate the pre-adjudication release of accused children, juvenile court judges routinely use bail as a means to keep youth in detention. In almost all interviews, defenders noted that judges use bail to detain children because they believe it is for the child's "own good." The court's perception of the stability of the child's family and home is reported to be an important factor in bail decisions. Defenders responding from three states reported that judges are reluctant to provide a path to release when children appear in court without parents. Three defenders reported similar issues when girls—without any evidence suggesting that they are at risk of trafficking or sexual exploitation—are detained by judges who believe detention should be used to "protect" them. But, as one defender pointed out, the judge's "'good' intentions get in the way of my client's due process."

In West Virginia, where every child is entitled to bail, a defender surveyed reported, "the system works backwards. First, the judge decides if the judge *wants* the kid in detention. If the answer is no, kids are released on their own recognizance. If the answer is yes, a high bail [that the child cannot afford] is set." This concern was echoed by a defender in Georgia who said once a decision to detain a child is made; bail is set in a way that upholds that decision, rather than as a mechanism for release. In Oklahoma, where judges largely rely on a pre-set bail schedule, a juvenile defender reported judges overtly saying, "they're going

to set it a little higher, 'just in case' the kid can post it." According to a defender from Massachusetts, judges sometimes imposed bail to give the child a "taste of incarceration" when the child has appeared before the judge on multiple occasions. A defender in Delaware reported that children who successfully make bail might then be subject to an additional hearing where additional release conditions are also put in place.

Defenders in eight of the states surveyed reported that rather than setting bail in order to facilitate the pre-adjudication release of accused children, juvenile court judges routinely use bail as a means to keep youth in detention.

Numerous defenders reported that judges routinely detain children by setting high bail amounts their clients cannot afford due to the court's misperception of the child's community environment in spite of research that indicates that detaining children can negatively impact their mental health, and educational and workforce outcomes.²³

23 JUSTICE POLICY INST., *STICKER SHOCK: CALCULATING THE FULL PRICE TAG FOR YOUTH INCARCERATION 17* (2014), http://www.justicepolicy.org/uploads/justicepolicy/documents/sticker_shock_final_v2.pdf.



4

Bail Frequently Encourages Children to Accept Plea Agreements and Waive Their Right to a Trial

Defenders surveyed also expressed concern that, for children who are detained because they cannot afford the set bail amount, there is considerable pressure to give up their right to trial and accept a plea agreement. Often, a plea may enable an incarcerated child to return home immediately. Other times, because children awaiting adjudication are often held on “dead time,”²⁴ if it is anticipated that the child will eventually be committed, they will accept a plea to expedite the start of their sentence. One defender explained:

Kids who are held on bail will take a plea even though they assert their innocence. Get out today and take a felony or get out in two weeks and take a gross misdemeanor. What kid has the frontal lobe necessary to make a good choice there? I see this happen every week.

Defenders from other states shared similar stories. The decision to accept a juvenile adjudication can have far-reaching consequences for youth,²⁵ and should not be made under duress caused by detention and financial hardship. This is especially true in light of what is known about the long-term harms of a juvenile court adjudication on education, housing, and employment.²⁶

24 “Dead time” refers to time spent in detention that is not credited as “time served” toward a youth’s sentence.

25 Clean Slate Clearinghouse Justice Ctr., *Collateral Consequences of a Juvenile Adjudication: How Juvenile Records Can Affect Youth Even After the Case Is Over* (2017), <https://csgjusticecenter.org/nrrc/webinars/collateral-consequences-of-a-juvenile-adjudication-how-juvenile-records-can-affect-youth-even-after-the-case-is-over/>.

26 *Id.*



5

Bail Contributes to the Disproportionate Number of Youth of Color in Detention

According to juvenile defenders who have witnessed the imposition of bail in practice, bail's function in delinquency court is in keeping with the pervasive racial disparities endemic to the juvenile court system as a whole.²⁷ As one defender in Washington plainly stated, "Bail is a way judges can avoid scrutiny for detaining more kids of color."

When speaking to the impact of race on juvenile court bail determinations, two recurring themes emerged during interviews. First, defenders offered that a disproportionate number of young people in detention are youth of color and cited bail as one method of keeping children detained.²⁸ In support of this proposition, several defenders pointed to statistical data on racial and ethnic disparities in their jurisdictions. Second, those interviewed explained that because white children tend to fare better at steps that precede the bail decision, it is not possible to make meaningful comparisons between white children and children of color with regard to bail amounts imposed or success in posting bail. In the words of one defender, "It starts at the onset. If a white kid even gets arrested, [they're] more likely to get diversion. Once they get to court, Black children

are more likely to get overcharged. As they filter through the process, almost everyone facing bail is a person of color."

In general, defenders surveyed offered multiple examples of the ways in which a child's race impacts whether and how much bail is required for their release. A West Virginia defender shared that children of color are subjected to higher bail because "there's a culture of institutionalized racism; the actions of Black children are seen as scarier." In Delaware, one defender reported that the prosecutor would "claim, without proof, that a youth is gang-involved, so that targets boys, children of color, and the poor" for higher bail. In Washington, one defender asserted that Native children have higher bail set than their white peers because of the court's perception that they, as a population, lack adequate parental supervision.

²⁷ Youth of color are more likely to be arrested, prosecuted, sentenced, and incarcerated than their white peers. In 2013, Black youth were more than four times as likely as white youth to be incarcerated; Native youth were more than three times as likely; and Latino youth were almost twice as likely. W. HAYWOOD BURNS INST., *STEMMING THE RISING TIDE: RACIAL AND ETHNIC DISPARITIES IN YOUTH INCARCERATION & STRATEGIES FOR CHANGE 5* (2016), http://www.burnsinstitute.org/wp-content/uploads/2016/05/Stemming-the-Rising-Tide_FINAL.pdf.

²⁸ See, e.g., Telephone Interviews with Juvenile Defenders in Colorado ("There are many more people of color in detention, so that says something."); Delaware ("There are a disproportionate number of minorities detained"); Tennessee ("White kids are less likely to get detained."); West Virginia ("Black kids in general are going to detention more").



In almost every state that imposes bail in juvenile court, defenders report that bail decisions disadvantage youth of color and contribute to their overrepresentation in juvenile detention facilities.²⁹ Studies on bail determinations in the criminal legal system have shown that too often judges rely on inaccurate racial stereotypes and biases in deciding whether a person is dangerous or a flight risk, and what amount of bail should be imposed.³⁰ Research and interviews with juvenile defenders suggest that youth of color are subject to higher bail amounts than white youth with similar charges and similar criminal histories,³¹ which could result in higher detention rates and contribute to the disproportionate number of youth of color in detention.

If a white kid even gets arrested, [they're] more likely to get diversion. Once they get to court Black children are more likely to get overcharged. As they filter through the process, almost everyone facing bail is a person of color."

29 The exception is Montana.

30 Cynthia Jones, "Give Us Free": *Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 943-44 (2013). See also David Arnold, Will Dobbie & Crystal S. Yang, *Racial Bias in Bail Decisions* (Nat'l Bureau of Econ. Research, Working Paper No. 23421, 2017), <https://www.nber.org/papers/w23421.pdf> (finding that bail judges make race-based prediction errors due to anti-Black stereotypes and representativeness-based thinking, which in turn leads to the over-detention of Black defendants).

31 Jones, *supra* 30, at 938.

Conclusion

The national dialogue on the unjust nature of the use of money bail in the criminal legal system cannot move forward without examining how state laws governing bail in the juvenile legal system have been put into practice and how money bail practices impact youth and their families. Our key findings highlight concerns by juvenile defenders who regularly see these injustices carried out in practice.

In states where bail is expressly allowed, children are regularly denied meaningful access to bail due to inconsistent practices by courts, which ensures that economically disadvantaged children are locked up simply because of their inability to pay. Children who are held on unaffordable bail are effectively jailed because of their own poverty, restricting normal adolescent development and eroding positive school, family, and community supports which are instrumental for development. Some judges routinely set high bail amounts with the intent of keeping youth detained, often because of a misperception of the child's environment, exposing them to unnecessary detention or financial hardship. For children who cannot afford the set bail amount, there is considerable pressure to give up their right to trial and accept a plea agreement in order to gain their freedom, which often leads to unanticipated collateral consequences. Lastly, children of color are subject to higher bail amounts than white children with similar charges and similar offending histories, which may play a role in the disproportionate number of youth of color in detention.

“Children who are held on unaffordable bail are effectively jailed because of their poverty, restricting normal adolescent growth and eroding positive school, family, and community supports which are instrumental for development.”

The intent behind bail is to safeguard a right to liberty, not to incur debt in exchange for release. This right to liberty is even more imperative in a juvenile legal system premised on rehabilitation and youth success. However, the way money bail has been implemented against youth and their families is all too often unjust, leading to erratic bail determinations and the perpetuation of racial and ethnic disparities in the juvenile legal system. And where the lives of youth are derailed by systemic injustice, it is incumbent upon all of us to advance reform.



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Appendix A

Our Study Methodology

Participants:

Eighty-two juvenile defenders, affiliated with NJDC, responded to a survey on bail laws and practices in their state and locale. This convenience sample consisted of two defenders, one from an urban jurisdiction and one from a rural or remote jurisdiction, from 18 of the 19 states³² where money bail is expressly permitted by statute or court rule in juvenile court. Additionally, the sample included two defenders from each of the nine states in which there was conflicting information on legislation and practice. Finally, one defender from 27 of the remaining 28 states³³ and territories that neither authorize nor prohibit the use of bail were also surveyed.

Measures:

An electronic survey was developed by NJDC that included approximately 20 open-ended questions covering bail laws and practices in the states and counties where responding defenders practiced. For example, questions asked if bail was ever imposed on youth in their local delinquency system and the criteria courts considered when determining bail amounts. Responding defenders were also asked to highlight their most significant concerns with money bail practices in their jurisdiction based on their own experiences and those of their colleagues. The survey was focused on learning about the harms of money bail and did not include any questions designed to elicit responses regarding circumstances in which defenders surveyed felt that the use of money bail would have helped get a client released from pretrial detention.

Follow-up phone interviews were conducted with survey respondents who identified their state as expressly allowing the use of money bail and/or identified their state as utilizing bail practices in delinquency court. Twelve open-ended interview questions were developed by NJDC staff and designed to elicit detailed information about the responding defenders' perception of, and experience with, bail practices within their jurisdictions.

³² No survey was sent to American Samoa.

³³ No survey was sent to the Northern Mariana Islands.

Procedure:

The responding defenders were recruited to participate in the electronic survey based on their affiliation with NJDC, their knowledge of the landscape and trends within their jurisdictions, and their specialized training and expertise in juvenile defense issues. Respondents were emailed a link from NJDC directing them to an electronic survey platform to answer questions. Out of the 84 defenders who received the survey, 82 responded after follow-up emails and phone calls were placed encouraging participation.

Twenty-three follow-up phone interviews were conducted with defenders who identified their state as expressly allowing the use of money bail and/or identified their state as utilizing bail practices in delinquency court. The interviews included at least one defender from 18 of the 19 states that expressly allow the use of money bail, including two or three defenders in states where bail practice was unclear based on survey responses despite statutory authorization. The goal of the follow-up interviews was to gather more detailed information on bail practices and the impact it had on youth and their families. These interviews occurred over a three-week period.

Analysis:

Data collected from the electronic survey and phone interview notes were qualitative in nature. NJDC staff analyzed the data by reviewing written survey and interview notes and identifying recurring themes. Our key findings consisted of the most prominent themes that emerged from our review of defenders' detailed responses regarding their experiences with the use of money bail in the juvenile legal system.

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