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## ELIMINATING PRETRIAL DETENTION

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### ABSTRACT

*Pretrial detention is a massive societal problem. The size of the jail population has doubled in the last thirty years despite historically low crime and arrest rates. People are detained and suffer employment, family, and personal harms when there is little empirical evidence of benefits in terms of deterrence or increased public safety. There is widespread agreement that pretrial incarceration is a societal muddle, but no agreement on how to tackle the overwhelming task of dismantling it. Indeed, in the last ten years of reform efforts aimed at reducing pretrial detention, hundreds of jurisdictions have proposed and enacted a variety of pretrial reform schemes. The four prevailing types of bail reforms include one focused on releasing low-risk offenders; one on supervising those released; another on eliminating cash bail; and yet another on demarcating release for those charged with low-level offenses. Yet all four prevailing bail reform schemes are irredeemably flawed. Indeed, all these schemes fail in reducing detention rates and actually increase recidivism, danger to the public, and unnecessary negative consequences for the accused. These approaches also fail to effectuate Supreme Court dictates that detention should remain a carefully circumscribed exception before trial. While some might advocate incremental reform before anything drastic like abolition, this Article proposes that near-total elimination of pretrial detention is the only viable solution to our national bail problem.*

*This Article articulates a statutory path toward eliminating pretrial detention, proposing drastic changes to both federal and state pretrial detention. It reviews the flaws of current reform approaches and proposes that instead, the vast number of accused must remain free before trial. This new statutory model*

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*proposes to release around 90% of defendants and detain a small number in a move that will actually improve public safety. In what is referred to as a "detention net" scheme, this Article proposes that a statutory release target of 90% can help jurisdictions effectuate abolition by holding judges accountable to higher rates of release. It provides empirical backing to the proposal that supports releasing 90% of defendants before trial, essentially eliminating the need for pretrial detention.*

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## INTRODUCTION

There are few fans left of mass incarceration as a societal practice,<sup>1</sup> but how to reduce it is a more difficult inquiry. While detention models have largely focused on public safety, in reality, any amount of incarceration has a substantial impact on both individuals and communities: from reducing abilities to maintain gainful employment and housing<sup>2</sup> to increasing chances of further incarceration and crime.<sup>3</sup> There has been a growing focus on the front end of the system of

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<sup>1</sup> Kyra Hill, *The 13th Amendment, Crime Legislation, and America's High Incarceration Rate*, CLOSE UP (May 8, 2024), <https://www.closeup.org/the-13th-amendment-crime-legislation-and-americas-high-incarceration-rate/> [<https://perma.cc/D7D9-3C4X>] (reporting 71% of U.S. citizens across political spectrum believe reducing prison population is important). *But see* Natalie Kitroeff, *El Salvador Decimated Its Ruthless Gangs. But at What Cost?*, N.Y. TIMES (Apr. 9, 2023), <https://www.nytimes.com/2023/04/09/world/americas/el-salvador-gangs.html> (reporting countries like Mexico and Guatemala want to follow El Salvador's example in relying on mass incarceration to end gang violence).

<sup>2</sup> *See* Bruce Western, Jeffrey R. Kling & David F. Weiman, *The Labor Market Consequences of Incarceration*, 47 CRIME & DELINQ. 410, 424 (2001) (“[S]erving time in prison can diminish an individual’s earnings but not necessarily employment prospects.”); Hensleigh Crowell, Note, *A Home of One’s Own: The Fight Against Illegal Housing Discrimination Based on Criminal Convictions, and Those Who Are Still Left Behind*, 95 TEX. L. REV. 1103, 1105-12 (2017) (discussing housing discrimination against those with criminal records); *see also* Jung K. Kim & Yumi Koh, *Pretrial Justice Reform and Black-White Difference in Employment*, 54 APPLIED ECON. 1396, 1410 (2022) (reducing pretrial detention increased labor participation of Black defendants by up to 6.8%).

<sup>3</sup> *See* CHRISTOPHER T. LOWENKAMP, MARIE VANNOSTRAND & ALEXANDER HOLSINGER, THE HIDDEN COSTS OF PRETRIAL DETENTION 3 (2013), [http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF\\_Report\\_hidden-costs\\_FNL.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf) [<https://perma.cc/8A84-AEBH>] (highlighting low-risk defendants held for two to three days were almost 40% more likely to commit new crimes before trial than those held at most twenty-four hours, and when held eight to fourteen days, 51% more likely to experience recidivism within two years); Paul Nieuwebeerta, Daniel S. Nagin & Arjan A.J. Blokland, *Assessing the Impact of First-Time Imprisonment on Offenders’ Subsequent Criminal Career Development: A Matched Samples Comparison*, 25 J. QUANTITATIVE CRIMINOLOGY 227, 251 (2009) (“Our findings suggest that the experience of first-time imprisonment is associated with an increase in criminal activity in the 3 years following release.”). Being incarcerated pretrial—even when controlling for seriousness of the charged offense and criminal history—makes defendants more likely to be rearrested for a new law violation in the future. Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 718 (2017) (“Although detention reduces defendants’ criminal activity in the short term through incapacitation, by eighteen months post-[detention] hearing, detention is associated with a 30% increase in new felony charges and a 20% increase in new misdemeanor charges . . .”).

incarceration—including arrest,<sup>4</sup> charging,<sup>5</sup> and bail practices.<sup>6</sup> If we can arrest fewer individuals, charge fewer crimes, and release more individuals before trial, there will be a substantial reduction in mass incarceration.<sup>7</sup> On the bail front, states and municipalities have responded by abolishing money bail,<sup>8</sup>

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<sup>4</sup> See, e.g., Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 826 (2015) (discussing consequences of arrest arising outside criminal justice system).

<sup>5</sup> See, e.g., Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1315 (2018) (discussing ability of prosecutors to use their charging power to manipulate plea bargaining).

<sup>6</sup> See, e.g., Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1401-03 (2017) (outlining public response to bail reform efforts); Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1350 (2014) (“[T]here are powerful doctrinal, textual, and historic reasons to conclude that the constitutional prohibition against excessive bail includes a right, for many non-dangerous defendants, to have the option of electronic monitoring in lieu of imprisonment.”); see also SHIMA BARADARAN BAUGHMAN, *THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM* 10 (2018) (identifying bail as “hidden key” to ending mass incarceration); *Challenging Pretrial Detention*, C.R. CORPS, <https://civilrightscorps.org/our-work/> [<https://perma.cc/WQD3-PAJY>] (last visited Sept. 27, 2024) (overviewing organization’s bail-related litigation across various states).

<sup>7</sup> See, e.g., Andrew D. Leipold, *Is Mass Incarceration Inevitable?*, 56 AM. CRIM. L. REV. 1579, 1579 (2019) (“This article explores the likelihood of a meaningful, sustained reduction in incarceration rates.”).

<sup>8</sup> See, e.g., 725 ILL. COMP. STAT. ANN. 5/110-1.5 (West 2024) (abolishing monetary bail in Illinois); Aída Chávez, *Bernie Sanders Introduces Bill to End Money Bail*, INTERCEPT (July 25, 2018, 1:30 PM), <https://theintercept.com/2018/07/25/bernie-sanders-money-bail/> (describing efforts by state and local governments in New Jersey, New York, and Philadelphia to limit or eliminate cash bail); Bruce Schreiner, *Kentucky High Court Asked to Fix ‘Badly Broken’ Bail System*, AP NEWS, <https://apnews.com/article/9722edf8c4387bdc9b595558b2af7457> [<https://perma.cc/Y7FR-N64M>] (last updated Jan. 21, 2020, 7:30 PM) (describing petition to protect defendants’ constitutional rights to reasonable bail); Chandra Bozelko, *The Cash Bail System Should Be Eliminated Rather than Reformed*, GUARDIAN (Feb. 5, 2016, 6:45 AM), <https://www.theguardian.com/commentisfree/2016/feb/05/the-cash-bail-system-should-be-eliminated-rather-than-reformed> [<https://perma.cc/A6G6-VFZA>] (noting eliminating cash bail for certain defendants or offenses has been proposed and accomplished in several cities and states).

implementing risk assessments,<sup>9</sup> increasing pretrial release supervision,<sup>10</sup> and attempting to eliminate detention for lower-level offenses, in what has been referred to as the “third wave” of bail reform.<sup>11</sup> All of these attempts have aimed to reduce the prison population. More recently, there has been some grassroots and scholarly momentum toward the abolition of prisons in the United States. These reformers agree that near-complete, and not total, abolition of the prison system is the goal.<sup>12</sup> Abolitionists envision a need to still remove some small dangerous segment of society to protect victims.<sup>13</sup> This push toward near-complete abolition has met some resistance due to isolated increases in crime rates in some major U.S. cities and the fear of increased crime.<sup>14</sup> Some scholars

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<sup>9</sup> See, e.g., Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 317-20 (2018) (noting proliferation of risk assessment in bail reform efforts); *Common Pretrial Risk Assessments*, MAPPING PRETRIAL INJUSTICE, <https://pretrialrisk.com/the-basics/common-prai/> [<https://perma.cc/VM69-EDS9>] (last visited Sept. 27, 2024) (finding Public Safety Assessment is “in use in at least 5 entire states and 59 counties across 20 other states”); MATTHEW DEMICHELE ET AL., *THE PUBLIC SAFETY ASSESSMENT: A RE-VALIDATION AND ASSESSMENT OF PREDICTIVE UTILITY AND DIFFERENTIAL PREDICTION BY RACE AND GENDER IN KENTUCKY* 5 (2018), <https://ssrn.com/abstract=3168452> [<https://perma.cc/58SB-QGPR>] (“[A]s of Winter 2018, there were over 38 state and local jurisdictions using the [Public Safety Assessment].”).

<sup>10</sup> See *infra* note 43.

<sup>11</sup> Shima Baradaran Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 1012 (2020) (noting third wave of bail reform focuses particularly on risk assessments); see also Lauryn P. Gouldin, *Reforming Pretrial Decision-Making*, 55 WAKE FOREST L. REV. 857, 876 (2020) (“In just the last three years, nearly every state in the country has made changes to its pretrial system.”).

<sup>12</sup> See, e.g., ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 39 (Greg Ruggiero ed., 2003) (“In the twenty-first century, antiprison activists insist that a fundamental requirement for the revitalization of democracy is the long-overdue abolition of the prison system.”); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1783 (2020) (describing how “the 2020 uprisings following the police murder of George Floyd in Minneapolis” brought abolition into mainstream); Dorothy E. Roberts, *The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 11 nn.45-46 (2019) (discussing abolition’s move into mainstream scholarship and activism since 1997); Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), <https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration> [<https://perma.cc/9ML8-EFU5>].

<sup>13</sup> Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1168 (2015) (“[T]here may be . . . some people who are so dangerous to others that they cannot live safely among us . . .”).

<sup>14</sup> See Astead W. Herndon, *They Wanted to Roll Back Tough-on-Crime Policies. Then Violent Crime Surged.*, N.Y. TIMES (Feb. 18, 2022), <https://www.nytimes.com/2022/02/18/us/politics/prosecutors-midterms-crime.html> (discussing political backlash against progressive prosecutors amid rising crime rates); Jesse McKinley, Alan Feuer & Luis Ferré-Sadurní, *Why Abolishing Bail for Some Crimes Has Law Enforcement on Edge*, N.Y. TIMES, <https://www.nytimes.com/2019/12/31/nyregion/cash-bail-reform-new-york.html> (last updated Feb. 23, 2021) (discussing critical pushback to bail reform measures amid fears of

and policymakers doubt that abolition is achievable politically or pragmatically.<sup>15</sup> The path toward eliminating prison and jail seems grim given the current political climate,<sup>16</sup> and abolition seems like a wishful but unrealistic thought experiment. However, abolition may not be the pipe dream it appears to be at first glance. There is robust constitutional, legislative, and empirical support for safely releasing at least 90% of defendants before trial.<sup>17</sup> A massive reduction in pretrial incarceration will actually improve public safety because any amount of incarceration leads to a higher likelihood of future crime as well as potential negative impacts on employment, custody, housing, and mental health.<sup>18</sup> Indeed, a 90% pretrial release target might provide an experimental path toward national abolition, in a way that presents few risks to public safety.

While pretrial detention rates have increased in recent years, detention before trial is a relatively new constitutional phenomenon. Historically, release before trial was the presumption because U.S. defendants maintained a constitutional presumption of release pretrial for all noncapital crimes.<sup>19</sup> But reality has not

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increased crime rates); Fola Akinnibi & Sarah Holder, *How Bail Reform, Crime Surge Mix in an Angry Debate: QuickTake*, BLOOMBERG L. (Aug. 29, 2023, 2:45 PM), <https://news.bloomberglaw.com/white-collar-and-criminal-law/how-bail-reform-crime-surge-mix-in-an-angry-debate-quicktake> (“Critics say releasing people without cash bail leads to higher crime levels . . .”).

<sup>15</sup> See Rachel E. Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. 245, 316 (2023) (“[E]ven a complete change in American societal structure would not achieve the ultimate goal of no crime because people will harm each other regardless of how a society is structured.”).

<sup>16</sup> See, e.g., David Feige & Robin Steinberg, Opinion, *Replacing One Bad Bail System with Another*, N.Y. TIMES (Sept. 11, 2018), <https://www.nytimes.com/2018/09/11/opinion/california-bail-law.html> (arguing eliminating cash bail will not “redress the larger systemic problems of which bail was a symptom — mass incarceration and structural racism”).

<sup>17</sup> See PRETRIAL SERVS. AGENCY FOR D.C., FY 2019 RELEASE RATES FOR PRETRIAL DEFENDANTS WITHIN WASHINGTON, DC 1 (2019), <https://www.psa.gov/sites/default/files/2019%20Release%20Rates%20for%20DC%20Pretrial%20Defendants.pdf> [<https://perma.cc/2G5L-2QGF>] (“94% of cases result in defendants being released pretrial.”); Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 558 (2012) (“[J]udges could safely release some [defendants] . . . without increasing danger to the public.”). See *infra* note 234 for examples of cities demonstrating that increasing pretrial release reduces crime.

<sup>18</sup> See PRETRIAL SERVS. AGENCY FOR D.C., *supra* note 17, at 1; Heaton, Mayson & Stevenson, *supra* note 3, at 711, 713 (finding those detained pretrial are more likely to commit future crimes and explaining “[a] person detained for even a few days may lose her job, housing, or custody of her children”).

<sup>19</sup> See *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (“Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”); *Bell v. Wolfish*, 441 U.S. 520, 533 (1979) (“Without question, the presumption of innocence plays an important role in our criminal justice system.”); see also Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 728 (2011)

always followed this presumption, as during the 1900s, some state and federal judges started detaining defendants by setting high bail amounts.<sup>20</sup> Detention rates remained low—at around 20-30% of defendants—until “bail reform” efforts began.<sup>21</sup> On two occasions, federal legislators attempted to reform bail to restore these constitutional rights: advocates pushed for federal and state bail reform legislation first in the 1960s and later in the 1980s in order to increase release of defendants before trial.<sup>22</sup> These efforts were ultimately unsuccessful in reducing detention and instead resulted in expansion of detention on the basis of dangerousness.<sup>23</sup> Prior to these efforts, judges could only order pretrial detention when the defendant was a flight risk or had been charged with a capital offense; judges were later permitted to consider several public safety factors and weigh evidence in ruling on pretrial detention.<sup>24</sup> Opening the door to considering public safety has caused more confusion than was anticipated when the Supreme Court weighed in on bail reform in the 1980s.<sup>25</sup> But despite these changes in detention, the Supreme Court has consistently made clear that detention before trial is a “carefully limited exception” with a clear mandate that the accused maintains liberty before trial.<sup>26</sup> In discussing pretrial liberty here, it is

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(“One of the most significant protections that accompanied the presumption of innocence was the constitutional right to pretrial release through bail.”).

<sup>20</sup> See BARADARAN BAUGHMAN, *supra* note 6, at 22-23 (explaining factors in setting bail amounts leading Supreme Court to consider forbidding excessive bail in multiple cases).

<sup>21</sup> U.S. DOJ, PRETRIAL RELEASE AND DETENTION: THE BAIL REFORM ACT OF 1984 1 (1988) (“The data in this report suggest that pretrial detention has largely been used as an alternative to bail as a means of holding defendants.”).

<sup>22</sup> See BARADARAN BAUGHMAN, *supra* note 6, at 22-27.

<sup>23</sup> *Id.* at 25 (noting bail reform legislation allowed courts to detain individuals who were deemed dangerous to community and those who had substantial evidence against them for serious crime).

<sup>24</sup> See, e.g., Bail Reform Act of 1966, Pub. L. No. 89-465, sec. 3(a), § 3146(b), 80 Stat. 214, 214 (repealed 1984).

[T]he judicial officer shall . . . take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused’s family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

*Id.*; see also Bail Reform Act of 1984, Pub. L. No. 98-473, § 203(a), 98 Stat. 1976, 1976-77 (codified as amended at 18 U.S.C. § 3142(g)) (including factors to consider in determining release, such as evidence against defendant, defendant’s history and characteristics, and nature and seriousness of the danger defendant’s release would pose).

<sup>25</sup> See *United States v. Salerno*, 481 U.S. 739, 755 (1987) (upholding provisions for pretrial detention in Bail Reform Act of 1984 as “carefully limited exception[s]” to societal norm of pretrial liberty).

<sup>26</sup> *Id.*; *Hudson v. Parker*, 156 U.S. 277, 285 (1895) (restating that statutes are framed on theory that person accused of crime should not be imprisoned or punished until proven guilty in court); *Powell v. Alabama*, 287 U.S. 45, 52 (1932) (establishing defendants “until

acknowledged that this right is part of a small subset of overlapping constitutional interests including the right to presumptive release, the right to legal defense, the prohibition of judicial fact-finding before trial, and the right to financial parity.<sup>27</sup> For shorthand, these liberty interests are referred to here as the right of pretrial liberty.

While the loss of these constitutional rights of liberty through judicial application is critical, that is not the focus of this Article. Instead, the focus here is demonstrating a pretrial case study for eliminating pretrial detention, which is best understood through examining the legislative failures in bail reform and creating a new statutory path. Thus far, federal and state legislation has not carefully protected individual liberties, and there are still many bills, passed and pending, that have little hope of decreasing detention in a meaningful way. Neither federal nor state legislatures have articulated a statutory scheme to effectuate presumptive release and eventual abolition.<sup>28</sup> Most bail formulations focus on public safety and only loosely recognize the right to liberty, which is then lost in complex statutory mires, balancing tests, and elaborate risk assessments.<sup>29</sup> Supreme Court doctrine mandates pretrial liberty as the default, but federal legislation includes exceptions that have been applied to detain a large swath of individuals.<sup>30</sup> While the Supreme Court has made clear that pretrial liberty should be respected except in limited cases,<sup>31</sup> federal legislation

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convicted” are presumed innocent); *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (asserting there should not be any imprisonment until after finding of guilt based on evidence presented to factfinder); *Bandy v. United States*, 81 S. Ct. 197, 197 (1960) (“The fundamental tradition in this country is that one charged with a crime is not, in ordinary circumstances, imprisoned until after a judgment of guilt.”); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 186 (1963) (connecting pretrial liberty rights to Magna Carta and requiring courts to not impose punishment “without due process of law”); *United States v. Bentvena*, 288 F.2d 442, 444 (2d Cir. 1961) (“Thus, until trial commences, enlargement on bail is the rule, upon adequate assurance that the accused will appear at trial.”).

<sup>27</sup> The overlapping constitutional interests are discussed in detail in a companion piece. See Shima Baradaran Baughman, *Taming Dangerousness*, 112 GEO. L.J. 215, 217-18 (2023) (describing that overlapping rights, including right to due process, right to equal protection, and right to counsel, form constitutional basis for right to pretrial liberty).

<sup>28</sup> Many states still have the groundwork for presumptive release by statute or constitution, but with the additional exceptions created by statutes, these rights are not effectuated. See, e.g., FLA. CONST. art. I, § 14 (“Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions.”); ILL. CONST. art. I, § 9 (“All persons shall be bailable by sufficient sureties, except for the following offenses where the proof is evident or the presumption great . . . .”); CAL. PENAL CODE § 1271 (West 2024) (“If the charge is for any [noncapital] offense, he may be admitted to bail before conviction, as a matter of right.”).

<sup>29</sup> See Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 508-16 (2018) (reviewing actuarial tools modern bail systems use to determine pretrial risk).

<sup>30</sup> See *infra* Section I.B.

<sup>31</sup> See *Salerno*, 481 U.S. at 755.

has not created a scheme to effectuate these rights.<sup>32</sup> Despite courts' continued and careful articulation of individual liberties, federal detention has increased considerably since the beginning days of bail reform.<sup>33</sup> On the state side, almost every state has adopted new pretrial policies,<sup>34</sup> with five hundred enactments from 2012 to 2017<sup>35</sup> and almost two hundred bills in 2017 alone.<sup>36</sup> State detention schemes diverge on whether to detain felony defendants, misdemeanor defendants, and those with a criminal history. And some tests discriminate based on socioeconomic status or introduce racially biased factors while others rely on financial means.<sup>37</sup> Liberty is not the focus of bail reform in any of the leading

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<sup>32</sup> The Bail Reform Act of 1966 sought to protect pretrial liberty by creating a presumption of pretrial release for noncapital offenses that could only be overcome by a finding that release would not reasonably assure appearance of the person required. Bail Reform Act of 1966, Pub. L. No. 89-465, § 3(a), 80 Stat. 214, 214 (repealed 1984) (describing conditions judicial officer may impose to assure appearance). However, the Bail Reform Act of 1984 dramatically eroded this protection by requiring courts to consider risk to public safety in making bail determinations. Bail Reform Act of 1984, Pub. L. No. 98-473, §§ 202-210, 98 Stat. 1976.

<sup>33</sup> See Baradaran, *supra* note 19, at 752 (describing Bail Reform Act of 1984's effect in increasing pretrial detention).

<sup>34</sup> PRETRIAL JUST. INST., THE STATE OF PRETRIAL JUSTICE IN AMERICA 5 (2017), [https://www.prisonpolicy.org/scans/pji/the\\_state\\_of\\_pretrial\\_in\\_america\\_pji\\_2017.pdf](https://www.prisonpolicy.org/scans/pji/the_state_of_pretrial_in_america_pji_2017.pdf) [<https://perma.cc/SX4Y-9KJY>] (“[I]t is the rare state that is not considering or has not recently implemented some adjustment to its pretrial justice system.”).

<sup>35</sup> Brandon L. Garrett, *Models of Bail Reform*, 74 FLA. L. REV. 879, 890 (2022) (“In the past decade and a half, there has been a flurry of state-level legislative activity concerning pretrial policies . . . [T]hose new statutes include a wide range of—sometimes inconsistent—approaches.”).

<sup>36</sup> See AMBER WIDGERY, NAT'L CONF. OF STATE LEGISLATURES, TRENDS IN PRETRIAL RELEASE: STATE LEGISLATION 1 (2015), [https://docs.legis.wisconsin.gov/misc/lc/study/2018/1783/010\\_august\\_16\\_2018\\_meeting\\_10\\_00\\_a\\_m\\_lc\\_conference\\_room/aug16handout\\_trends](https://docs.legis.wisconsin.gov/misc/lc/study/2018/1783/010_august_16_2018_meeting_10_00_a_m_lc_conference_room/aug16handout_trends) [<https://perma.cc/6YA2-58F3>] (detailing pretrial release laws from 2012 to 2014); NAT'L CONF. OF STATE LEGISLATURES, TRENDS IN PRETRIAL RELEASE: STATE LEGISLATION UPDATE 1 (2018), [https://docs.legis.wisconsin.gov/misc/lc/study/2018/1783/010\\_august\\_16\\_2018\\_meeting\\_10\\_00\\_a\\_m\\_lc\\_conference\\_room/aug16\\_enactments](https://docs.legis.wisconsin.gov/misc/lc/study/2018/1783/010_august_16_2018_meeting_10_00_a_m_lc_conference_room/aug16_enactments) [<https://perma.cc/P6MX-RAL5>] (summarizing legislative trends from 2015 to 2017 and stating 182 new pretrial laws were enacted in 2017).

<sup>37</sup> See *Pretrial Release Eligibility and Detention*, NAT'L CONF. OF STATE LEGISLATURES (June 1, 2020), <https://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-eligibility.aspx> [<https://perma.cc/3KJS-A5GZ>] (providing fifty-state chart identifying various categories of crimes for which states permit pretrial detention); TIMOTHY R. SCHNACKE, CTR. FOR LEGAL AND EVIDENCE-BASED PRACS., “MODEL” BAIL LAWS: RE-DRAWING THE LINE BETWEEN PRETRIAL RELEASE AND DETENTION 140 (2017), [http://www.clebp.org/images/04-18-2017\\_Model\\_Bail\\_Laws\\_CLEPB\\_.pdf](http://www.clebp.org/images/04-18-2017_Model_Bail_Laws_CLEPB_.pdf) [<https://perma.cc/JG77-8CUX>] (“[O]ne sees that every state has already articulated where it intends the line to be drawn between release and detention. It just so happens that the states have drawn that line in dramatically different variations . . .”).

approaches; thus, state legislation has failed to provide any improvement in pretrial incarceration.

The underlying difficulty with the right of liberty is that without statutory presumptions, it is difficult to effectuate and is easily lost due to misguided judicial overemphasis on public safety.<sup>38</sup> Without statutory presumptions of release, many different approaches have proliferated among the states, with most detaining more people than necessary.<sup>39</sup> While statutory schemes seeking to increase pretrial liberty have increased, the disparities in defining the right across different jurisdictions have also grown.<sup>40</sup> To uncover the problems of bail reform, a review of all of the problematic approaches—including the federal detention model and the most common approaches among the states—must be considered. This Article demarcates and distinguishes between these various types of bail reform and classifies them as risk-based, supervision, financial, and demarcation approaches. None of these four approaches to bail effectively increase pretrial liberty, and they fail to provide a viable path toward abolition.

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<sup>38</sup> See Baradaran & McIntyre, *supra* note 17, at 537 (“[A]bout 80% of pretrial defendants have less than a 3% chance of being rearrested. . . . [O]nly about 40%--60% of federal and state defendants are released . . . .”); Mayson, *supra* note 29, at 516 (“As for statutory law, every state already authorizes judges to order conditions of release to protect ‘public safety,’ but the current standards are varied, ambiguous, and often irrational.”).

<sup>39</sup> See, e.g., H.B. 81, 2020 Leg., Reg. Sess. (Ala. 2020) (proposing amendment to Constitution of Alabama to allow reasonable bail prior to conviction); S.B. 1647, 54th Leg., 2d Reg. Sess. (Ariz. 2020); S.B. 20-161, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020); H.B. 49, 2020 Gen. Assemb., Reg. Sess. (Md. 2020); H.L.D. 1421, 129th Leg., 1st Reg. Sess. (Me. 2019); H. File 741, 91st Leg., 2019-2020 Sess. (Minn. 2020); Legis. B. 881, 106th Leg., 2019-2020 Sess. (Neb. 2020); Joint Motion for Dismissal Without Prejudice at 2-3, *Allison v. Allen*, No. 19-cv-1126 (M.D.N.C. dismissed May 3, 2024) (describing bail reform enacted after preliminary injunction rendering claims moot); H.B. 191, 135th Gen. Assemb., Reg. Sess. (Ohio 2023); S. 2552, Gen. Assemb., 2020 Sess. (R.I. 2020); Amanda Woog & Nathan Fennell, *Power and Procedure in Texas Bail-Setting*, 74 SMU L. REV. 475, 475, 480 (2021) (“[I]n most bail-setting courts in Texas, formal procedural requirements, like mandating that bail-setting magistrates consider certain factors when making initial bail decisions, do not achieve their promise.”); H.B. 206, 2020 Leg., Gen. Sess. (Utah 2020).

<sup>40</sup> See Garrett, *supra* note 35, at 890; see also Isabella Jorgensen & Sandra Susan Smith, *The Current State of Bail Reform in the United States: Results of a Landscape Analysis of Bail Reforms Across All 50 States* 5-7 (Harvard Kennedy Sch., Working Paper No. RWP21-033, 2021) (describing wide variation in state legislatures’ initiatives to reduce pretrial detention through different bail reform measures, including creating presumption of release, adopting risk assessments, and establishing guidelines for judges to consider when imposing bail). Compare KY. REV. STAT. ANN. § 532.007 (West 2024) (“Sentencing judges shall consider . . . the results of a defendant’s risk and needs assessment included in the presentence investigation . . . .”), with N.M. CONST. art. II, § 13 (“Bail may be denied by a court of record pending trial for a defendant charged with a felony if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community.”).

The first approach to bail reform relies on risk assessments to determine which defendants are safe to release pretrial.<sup>41</sup> States have been praised for using risk assessments in their bail reform efforts, but some, like Kentucky, Florida and Colorado, have actually increased detention after adopting these reforms.<sup>42</sup> Another approach to bail reform is pretrial supervision. Some states have increased the use of pretrial services, though this Article demonstrates that this does not necessarily equate to greater pretrial liberty.<sup>43</sup> Other states have relied on a third, financial approach to bail reform—eliminating money bail in hopes that more people would be released—though this Article demonstrates that this approach has generally been unsuccessful in improving release rates.<sup>44</sup> Finally,

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<sup>41</sup> See, e.g., S.B. 995, 100th Gen. Assemb., 2d Reg. Sess. (Mo. 2020) (creating system where judges rate defendants' flight risk, with "low risk" defendant receiving release on unsecured bond, "moderate risk" defendant receiving similar release but with possible conditions attached, and "high risk" defendant receiving judicial discretion of either pretrial detention or release with conditions).

<sup>42</sup> See MEGAN T. STEVENSON & JENNIFER L. DOLEAC, AM. CONST. SOC'Y, *THE ROADBLOCK TO REFORM* 5 (2018), <https://www.acslaw.org/wp-content/uploads/2018/11/RoadblockToReformReport.pdf> [<https://perma.cc/ZER5-GX4N>] (noting Kentucky's pretrial release rate for low- and moderate-risk defendants would have been 37% higher if judges had followed risk assessment recommendations). See generally John Logan Koepke & David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 WASH. L. REV. 1725, 1759-63 (2018) (explaining Colorado's Pretrial Assessment Tool ("CPAT") led to around half of all defendants being categorized as higher risk, when CPAT tool projected only one-third of defendants would be, despite their low rates of failing to appear in court and committing new crimes); Joshua J. Luna, Comment, *Bail Reform in Colorado: A Presumption of Release*, 88 U. COLO. L. REV. 1067, 1095 (2017) (detailing instance where judge disregarded defendant's qualification for unsecured bond under CPAT and instead set bond at \$1,500); Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [<https://perma.cc/67AJ-GWJ7>] (providing example of Broward County, Florida, which implemented "remarkably unreliable" risk assessment tool that overpredicted who would commit violent crime, and showing evidence of judges disregarding tool's scores).

<sup>43</sup> See, e.g., VA. CODE ANN. § 19.2-152.4:3(A)(1)-(3) (2024) (dictating through statute role of pretrial services officers and indicating they are to investigate and interview defendants, present a pretrial investigation report with recommendations to assist courts, and supervise all defendants to ensure compliance with terms and conditions of bail). In Texas, bail reform efforts resulted in judges maintaining discretion on pretrial release and departing from pretrial release recommendations of pretrial services 66% of the time. *O'Donnell v. Harris Cnty.*, 892 F.3d 147, 154 (5th Cir. 2018), *overruled by Daves v. Dallas Cnty.*, 64 F.4th 616 (5th Cir. 2023).

<sup>44</sup> See, e.g., Act of May 11, 2013, ch. 202, 2013 Colo. Sess. Laws 820 (codified as amended in scattered sections of COLO. REV. STAT. tit. 16) (creating new presumptions and revising method of setting bail); KY. REV. STAT. ANN. § 431.510 (West 2024) (outlawing commercial bail bond industry); Public Act 101-0652 art. 10, 2020 Ill. Laws 2483 (2021) (ending cash bail system in Illinois and replacing it with binary system of either pretrial release or detention if the court determines defendant is dangerous or poses flight risk); MD. R. 4-216.1

some states have used what this Article refers to as the demarcation approach, dictating which types of crimes are eligible for release or detention. This approach, though well-intentioned, has typically increased the number of offenses eligible for detention,<sup>45</sup> and therefore increased overall pretrial detention rates.<sup>46</sup> As a result, hardly any jurisdictions have articulated a bail reform scheme that increases pretrial liberty or provides a path to eliminating pretrial detention.<sup>47</sup>

This Article first identifies the deficiencies in the four prevailing bail approaches and introduces a new detention net model that has the potential of

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(stipulating special conditions of release with financial terms are meant only to ensure defendant's appearance, not solely to prevent future criminal conduct or protect others' safety); VT. STAT. ANN. tit. 13, § 7551(b)(2) (2024) (capping bail at \$200 for some misdemeanors). In 2016, Alaska enacted S.B. 91, which mostly eliminated cash bail. Act of July 11, 2016, 2016 Alaska Sess. Laws ch. 36, § 59 (repealed 2019). This bill was repealed in 2019 by H.B. 49, which reinstated cash bail and created a presumption of guilt. Act of July 8, 2019, 2019 Alaska Sess. Laws ch. 4, § 59 (codified at ALASKA STAT. § 12.30.011 (2024)) (“[T]here is a rebuttable presumption that there is a substantial risk that the person will not appear and the person poses a danger to the victim, other persons, or the community . . .”). This attempt at reform is an example of a state trying to address their crime and prison problems, but not through targeting the cause of them. In November 2016, New Mexico voters approved a constitutional amendment that allows judges to deny bail to defendants who appear exceptionally dangerous, and to grant pretrial release to nondangerous, indigent offenders who cannot provide bail. N.M. CONST. art. II, § 13. California's lauded reform efforts aimed at ending money bail permitted local courts and judges discretion regarding what policies to adopt, which directly impacts whether pretrial liberty is enhanced. Brandon L. Garrett & John Monahan, *Judging Risk*, 108 CALIF. L. REV. 439, 443 (2020) (“In California, lawmakers enacted noteworthy legislation barring cash bail, but permitting local courts and judges to exercise discretion regarding what policies to adopt.”).

<sup>45</sup> See Act of Aug. 3, 2020, No. 547, 2020 Ga. Laws 570, 571 (codified as amended at GA. CODE ANN. § 17-6-12 (2024)) (expanding list of “bail restricted offense[s]” to include crimes such as violent crimes, drug trafficking, and driving under the influence, and prohibiting release on recognizance for those crimes); Act of May 5, 2021, ch. 431, 2021 Utah Laws 3658 (“This bill . . . removes the presumption of release for a person arrested for certain criminal offenses while the person awaits trial . . .”).

<sup>46</sup> See sources cited *supra* note 45.

<sup>47</sup> See William M. Carlucci, Comment, *Death of a Bail Bondsman: The Implementation and Successes of Nonmonetary, Risk-Based Bail Systems*, 69 EMORY L.J. 1205, 1213-29 (2020) (highlighting limitations of historic and current state bail statutes as well as exploring current trend toward risk-based detention strategies); Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J.F. 1098, 1102-12 (2019) (highlighting constitutional deficiencies of money bail systems currently in place in many states); Mayson, *supra* note 29, at 507 (“Despite the ambitions of the first two waves [of bail reform], most jurisdictions never fully implemented regimes of preventive detention or non-financial conditions of release.”). *But see* Public Act 101-0652, art. 10, 2020 Ill. Laws at 2670 (2021) (codified as amended at 725 ILL. COMP. STAT. ANN. 5/110-2 (West 2024)) (“Detention only shall be imposed when it is determined that the defendant poses a specific, real, and present threat to a person, or has a high likelihood of willful flight.”).

creating a viable statutory path toward near-complete abolition pretrial. It proceeds as follows. Part I reviews the current muddle of federal bail reform, starting from the 1960s when pretrial public safety considerations began. It reviews the efforts of the third generation of bail reform of 2010, while also exploring the relevant shifts in the second wave of the 1980s, which increased pretrial detention through consideration of public safety. A historical exploration of federal bail reform and the statutory presumptions it created that led to detention provides important insight into current national bail problems. Part II explores the state bail reform landscape in the most recent wave of bail reform and identifies four types of reform efforts, including risk-based reforms, supervision, financial reforms, and demarcation reforms. It briefly reviews each type and provides examples of all these models' failures to enhance pretrial liberty. Through analyzing current and proposed statutory schemes, it demonstrates that none of the existing bail reform approaches provide a path toward pretrial abolition. Part III proposes a viable path toward pretrial abolition with a "detention net" model. The detention net approach provides a blueprint for federal and state legislatures to dramatically increase release rates, with a target of near-complete jail elimination. It recommends a pretrial presumption of release for the majority of the accused and a release target set by legislatures. It suggests a 90% release target for states, which has been proven to have public safety benefits in Washington, D.C., and more recently in New Jersey, and is supported by robust empirical data. It also provides insights into how increasing release and using a narrower detention net could substantially reduce detention while improving public safety. The path toward rethinking punishment might start with pretrial detention, where near-complete release is possible and could provide a case study that might be replicated to end mass incarceration.

#### I. TRACING FEDERAL BAIL REFORM DETENTION

Over the years, the United States has pursued incremental criminal justice reforms to reduce detention rates pretrial, but they have backfired to increase detention instead. While intending to restore the historic rights of pretrial liberty, the two waves of federal bail reform—in the 1960s and 1980s—both increased pretrial detention rates.<sup>48</sup> For instance, in 1965, federal pretrial detention held 39% of defendants before trial; in 1984, it held 22.1% of defendants before trial;

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<sup>48</sup> LÉON DIGARD & ELIZABETH SWAVOLA, VERA INST. OF JUST., JUSTICE DENIED: THE HARMFUL AND LASTING EFFECTS OF PRETRIAL DETENTION 1-2 (2019), <https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf> [<https://perma.cc/9PJW-6ZLR>] (showing pretrial detention accounted for 53% of total United States jail population in 1970, and 64% in 2015); see Alexa Van Brunt & Locke E. Bowman, *Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next*, 108 J. CRIM. L. & CRIMINOLOGY 701, 726, 738 (2018) (describing how pretrial detention rates increased after first wave and second wave of bail reform).

in 1988, it held 30.1%; and in 2018, it held 74.8% of defendants.<sup>49</sup> To understand why the majority of federal defendants are now detained pretrial, it is important to understand the history of the federal model of bail reform and how it increased its reliance on public safety and thus increased detention before trial. The United States has seen two federal bail reform periods where advocates succeeded in promulgating bail reform legislation: first in the 1960s and later in the 1980s.<sup>50</sup> These efforts expanded pretrial detention practices to include defendants who posed a safety risk and defendants for which there was evidence of a serious crime.<sup>51</sup> Prior to these efforts, judges could only order pretrial detention when the defendant was a flight risk or had been charged with a capital offense; after these efforts, judges were permitted to consider several factors in ruling on pretrial detention.<sup>52</sup> These federal acts inadvertently placed statutory presumptions in the wrong direction leading to increased pretrial detention. Analyzing the history of reforms in the pretrial area provides an important lesson in the mistakes to avoid in any attempts at reducing incarceration.

Section I.A first recounts the history of bail reform legislation in federal courts in the two waves. It goes on to explain where the presumptions of release were reversed and where federal bail reform went wrong. Section I.B reviews federal legislation's impact on release rates and new legislation aimed to curb federal pretrial detention. Federal bail reform is critical to understand as it influenced state bail practices nationally and demonstrates that well-meaning criminal justice reform efforts can increase incarceration if not articulated carefully.

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<sup>49</sup> In 1965, there were 12,892 total *sentenced* detainees in federal detention, and 21,040 total detainees in federal prison. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 1970, at 157, 159 (1970) (providing tables with statistics in federal institutions); U.S. DOJ, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1984, at 27 tbl.2.7 (1984); U.S. DOJ, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1988, at 22 tbl.2.1 (1991); *Table H-14—Federal Pretrial Services Judicial Business*, U.S. COURTS (Sept. 30, 2018), [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_h14\\_0930.2018.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_h14_0930.2018.pdf) [<https://perma.cc/AN6H-AU6G>]; Matthew G. Rowland, *The Rising Federal Pretrial Detention Rate, in Context*, FED. PROB., Sept 2018, at 13, 13.

<sup>50</sup> See Shima Baradaran Baughman, Lauren Boone & Nathan Jackson, *Reforming State Bail Reform*, 74 SMU L. REV. 447, 450 (2021); BARADARAN BAUGHMAN, *supra* note 6, at 22-27.

<sup>51</sup> Baradaran Baughman et al., *supra* note 50, at 450 (“[J]udges gained a multitude of other reasons [outside of flight risk] through the 1960s and 1980s to detain individuals before trial in the name of ‘preventative detention.’”); BARADARAN BAUGHMAN, *supra* note 6, at 22-27; see ZHEN ZENG, U.S. DOJ, JAIL INMATES IN 2016, at 4 (2018), <https://www.bjs.gov/content/pub/pdf/ji16.pdf> [<https://perma.cc/E2QW-2DKU>] (estimating 65% of detainees unconvicted in 2016).

<sup>52</sup> See Baradaran, *supra* note 19, at 731.

A. *Historical Review of Federal Detention Statutes*

Before reviewing the current statutory bail approaches and the quagmires we find ourselves in, it is important to trace the steps that helped get us here. This includes a very brief review of the first generation (1966 Federal Bail Reform Act),<sup>53</sup> and second generation (1970 D.C. Act and 1984 Bail Reform Act) of bail reform.<sup>54</sup> Bail reform in the United States started with some community reform efforts like the Manhattan Bail Project which sparked interest in federal and state legislation nationally.<sup>55</sup> The major goals of both first and second generations of bail reform were to reduce detention rates and restore the constitutional right to pretrial release.

The first generation of bail reform aimed to reduce detention rates and move away from considering the ability of a defendant to pay for release.<sup>56</sup> The Federal Bail Reform Act of 1966 (“the 1966 Act”) only applied to federal courts and the District of Columbia, but it directly influenced bail reform in at least ten states.<sup>57</sup> The 1966 Act recognized a historic presumption of release before trial, with the exception of where the defendant was charged with a capital offense and there was a danger the defendant would fail to appear.<sup>58</sup> Indeed, the 1966 Act

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<sup>53</sup> Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (repealed 1984).

<sup>54</sup> District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 210, 84 Stat. 604 (codified as amended at D.C. CODE tit. 23 (2024)); Bail Reform Act of 1984, Pub. L. No. 98-473, §§ 202-210, 98 Stat. 1976.

<sup>55</sup> Jerome E. McElroy, *Introduction to the Manhattan Bail Project*, 24 FED. SENT’G REP. 8, 8-9 (2011) (“The spirit of doing justice that inspired the Manhattan Bail Project still burns brightly in CJA: The agency is now operating a supervised release program in Queens for selected defendants charged at criminal court arraignment with nonviolent felonies.”).

<sup>56</sup> Bail Reform Act of 1966 § 2.

The purpose of this Act is to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justices nor the public interest. *Id.*

<sup>57</sup> At least ten states were influenced by the 1966 Act to enact similar legislation. *See, e.g.*, Act of Apr. 19, 1967, 1967 Alaska Sess. Laws ch. 112 (repealed 2010); Act of Apr. 18, 1969, ch. 129, 1969 Ariz. Sess. Laws 310; Act effective Oct. 1, 1968, No. 549, 1967 Conn. Pub. Acts 736; District of Columbia Court Reform and Criminal Procedure Act of 1970 § 210; Act of June 21, 1969, Pub. Act 76-1394, 1969 Ill. Laws 2830; Bail or Release on Recognizance—Disallowance, IOWA CODE § 763.16 (1971) (repealed effective 1978); Act of Mar. 23, 1970, ch. 129, 1970 Kan. Sess. Laws 472; Act of Feb. 10, 1976, ch. 2, 1976 Ky. Acts 1 (codified as amended at KAN. STAT. ANN. art. 22); Act of July 22, 1973, ch. 836, 1973 Or. Laws 2703; PA. R. CRIM. P. 4007 (1973) (rescinded 1995).

<sup>58</sup> Bail Reform Act of 1966 § 3(a), states:

A person . . . charged with an offense punishable by death, or . . . has been convicted . . . shall be treated [like others with the presumption of release] unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community.

*Id.* Money bonds were not prohibited by the Act of 1966 but were given low priority. CAROL

mandated release before trial.<sup>59</sup> Even when there was a question of whether an individual would appear, the judge imposed one or multiple release conditions, not detention.<sup>60</sup> To determine which conditions would assure appearance in court, the judicial officer was to consider several factors including the nature and circumstances of the offense and the weight of evidence against the accused.<sup>61</sup> Those charged with noncapital offenses were granted a “release hearing” within twenty-four hours, and detention was not mandated for any specific charge.<sup>62</sup> If nothing was done, the default was release for all defendants before trial.<sup>63</sup> While

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TRILLING LINKER & STEPHEN F. SLOAN, N.Y. SENATE RSCH. SERV., ACCUSED AND UNCONVICTED: A BRIEF ON BAIL PRACTICES 34 (1978) (“While imposition of a money bond was nowhere prohibited, it was accorded low-priority status in the hierarchy of release alternatives.”).

<sup>59</sup> For noncapital cases, judges had to release someone on their personal recognizance or upon the execution of an unsecured appearance bond (amount specified by the judge) unless the judge determined that a release would not reasonably assure the appearance. Bail Reform Act of 1966 § 3(a).

<sup>60</sup> However, if the judge determines that:

[A] release will not reasonably assure the appearance of the person as required. . . . [then] the judicial officer shall . . . impose . . . the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions:

- (1) place the person in the custody of a designated person or organization agreeing to supervise him;
- (2) place restrictions on the travel, association, or place of abode of the person during the period of release;
- (3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;
- (4) require the execution of a [secured] bail bond . . . or the deposit of cash in lieu thereof; or
- (5) impose any other condition deemed reasonably necessary to assure appearance as required.

*Id.* Later in the section, the statute states the right to review is granted twenty-four hours “from the time of the *release hearing*.” *Id.* (emphasis added).

<sup>61</sup> *Id.*

[T]he judicial officer shall . . . take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused’s family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings. *Id.*

<sup>62</sup> *Id.*

A person for whom conditions of release are imposed and who after twenty-four hours from the time of the release hearing continues to be detained as a result of his inability to meet the conditions of release, shall, upon application, be entitled to have the conditions reviewed by the judicial officer who imposed them. *Id.*

<sup>63</sup> *Id.* (“Any person charged with an offense . . . shall . . . be ordered released pending trial.”).

the 1966 Act maintained a presumption of release, it was the first federal bail reform act that allowed for judicial fact-finding and “weighing” before trial.<sup>64</sup> This opened the door to considering dangerousness and public safety in the next iteration of bail reform, conflicting with the goal of increasing pretrial release rates.<sup>65</sup>

The 1966 Act ultimately failed to improve pretrial release, partly because it left two methods for judges to needlessly detain defendants. First, a judge could set a high money bond. Second, if the judge determined there was a high risk of flight, they could claim there were no conditions under the 1966 Act to manage the risk and order detention.<sup>66</sup> The judge was not yet permitted to order detention based on concerns of public safety.<sup>67</sup> The 1966 Act maintained the presumption of release for all defendants before trial but introduced some language about “danger” that ended up leading to increased detention in the next wave of bail reform.<sup>68</sup> It also allowed money bail to prevent some individuals, without the means to pay, to be detained pretrial.

From the early 1970s into the late 1980s, competing concerns about crime, recidivism, and a desire to reduce the use of money bail led to the second generation of bail reform.<sup>69</sup> This wave was different than the first, and for the first time, attempted to address the concern of defendants committing new crimes after release.<sup>70</sup> Congress first passed the District of Columbia Court Reform and Criminal Procedure Act of 1970 (“1970 D.C. Act”),<sup>71</sup> and later the Bail Reform Act of 1984 (“1984 Act”).<sup>72</sup> The 1970 D.C. Act allowed detention of several categories of individuals: (1) those charged with a “dangerous

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<sup>64</sup> Baradaran, *supra* note 19, at 738-39 (explaining that until 1950s, bail was presumed for all noncapital defendants unless there was risk of flight).

<sup>65</sup> *See infra* Part II.

<sup>66</sup> SCHNACKE, *supra* note 37, at 56 (“If set for reasons of public safety – at the time an unconstitutional purpose for limiting pretrial freedom – the judge would be forced to couch the release order only in terms of court appearance, and to refrain from any record discussing public safety.”).

<sup>67</sup> Patricia M. Wald & Daniel J. Freed, *The Bail Reform Act of 1966: A Practitioner’s Primer*, 52 AM. BAR ASS’N J. 940, 940 (1966) (“[The 1966 Act] does not authorize courts to consider danger to the community in setting conditions of pretrial release in noncapital cases . . .”).

<sup>68</sup> *See* Bail Reform Act of 1966 sec. 3(a), § 3148 (stating prisoners charged with capital cases are to receive same presumption of release unless court “has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community”).

<sup>69</sup> BARADARAN BAUGHMAN, *supra* note 6, 23-25.

<sup>70</sup> *See id.*

<sup>71</sup> District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 210, 84 Stat. 604 (codified as amended at D.C. CODE tit. 23 (2024)).

<sup>72</sup> Bail Reform Act of 1984, Pub. L. No. 98-473, §§ 202-210, 98 Stat. 1976.

crime,”<sup>73</sup> (2) those charged with a “crime of violence,”<sup>74</sup> (3) those who threaten or attempted to threaten, injure or intimidate a witness or juror,<sup>75</sup> or (4) those that pose a serious flight risk.<sup>76</sup> The Act required a judge to conclude before the defendant was detained that: (1) “there is clear and convincing evidence that the person [was eligible for detention under the above categories];”<sup>77</sup> (2) “there is no condition or combination of conditions of release which [would] reasonably assure the safety of any other person or the community;”<sup>78</sup> (3) and “there is a substantial probability that the person committed the offense.”<sup>79</sup> The 1970 D.C. Act set up a system that resulted in presumed release for most defendants, and only detained a small category of defendants.

Next came the 1984 Act, which maintained liberty as the default in pretrial proceedings unless the federal government motioned the court for a detention hearing.<sup>80</sup> Under the 1984 Act, judges were to release individuals unless there was an additional finding—meaning the presumption for all defendants was still release.<sup>81</sup> The standard at pretrial hearings was clear and convincing evidence, and the government had to prove that the person’s future appearance and safety of the community could not be reasonably assured with any conditions.<sup>82</sup> Judges

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<sup>73</sup> District of Columbia Court Reform and Criminal Procedure Act of 1970 sec. 210, § 23-1322(a)(1).

<sup>74</sup> *Id.* § 23-1322(a)(2).

<sup>75</sup> *Id.* § 23-1322(a)(3).

<sup>76</sup> *Id.* § 23-1322(e).

<sup>77</sup> *Id.* § 23-1322(b)(2)(A).

<sup>78</sup> *Id.* § 23-1322(b)(2)(B).

<sup>79</sup> *Id.* §§ 23-1322(a)(1), (b)(2)(C).

<sup>80</sup> Bail Reform Act of 1984, Pub. L. No. 98-473, sec. 203(a), §§ 3142(e)-(g), 98 Stat. 1978, 1978-80

<sup>81</sup> *Id.* §§ 3142(b)-(c) (“The judicial officer *shall* order the pretrial release of the person . . . unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.” (emphasis added)).

<sup>82</sup> *Cf.* *Addington v. Texas*, 441 U.S. 418, 431-33 (1979) (holding “clear and convincing” evidence standard is appropriate in civil commitment proceedings); *Cruzan ex rel. Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 282-83 (1990) (explaining Supreme Court requires clear and convincing evidence for deportation, denaturalization, civil commitment, termination of parental rights, allegations of civil fraud, and other civil cases implicating important interests); *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 313 (E.D. La. 2018) (explaining Due Process Clause requires that government prove by clear and convincing evidence that pretrial detention is necessary to mitigate risk of flight, due to “vital importance of the individual’s interest in pretrial liberty recognized by the Supreme Court”). But in the Second Circuit, the standard by which the government must prove there are no conditions of release that will reasonably assure the defendant attendance at trial is preponderance of the evidence. *See United States v. Tedder*, 903 F. Supp. 344, 345 (N.D.N.Y. 1995); *see also United States v. Martir*, 782 F.2d 1141, 1146 (2d Cir. 1986) (“For detention to be proper, the government had to prove by a preponderance of the evidence that no conditions of release would reasonably assure Martir’s attendance at trial.”).

could consider in this determination the nature and circumstances of the crime, the weight of the evidence, the history of the person, and the “nature and seriousness of the danger” posed to society if released.<sup>83</sup> The 1984 Act categorized defendants potentially eligible for detention into five categories.<sup>84</sup> It did not mandate detention of people charged with any crimes, but it did require a judicial hearing to determine whether a defendant should be detained for (1) a “crime of violence;”<sup>85</sup> (2) “an offense for which the maximum sentence is life imprisonment or death;”<sup>86</sup> (3) certain serious drug offenses with sentences of ten years or more;<sup>87</sup> (4) any felony after conviction of two or more crimes like those listed in the crime of violence or life imprisonment/death categories;<sup>88</sup> or if there was (5) a serious risk of flight, obstruction of justice, or threatening or intimidating a witness or juror.<sup>89</sup> The Act also made clear that judges must not impose financial conditions for release, and for the most part prohibited money bail.<sup>90</sup> Although the presumption under the 1984 Act was still release, the exceptions articulated where a judge must hold a hearing became very broad categories. A crime of violence and danger posed to the community was construed broadly, and many drug defendants satisfied the detention conditions for violent crimes. On its face, the 1984 Act seemed to maintain a presumption of release and was articulated like the D.C. Act.<sup>91</sup> However, as discussed below, given the major categories that allow a “release” hearing, most individuals end up detained despite a purported presumption of release.<sup>92</sup>

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<sup>83</sup> Bail Reform Act of 1984 sec. 203(a), § 3142(g). History of a person included their “character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings” and “whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial . . .” *Id.* § 3142(g)(3).

<sup>84</sup> *Id.* § 3142(f) (immediate hearing unless continuance by either party—but not more than three days on behalf of government).

<sup>85</sup> *Id.* In 1984, a crime of violence was defined as “an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another . . .” *Id.* sec. 203(c), § 3156(a)(4)(A); *see also id.* § 3156(a)(4)(B) (“[A]ny other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”); *Id.* sec. 203(a), § 3142(f)(2) (“The person may be detained pending completion of the hearing.”).

<sup>86</sup> *Id.* § 3142(f)(1)(B).

<sup>87</sup> *Id.* § 3142(f)(1)(C).

<sup>88</sup> *Id.* § 3142(f)(1)(D).

<sup>89</sup> *Id.* § 3142(f)(2).

<sup>90</sup> *Id.* § 3142(c)(2) (“The judicial officer may not impose a financial condition that results in the pretrial detention of the person.”).

<sup>91</sup> *See supra* note 80 and accompanying text.

<sup>92</sup> *See infra* notes 99-110 and accompanying text.

Because the 1984 Act was the first federal law allowing preventative detention based on public safety concerns (rather than simply flight risk), it was soon challenged. The Supreme Court upheld the 1984 Act on constitutional grounds in *United States v. Salerno*,<sup>93</sup> confirming that “liberty is the norm,” and the provisions in the 1984 Act fall within the carefully limited exception of detention before trial.<sup>94</sup> Money bail was not the preferred route in federal cases as judges set conditions rather than imposing a bond when a defendant poses a risk upon release. However, the 1984 Act—though limited—still imposed a preventative detention scheme, setting major categories of crimes as eligible for detention.<sup>95</sup> Once the Supreme Court gave its blessing to preventative detention, many states followed the federal government with detention schemes of their own.<sup>96</sup> The next section explores the aftermath of the rise in pretrial detention after the second wave of bail reform in the federal arena.

#### B. *The Current State of Federal Detention*

The 1966 and 1984 Acts provide valuable examples of well-designed bail reform efforts gone awry and emphasize the importance of prioritizing presumptive release if the goal is reducing incarceration. Federal detention has increased dramatically after the 1984 Act such that the majority of individuals who appear in federal court are now detained pretrial. Detention rates in the federal system expanded through the 1980s and beyond.<sup>97</sup> From the date of the 1984 Act, federal detention rates increased from 24% of defendants to 72% of defendants in recent years.<sup>98</sup> The default in federal courts is now detention when a defendant is charged with a crime.

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<sup>93</sup> *United States v. Salerno*, 481 U.S. 739, 755 (1987) (upholding 1984 Act on constitutional grounds).

<sup>94</sup> *Id.* (holding per 1984 Act, “liberty is the norm,” meaning there was presumption of release).

<sup>95</sup> Bail Reform Act of 1984 sec. 203(a), § 3142(e).

<sup>96</sup> See sources cited *supra* note 57; see, e.g., CRIM. JUST. POL’Y PROGRAM AT HARVARD L. SCH., MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 25 & 38 n.210 (2016) (listing twenty-two jurisdictions that permitted preventative detention in at least some scenarios by 2016: Alaska, Arizona, Colorado, District of Columbia, Florida, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Jersey, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Washington, and Wisconsin).

<sup>97</sup> Van Brunt & Bowman, *supra* note 48, at 738-39 (noting increased use of “preventive detention mechanisms did not sound the death knell of cash bond” but rather heightened use of cash bond going forward).

<sup>98</sup> Rowland, *supra* note 49, at 13 fig.1, 14 (showing from 1988 to 2018, number of defendants detained pretrial increased from about 30% to almost 75%, costing \$1.5 billion annually and leading to increased “wrongful convictions, potentially longer-than-necessary prison sentences and higher recidivism rates”).

Even though the 1966 and 1984 Acts both make clear that they do not modify or limit the presumption of innocence, they have increased pretrial detention.<sup>99</sup> The 1984 Act supposedly presumes release, with several categories of crimes where a prosecutor can request a hearing to determine whether release is appropriate.<sup>100</sup> Despite this release-focused statutory language, the current federal legislative scheme—the 1984 Act—does not actually default to pretrial release. Federal legislation has instead increased pretrial release rates. Detention nets under federal law are sweeping, as the exceptions for detention under the 1984 Act are more prominent than the purported default in favor of release.<sup>101</sup> When a defendant is charged with most drug offenses or a sexual or violent offense (including possession of a firearm), or has a predicate felony, there is typically a hearing and the default is almost always detention.<sup>102</sup> While this provision was intended to detain the worst offenders by clear and convincing evidence (or strict scrutiny),<sup>103</sup> in practice it defaults to detaining most people who enter the federal criminal system. Critics have claimed that the evidentiary burden anticipated by the 1984 Act is much different than the burden required in federal courts. Indeed, almost half of federal pretrial detention cases end in detention because this de facto hearing provision ends up effectuating a presumption of detention.<sup>104</sup> For instance, between 2014 and 2018, the federal

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<sup>99</sup> See Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (repealed 1984); Bail Reform Act of 1984 §§ 202-210. Note also that the proposed Federal Bail Reform Act of 2020 states that it does not limit or modify the presumption of innocence. H.R. 9065, 116th Cong. § 3 (2020).

<sup>100</sup> Bail Reform Act of 1984 sec. 203(a), § 3142(f) (noting prosecutors may request hearing in cases involving crimes of violence, offenses that may result in life sentence or death penalty, certain offenses prescribed in Controlled Substances Act, or any felony committed by person with two qualifying prior convictions).

<sup>101</sup> *Id.* § 3142(e) (creating rebuttable presumption in favor of detention for qualifying offenses).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* §§ 3142(b)-(c).

<sup>104</sup> Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, FED. PROB., Sept. 2017, at 52, 61.

[T]he presumption was created with the best intentions: detaining the ‘worst of the worst’ defendants who clearly posed a significant risk of danger to the community by clear and convincing evidence. Unfortunately, it has become an almost de facto detention order for almost half of all federal cases. Hence, the presumption has contributed to a massive increase in the federal pretrial detention rate, with all of the social and economic costs associated with high rates of incarceration.

*Id.* The judiciary has asked that Congress reexamine the presumption of pretrial detention provisions of the 1984 Act to narrow the scope of its applicability. The Committee on Criminal Law “concluded that the § 3142(e) presumption was unnecessarily increasing detention rates of low-risk defendants, particularly in drug trafficking cases.” JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 10 (2017); see also Rowland, *supra* note 49, at 17 (noting 18 U.S.C. § 3142(e) has been called

detention rate for immigration cases was approximately 95%,<sup>105</sup> drugs and weapons cases 75%, property and financial offenses about 30%, and public order offenses 13%.<sup>106</sup> Overall, the 1966 and 1984 Acts have led to dramatic increases in federal detention rates.<sup>107</sup> Thirty-six years ago, about a third of defendants were detained before trial; now, almost three-quarters of federal defendants are held pretrial.<sup>108</sup> Even though there is an evidentiary bar that must be satisfied under the federal standard to detain, release has not been the default because the statutory presumption is not release.<sup>109</sup> A large number of crimes permit the holding of a hearing, but the result of those hearings is typically detention.<sup>110</sup> The exceptions are so large that the presumption has been detention under federal bail reform statutes. Furthermore, as discussed in Part III, increased detention has actually harmed public safety, rather than protected society against dangerous defendants as envisioned by reform legislation.

Having considered the increased detention on the federal front, Part II considers the results of the hundreds of bail reform iterations across the states in the third wave of bail reform. It categorizes these reforms and discusses how they have impacted incarceration rates more broadly.

## II. STATE BAIL REFORM CHAOS

State bail practices and reform efforts vary widely throughout the United States but have generally failed in reducing pretrial detention rates.<sup>111</sup> Once bail determinations moved in the 1980s from simply considering flight risk to being constitutionally permitted to consider the danger posed by defendants, many types of bail reform became acceptable. Myriad state legislations followed the federal preventative-detention model.<sup>112</sup> Very few state statutes today consider flight risk, and most are focused on preventative detention to avoid public

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into question by judiciary because its enumerated offenses may not be best predictors of risks of flight or danger they were meant to protect against).

<sup>105</sup> Detention for immigration cases increased from 20.85% in 2001 to 46.3% in 2015. Halsey B. Frank, *Shedding Light on the United States Pretrial Services Agency's Pretrial Risk Assessment Tool*, CRIM. JUST., Fall 2021, at 32, 36 (2021).

<sup>106</sup> Rowland, *supra* note 49, at 18 (juxtaposing rates of pretrial detention in four years preceding article's publication in 2018).

<sup>107</sup> BARADARAN BAUGHMAN, *supra* note 6, at 23-25.

<sup>108</sup> Rowland, *supra* note 49, at 13.

<sup>109</sup> *Id.* at 17 (explaining 18 U.S.C. § 3142(e) creates exception for law's general favorable attitude toward release by flipping burden of proof for release onto defendants charged with qualifying offenses).

<sup>110</sup> *See id.*

<sup>111</sup> *See supra* notes 32-37 and accompanying text.

<sup>112</sup> John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 1 (1985) (describing how Federal Bail Reform Act unified bail reform beginning to appear in states between first two waves of bail reform).

harm.<sup>113</sup> As federal detention rates rose in the 1980s, so did state detention rates. States increased the use of money bail, as they were not bound by the statutory limit on money bail imposed by the 1984 Act.<sup>114</sup> Throughout the 1980s, many states relying on preventative detention schemes widened detention pretrial.<sup>115</sup> And in the 1990s, the bail insurance industry lobbied in individual states and counties, an effort that expanded the use of money bail and increased pretrial detention.<sup>116</sup>

The “third wave” of bail reform—beginning around 2010—is not restricting the rise in pretrial incarceration rates but is instead expanding it. In 2016, unconvicted individuals represented 65.1% of the overall local jail population nationally.<sup>117</sup> State detention rates have increased 77% since 2008.<sup>118</sup> All of this has contributed to increased detention, as between 1970 and 2015, the number of people incarcerated before trial increased by 433%.<sup>119</sup> Between 1983 and 2013, the annual admissions to jail nearly doubled from 6 million to 11.7

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<sup>113</sup> Baradaran & McIntyre, *supra* note 17, at 549-50.

Outside of New York and New Jersey, increasing one’s flight risk hardly changes the likelihood of being detained at all. Instead, these other states place tremendous weight on predicted violence. A person with a higher-than-average risk of violence would see a 14% rise in the probability of being held. Most state judges consider dangerousness at a much higher rate than flight risk, though most states claim to consider both factors in release decisions and some even state that flight risk is the primary consideration. *Id.*

<sup>114</sup> Van Brunt & Bowman, *supra* note 48, at 738-39 (describing how states’ use of money bonds with no explicit judicial limits further contributed to increased pre-trial detention, as pretrial bonds are prohibitively high for many indigent defendants). But even in the 1960s, the majority of defendants could not make their required bail amounts to obtain release. See Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 995-96 (1965).

<sup>115</sup> BARADARAN BAUGHMAN, *supra* note 6, at 27.

<sup>116</sup> See Mayson, *supra* note 29, at 507 (“Indeed, since 1990, both pretrial detention rates and the use of money bail have risen steeply; it is likely that we now detain millions of people each year for their inability to post even small amounts of bail.”).

<sup>117</sup> ZENG, *supra* note 51, at 4 (providing overview of jail population in 2016, including breakdowns by conviction status).

<sup>118</sup> Shima B. Baughman & Alyssa J. Campbell, *Will the Third Wave of Bail Reform Also Fail?*, ABA (July 25, 2022), [https://www.americanbar.org/groups/criminal\\_justice/publications/criminal-justice-magazine/2022/summer/will-third-wave-bail-reform-also-fail](https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2022/summer/will-third-wave-bail-reform-also-fail); ZHEN ZENG & TODD D. MINTON, U.S. DOJ, JAIL INMATES IN 2019, at 5 (2021), <https://www.bjs.gov/content/pub/pdf/ji19.pdf> [<https://perma.cc/4JQ4-G5GQ>].

<sup>119</sup> DIGARD & SWAVOLA, *supra* note 48, at 1 (noting pretrial detention population grew from 82,922 people in 1970 to 441,790 people in 2015); see also DARRELL K. GILLARD & ALLEN J. BECK, U.S. DOJ, PRISON AND JAIL INMATES, 1995, at 11 (1996), <https://www.bjs.gov/content/pub/pdf/PJI95.PDF> [<https://perma.cc/EMA5-8JHU>] (“Between 1985 and 1995 . . . the number of unconvicted jail inmates, including those on trial or awaiting arraignment or trial, doubled (from 127,059 to an estimated 284,100).”).

million.<sup>120</sup> 2018 marked a 30% increase in the pretrial population over the last twenty years, even with crime rates and convictions down—demonstrating that the real growth in jail populations has come from pretrial detention.<sup>121</sup>

This Part demonstrates how the third and latest bail reform period, between 2010 and now, neglects to protect pretrial liberty and has failed to decrease pretrial detention. Most statutory “reforms” have increased detention, despite constitutional case law and statutory dictates that detention should remain the exception.<sup>122</sup> On the state side, several divergent and overlapping bail reform schemes have responded to external pressures.<sup>123</sup> There are several types of bail reforms discussed below that are broadly focused on preventative detention, though the categories are not exact and they overlap. This Part examines the state bail schemes, including what I refer to as the risk-based approach,<sup>124</sup>

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<sup>120</sup> VERA INST. OF JUST., REPORT SUMMARY: INCARCERATION’S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 1 (2015), <https://www.vera.org/downloads/publications/incarcerations-front-door-summary.pdf> [<https://perma.cc/FY24-HFLF>] (“Not only are more people ending up in jail today compared to three decades ago, those who get there are spending more time behind bars, with the average length of stay increasing from 14 days to 23 days.”).

<sup>121</sup> See DIGARD & SWAVOLA, *supra* note 48, at 2 (noting growth of pretrial population occurred even where violent and property crimes decreased by 50% and 47% respectively, and arrest rates decreased as well); WENDY SAWYER & PETER WAGNER, MASS INCARCERATION: THE WHOLE PIE 2020, at 5, [https://www.prisonpolicy.org/factsheets/pie2020\\_allimages.pdf](https://www.prisonpolicy.org/factsheets/pie2020_allimages.pdf) [<https://perma.cc/BK8R-SAKX>]; ZENG & MINTON, *supra* note 118, at 1 (noting close to 65% of jail inmates in 2019 were awaiting court action on current charges); Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration*, 94 S. CAL. L. REV. 1123, 1126 (2021) (“[I]n the last ten or more years, the number of crimes committed have decreased, the number of arrests per year have decreased consistently, and while people are still serving long sentences, some federal sentences have been reduced.” (footnotes omitted)); see also ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 51, 60, 67 (2018) (noting 2010s saw increases in arrests and racial disparities among arrests, but at same time conviction rates and jail sentences also decreased).

<sup>122</sup> *United States v. Salerno*, 481 U.S. 739, 755 (1987) (“In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”); STANDARDS FOR CRIM. JUST.: PRETRIAL RELEASE § 10-1.6 (AM. BAR ASS’N 2007) (limiting pretrial detention to scenarios where court deems defendant to be flight risk or dangerous and regulating use of pretrial detention, specifically by creating “criteria and procedures” instructing implementation of pretrial detention).

<sup>123</sup> See, e.g., Yang, *supra* note 6, at 1401-03 (outlining response to reform efforts); BARADARAN BAUGHMAN, *supra* note 6, at 170 (outlining ten class-action challenges to constitutionality of commercial money bail); *Challenging Pretrial Detention*, *supra* note 6.

<sup>124</sup> See, e.g., Stevenson, *supra* note 9, at 317-20 (noting proliferation of risk assessment in bail reform efforts).

supervision approach,<sup>125</sup> elimination of money bail,<sup>126</sup> and demarcation approach.<sup>127</sup>

This Part aims to examine the morass of state statutory reforms and put some order into these divergent schemes. It also explores the overlapping bail schemes in an attempt to dissuade decision makers from following the same paths in future and pending efforts, and to instead consider a new approach outlined in Part III. It is helpful to note here that Professor Brandon Garrett has carefully categorized “models of bail reform” in the third wave of bail reform and similarly acknowledges that there is overlap between the categories.<sup>128</sup> This Section does not attempt to carefully parse out all the various types of bail reform as Garrett does,<sup>129</sup> and though a few of these categories overlap with his, this Section’s ultimate goal in delineating these types of bail reform is to better understand how pretrial liberty and legislative presumptions interplay with various bail reform efforts. This Part demonstrates that all four approaches are inadequate and have led to disparate results due to failures to create presumptions of release and targeted release rates. It then considers how reform efforts can more directly reduce pretrial detention and increase freedom before trial. The preventative detention bail reform schemes highlighted here include risk-based reforms (Section II.A), supervision reforms, (Section II.B), financial reforms (Section II.C), and demarcation reforms (Section II.D). While none of these categories achieve bail “reform” in the true sense of increasing pretrial release, they all aim to do so. Statutes falling in the latter category of “demarcation” have, in some contexts, explicitly increased categories of detention in the name of bail reform. Even most pending and recently enacted bail reform measures,<sup>130</sup> including the Uniform Pretrial Release and Detention

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<sup>125</sup> See, e.g., PRETRIAL JUST. INST., *supra* note 34 (detailing pretrial practices of each state).

<sup>126</sup> See, e.g., H.B. 3347, 101st Gen. Assemb., 2019-2020 Sess. (Ill. 2019) (proposing abolishing monetary bail in Illinois); PRETRIAL JUST. INST., *supra* note 34 (detailing bail mechanisms used in several states).

<sup>127</sup> See, e.g., *supra* note 45 and accompanying text. For another characterization of current bail reform law schemes, see Garrett, *supra* note 35, at 2 (describing six models of bail reform law, including “(1) the procedural due process approach; (2) the risk assessment approach; (3) the categorical approach; (4) the community services approach; (5) an equal protection model; and (6) the use of alternatives to arrest”).

<sup>128</sup> See Garrett, *supra* note 35, at 6.

<sup>129</sup> *Id.* at 2-4. Indeed, this Article doesn’t provide a focused discussion on the “procedural” types of bail reform focused on shortening pretrial hearing waiting periods and increasing burdens for detention.

<sup>130</sup> See PRETRIAL JUST. INST., *supra* note 34 (detailing recent passed legislation and recent proposed legislation relating to bail reform); *State Pretrial Policy: Bill Tracking Database*, NCSL (Oct. 18, 2018), <http://www.ncsl.org/research/civil-and-criminal-justice/state-pretrial-policy-billtracking-database.aspx> [<https://perma.cc/8BXY-TSYT>]; see also Tiana Herring, *Bail Reform: Reducing Pretrial Populations and Protecting Public Safety*, CRIME REP. (Nov. 17, 2020), <https://thecrimereport.org/2020/11/17/bail-reform-reducing-pretrial-populations->

Act,<sup>131</sup> are similar to attempts from prior bail reform periods that are likely to backfire and increase detention, hampering more comprehensive efforts.

A. *Risk-Based Reforms*

Risk-based reforms rely on risk assessments and other pretrial prediction bail reform schemes to determine which defendants to release before trial.<sup>132</sup> A risk assessment uses the characteristics and history of a person to estimate the likelihood of that person causing a particular outcome.<sup>133</sup> “Risk factors” are variables that statistically correspond with recidivism pretrial.<sup>134</sup> Bail risk assessments typically focus on criminal history, current charges, prior failures to appear, and other factors to determine whether a defendant is likely to appear in court or be arrested for a crime before returning for trial.<sup>135</sup> Policymakers adopt risk-based reforms in an attempt to reduce pretrial detention rates and determine which defendants can safely be released before trial.<sup>136</sup>

Once *Salerno* allowed preventative detention,<sup>137</sup> many jurisdictions started to adopt “risk-based” tools to help judges decide which defendants were safe to release. These tools, as well as the empirical methods behind them, have increased in sophistication over the years.<sup>138</sup> As we have improved our understanding of empirical methods, the popularity of quantitative tools to evaluate criminal justice has increased, and with it, the use of risk assessments in criminal law.<sup>139</sup> Garrett and Monahan have described this burgeoning

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and-public-safety/ [<https://perma.cc/W9AB-DTU5>] (outlining recently passed pretrial reforms on both state and municipal levels).

<sup>131</sup> UNIF. PRETRIAL RELEASE & DET. ACT § 402(a) (UNIF. L. COMM’N 2020).

<sup>132</sup> See, e.g., S.B. 995, 100th Gen. Assemb., 2d Reg. Sess. (Mo. 2020) (creating system where judges rate defendants’ flight risk by low, moderate and high risk, where defendant is detained or released with or without conditions).

<sup>133</sup> Garrett & Monahan, *supra* note 44, at 442-43 (describing purposes of risk assessment as alternative to bail and how judges use risk assessments in practice).

<sup>134</sup> *Id.* at 449.

<sup>135</sup> See, e.g., LAURA & JOHN ARNOLD FOUND., PUBLIC SAFETY ASSESSMENT: RISK FACTORS AND FORMULA 2 (2016) (identifying nine factors that predict a defendant’s risk to public safety after analyzing 1.5 million cases from roughly 300 U.S. jurisdictions).

<sup>136</sup> See BARADARAN BAUGHMAN, *supra* note 6, at 44-45.

<sup>137</sup> See *supra* notes 93-96 and accompanying text.

<sup>138</sup> Baradaran & McIntyre, *supra* note 17, at 500-02.

<sup>139</sup> Jonathan Simon, *Reversal of Fortune: The Resurgence of Individual Risk Assessment in Criminal Justice*, 1 ANN. REV. L. & SOC. SCI. 397, 413-17 (2005) (recounting how at turn of twentieth century, quantitative data was considered in criminal law and in calculating risk); DANIELLE KEHL, PRISCILLA GUO & SAMUEL KESSLER, HARVARD L. SCH., ALGORITHMS IN THE CRIMINAL JUSTICE SYSTEM: ASSESSING THE USE OF RISK ASSESSMENTS IN SENTENCING (2017), [https://dash.harvard.edu/bitstream/handle/1/33746041/2017-07\\_responsivecommunities\\_2.pdf](https://dash.harvard.edu/bitstream/handle/1/33746041/2017-07_responsivecommunities_2.pdf) [<https://perma.cc/6ZZU-YN3V>] (raising fundamental legal and ethical questions about fairness, accountability, and transparency of incorporating risk assessment tools into criminal sentencing process).

popularity of empirical evaluation of risk as a “risk-assessment revolution in criminal justice.”<sup>140</sup> Risk-based approaches to bail reform have been endorsed by the Model Penal Code,<sup>141</sup> the First Step Act,<sup>142</sup> national bodies like the American Bar Association,<sup>143</sup> and many state statutory schemes.<sup>144</sup>

Though the risk-based approach has grown in popularity, it has significant critics on all sides.<sup>145</sup> Risk models have been criticized for racial bias, for lack of accuracy and transparency, and, more recently, for increasing incarceration rates.<sup>146</sup> The latter criticism is the focus of this paper because finding the right

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<sup>140</sup> Garrett & Monahan, *supra* note 44, at 441, 448.

<sup>141</sup> MODEL PENAL CODE § 6B.07 (AM. L. INST. 2017).

<sup>142</sup> First Step Act of 2018, Pub. L. No. 115-391, § 101, 132 Stat. 5194, 5195 (requiring periodic risk assessment of almost all federal prisoners); Garrett & Monahan, *supra* note 44, at 442 (“[T]he First Step Act, perhaps the most far-reaching federal sentencing reform in a generation, mentions risk or risk assessment no less than one hundred times, and relies on risk assessments to allocate prison programming and determine prisoner release.”).

<sup>143</sup> The American Bar Association recommends the use of pretrial risk assessment, as does the National Association of Counties and the Conference of State Court Administrators. *See, e.g.*, ARTHUR W. PEPIN, CONF. OF STATE CT. ADM’RS, 2012-2013 POLICY PAPER: EVIDENCE-BASED PRETRIAL RELEASE 5-9 (2012); NAT’L ASS’N OF CNTYS., ADOPTED INTERIM POLICY RESOLUTIONS 11 (2017); STANDARDS FOR CRIM. JUST.: PRETRIAL RELEASE § 10-1.10 (AM. BAR ASS’N 2007).

<sup>144</sup> DEMICHELE ET AL., *supra* note 9, at 5 (noting, as of 2018, risk-assessment approaches using Public Safety Assessment tool developed by LJAF have been adopted in thirty-eight state and local jurisdictions); JOHN CLARK, TIMOTHY R. SCHNACKE & SUE FERRERE, UPGRADING NORTH CAROLINA’S BAIL SYSTEM: A BALANCED APPROACH TO PRETRIAL JUSTICE USING LEGAL AND EVIDENCE-BASED PRACTICES 22 (2016), [https://www.sog.unc.edu/sites/default/files/course\\_materials/nccalj\\_criminal\\_investigation\\_and\\_adjudication\\_committee\\_report\\_pretrial\\_justice.pdf](https://www.sog.unc.edu/sites/default/files/course_materials/nccalj_criminal_investigation_and_adjudication_committee_report_pretrial_justice.pdf) [<https://perma.cc/J6Q9-VLD5>], (listing Colorado, Delaware, Hawaii, Kentucky, New Jersey, Virginia, and West Virginia as states requiring usage of pretrial risk assessment tool).

<sup>145</sup> *See, e.g.*, Jenny E. Carroll, *Beyond Bail*, 73 FLA. L. REV. 143, 184-92 (2021) (detailing monetary costs, social costs, and criminogenic effects of bail reforms); Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. REV. 837, 897-98 (“While modern risk assessment tools certainly help to address some of these concerns by taking risk calculation work away from judges, many of these tools are flawed in ways that reinforce problematic judicial practices instead of correcting them.”); Sean Allan Hill II, *Bail Reform and the (False) Racial Promise of Algorithmic Risk Assessment*, 68 UCLA L. REV. 910, 915 (2021) (“[Pretrial risk assessment instruments] can expand the basis for imposing pretrial conditions, if not outright detention.”); Mayson, *supra* note 29, at 566-67 (concluding actuarial risk assessments present problems; namely, constitutional, moral, and practical (including accuracy, racial disparity, and transparency) concerns pervade their use); Robert Werth, *Theorizing the Performative Effects of Penal Risk Technologies: (Re)producing the Subject Who Must Be Dangerous*, 28 SOC. & LEGAL STUD. 327, 328-29 (2019) (arguing risk assessments do not describe reality, they shape beliefs, and they lead to view that all paroled subjects are risky).

<sup>146</sup> For instance, commenters have noted that risk assessments may in fact increase incarceration rates. *See* Baradaran Baughman, *supra* note 11, at 1012-22, 1014 (detailing risks

tools has distracted from the underlying rights of the accused to pretrial liberty, especially the right to presumptive release.

Risk-based reforms do not increase pretrial release rates on their own. The problem with risk-based reforms is that they focus on a tool to determine who to release and lack a focus on presumptive release, or a narrow detention net and release target to ensure more defendants are released than detained. Some applications of risk assessments illustrate the potential problem with a reliance on risk instruments alone. A New York study projected that if judges abandoned subjective assessments and money bail and used algorithm-based risk instruments, jail populations could be reduced by 41.9% and pretrial crime decreased by 24.7%.<sup>147</sup> It is true that if judges relied on data, they could release more people and crime rates would decrease.<sup>148</sup> However, this is not a guarantee. Other states that have relied on risk-based approaches have seen judges overestimating risk and increasing pretrial detention rates. For example, in Montgomery County, Maryland, pretrial detention rates for those held without bail increased from 7.5% to 19.3% within a year of implementing Maryland's statewide risk assessment tool.<sup>149</sup> A Virginia study demonstrates that of all those in the assessment's low-risk category who were eligible for an alternative sentence, 57.8% did not receive one.<sup>150</sup> Kentucky required judges to provide written reasons to detain, and often judges would either not use the pretrial risk assessment instrument or list broad reasons like "danger" for detaining

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of risk assessments and demonstrating "[d]ata from states employing risk assessment tools demonstrates that they do not necessarily lower pretrial release rates"). *See generally* David L. Faigman, John Monahan & Christopher Slobogin, *Group to Individual (G2i) Inference in Scientific Expert Testimony*, 81 U. CHI. L. REV. 417, 455-57 (2014) (providing examples of risk-assessment software informing diagnostic testimony); *see also* Garrett & Monahan, *supra* note 44 (arguing risk assessment will not reduce incarceration rates unless courts apply them with more uniformity); Stevenson, *supra* note 9, at 306 ("Somehow, criminal justice risk assessment has gained the near-universal reputation of being an evidence-based practice despite the fact that there is virtually no research showing that it has been effective.").

<sup>147</sup> Jon Kleinberg, Himabindu Lakkaraju, Jure Leskovec, Jens Ludwig & Sendhil Mullainathan, *Human Decisions and Machine Predictions*, 133 Q.J. ECON. 237, 238 (2018) ("[O]ne policy simulation shows crime reductions up to 24.7% with no change in jailing rates, or jailing rate reductions up to 41.9% with no increase in crime rates.").

<sup>148</sup> *See* Baradaran & McIntyre, *supra* note 17, at 557-58 ("Indeed, we would be able to release 25% more defendants while decreasing pretrial crime levels if [judges] released defendants using our evidence-based model.").

<sup>149</sup> MD. JUDICIARY, IMPACT OF CHANGES TO PRETRIAL RELEASE RULES 7, 35 (2018), <https://mdcourts.gov/sites/default/files/import/reference/pdfs/impactofbailreviewreport.pdf> [<https://perma.cc/89HK-CUF5>] (displaying charts of percentage held without bail after initial appearance in Maryland counties).

<sup>150</sup> Brandon L. Garrett, Alexander Jakubow & John Monahan, *Judicial Reliance on Risk Assessment in Sentencing Drug and Property Offenders: A Test of the Treatment Resource Hypothesis*, 46 CRIM. JUST. & BEHAV. 799, 802 (2019) (reviewing Virginia Criminal Sentencing Commission data from 2016 fiscal year).

people.<sup>151</sup> Even though the risk assessment in Kentucky became “uniform,” the data showed that adopting it actually increased pretrial detention after a short stint where pretrial release rates went down.<sup>152</sup> In addition, San Francisco instituted a risk assessment tool in 2016 and saw incremental increases in its pretrial jail population.<sup>153</sup>

Maryland requires a pretrial risk assessment audit every five years, which is a prudent approach to tracking the effects of bail reforms.<sup>154</sup> But the larger problem is not necessarily any potential issues with the risk instrument but rather that judges do not faithfully rely on recommendations of risk assessments even when instituted by statute.<sup>155</sup> In essence, risk assessments are not the hallmark of effective bail reform and do not automatically protect the rights of pretrial liberty. The mixed results of risk-based bail reform are due to a lack of a measurable release target, a narrow detention net, and a presumption of release—all of which are needed to increase liberty, as explained in Part III.

### B. *Supervision Reforms*

Another type of bail reform that has maintained popularity and has gained new adoptions in various states is what I refer to as the pretrial “supervision” model.<sup>156</sup> States using the supervision approach have invested more heavily in

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<sup>151</sup> See STEVENSON & DOLEAC, *supra* note 42, at 5 (noting if judges did not override risk assessment tool, pretrial release rates would be 37% higher). Colorado faced a similar outcome. See generally Koepke & Robinson, *supra* note 42 (explaining that actual implementation of Colorado’s Pretrial Assessment Tool (“CPAT”)—which rated defendants’ risk level on increasing basis from one to four—led to half or more of all defendants being categorized as higher-risk).

<sup>152</sup> See Stevenson, *supra* note 9, at 357 (explaining risk assessment release rate decreases were “short-lived” in Kentucky and by 2015, release rates were lower than when bail reforms were instituted).

<sup>153</sup> JOHANNA LACOE, ALISSA SKOG & MIA BIRD, CAL. POL’Y LAB, BAIL REFORM IN SAN FRANCISCO: PRETRIAL RELEASE AND INTENSIVE SUPERVISION INCREASED AFTER HUMPHREY 2, 5 (2021), <https://www.capolicylab.org/wp-content/uploads/2021/05/Bail-Reform-in-San-Francisco-Pretrial-Release-and-Intensive-Supervision-Increased-after-Humphrey.pdf> [<https://perma.cc/J7UR-U682>] (summarizing case study in San Francisco after Pretrial Safety Assessment was adopted in 2016 and finding there was no increase in bail releases, but rather “there was a shift away from bail release and an increase in releases to intensive supervision” and pretrial detention population remained stable).

<sup>154</sup> See MD. CODE ANN., CRIM. PROC. § 5-103 (LexisNexis 2024) (“A jurisdiction that uses a pretrial risk scoring instrument to determine the eligibility of a defendant for pretrial release shall have an independent validation study of the pretrial risk scoring instrument conducted at least once every 5 years.”).

<sup>155</sup> See Stevenson, *supra* note 9, at 369-70 (“[J]udicial discretion was used not to correct the risk assessment when it erred, but to override the risk assessment when it was correct.”).

<sup>156</sup> See, e.g., Act of May 19, 2017, ch. 391, 2017 Mont. Laws 1450 (“Allocated funds may be used for pretrial services staff, to obtain assessment instruments, and to provide supervision of pretrial felony defendants.”).

pretrial release supervision or conditional release models.<sup>157</sup> Pretrial supervision assigns the accused an individual to guide them through the pretrial process at various levels of involvement including phone calls, text reminders, or even explanations of the steps moving forward.<sup>158</sup> Some states partner with private or nonprofit entities to provide supervision of people released before trial.<sup>159</sup> Conditional release is where the terms of a contract are set with the accused, and they are permitted to be released if they agree to certain conditions that should be particularized to the charges and history of a defendant.<sup>160</sup> The supervision approach often involves services to remind a defendant to appear at trial, which various studies have proved to be effective in improving appearance rates.<sup>161</sup>

One jurisdiction in particular, Washington, D.C., has used supervision reforms for many years, with incredible results in pretrial liberty.<sup>162</sup> Although pretrial supervision reforms do not guarantee pretrial release, Washington, D.C., provides the best example of a pretrial supervision approach that has maintained presumptive release and a narrow detention net in practice. All defendants in Washington, D.C., have access to pretrial release supervision to help them appear at their court dates, access drug tests in some cases, and maintain a clean record on arrest.<sup>163</sup> In addition, judges narrowly interpret the category of

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<sup>157</sup> BARADARAN BAUGHMAN, *supra* note 6, at 208-09 (discussing overall cost-efficiency of investing in pretrial supervision, which saves states thousands per defendant long-term).

<sup>158</sup> *See, e.g.*, COLIN DOYLE, CHIRAAG BAINS & BROOK HOPKINS, BAIL REFORM: A GUIDE FOR STATE AND LOCAL POLICYMAKERS 60 (2019).

Community-sponsored release is a unique pretrial reform . . . [where] defendants will be able to elect sponsorship by a community-based organization, such as a church or ethnic association, as a condition of release. That organization will then support the defendant by providing services, such as court date reminders, transportation, and referrals to any needed social services.

*Id.* (footnote omitted).

<sup>159</sup> *Id.* (“This concept is comparable to existing models for reentry services and community service sentencing, where local governments partner with private non-profit organizations to ensure the safe and effective administration of the criminal justice system.”).

<sup>160</sup> *See, e.g.*, *United States v. Scott*, 450 F.3d 863, 865-66 (9th Cir. 2006) (quoting *Bell v. Wolfish*, 441 U.S. 520, 536 (1979)).

The government may detain an arrestee ‘to ensure his presence at trial,’ . . . and may impose some conditions, such as reasonable bail, before releasing him . . . Many pretrial detainees willingly consent to such conditions, preferring to give up some rights in order to sleep in their own beds while awaiting trial. *Id.*

<sup>161</sup> BARADARAN BAUGHMAN, *supra* note 6, at 208 (summarizing studies which show reminding defendants through pretrial services such as calls, texts, or post cards, is effective method for reducing failure to appear rates).

<sup>162</sup> *See id.* at 196 (detailing D.C.’s effective system, which results in 89% of arrestees appearing before court and 88% of arrestees having no rearrest).

<sup>163</sup> *See* PRETRIAL SERVS. AGENCY FOR D.C., CONGRESSIONAL BUDGET JUSTIFICATION AND PERFORMANCE BUDGET REQUEST: FISCAL YEAR 2021, at 13-15 (2020) (discussing enhancements in defendant supervision, prosocial service interventions, and drug testing within jurisdiction).

defendants they are permitted to detain—those charged with dangerous crimes, those charged with crimes of violence, and those who might threaten a witness or juror.<sup>164</sup> In the nation’s capital, judges cannot set money bail that results in pretrial detention, and there are strict limits to the amount of time people can spend in jail after their arrest.<sup>165</sup> The result is that 87% of arrestees are released without money bail set.<sup>166</sup> This model manages to protect public safety; in 2019, 87% of those released were not rearrested when released pretrial, and 99% were not rearrested for a violent crime.<sup>167</sup> The combination of a pretrial supervision program, a narrow detention net enforced by judges, and a strict limit on money bail has created a model pretrial system in Washington, D.C.

However, other jurisdictions adopting supervision reforms have not had anything close to the level of success in Washington, D.C.<sup>168</sup> In 2017, federal courts charged Texas jurisdictions through consent decree to provide more

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<sup>164</sup> District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 210, 84 Stat. 604, 644 (1970) (codified as amended at D.C. CODE § 23-1322 (2024)) (permitting judicial officers to detain persons charged with dangerous crimes, charged with crimes of violence, or charged with offense of threatening, injuring, or intimidating witnesses or jurors). There is also a clear and convincing evidentiary burden to detain anyone under the Act. *Id.*

<sup>165</sup> See D.C. CODE § 23-1321(c)(3) (2024) (“A judicial officer . . . may impose such a financial condition to reasonably assure the defendant’s presence at all court proceedings that does not result in the preventive detention of the person . . .”); see also *Court Support, PRETRIAL SERVS. AGENCY FOR D.C.*, [https://www.psa.gov/?q=programs/court\\_support](https://www.psa.gov/?q=programs/court_support) [<https://perma.cc/7J5E-PSQP>] (last visited Sept. 27, 2024) (“Defendants usually are interviewed and brought to court within 24 hours of arrest (defendants legally must be brought to court within 48 hours of arrest).”).

<sup>166</sup> See *PRETRIAL SERVS. AGENCY FOR D.C.*, *supra* note 163, at 12 (noting from 2015 to 2019, 85-88% of defendants maintained compliance with pretrial release conditions, 86-89% stayed arrest free, and 88-91% made all scheduled court appearances).

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

<sup>168</sup> See Baradaran Baughman et al., *supra* note 50, at 449 n.7 (contrasting D.C.’s system to reforms adopted by New Jersey, Kentucky, and Tennessee); see, e.g., *PRETRIAL JUST. INST.*, *supra* note 34, at 3 (highlighting D.C.’s implementation of pretrial services agency, which employs graduated supervision levels for pretrial release with demonstrated high success rate); Richard Williams, *Bail or Jail*, *NCSL ST. LEGISLATURES MAG.*, May 2012, at 30, 30 (2012) (noting at least twenty-eight states had enacted seventy-three bills addressing bail policy by 2011); *N.J. JUDICIARY, CRIMINAL JUSTICE REFORM: PRETRIAL SERVICES PROGRAM 2* (2017), [https://www.njcourts.gov/forms/12088\\_cjr\\_pretrial\\_svcs\\_brochure.pdf](https://www.njcourts.gov/forms/12088_cjr_pretrial_svcs_brochure.pdf) [<https://perma.cc/WK3HGWDA>] (noting New Jersey implemented pretrial services to ensure quick release and proper pretrial monitoring); *POLICE EXEC. RSCH. F., NEW CHALLENGES AND PROMISING PRACTICES IN PRETRIAL RELEASE, DIVERSION, AND COMMUNITY-BASED SUPERVISION 17-19* (2020) (discussing Davidson County, Tennessee’s reforms that increased automation, standardized risk assessments and expanded options for community-based supervision of low-risk defendants with results of increased pretrial release to 73% with declining jail populations of 32% and cost savings of 2.7 million in 2018).

pretrial supervision and access to social services to mitigate nonappearance.<sup>169</sup> Texas courts have been less than compliant with these reforms and as a result have not seen improved release rates.<sup>170</sup> San Francisco saw very little decrease in pretrial jail population from investing in pretrial supervision.<sup>171</sup> Santa Clara County, California, instituted pretrial release services in 2012, but a few years later, only about 10% of defendants were granted release without having to pay bail.<sup>172</sup> The county is now considering building a new jail.<sup>173</sup> Arizona recently attempted to pass a bail reform allowing primary caregivers charged with serious crimes to enter a pretrial supervision program involving conditions that allow a possibility of dropped charges.<sup>174</sup> It is too soon to know whether this initiative will decrease detention rates, but it does not have a presumptive release element, which is critical to success as a comprehensive bail reform plan. Philadelphia saw very positive outcomes for defendants in a recent pretrial supervision program involving “bail advocates” who simply guided (though did not represent) defendants through the pretrial process by providing information and some counseling.<sup>175</sup> However, this pretrial guidance for defendants did not

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<sup>169</sup> See Consent Decree at 32, *ODonnell v. Harris Cnty.*, 251 F. Supp. 3d 1052 (S.D. Tex. 2017), *aff’d as modified*, 892 F.3d 147 (5th Cir. 2018) (discussing Texas consent decree calling for budget of at least \$850,000 per year to be spent to mitigate causes of nonappearance); see also *id.* at 26 (describing pretrial defense counsel access to social workers and essential support staff).

<sup>170</sup> See *Woog & Fennell*, *supra* note 39, at 479-81 (noting evidence that Texas magistrate judges regularly violate Fifth Circuit precedent requiring judges to consider each person’s case individually before setting amount and type of bail, and arguing these practices are unconstitutional as a matter of law, “[y]et there has been no indication that courts or counties across Texas have changed their practices”).

<sup>171</sup> See *LACOE ET AL.*, *supra* note 153, at 1 (“The overall likelihood of detention for filed cases declined from 25% to 22%. . . . Among filed cases that were released, the share released on cash bail declined from 22% to 15%.”).

<sup>172</sup> CNTY. OF SANTA CLARA BAIL AND RELEASE WORK GRP., FINAL CONSENSUS REPORT ON OPTIMAL PRETRIAL JUSTICE 3 (2016) (“[A]s of 2015, only 10.5% of defendants taken into custody in County jails were granted pretrial release without having to pay bail.”).

<sup>173</sup> Letter from Katherine Hubbard, Deputy Dir. of Litig., Civ. Rts. Corps, & Carson White, Senior Att’y, Civ. Rts. Corps, to Santa Clara Cnty. Bd. of Supervisors 1 (Jan. 24, 2022), [https://civilrightscorps.org/wp-content/uploads/2022/01/2022-01-24-Santa-Clara-Letter\\_Civil-Rights-Corps.pdf](https://civilrightscorps.org/wp-content/uploads/2022/01/2022-01-24-Santa-Clara-Letter_Civil-Rights-Corps.pdf) [<https://perma.cc/959Y-QHPY>] (“[T]he Board of Supervisors will soon be voting on whether to build a new jail . . .”).

<sup>174</sup> S.B. 1647, 54th Leg., 2d Reg. Sess. (Ariz. 2020) (permitting defendants who are primary caregivers and who meet other criteria—such as not being “charged with a serious offense or a violent or aggravated felony” to enter pretrial diversion program and potentially have charges dropped upon “satisfactory” performance).

<sup>175</sup> See, e.g., Paul Heaton, *Enhanced Public Defense Improves Pretrial Outcomes and Reduces Racial Disparities*, 96 *IND. L.J.* 701, 711-13, 724-25 (2021) (finding bail advocates did not, on average, reduce detention rates, but did substantially reduce clients’ likelihood of bail violations (-64%) and future arrest (-26%)).

reduce detention rates.<sup>176</sup> The sample size is small, but it appears that no jurisdictions have seen close to the level of success that Washington, D.C., has enjoyed with pretrial supervision reforms.<sup>177</sup> In fact, most jurisdictions implementing this type of reform have seen more success in public safety than in reducing detention rates.<sup>178</sup>

Supervision reforms often do not reduce detention rates because this approach lacks a presumption of release and a defined detention net, as discussed in Part III. On top of that, while the research makes clear that the right kind of pretrial supervision may reduce detention rates, sometimes pretrial conditions can actually lead to worse outcomes, especially for low-risk defendants.<sup>179</sup> And pretrial supervision can be expensive, so mandating supervision can create an unfunded mandate that counties do not have resources to implement.<sup>180</sup> For most defendants, the best long-term outcomes result from pretrial freedom. Pretrial supervision can be a part of a comprehensive reform effort, but it cannot replace the importance of a targeted release rate and presumptive release.

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<sup>176</sup> *Id.* at 723 (“Overall, we do not see strong evidence that bail advocates altered bail outcomes, at least on average, although most of these estimates are sufficiently imprecise that they cannot preclude moderate positive or negative impacts of bail advocates on the outcome in question.”).

<sup>177</sup> Yakima County, Washington, through pretrial supervision, saw a 7% drop in reoffense rates. OFF. OF THE WASH. STATE AUDITOR, REFORMING BAIL PRACTICES IN WASHINGTON 13 (2019).

<sup>178</sup> See Sarah Staudt, *Releasing People Pretrial Doesn't Harm Public Safety*, PRISON POL'Y INITIATIVE (July 6, 2023), <https://www.prisonpolicy.org/blog/2023/07/06/bail-reform/> [<https://perma.cc/8MDS-KJ57>] (finding bail reforms increase public safety in cities like San Francisco and states like New Mexico). *But see* Paul G. Cassell & Richard Fowles, *Does Bail Reform Increase Crime? An Empirical Assessment of the Public Safety Implications of Bail Reform in Cook County, Illinois*, 55 WAKE FOREST L. REV. 933, 938-39 (2020) (arguing empirical study of bail reform in Chicago shows increase in violent crime).

<sup>179</sup> See Garrett, *supra* note 35, at 37-39 (discussing failure of pretrial categorical model to reduce arrests as officers and judges upcharge categories to ensure pretrial detention); Paul Heaton, *The Expansive Reach of Pretrial Detention*, 98 N.C. L. REV. 369, 372 (2020) (“[C]ash bail increases conviction likelihood from 50% to 56% (a 12% increase), does not measurably reduce nonappearance (at least as captured by an imperfect proxy of bench warrants), and increases future crime by 9%.” (footnotes omitted)); *see also* Carroll, *supra* note 145, at 180-83 (noting reforms have not created nuanced and meaningful detention analysis from judges who make bail decisions during five-minute events).

<sup>180</sup> See *What We Learned About Bail Reform and Police Budgeting Reform from Two Expert Panel Discussions*, CIVIC FED'N (Aug. 17, 2021), <https://www.civicfed.org/civic-federation/blog/what-we-learned-about-bail-reform-and-police-budgeting-reform-two-expert-panel> [<https://perma.cc/LLF2-A7S8>] (“Many of the [new Illinois bail law] requirements are unfunded mandates, so there will need to be state funding to make up for the cost of additional local personnel and for lost revenue from the elimination of bond payments.”).

### C. *Financial Reforms*

Financial reforms are some of the most common legislative reforms among states in the third wave of bail reform. They either focus on reducing or eliminating the use of money bail altogether or requiring a determination of a defendant's ability to pay before imposing money bail. The latter type of reform is specifically focused on protecting the right to financial parity pursuant to the Equal Protection and Due Process Clauses.<sup>181</sup> Ensuring financial parity between defendants is a key piece of protecting the constitutional right to pretrial liberty, and is one of the largest impediments to release for defendants pretrial.<sup>182</sup> However, while several benefits result from reducing money bail, the key issue is whether pretrial liberty is enhanced by these measures.

Focusing on improving pretrial release, several states and jurisdictions have attempted a variety of money bail reforms. Recent Colorado reforms restrict money bail for some low level offenses.<sup>183</sup> Some counties and states have abandoned money bail altogether,<sup>184</sup> and others have explicitly prohibited

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<sup>181</sup> See Baradaran Baughman, *supra* note 27, at 258 (noting though courts often treat due process and equal protection claims separately, equal protection and due process claims should be viewed together).

<sup>182</sup> *Id.*

<sup>183</sup> Act of Apr. 25, 2019, ch. 132, 2019 Colo. Sess. Laws 590 (codified as amended at COLO. REV. STAT. § 16-4-113 (2024)) (prohibiting court from imposing monetary condition of release for defendant charged with traffic offenses, petty offenses, or comparable municipal offenses).

<sup>184</sup> Grace Elletson, *Sarah George Ends Requests for Cash Bail, Aiming to Make Justice System More Fair*, VTDIGGER (Sept. 17, 2020, 10:38 AM), <https://vtdigger.org/2020/09/17/prosecutor-ends-requests-for-cash-bail-aiming-to-make-justice-system-more-fair/> [<https://perma.cc/5FFN-YNUQ>] (announcing Chittenden County State's Attorney Sarah George would no longer seek cash bail in any case); Justin Jouvenal, *Fairfax County Prosecutor Formally Ends Cash Bail, Joining a Growing Movement*, WASH. POST (Dec. 21, 2020, 6:43 PM), [https://www.washingtonpost.com/local/public-safety/cash-bail-end-prosecutor-fairfax/2020/12/21/2429124e-43b8-11eb-b0e4-0f182923a025\\_story.html](https://www.washingtonpost.com/local/public-safety/cash-bail-end-prosecutor-fairfax/2020/12/21/2429124e-43b8-11eb-b0e4-0f182923a025_story.html) (announcing Fairfax County will no longer request cash bail and calling on state legislature to eliminate cash bail in next general assembly); N.J. STAT. ANN. § 2A:162-15 (West 2024) ("Monetary bail may be set for an eligible defendant only when it is determined that no other conditions of release will reasonably assure the eligible defendant's appearance in court when required."); 725 ILL. COMP. STAT. ANN. 5/110-6.1(a) (West 2024) (focusing on type of crime to determine pretrial release eligibility). In 2016, Alaska enacted S.B. 91, which mostly eliminated cash bail. Act of July 11, 2016, 2016 Alaska Sess. Laws ch. 36, § 59 (repealed 2019). This bill was repealed in 2019 by H.B. 49, which reinstated cash bail and created a presumption of guilt. Act of July 8, 2019, 2019 Alaska Sess. Laws ch. 4, § 59 (codified at ALASKA STAT. § 12.30.011 (2024)) ("[T]here is a rebuttable presumption that there is a substantial risk that the person will not appear and the person poses a danger to the victim, other persons, or the community . . ."). In 2019, New York attempted to eliminate money bail in all but 10% of cases, but this legislation was only in effect a few months. It is difficult to measure its impact before it was amended to allow judges to set bail in more cases. See CTR. FOR CT. INNOVATION, NEW YORK'S BAIL REFORM LAW SUMMARY OF MAJOR

detention due to the inability of accused individuals to pay money bail.<sup>185</sup> Ohio enacted and Maine attempted to enact reforms requiring money bail to be set only at an amount reasonably necessary to assure appearance.<sup>186</sup> Similarly, Rhode Island attempted to pass an act specifically requiring the consideration of socioeconomic status in bail determination.<sup>187</sup> One North Carolina county requires a presumption that a defendant cannot pay money bail, rather than requiring a defendant to demonstrate this inability.<sup>188</sup> Illinois first prohibited bail set without consideration of financial means.<sup>189</sup> The state then eliminated money

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COMPONENTS 1 (2019), [https://www.innovatingjustice.org/sites/default/files/media/document/2019/Bail\\_Reform\\_NY\\_Summary.pdf](https://www.innovatingjustice.org/sites/default/files/media/document/2019/Bail_Reform_NY_Summary.pdf) [<https://perma.cc/FG87-QW9T>] (“On April 1, 2019, New York State passed sweeping criminal justice reform legislation that eliminates money bail and pretrial detention for nearly all misdemeanor and nonviolent felony cases.”); *see also* Memorandum from Hum. Rts. Watch on Pres. of the N.Y. Pretrial Reform Law to N.Y. State Assemb. & Senate 1 (Mar. 20, 2020), [https://www.hrw.org/sites/default/files/supporting\\_resources/newyork\\_pretriallaw\\_norollback\\_final.pdf](https://www.hrw.org/sites/default/files/supporting_resources/newyork_pretriallaw_norollback_final.pdf) [<https://perma.cc/6RXT-B283>] (“Human Rights Watch urges you to resist calls to weaken New York State’s landmark pretrial reform law.”).

<sup>185</sup> Fort Bend County Judges, General Order Regarding Procedures for Bail Hearings and Pre-Trial Release (Aug. 12, 2020) (ordering due process requires that judges conducting bail hearings must inquire into “the arrestee’s ability to post monetary bond,” consider “alternative conditions of release,” and “[n]o arrestee may be kept in jail due to her inability to pay a fee or cost associated with a condition of release”) (on file with author); CRIM. JUST. COMM., TEX. JUD. COUNCIL, 2020 CRIMINAL JUSTICE COMMITTEE REPORT & RECOMMENDATIONS - SEPTEMBER (2020).

<sup>186</sup> H.L.D. 1421, 129th Leg., 1st Reg. Sess. (Me. 2019) (attempting to expand pretrial rights by creating requirement that judge may only impose financial condition if it “is not in excess of that reasonably necessary to ensure the appearance of the defendant”); OHIO CRIM. R. 46 (2020) (repealed 2023) (calling for judges to release defendants “on the least restrictive conditions that . . . will reasonably assure the defendant’s appearance in court,” that “financial conditions shall be related to the defendant’s risk of non-appearance, the seriousness of the offense, and the previous criminal record of the defendant,” and requiring financial conditions be set at “least costly” amount to defendant while still assuring appearance in court).

<sup>187</sup> S. 2552, Gen. Assemb., 2020 Sess. (R.I. 2020) (creating “a presumption that any conditions of release imposed shall be non-monetary in nature and the court shall impose the least restrictive conditions . . . necessary to reasonably ensure the appearance of the defendant” and stating “court shall consider the defendant’s socio-economic circumstance when setting conditions of release or imposing monetary bail”).

<sup>188</sup> Consent Order for Preliminary Injunction at 3, *Allison v. Allen*, No. 19-cv-1126 (M.D.N.C. May 8, 2020) (ordering defendants in custody in Alamance County receive individualized bail hearing within 48 hours of arrest, “a meaningful opportunity to be heard before a neutral fact-finder,” and “a rebuttable presumption that a person is unable to pay any secured bond amount that exceeds 2 percent of that person’s monthly income”).

<sup>189</sup> Some use Cook County, Illinois as a successful story of money bail reforms because in 2017, it allowed judges to consider what people can afford in setting bail, and jail populations went down. What is important to note though is that the pretrial jail population dramatically decreased before and after the order, so it is unclear what the cause of this decline in the jail population was. *See generally* JAMES AUSTIN & WENY NARO-WARE, *THE JFA INST., WHY*

bail and placed it with a risk-based presumptive release scheme for nonviolent felonies and misdemeanors.<sup>190</sup> Money bail reforms are positive developments in enhancing financial parity, but they are not necessarily able to increase pretrial liberty due to a lack of presumptive release.

It is unclear whether money bail reforms will increase pretrial liberty any more than risk-based reforms,<sup>191</sup> but it seems that rearrest rates were not increased due to money bail reforms. For instance, in New Orleans, an analysis found that defendants released without paying money bail were not more likely to be rearrested than those who did pay bail.<sup>192</sup> In Harris County, Texas, and Jefferson County, Colorado, money bail reforms requiring a determination of ability to pay did not increase rearrest rates.<sup>193</sup> However, while eliminating money bail seems not to increase rearrest, it does not necessarily increase pretrial release. Indeed, several jurisdictions—New Mexico; Harris County, Texas; and

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BAIL REFORM IS SAFE AND EFFECTIVE: THE CASE OF COOK COUNTY (2020), [https://static.prisonpolicy.org/scans/Cook\\_County\\_Bail\\_Report.pdf](https://static.prisonpolicy.org/scans/Cook_County_Bail_Report.pdf) [<https://perma.cc/2PR4-RQSY>].

<sup>190</sup> See Public Act 101-0652, art. 10, 2020 Ill. Laws 2483 (ending cash bail system in Illinois and replacing it with binary system of either pretrial release or detention). This provision was set to go into effect on January 1, 2023, but it has faced legal challenges from some state prosecutors. The Illinois Supreme Court issued an order staying the provision until it hears the case on appeal. See Amanda Vinicky, *Illinois Supreme Court Pauses Plan to Eliminate Cash Bail on Eve Before Taking Effect*, WTTW (Dec. 31, 2022, 8:30 PM), <https://news.wttw.com/2022/12/31/illinois-supreme-court-pauses-plans-eliminate-cash-bail-eve-taking-effect> [<https://perma.cc/GX6P-3L29>] (detailing Illinois Supreme Court’s staying of provision).

<sup>191</sup> Compare CAL. PENAL CODE § 1269b (West 2024) (“[T]he amount of bail shall be pursuant to the uniform countywide schedule of bail . . . previously fixed and approved . . .”), with Public Act 101-0652, art. 10 (stating court must determine defendant’s dangerousness in “individualized” way, along with pretrial release presumption and elimination of money bail system).

<sup>192</sup> AH DATALYTICS, ASSESSMENT OF RELEASE ON RECOGNIZANCE IN NEW ORLEANS 6 (2020), <https://council.nola.gov/council/media/Assets/Committees/Criminal-Justice/Assessment-of-Release-on-Recognizance-in-New-Orleans.pdf> [<https://perma.cc/V3P4-AJYL>] (“People who were [Released on Recognizance] were arrested after release 16.4 percent of the time while people who were released on bail were re-arrested 16.3 percent of the time.”).

<sup>193</sup> BRANDON L. GARRETT & SANDRA GUERRA THOMPSON, MONITORING PRETRIAL REFORM IN HARRIS COUNTY: FIRST SIXTH MONTH REPORT OF THE COURT-APPOINTED MONITOR 27-29 (2020) (offering quantitative analysis of recidivism following Texas’ bail reforms). Also, in Jefferson County, Colorado, accused who were released without money bail were slightly less likely to have a new arrest than those released with money bail. CLAIRE M.B. BROOKER, MICHAEL R. JONES & TIMOTHY R. SCHNACKE, PRETRIAL JUST. INST., THE JEFFERSON COUNTY BAIL PROJECT: IMPACT STUDY FOUND BETTER COST EFFECTIVENESS FOR UNSECURED RECOGNIZANCE BONDS OVER CASH AND SURETY BONDS (2014), [http://www.clebp.org/images/Jefferson\\_County\\_Bail\\_Project-Impact\\_Study\\_-\\_PJI\\_2014.pdf](http://www.clebp.org/images/Jefferson_County_Bail_Project-Impact_Study_-_PJI_2014.pdf) [<https://perma.cc/B4GK-2QY5>].

Jefferson County, Colorado—have eliminated money bail at some level but showed no drop in the pretrial jail population.<sup>194</sup> Consequently, none of these money bail reforms necessarily aid in increasing pretrial abolition, and without presumptive release and a target release rate, it is not possible to ensure increased pretrial release.

#### D. *Demarcation Reforms*

It is important to note here that any of the above bail reform models can and have led to increased detention, even though they have all aimed to reduce pretrial detention. Consider the Pretrial Release and Detention Act (“PRDA”), the model bill recently proposed by the Uniform Law Commission for all states.<sup>195</sup> It leaves many points to state discretion, including which and how many crimes are eligible for presumptive release, and like many other bail reform efforts, focuses on public safety rather than pretrial liberty, and fails to identify a clear release target.<sup>196</sup> Limiting which crimes are eligible for detention is critical and states that have neglected this piece have created sweeping legislation allowing detention for many crimes and have failed to enhance pretrial liberty in turn.<sup>197</sup>

However, some reforms are more explicit about their increase of pretrial detention in the name of bail “reform.” One important, non bail reform change that has occurred in several jurisdictions which have reformed bail is an expansion of detention through a demarcation of detainable crimes, typically low-level misdemeanor offenses. A number of jurisdictions have increased the number of crimes that are eligible for detention. In the name of “reforming bail,” they have added reasons to detain individuals. For instance, in reforming bail, Georgia expanded the list of “bail restricted offenses” to include drug

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<sup>194</sup> BRANDON L. GARRETT ET AL., MONITORING PRETRIAL REFORM IN HARRIS COUNTY, THIRD REPORT OF THE COURT-APPOINTED MONITOR 30 (2021) (“Even though the total number of misdemeanor cases [in Harris County] has clearly declined between 2015 and 2019 . . . , the number of misdemeanor cases involving initial pretrial detention has in fact *increased* during this period of time.”); JEFFERSON CNTY. JUST. SERVS., BAIL PROJECT: THEN AND NOW 17 (2015) (stating average daily population of pretrial defendants in jail in Jefferson County increased from 525 to 561 from 2014 to 2015, despite implementation of bail reform); KRISTINE DENMAN, ELLA SIEGRIST, JOEL ROBINSON, ASHLEIGH MAUS & JENNA DOLE, N.M. STAT. ANALYSIS CTR., BAIL REFORM: MOTIONS FOR PRETRIAL DETENTION AND THEIR OUTCOMES 41 (2021), <https://isr.unm.edu/reports/2021/bail-reform-motions-for-pretrial-detention-and-their-outcomes.pdf> [<https://perma.cc/U823-6NUQ>] (stating percentage of pretrial defendants in prison in New Mexico increased from 16.7% to 37.3% from 2017 to 2019).

<sup>195</sup> UNIF. PRETRIAL RELEASE & DET. ACT (UNIF. L. COMM’N 2020).

<sup>196</sup> *Id.* § 304 (listing balance between public safety and individual liberty as PRDA’s first goal and basing presumptive release on whether arrested individual poses relevant risk).

<sup>197</sup> *See, e.g.*, VA. CODE ANN. §§ 19.2-119 to 19.2-134.1 (2024) (providing no limits on which crimes are eligible for detention).

trafficking, among other crimes.<sup>198</sup> New York similarly increased the number of offenses eligible for cash bail and detention and added release conditions, increasing the numbers of individuals detained pretrial.<sup>199</sup> Utah also expanded the category of “violent crimes” eligible for detention in its bail reform provisions that broadly defined violent crimes to include many misdemeanor and felony offenses.<sup>200</sup> Indeed, in the name of bail reform, several jurisdictions have demarcated crimes in a way that increased detention rates. These bail reforms have not enhanced release but have had the opposite effect.

In the major categories of bail reforms, scholars are starting that the result has been increased detention.<sup>201</sup> Van Brunt and Bowman recognize that jurisdictions

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<sup>198</sup> See Act of Aug. 3, 2020, No. 547, § 1-1, 2020 Ga. Laws 570, 571 (codified as amended in GA. CODE ANN. § 17-6-12 (2024)) (expanding list of crimes ineligible for bail to include violent crimes, drug trafficking, and driving under the influence).

<sup>199</sup> MICHAEL REMPEL & KRISTAL RODRIGUEZ, CTR. FOR CT. INNOVATION, BAIL REFORM REVISITED: THE IMPACT OF NEW YORK’S AMENDED BAIL LAW ON PRETRIAL DETENTION 1 (2020),

[https://www.innovatingjustice.org/sites/default/files/media/document/2020/Bail\\_Reform\\_Revisited\\_050720.pdf](https://www.innovatingjustice.org/sites/default/files/media/document/2020/Bail_Reform_Revisited_050720.pdf) [<https://perma.cc/NL2W-UW69>] (noting although recent New York bail reform had been successful, most recent round of bail reform—including increase in offenses eligible for cash bail and detention and increase in use of release conditions—would likely increase those held in jail pretrial by 16%, a setback of previous bail reform that had reduced pretrial jail population by 40%). In 2019, the New York legislature passed a bill that would eliminate bail for most nonviolent crimes. See generally Act of Apr. 12, 2019, ch. 59, pt. JJJ, 2019 N.Y. Laws 541, 631-47 (codified as amended at N.Y. CRIM. PROC. LAW (McKinney 2024)). The law was valid in January 2020, but by March of 2020, the NYPD released a report claiming that the law had spiked crime. See *NYPD Announces Citywide Crime Statistics for February 2020*, N.Y.C. POLICE DEP’T (Mar. 5, 2020), <https://www.nyc.gov/site/nypd/news/pr0305/nypd-citywide-crime-statistics-february-2020> [<https://perma.cc/4Z8D-64JW>] (noting 22.5% increase in major index crime between February 2019 and February 2020, and mentioning 482 individuals arrested for offenses that, prior to Bail Elimination Act, “could have landed them in jail”). The law was thereafter amended. See generally Act of Apr. 3, 2020, ch. 56, pt. UU, 2020 N.Y. Laws 184, 438-46 (codified as amended at N.Y. CRIM. PROC. LAW (McKinney 2024)).

<sup>200</sup> Baradaran Baughman, *supra* note 11, at 1018 (“As a comparison, Utah lists over 220 crimes as violent (misdemeanors and felonies) and New Jersey only lists about half that number as violent crimes.”); see also *id.* at 995 (noting many states do not have clear definitions of which crimes should be classified violent, leading to broad judicial interpretation, and increased pretrial detention rates).

<sup>201</sup> See Koepke & Robinson, *supra* note 42, at 1785 (“Ultimately, [bail] reforms predicated on pretrial risk assessment may expand the instances in which defendants are preventively detained and denied bail pretrial.”); PRETRIAL JUST. INST., THIS AIN’T JUSTICE. 10 PRETRIAL REFORMS WITH UNJUST CONSEQUENCES 3 (2019), <https://progov21.org/Download/Document/I0P282> [<https://perma.cc/Z2R3-H77V>] (arguing if the “detention eligibility net” is too large or “full due process protections are not in place, then excessive preventive detention can simply replace detention by an inability to post a secured money bond”); Baradaran Baughman, *supra* note 11, at 1024 (explaining reforms are increasing detention because they do not distinguish between minor and serious crimes, and majority of

with money bail reforms have adopted preventive detention which “does not necessarily represent a liberalization of the bail process.”<sup>202</sup> They recognize that the elimination of money bail is increasing the number of pretrial detainees who never see release before trial.<sup>203</sup> The warning is clear—not all bail reforms are created equal and some have or can cause more harm than good.<sup>204</sup> Some states have broadened their nets of detention in the name of bail reform.<sup>205</sup>

None of these bail reform models protect pretrial liberty or provide a path to jail abolition. The next part, Part III, takes the lessons from historic and modern-day statutory confusion to propose a narrow detention net model that might be the only statutory scheme capable of protecting pretrial liberty and providing a path towards abolition.

### III. TOWARD FEDERAL AND STATE PRETRIAL ABOLITION

At this point, having explored the past and present federal and state detention failures, it is time to consider a new model that might create a path towards pretrial abolition while maintaining or even improving public safety. With this aim, this Article proposes that a detention net scheme with presumptive release for most offenses and an articulated release target based on risk data is best equipped to protect pretrial liberty rights while allowing for near pretrial abolition. I will refer to this as a “narrow detention net.” A narrow detention net relies on the empirical gains of the risk-based release movement by allowing our understanding of risk to inform the percentage of defendants targeted for release overall. Empirical data considering violent crime discussed in detail in prior

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incarcerated persons are not convicted with pending misdemeanor charges dropped during their stay, meaning they could have been safely released before serving any jail time).

<sup>202</sup> Van Brunt & Bowman, *supra* note 48, at 709.

<sup>203</sup> *Id.* at 757.

<sup>204</sup> *Id.* at 759 (acknowledging egregious consequences of financial detention and arguing that current trends risk “rubber-stamping an expansion of the system of preventive detention”); PRETRIAL JUST. INST., *supra* note 201, at 3 (“[E]xcessive preventive detention can simply replace detention by an inability to post a secured money bond.”); Karla Dhungana Sainju et al., *Electronic Monitoring for Pretrial Release: Assessing the Impact*, FED. PROB., Dec. 2018, at 3, 8 (explaining electronic monitoring is shown to triple likelihood of jail time due to “technical violation”).

<sup>205</sup> See, e.g., GA. CODE ANN. § 17-6-1(e) (2024) (allowing judges to deny bail for defendants who pose a flight risk, “[a] significant threat or danger to any person, to the community, or to any property in the community,” or “[a] significant risk of intimidating witnesses or otherwise obstructing the administration of justice”); HAW. REV. STAT. § 804-3 (LexisNexis 2024); N.C. GEN. STAT. § 15A-534(c) (2024) (instructing judges to take into account family ties, employment, financial resources, character, and mental conditions when deciding bail, but noting final determination for release is whether any conditions will “reasonably assure the appearance of the defendant as required; will pose a danger of injury to any person; or is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses”).

works,<sup>206</sup> as well as years of empirical data from Washington, D.C., indicate that around 90% of defendants can be safely released pretrial.<sup>207</sup> Specifically, robust empirical data demonstrates that 80% of felony defendants pose a less-than-3% risk of arrest for a violent crime while released pretrial.<sup>208</sup> Misdemeanor defendants have been shown to pose an even higher risk of recidivism if detained, and Washington, D.C., has shown on average 88% arrest-free rates for the almost 90% of felony and misdemeanor defendants they have released pretrial for the last fifty years.<sup>209</sup> Another aspect of a proper detention net is the right to presumptive release—indicated by statute, rather than left to judicial discretion to avoid the problems of other state statutes. Another piece has established that judges cannot be relied upon to reduce pretrial detention, despite the strong constitutional protections existing for defendants pretrial.<sup>210</sup> Similarly, prevailing legislation fails to protect pretrial liberty because it does not set a statutory default for presumptive release and fails to indicate narrow categories for detention. The new detention net pattern envisioned here does not expect to remove all statutory or constitutional ambiguity; hard decisions will undoubtedly remain. But it aims to facilitate the orderly and rational development of the law by providing a blueprint for near-complete state and federal pretrial abolition.

This Part proceeds as follows. Section III.A defines a detention net for the first time in scholarly literature and lays the legal groundwork for a detention net statutory scheme by conducting a historical review of the limited case law and scholarly discussion that exists regarding detention nets. Then Section III.B explains what a detention net scheme looks like and how it would differ from

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<sup>206</sup> Research demonstrates that over 80% of felony defendants can be released pretrial. Baradaran & McIntyre, *supra* note 17, at 537 (“[A]bout 80% of pretrial defendants have less than a 3% chance of being rearrested.”). “[A] little over one-third of the released [pretrial felony] defendants have less than a 1% chance of being rearrested, and another third has a 1%-2% chance of being rearrested.” *Id.* Furthermore, “those charged with violent crimes are *not* necessarily more likely to be rearrested pretrial. The highest pretrial rearrest rates were for defendants charged with drug sales or robbery (21%), followed by motor vehicle theft (20%), and burglary (19%).” *Id.* at 528 (footnote omitted). “Those released who were charged with the ‘more dangerous crimes,’ such as murder, rape, and felony assault, had much lower overall rates of pretrial rearrest at 12%, 9%, and 12% respectively.” *Id.*

<sup>207</sup> See PRETRIAL SERVS. AGENCY FOR D.C., *supra* note 17, at 1 (“94% of cases result in defendants being released pretrial.”); DOYLE ET AL., *supra* note 158, at 35 (noting in Washington, D.C., an average of 94% of defendants are released pretrial, 91% of those released make their scheduled court dates during pretrial period, and 98% are not arrested for violent crime while awaiting trial).

<sup>208</sup> Baradaran & McIntyre, *supra* note 17, at 524-25, 537 (studying over 150,000 defendants in seventy-five of the largest counties over fifteen years).

<sup>209</sup> PRETRIAL SERVS. AGENCY FOR D.C., *supra* note 163, at 12 (citing Pretrial Service Agency’s findings from 2015-2019 on arrest free rate of those released pretrial).

<sup>210</sup> See Baradaran Baughman, *supra* note 27, at 215-16 (recognizing “judicial failure to protect” pretrial defendants’ rights).

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the current bail reform schemes in both state and federal models as discussed in Parts I and II. It will provide examples of the states that come closest to such a scheme and explain how this detention net scheme will provide a path to pretrial abolition, creating a path for expanding abolition in other aspects of criminal justice. It specifically discusses three requirements of a detention net scheme, including presumptive release where a statutory default is set to release most defendants (Section III.B.1), a release target where there is a legislative dictate on the number of defendants who should be released (Section III.B.2), and the importance of a narrow detention net where most defendants are released as a default before trial (Section III.B.3). The pretrial context provides a useful case study in how to effectuate near-complete jail abolition while protecting public safety.

A. *Definition and Legal Framework for a Detention Net*

The term “detention net” has been used occasionally in discussing pretrial release with reference to public safety, though without definition. In introducing this term and a new bail reform scheme based upon it, reviewing prior legal mentions of this term and defining it provides some vital structure to this discussion. The first judicial mention of a “net of detention” is by Judge Fuchsberg in 1976. In *People ex rel. Wayburn v. Schupf*,<sup>211</sup> Judge Fuchsberg points out in a concurrence that some juveniles are detained and released after adjudication of their case, “thereby demonstrating that they were never in need of detention, while other juveniles somehow slip through the *net of detention* and then commit further crimes.”<sup>212</sup> Judge Fuchsberg specifically envisions there being a net of detention to detain those who might pose a threat to public safety. A bail historian, Timothy Schnacke, has discussed detention nets in his detailed account of common law bail history. He indicates that a pretrial “detention net” should be reserved only for “defendants charged with ‘violent crimes.’”<sup>213</sup> Alexa Van Brunt and Locke E. Bowman also argue that failing to eliminate money bail while encouraging preventative detention using risk will “widen the net of detention.”<sup>214</sup> Policy advocates have also discussed pretrial

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<sup>211</sup> 350 N.E.2d 906 (N.Y. 1976).

<sup>212</sup> *Id.* at 911 (Fuchsberg, J., concurring) (emphasis added) (“Choices among juveniles as to who is a risk and who is not are thus essentially random and inexplicable in terms of any articulated and validated behavioral criteria.”).

<sup>213</sup> SCHNACKE, *supra* note 37, at 174. Schnacke argues that nets broader than for “violent crimes” are not justified because: (1) they do not avoid the harms the net seeks to address, (2) defendants are more likely to succeed if released on conditions, (3) the term “serious” is too vague of a concept, (4) the defendant is unconvicted of the alleged charge, and (5) probation, parole, or other post-conviction release terms prevent harm. *Id.* at 180.

<sup>214</sup> Van Brunt & Bowman, *supra* note 48, at 708; *see also* Hill, *supra* note 145, at 985 (“Recent events in both California and New York have arguably affirmed that [pretrial risk assessment instruments] do not guarantee decarceral outcomes.”).

detention “nets,”<sup>215</sup> though they are not mentioned by key national pretrial release standards.<sup>216</sup> Although some have indicated what their ideal detention net would look like, there is not yet a definition of a detention net in the pretrial detention literature. To create a proper detention net scheme, a working definition is helpful here.

A proper detention net considers release as the presumption for most of the accused and a narrow “net” captures a small number of people who are unable to be released pretrial. The reason an analogy of a “net” is appropriate with pretrial detention is because a net, by its nature, only captures a few out of the many. This analogy fits the hallmark requirements of due process and pretrial liberty that dictate a presumption of release for most defendants as enshrined in the U.S. Constitution.<sup>217</sup> The “detention net” makes release presumptive for all but a small category of crimes. The “net” anticipates capturing only those who are unable to be released with or without any supervision or conditions. A release target set by the legislature and a presumptive release statute allow the goals of pretrial liberty to be effectuated. In short, a proper detention net is a categorical and outcome-driven release model where the vast majority of individuals charged with a crime are released before trial without a hearing and only a small portion of the defendants are detained before trial. To maintain high release rates, this scheme sets a release target for judges to release the majority of individuals before trial, in accord with constitutional mandates that detention remain the carefully circumscribed exception.<sup>218</sup> Three defining features of a detention net approach to bail—that differs from all other bail reform models—

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<sup>215</sup> See PRETRIAL JUST. INST., *supra* note 201, at 3 (“Some states have passed constitutional amendments defining a ‘detention eligibility net.’ A net should only include serious violent charges, and people whose charges fall within the net have a right to a full adversarial detention hearing on their likelihood of appearing in court without a new charge.”); Baradaran Baughman et al., *supra* note 50, at 470 (“A model detention net must set aggressive release goals and allow detention only where the government proves, by substantial burden, that a defendant is unable to be safely released.”); see also UNIF. L. COMM’N, PRETRIAL RELEASE & DETENTION ACT: GUIDE FOR ADVOCATES & POLICYMAKERS 5 (2020) (noting narrow pretrial detention net can ensure presumption of innocence and pretrial liberty is satisfied, and “[a]dvocates must press for a narrow net involving only ‘extremely serious’ charges.”); PRETRIAL JUST. INST., THE CASE AGAINST PRETRIAL RISK ASSESSMENT INSTRUMENTS 11 (2020), <https://www.pretrial.org/files/resources/thecaseagainstpretrialriskassessmentinstruments—pji2020.pdf> [<https://perma.cc/J2DQ-UL36>] (“The focus should be on implementing a very narrow detention net and providing robust detention hearings that honor the charge of the Supreme Court forty years ago.”).

<sup>216</sup> SEE STANDARDS FOR CRIM. JUST.: PRETRIAL RELEASE § 10-1.16 (AM. BAR. ASS’N 2007) (allowing detention for dangerous offenses, serious offenses while on release, serious offenses posing substantial risk of nonappearance, and any offense showing substantial risk of obstructing justice).

<sup>217</sup> See *supra* notes 26-27, 122 and accompanying text (describing constitutional and statutory support for presumption of release).

<sup>218</sup> See *supra* text accompanying note 26-27 (explaining Supreme Court precedent mandates default pretrial liberty).

are first, making most categories of crimes bailable by default without a hearing (presumptive release); second, setting a high target rate of release for a jurisdiction; and third, having a narrow detention net to detain those charged with a limited number of crimes who cannot be safely released.

First, to satisfy constitutional dictates that detention remain a very limited exception, most defendants must be presumptively released without a hearing. To effectuate presumptive release, most individuals should be released without a hearing but by statutory default. This means that there should be no pretrial fact-finding by a judge, preserving every accused's right to a jury determination of the facts in their case. For this reason, prosecutors should not present facts of alleged crimes (that have not been found as such by juries) and if a hearing is requested, a prosecutor must only state the charge and is permitted to discuss only prior charges which resulted in a conviction by a jury. In any jurisdiction where legal defense is not provided for defendants in a bail determination, the defendant should be released as a default. If the prosecutor requests a hearing for a bail determination, the defendant must be appointed pretrial counsel. The current practice allows most defendants to remain unrepresented and without any defense present in their release hearings.<sup>219</sup>

Second, a vital missing piece in all current bail models is a release target. The legislature must dictate a release target for each jurisdiction that effectuates the constitutional mandates that detention is a carefully circumscribed exception. Currently, these constitutional release dictates exist but are constantly violated by legislative enactments that poorly protect these rights.<sup>220</sup> A proper detention net scheme sets forth a release target set for each jurisdiction where most defendants are released before trial. Though no state currently has a formal release target, a proven release rate that has worked for many years in Washington, D.C., is around 90%.<sup>221</sup> Abolition literature and research is extremely instructive on this front and should be relied on to show that relying on other rehabilitation or restorative justice methods besides incarceration is viable.<sup>222</sup> A detention net scheme with a release target of 90% has the potential of enhancing liberty and effectuating pretrial abolition for most of the accused.

Third, a detention net must be narrow so that the vast majority are released pretrial and only those who are unable to be released or supervised without too

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<sup>219</sup> See Baradaran Baughman, *supra* note 27, at 244-45 (describing unrepresented defendants who also cannot advocate for themselves at release hearing); JOCELYN SIMONSON, RADICAL ACTS OF JUSTICE: HOW ORDINARY PEOPLE ARE DISMANTLING MASS INCARCERATION 52-55 (2023) (documenting numerous cases of magistrate judge in Louisiana instructing defendants not to speak during bail hearings).

<sup>220</sup> See *supra* Section I.B (detailing how federal legislative enactments have increased detention rates).

<sup>221</sup> See *supra* notes 206-09209 and accompanying text.

<sup>222</sup> See, e.g., DOMINIQUE D. GILLIARD, RETHINKING INCARCERATION: ADVOCATING FOR JUSTICE THAT RESTORES 202 (2018) (naming church as one avenue for creating "a system that gives opportunities for authentic rehabilitation, lasting transformation, and healthy reintegration").

much risk are incarcerated. The net must also be narrow to meet release targets. The majority of those accused should be released pretrial without a hearing. Examples of crimes that should have presumptive release include all misdemeanor crimes and all nonviolent felonies. The individuals detained in the “net” are only detained temporarily after a hearing is requested by counsel. Individuals who require a hearing should be those who have a history of convictions for violent crime and with pending violent felony charges or those who would substantially threaten a fair trial by interfering with witnesses or the justice process.<sup>223</sup> Those charged with serious violent crimes may be released if the flight risk and risk of violent crime on release is low, given their more pressing need to meet with counsel and prepare a defense. Empirical data on release is informative here, on both dangerousness and risk of flight. As far as violent crime, those charged with serious violent crimes without a violent crime history can be released safely to prepare for trial.<sup>224</sup> Data indicate that those charged with capital offenses are also not necessarily a flight risk, despite this historical assumption.<sup>225</sup> In other words, the default pretrial for most of the accused can be release without compromising public safety. Misdemeanor defendants, for instance, could be released presumptively, unless the government proves by clear and convincing evidence that they pose a substantial risk to the safety of specific individuals.<sup>226</sup> Some exceptions for short-term detention of individuals who are unstable will be permitted. Some crimes that are exceptions and typically captured in the detention net include violence or

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<sup>223</sup> See BARADARAN BAUGHMAN, *supra* note 6, at 190 (arguing “protecting the judicial process from interference from defendants” is valid reason for restricting one’s liberty before trial).

<sup>224</sup> Baradaran & McIntyre, *supra* note 17, at 528.

[T]hose charged with violent crimes are *not* necessarily more likely to be rearrested pretrial. The highest pretrial rearrest rates were for defendants charged with drug sales or robbery (21%), followed by motor vehicle theft (20%), and burglary (19%). Those released who were charged with the ‘more dangerous crimes,’ such as murder, rape, and felony assault, had much lower overall rates of pretrial rearrest at 12%, 9%, and 12% respectively.

*Id.* (footnote omitted).

<sup>225</sup> BRIAN A. REAVES, U.S. DOJ, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009, at 15 (2013), <https://bjs.ojp.gov/content/pub/pdf/fdluc09.pdf> [<https://perma.cc/PT33-9QVL>] (“In 2009, failure-to-appear rates were lowest for murder (5%) and rape (7%) defendants, and highest for those released after being charged with motor vehicle theft (28%).”). Data from the Bureau of Justice Statistics for 2009 based on released felony defendants who failed to make a scheduled court appearance in the seventy-five largest counties for the most serious charges (including murder, rape, robbery, assault, other violent crimes, burglary, larceny/theft, motor vehicle theft, weapons, etc.) show that for all offenses, 83% made all court appearances. *Id.* at 21. Of the 17% who failed to appear in court, 13% returned to court and only 3% remained fugitives. *Id.* However, the defendants classified as fugitives could have still been returned to court at a later date, outside of the one-year study period. *Id.*

<sup>226</sup> Baradaran Baughman et al., *supra* note 50, at 470 n.124 (listing several state statutes restricting law enforcement’s ability to issue citations or summons).

sexual abuse towards individuals who cannot be protected where accused has a history of violent crime, temporary detention for driving under the influence, domestic violence, child sexual abuse and other serious crimes that require short-term protection of vulnerable victims.<sup>227</sup> A prosecutor can make a request to obtain a hearing to detain an individual, and demonstrate that there is no way to release this individual safely, establishing the constitutionally required bar to detain for dangerousness.<sup>228</sup> The prosecutor bears this heavy burden, requiring at least clear and convincing evidence, and must provide actionable evidence of specific individuals who will be seriously harmed upon the defendant's release.<sup>229</sup> Standards change once a defendant is charged with another crime while on release or if there is a substantial risk or evidence that the defendant is obstructing justice by intimidating witnesses or victims. If a state wants to request money bail, to protect a defendant's right to financial parity, an individualized determination of their ability to pay must take place.<sup>230</sup> An individual cannot be detained due to an inability to pay a bail amount, in accord with their Equal Protection and Due Process Rights.<sup>231</sup> The three specific requirements of a detention net will be discussed in further detail below, with examples of current statutory models that most closely fit its three parts and how this pattern provides a blueprint for pretrial abolition.

#### B. *Three Parts of a Detention Net Scheme*

A detention net scheme with determined release goals might be best suited to provide a viable road to abolition. As articulated above, several of the more complicated bail reform approaches have been critiqued for increasing detention rates or alleged crime rates, and this of course must be considered carefully.<sup>232</sup>

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<sup>227</sup> C.R. CORPS, BAIL REFORM: BASIC STATUTORY PRINCIPLES 1 (2018), <https://cdn.buttercms.com/JPyqkFCyTgGfNL8sk3Gy> [https://perma.cc/H7VT-RQRM] (“Allow detention for flight risk or ‘dangerousness’ only . . . for very limited and explicitly identified offenses . . .”); 725 ILL. COMP. STAT. ANN. 5/110-6.1(a) (West 2024) (listing domestic battery, child sexual abuse, and aggravated driving under the influence causing great bodily harm as charges for which courts can deny pretrial release).

<sup>228</sup> See Baradaran Baughman, *supra* note 27, at 233.

<sup>229</sup> See *id.* at 234 (concluding substantive due process requires clear and convincing evidence that government cannot release defendant safely).

<sup>230</sup> See *id.* at 255 (“[P]retrial financial parity requires all defendants to be treated similarly in their access to release, regardless of their income or ability to afford bail.”).

<sup>231</sup> See *id.* at 258-61 (setting forth financial parity arguments based on Equal Protection and Due Process Clauses).

<sup>232</sup> See Tiana Herring, *Releasing People Pretrial Doesn't Harm Public Safety*, PRISON POL'Y INITIATIVE (Nov. 17, 2020), <https://www.prisonpolicy.org/blog/2020/11/17/pretrial-releases/> [https://perma.cc/Q4HV-A5VY] (“The NYPD asserted in March 2020 that the original bail reform measures were a ‘significant reason’ for increased arrests in six crime categories from February 2019 to February 2020.”). However, Human Rights Watch argued “that the reforms had not been in place long enough to pinpoint them as the driving force

The outcomes of bail reforms and whether they increase<sup>233</sup> or decrease crime,<sup>234</sup> or increase or decrease pretrial liberty should be tracked. All proposed interventions must be properly studied to ensure that public safety is protected while pretrial liberty is enhanced according to the careful balance struck by the Constitution. Bail reform in recent years has mostly increased pretrial detention, not decreased it.<sup>235</sup> While there is no detention net scheme that currently protects all pretrial liberty interests or provides for pretrial abolition, a few come close and are highlighted in the discussion that follows. This Part illuminates three aspects of a proposed detention net scheme and compares them to examples of prevailing models, ultimately concluding that pretrial abolition might best be achieved with a detention net scheme.

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behind a rise in crime, and accused prosecutors, police, and bail bond agents of spreading ‘sensational stories and misleading statistics’ to kill the reforms.” *Id.*

<sup>233</sup> See Cassell & Fowles, *supra* note 177 (arguing empirical study of bail reform in Chicago shows increase in violent crime). *But see* Miguel F.P. de Figueiredo & Dane Thorley, *Pretrial Disparity and the Consequences of Money Bail*, 81 MD. L. REV. 557, 576, 607-11 (2022) (arguing methodology Cassell and Fowles used to analyze data was incomplete).

<sup>234</sup> Several states have seen significant drops in violent crime by increasing pretrial release. A 2017 study found that “[a]lthough detention reduces defendants’ criminal activity in the short term through incapacitation, by eighteen months post-hearing, detention is associated with a 30% increase in new felony charges and a 20% increase in new misdemeanor charges.” Heaton et al., *supra* note 3, at 718. The Prison Policy Initiative found three states and nine cities and counties where jurisdictions saw “decreases or negligible increases in crime after implementing [pretrial] reforms.” Herring, *supra* note 232. In New Jersey, since the pretrial reforms, “[v]iolent crimes decreased by 16% from 2016 to 2018. There was a negligible difference in the number of people arrested while on pretrial release.” *Id.*; *see also* N.J. STAT. ANN. § 2A:162-20 (West 2024). In New Mexico, “[s]tate-wide crime rates have declined since the reforms took effect in mid-2017” and “the number of people released pretrial who are not charged with committing a new crime, increased from 74% to 83.2% after the reforms took effect.” Herring, *supra* note 232. In Kentucky, “[t]he new criminal activity rate, which measures the rate at which people commit new crimes while awaiting trial, has not changed.” *Id.* In San Francisco, the city’s new criminal activity rate is 10% which “puts it on par with Washington, D.C. which is often used as a model of pretrial reform success.” *Id.* In Washington, D.C., “87% of people were not rearrested when released pretrial, and 99% weren’t rearrested for a violent crime” in 2019. *Id.* In Philadelphia, “[r]esearchers found no difference in recidivism after the reforms.” *Id.* In Santa Clara County, “99% of people released were not rearrested” after pretrial reforms took place. *Id.* In Cook County, the “vast majority [] (99.4%) of people who were released pretrial between October 2017 and December 2018 were not charged with any new violent offenses, and 83% remained charge-free while their cases were pending.” *Id.* But researchers found that, in Harris County, Texas, “people detained pretrial were significantly less likely to be rearrested during the first 13 days after their bail hearings than similarly situated people who posted bail and were released, but significantly more likely to be rearrested by day 30.” DIGARD & SWAVOLA, *supra* note 48, at 6.

<sup>235</sup> See *supra* Part II (explaining how third wave of bail reform mostly increased pretrial detention).

### 1. Presumptive Release

To increase pretrial liberty, most defendants must be released pretrial either through a cite and release or simple presumptive release.<sup>236</sup> A cite-and-release system allows the accused to receive a summons for their court date and obtain release without booking, detention, or any bail determination pretrial, though potentially with a fine.<sup>237</sup> It is one way jurisdictions have been able to avoid pretrial detention. Another method is simply to release defendants with a summons to return for their court date, but no citation or fine. A presumption of release enshrined in statutory form may be the most important tool to protect pretrial liberty. A few states have started to institute presumptive release as a matter of statute, although Supreme Court precedent has made clear that release must be the presumption before a determination of guilt.<sup>238</sup> While federal statutes intended release to become a default, as discussed in Part I, this aim was not accomplished as the exceptions have become too large. Also, while federal statutes seemed to articulate a presumptive release model, they failed to institute such a model by requiring a hearing in most cases. Without setting a statutory default of release in cases where a defendant poses a low risk, detention becomes the norm. To change the presumption to release, statutes must not default in hearings for most cases. There should be statutory defaults of release for most defendants, and hearings only by request when a prosecutor wants to demonstrate that a defendant is unsafe to release under any conditions. Release protects an accused's right to counsel particularly in states that cannot afford to provide pretrial counsel; presumptive release is a way to protect a defendant's right to legal defense. Without detention pretrial, the accused is able to meet with counsel upon release, and the state does not have to worry about providing lawyers for each defendant in this early hearing. More people will be released if the statutory default is release, rather than a hearing.

A few examples of states that have attempted to reform bail are instructive to show that with presumptive release and a proper detention net, significant jail elimination is within reach. New Jersey has a presumption of release for most cases.<sup>239</sup> New Jersey's law, which became effective in 2017, instituted a

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<sup>236</sup> See BARADARAN BAUGHMAN, *supra* note 6, at 214 (“[A]n optimal bail system in America . . . would release a larger number of safe indigent defendants . . .”).

<sup>237</sup> Henry F. Fradella & James A. Purdon, *Citations in Lieu of Arrest*, in CHRISTINE S. SCOTT-HAYWARD, JENNIFER E. COPP & STEPHEN DEMUTH, *HANDBOOK ON PRETRIAL JUSTICE* 220, 221, 242 (2022) (ebook) (discussing benefits of citations in lieu of formal arrest including diminished burdens on accused, unintended criminogenic influences, increased officer and public safety, and reduced costs).

<sup>238</sup> See *supra* note 26 and accompanying text (describing Supreme Court precedent requiring default of pretrial liberty).

<sup>239</sup> See N.J. CT. R. 3:4A(b)(5).

Except when a presumption of detention is required pursuant to paragraph (b)(4), when a motion for pretrial detention is filed pursuant to paragraph (a), there shall be a rebuttable presumption that some amount of monetary bail, non-monetary conditions of pretrial release or combination of monetary bail and conditions would reasonably assure

presumption of release by allowing release before or at the defendant's first appearance, unless the prosecutor files a motion of detention.<sup>240</sup> In the new system, the vast majority of arrested individuals—68.6% of all arrested individuals in 2019—were cited and released on a complaint-summons, with no arrest or detention.<sup>241</sup> These bail changes in New Jersey contributed to a 6.4% reduction in the jail population between 2018 and 2019.<sup>242</sup> New Jersey's pretrial

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the defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the defendant will not obstruct or attempt to obstruct the criminal justice process.

*Id.* at 3:4-3 (“Whether or not the court finds probable cause, it shall continue in effect any monetary bail previously posted in accordance with R. 3:26 or any other condition of pretrial release not involving restraints on liberty . . .”); *id.* at 3:26-1.

[A]ll persons for whom a complaint-warrant or a warrant on indictment is issued for an initial charge involving an indictable offense or disorderly persons offense shall be released before conviction on either personal recognizance, the execution of an unsecured appearance bond, or the least restrictive non-monetary conditions that, in the judgment of the court, will reasonably assure their presence in court when required, the protection of the safety of any other person or the community, and that the defendant will not obstruct or attempt to obstruct the criminal justice process. . . . In addition to these non-monetary conditions, monetary conditions may be set for a defendant but only when it is determined that no other conditions of release will reasonably assure the defendant's appearance in court when required. *Id.*

<sup>240</sup> Baradaran Baughman et al., *supra* note 50, at 457 n.39; *see also* N.J. STAT. ANN. § 2A:162-16 (West 2024) (creating general presumption of pretrial release unless prosecutor files motion of detention). GLENN A. GRANT, N.J. CTS., 2018 CRIMINAL JUSTICE REFORM REPORT TO THE GOVERNOR AND THE LEGISLATURE 34 (2019), <https://static.prisonpolicy.org/scans/2018cjrannual.pdf> [<https://perma.cc/77P2-3ZXL>].

Under [New Jersey Criminal Justice Reform (“CJR”)], prosecutors may seek to detain defendants charged on a complaint-warrant without the opportunity for release. Pretrial detention motions are limited to indictable charges and domestic violence related disorderly persons charges. The prosecution has the burden to demonstrate that no combination of conditions or level of monitoring is sufficient to reasonably assure the safety of the community. If the prosecutor files a detention motion, a Superior Court judge holds a pretrial detention hearing — usually within three to five days of the filing — so that both the prosecution and defense can present evidence. If the court orders a defendant detained, CJR's speedy trial law sets specific timeframes that require the case to proceed to indictment and trial. If those timeframes are not met, the defendant can be released from jail. *Id.*

<sup>241</sup> GLENN A. GRANT, N.J. CTS., ANNUAL REPORT TO THE GOVERNOR AND THE LEGISLATURE: CRIMINAL JUSTICE REFORM 14 (2021), <https://www.njcourts.gov/sites/default/files/courts/criminal/2020cjrannual.pdf> [<https://perma.cc/K4GC-LYVA>] (noting vast majority of defendants are categorized as “lower risk” and released with no jail time); *see* N.J. STAT. ANN. § 2A:162-16(d)(1) (West 2024) (requiring defendants charged on complaint-summons be released from custody). The other individuals are arrested on a complaint-warrant which can be issued only after a judge finds probable cause that the charged offense was committed. GRANT, *supra*, at 14 (noting remaining 31.4% of defendants received complaint-warrants); *see* N.J. CT. R. 3:3-1(a) (creating procedures for issuing complaint-warrant).

<sup>242</sup> GRANT, *supra* note 241, at 18.

release presumption is very similar to what is proposed here and has led to pretrial release of around 93% of defendants in the most recent evaluations.<sup>243</sup>

Some promising new bail reform from Illinois shows that a presumption of release could lead to important gains in pretrial liberty. The 2021 Illinois Act requires a presumption of release for most crimes.<sup>244</sup> The Illinois Act is not yet fully operational, so it remains to be seen how it impacts pretrial liberty.<sup>245</sup> But as far as presumptive release, New Jersey and Illinois come closest to a detention net model due to a statutory presumption of release for most crimes. This model has proven to increase release rates in New Jersey without affecting pretrial crime, as it has for many years in Washington, D.C.

For over fifty years, D.C. has instituted a presumption of release in practice and only allows money bail in a limited number of cases.<sup>246</sup> D.C. has maintained the longest lasting presumptive release practice with about 85% of D.C. felony and misdemeanor defendants released at the initial hearing, and about 94% released at subsequent hearings.<sup>247</sup> New Jersey, D.C. and Illinois all maintain

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<sup>243</sup> *Id.* at 33 (noting in 2020, 93% of all felony and misdemeanor defendants were released pretrial, most never went to jail and were released on summons (65.5%), 53.3% of those who received a warrant were resolved or released after first court appearance, and about 40% of prosecutors' detention motions were denied, resulting in release after hearing). New Jersey has faced pressure to roll back bail reforms, but data supports that New Jersey reforms have been successful. *See Bail Reform Is Working*, N.J.L.J. (Nov. 7, 2021, 10:00 AM), <https://www.law.com/njlawjournal/2021/11/07/bail-reform-is-working/>.

A judiciary criminal justice reform report for 2020, released Oct. 8, 2021, indicates that there was only 0.2% of the jail population (14 people) incarcerated for inability to pay cash bail of \$2,500 or less. The percentage of low-risk defendants incarcerated in 2012 was 12%; in 2018, 4.6%; and in 2019, 2.4%. *Id.*

<sup>244</sup> *See* 725 ILL. COMP. STAT. ANN. 5/110-2(a) (West 2024) ("It is presumed that a defendant is entitled to release on personal recognizance on the condition that the defendant attend all required court proceedings and the defendant does not commit any criminal offense, and complies with all terms of pretrial release . . ."). The Act includes monetary fines or fees only when an individual violates the Uniform Criminal Extradition Act, the Driver License Compact, or the Nonresident Violator Compact or when the defendant's release is conditioned on supervision by a pretrial service agency or a pretrial home service, both of which require electronic monitoring. *See id.* at 5/110-1.5, 5/110-10 (listing exceptions to general abolition of monetary bail).

<sup>245</sup> This provision was set to go into effect on January 1, 2023, but it has faced legal challenges from many of the State's prosecutors. *See* Vinicky, *supra* note 190 (reporting Illinois Supreme Court stayed elimination of cash bail before it took effect).

<sup>246</sup> Money bail can only be imposed if set at an amount that the accused can presently afford, and it can only be used to assure court appearance—not public safety. D.C. CODE § 23-1321(c)(3) (2024). In practice it is rarely used. *See The D.C. Pretrial Services Agency: Lessons from Five Decades of Innovation and Growth*, PRETRIAL JUST. INST. (2018), <https://www.psa.gov/sites/default/files/PJI-DCPSACaseStudy.pdf> [<https://perma.cc/9B3V-RU5W>].

<sup>247</sup> PRETRIAL SERVS. AGENCY, *supra* note 17; Telephone Interview with Officer Eric Coleman, Front Desk, Off. of the Dir. of Pretrial Servs. Agency for D.C. (Feb. 3, 2022)

presumptive release though they lack a formal release target and leave it open for judges to decide how to interpret the statutory detention net.<sup>248</sup> There is a risk—particularly in Illinois where a practice of release has not yet been established—that judges could broadly interpret the detention net and fail to increase the pretrial release rates.<sup>249</sup> The next Section discusses the importance of setting a high release target as a part of a bail scheme that increases release.

## 2. High Release Rates and Release Target

Setting a release target might be the simplest way to ensure high release rates, thereby improving pretrial liberty and momentum towards pretrial abolition. Nuance in the law is necessary, but complexity has mired the three prior bail generations, so clarity and simplicity might provide a better path. While no jurisdiction has set a formal pretrial release target, high pretrial release rates have a track record of success and there is nothing inappropriate about legislatures making prophylactic rules to protect the badly botched constitutional protection of detention being a carefully circumscribed exception. A simple 90% release rate—like that achieved by Washington, D.C., each year for the last 54 years<sup>250</sup>—makes the constitutional mandate of release clear to judges. If release is the presumption with limited exception, a 90% release rate is a reasonable release target. Judges must maintain discretion and be able to detain individuals when necessary—and not be driven solely by numbers—but a high release target might be the simplest way to abide by a constitutional mandate that we have moved farther from complying with after each subsequent wave of bail reform.

Without presumptive release and high release rates, previous experiences with state bail reform demonstrate that it has failed in all but a few instances. Kentucky and Virginia’s attempts, as well as new legislation in California and the Uniform Pretrial Release and Detention Act are some examples of such

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(describing D.C.’s post-arrest procedure—prisoners are imprisoned, then screened in diagnostics unit, drug tested at U.S. Marshalls unit, then taken to arraignment the next day where judge decides whether to release or detain them pretrial). Defendants also maintain the right to counsel at bail hearings. D.C. CODE § 23-1322(d)(1)(2).

<sup>248</sup> N.J. CT. R. 3:4A states:

Except when a presumption of detention is required . . . there shall be a rebuttable presumption that some amount of monetary bail, non-monetary conditions of pretrial release or combination of monetary bail and conditions would reasonably assure the defendant’s appearance in court when required, the protection of the safety of any other person or the community, and that the defendant will not obstruct or attempt to obstruct the criminal justice process.

See also Public Act 101-0652, art. 10, 2020 Ill. Laws 2483 (2021).

<sup>249</sup> New Jersey also has a centralized court system, which makes it easier to maintain uniformly high release rates after bail changes.

<sup>250</sup> Herring, *supra* note 232 (“The District’s Pretrial Services Agency has used a risk assessment tool since the agency was created by Congress in 1967 . . .”).

failures.<sup>251</sup> A proper detention scheme should establish benchmarks for release goals, like 90% release,<sup>252</sup> instead of allowing judges unfettered discretion.<sup>253</sup> Insofar as judges have a set release goal, they can be better held accountable for their decisions. These goals should be baked into a risk assessment instrument, if a state has adopted one.<sup>254</sup> Only fourteen states currently meet a 90% release standard.<sup>255</sup> In the past, states have demonstrated a pattern of “reforming” bail while still engaging in rampant pretrial detention. Any ambiguity between the release target, the types of crimes eligible for preventative detention, and those crimes for which the accused are presumptively released typically ends in increased detention.

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<sup>251</sup> Baradaran Baughman et al., *supra* note 50, at 472 (explaining ULC Model Pretrial Act has potential to increase detention rates because judges are given great discretion to weigh evidence against individual when determining risk at defendant’s release hearing rather than defining narrow detention net). The proposed act allows states to decide whether they want to institute a cite and release system and mandate pretrial counsel, but none of these proposals are required. *See id.* California transformed its bail system and prohibited money bail but did not establish a presumption of release for most cases, so it is unlikely to increase release rates through its reforms. *See In re Humphrey*, 482 P.3d 1008, 1019 (Cal. 2021); Garrett & Monahan, *supra* note 44, at 443 (discussing discretion of judges and courts regarding what policies to adopt).

<sup>252</sup> A 90% release rate is a reasonable goal given empirical data on risk of release. *See Baradaran & McIntyre, supra* note 17, at 537 (“5% of defendants have more than a 5% chance of being rearrested on a violent felony charge, with a few having higher than a 10% chance.”).

<sup>253</sup> Jurisdictions do not often distinguish between misdemeanor and felony defendants in bail assessments. *See Baradaran Baughman, supra* note 11, at 1021; Shima Baradaran Baughman, *The History of Misdemeanor Bail*, 98 B.U. L. REV. 837, 872 (2018) (“Misdemeanor defendants are detained before trial almost as often as felony defendants because they cannot afford bail.”). Eliminating or decreasing the use of misdemeanor detention is especially important because such detention “discriminates against the poor and minorities, especially against African Americans, who often have less options to pay for release.” *Id.* at 882; *see also* Koepke & Robinson, *supra* note 42, at 1747 (considering recent Connecticut statute eliminating cash bail for misdemeanor defendants); Heaton et al., *supra* note 3, at 711.

<sup>254</sup> Baradaran Baughman, *supra* note 11, at 1014-20 (providing examples of Kentucky, Utah, New Jersey, and Colorado). Recognizing, however, that risk assessment instruments are rarely implemented to release low level offenders. *See generally* Doug Dais, *Cash Bail Keeps Poor People in Jail. Here’s How We Fix It*, FREETHINK (Aug. 8, 2020, 12:00 PM), <https://www.freethink.com/videos/bail-reform> [<https://perma.cc/5JEZ-Z347?type=image>]; Alexandra Natapoff, *The High Stakes of Low-Level Criminal Justice*, 128 YALE L.J. 1648 (2019) (reviewing ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* (2018)).

<sup>255</sup> *See* PRETRIAL JUST. INST., *supra* note 34, at 11-14 (noting that Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New York, Ohio, Oregon, Rhode Island, Utah, Vermont, and Washington had less than 10% pretrial detention rates as of 2017). These percentages are 10% of the total population, not 10% of defendants, which is a different consideration than what we are proposing here.

A high release rate and presumption of release is a proven approach to bail reform, as it has been used by Washington, D.C., for many years. In fact, Washington, D.C., has historically maintained the highest release rate of any jurisdiction.<sup>256</sup> For instance, in 2019, 75% of individuals facing felony charges and 98% of individuals facing misdemeanor charges—94% of all defendants—were released pretrial.<sup>257</sup> Although Washington, D.C., has never set a statutory “release target,” they have always kept release rates high through presumptions of release and, in recent years, through strategic goals targeting high release rates.<sup>258</sup> And in D.C., most individuals who are released not only appear for their court date but also remain arrest free—only 1% are arrested for a violent crime while released.<sup>259</sup> Given prior empirical studies, it is likely that national pretrial crime rates could remain low like D.C.’s if other states dramatically increased their release rates.<sup>260</sup>

New Jersey and Illinois have not instituted target release rates, but this could help maintain release rates. New Jersey already releases 93.5% of defendants due to presumptive release and a centralized court system.<sup>261</sup> As in D.C., the data from New Jersey shows similar positive outcomes from high pretrial release rates. In 2019, 90.9% of defendants appeared for their court date, only 13.7% were rearrested for an indictable offense, and fewer than 1% were charged with a serious crime while on pretrial release.<sup>262</sup> Other states do not have a centralized court system and their bail decisions show more disparity, so a targeted release

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<sup>256</sup> See, e.g., Ann E. Marimow, *When It Comes to Pretrial Release, Few Other Jurisdictions Do It D.C.’s Way*, WASH. POST (July 4, 2016, 10:00 PM), [https://www.washingtonpost.com/local/public-safety/when-it-comes-to-pretrial-release-few-other-jurisdictions-do-it-des-way/2016/07/04/8eb52134-e7d3-11e5-b0fd-073d5930a7b7\\_story.html](https://www.washingtonpost.com/local/public-safety/when-it-comes-to-pretrial-release-few-other-jurisdictions-do-it-des-way/2016/07/04/8eb52134-e7d3-11e5-b0fd-073d5930a7b7_story.html) (sharing statistics about D.C. detention rates and how detention rates in U.S. states have increased over time).

<sup>257</sup> See PRETRIAL SERVS. AGENCY FOR D.C., *supra* note 17.

<sup>258</sup> See PRETRIAL SERVS. AGENCY FOR D.C., *supra* note 163, at 12 (detailing key accomplishments of maintaining high release rates including supporting judicial decision making, enhancing drug testing, enhancing defendant supervision, and enhancing prosocial services interventions).

<sup>259</sup> *Id.* 87% remained on release at the conclusion of the pretrial period without a pending request for removal or revocation. *Id.* In 2019, 87% of all individuals who were released pretrial remained arrest-free during the pretrial period. *Id.*

<sup>260</sup> See Baradaran & McIntyre, *supra* note 17, at 527, 557 (reporting “those charged with violent crimes are *not* necessarily more likely to be rearrested pretrial” and only 1.9% of felons who are released are rearrested for a violent felony).

<sup>261</sup> GRANT, *supra* note 240, at 8 (“Out of the universe of 135,009 defendants charged by complaint-summons or complaint-warrants in 2018, the rate of pretrial detention was 6.4 percent, and 93.5 percent of defendants were released pretrial.”); N.J. STAT. ANN. § 2A:162-16 (West 2024). The 6.4%, including 20% of all CJR-eligible individuals, were ordered detained in 2018. GRANT, *supra* note 240, at 38. The pretrial population fell 43.9% from December 2015 to December 2018. *Id.*

<sup>262</sup> GRANT, *supra* note 241, at 8-10.

rate would be helpful to maintain consistency in those jurisdictions. Illinois could also benefit from a high release target to make sure that its presumptive release goals reduce pretrial detention.

Without a determined detention net—where those charged with serious violent crimes are the only ones eligible for preventative detention—the discretion of judges will continue to lead to increased pretrial detention. The next Section focuses on how to achieve a narrow detention net, which is also critical to achieving high release rates and near abolition pretrial.

### 3. Execution of Narrow Detention Net

The determination of what constitutes an appropriate detention net—or which crimes are eligible for preventative pretrial detention—is the most important consideration when it comes to bail policy. This single determination has the largest impact on how many are detained—which is ultimately the goal of all successful bail reform and abolition—detaining only the very few most dangerous defendants. To achieve this goal, statutes should dictate detention only for serious violent crimes where the defendant has a history of violent crime.<sup>263</sup> Not only is releasing more people pretrial a constitutional mandate, but it also may actually have a side benefit of reducing crime rates. When considering those accused of less serious crimes, it is evident they are less likely to commit additional crimes when released before trial than when detained.<sup>264</sup> Some states which have reformed bail in recent years have allowed detention for many crimes, including misdemeanor offenses.<sup>265</sup> This sort of “reform” defeats the purpose of bail reform, often by increasing pretrial detention.<sup>266</sup>

The presumption for most charged with crimes in Washington, D.C., pretrial is release.<sup>267</sup> To illustrate this point, compare D.C.’s pretrial release outcomes with those of Kentucky and Virginia. All three jurisdictions rely on pretrial risk instruments, but only D.C. limits detention. In practice, D.C. judges limit preventative detention to only serious violent crimes like murder and assault with the intent to kill.<sup>268</sup> For everything else, D.C. requires a hearing to detain,

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<sup>263</sup> See PRETRIAL JUST. INST., *supra* note 201 (arguing detention before trial should be limited to serious violent charges and all should include full adversarial hearing before judge); see Baradaran & McIntyre, *supra* note 17, at 511.

<sup>264</sup> Heaton et al., *supra* note 3, at 768 (estimating pretrial detention of 10,000 people charged with misdemeanors could be expected to result in 400 additional felonies and 600 more misdemeanors than if they had been released pretrial).

<sup>265</sup> See *supra* notes 198-200 and accompanying text.

<sup>266</sup> See *supra* notes 198-200 and accompanying text.

<sup>267</sup> LINKER & SLOAN, *supra* note 58, at 1 (discussing how other states have adopted presumption of release).

<sup>268</sup> D.C. Judges are permitted to detain for white collar crimes and drug crimes, but they rarely do so. See D.C. CODE § 23-1322 (2024).

and as a result, D.C. releases more than 90% of defendants pretrial.<sup>269</sup> In contrast, though Kentucky and Virginia have provided more pretrial supervision, adopted risk assessments, and reduced reliance on money bail, their release rates fall below the risk assessments' recommendations and have not shown declines in pretrial detention despite years of reforms.<sup>270</sup> Judges certainly vary in their reliance on risk assessments or pretrial services, but neither of these reforms necessarily result in a narrow detention net or high release rates.<sup>271</sup> Without a release target and presumptive release built in by statute, Kentucky and Virginia bail reform efforts have not enhanced pretrial liberty. D.C. judges, though lacking a narrowly defined detention net,<sup>272</sup> have interpreted statutory provisions to only detain the most serious violent defendants before trial for more than fifty years.

A narrow detention net is executed by drastically reducing the crimes that are eligible for detention pretrial and releasing the majority of individuals presumptively. Detention should be an option only for individuals who the government proves are statistically high risk due to prior violent crime and pose

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<sup>269</sup> See BARADARAN BAUGHMAN, *supra* note 6, at 45 (“Under the DC system, defendants are classified as high, medium, or low risk according to points on a thirty-eight-factor instrument.”); PRETRIAL JUST. INST., *supra* note 34, at 3 (noting Washington, D.C., releases 92% defendants pretrial). D.C. also relies on a risk assessment instrument for assessing risk and prohibits cash bail completely. See D.C. CODE § 23-1321; see also *What Changed After DC Ended Cash Bail*, NPR (Sept. 2, 2018, 7:43 AM), <https://www.npr.org/2018/09/02/644085158/what-changed-after-d-c-ended-cash-bail> [<https://perma.cc/46GY-FGF8>] (discussing progressive moves away from cash bail made by D.C. in 1992).

<sup>270</sup> Baradaran Baughman et al., *supra* note 50, at 471 (arguing these results demonstrate judges vary in their use of risk assessments); Garrett & Monahan, *supra* note 44, at 471 (“Over time, Stevenson describes, judges reverted to their prior habits in bail-setting pretrial.”); see STEVENSON & DOLEAC, *supra* note 42, at 6 (noting Kentucky’s pretrial release rate for low and moderate-risk defendants would have been 37% higher if judges had followed risk assessment recommendations); see also Kaylee Raymer, *Bailing on a Broken Cash Bail System: A Comparative Analysis of Cash Bail Reform in North Carolina, Kentucky, and California*, 58 U. LOUISVILLE L. REV. 515, 520 (2020) (“In 1976, Kentucky became a national leader in bail reform when its legislature created the Pretrial Services Agency and made for-profit bail illegal.”); Steve Descano, Opinion, *Virginia Must End Cash Bail*, WASH. POST (Dec. 18, 2020, 9:00 AM) [https://www.washingtonpost.com/opinions/local-opinions/virginia-must-end-cash-bail/2020/12/17/bc523b9e-38ab-11eb-bc68-96af0daae728\\_story.html](https://www.washingtonpost.com/opinions/local-opinions/virginia-must-end-cash-bail/2020/12/17/bc523b9e-38ab-11eb-bc68-96af0daae728_story.html) (arguing local attempts to implement alternatives to cash bail are not sufficient).

<sup>271</sup> See Baradaran Baughman, *supra* note 11, at 1014-16 (explaining risk assessment tools used in Kentucky and Virginia were not successful in reducing incarceration rates because judges are not required to follow risk assessment recommendation, which presume release).

<sup>272</sup> Statutory language in D.C. for categories of detention is actually broad—but just interpreted narrowly for a long period of time by judges. See D.C. CODE §§ 23-1311(3)(A)-(J), 23-1322(b)(1)(A) (including burglary, cruelty to children, robbery, first degree sexual abuse, sale or distribution of drugs, arson and other crimes).

a substantial danger to specific individuals if released pretrial.<sup>273</sup> A statutory scheme makes clear the narrow category of serious violent crimes eligible for preventative detention—with some conditions, monitoring, supervision, or if nothing is possible to protect the public, detention before trial.<sup>274</sup> It is important to distinguish the crimes that are eligible for detention from those that are serious and violent, or forcible and violent. For instance, the narrow detention net in New Jersey detains only individuals charged with murder or another crime punishable by life imprisonment.<sup>275</sup> However, it still allows a prosecutor to move to detain anyone charged with a broad list of offenses. Illinois’s most recent act seems to provide a narrow detention net.<sup>276</sup> The 2021 Illinois Act requires that “[a]ll defendants shall be presumed eligible for pretrial release” unless the defendant has committed a forcible felony or other violent crime and poses a “specific” threat to a person or high likelihood of willful flight.<sup>277</sup> Although the impacts of the Illinois Act are not yet known, it limits the detention net in a way that should only impose detention on a limited number of defendants, though the net seems broader than similar nets in New Jersey and D.C. Most individuals charged with a crime could be released on their own recognizance from the police station, even without a pretrial detention hearing, including most misdemeanor defendants.<sup>278</sup> Individuals charged with serious forcible felonies

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<sup>273</sup> See BARADARAN BAUGHMAN, *supra* note 6, at 92 (showing courts could potentially release 28% more defendants under this proposed model).

<sup>274</sup> *Id.* at 43 (“Release on recognizance provides an assurance to judges that certain defendants will not be held in pretrial detention. This assurance cannot be guaranteed with any other form of release because of the economic standing of many defendants.”).

<sup>275</sup> The only arrested individuals for whom there is not a presumption of release are those charged with murder or charged with any offense for which the individual might face life imprisonment. See N.J. STAT. ANN. § 2A:162-19 (West 2024).

<sup>276</sup> See generally Public Act 101-0652, art. 10, 2020 Ill. Laws 2483 (2021). New Jersey is a decent example of this as well. See Baradaran Baughman, *supra* note 11, at 1018 (New Jersey dramatically limits number of “violent crimes” subject to pretrial detention).

<sup>277</sup> 725 ILL. COMP. STAT. ANN. 5/110-6.1(e) (West 2024).

<sup>278</sup> Exceptions for misdemeanors where detention is not guaranteed include DUIs, child abuse, and domestic violence where the safety of the witnesses cannot be insured before trial. See VT. R. CRIM. P. 3(c) (stating law enforcement may merely issue citation unless misdemeanor is assault against family member, violation of court order, violation of foreign abuse prevention order, misdemeanor offense against vulnerable adult, DUI after prior conviction, violation of hate-motivated crime injunction, violation of condition of release, stalking, simple assault, recklessly endangering another person, failure to register as sex offender, or cruelty to child, among other things); VA. CODE ANN. § 19.2-74(A)(2) (2024) (stating law enforcement must arrest, not issue summons for offenses included in section 19.2-81 of the Virginia Code, which include DUIs and minors driving after consuming alcohol); W. VA. CODE ANN. § 62-1-5a(1) (LexisNexis 2024) (stating law enforcement must arrest for misdemeanors involving injury to the person); WIS. STAT. ANN. § 968.085(8) (West 2024) (stating law enforcement must arrest, not write citation, in domestic abuse cases); see also Heaton et al., *supra* note 3, at 749 (“For driving while intoxicated (DWI), for example,

could be held until their hearing for pretrial release.<sup>279</sup> D.C.'s law, though by statute opens a broader category of crimes for detention, in practice also achieves this goal since judges only order detention for serious violent crimes.<sup>280</sup> As a best practice for liberty and public safety, a narrow detention net requires a very small subset of crimes to be statutorily eligible for detention pretrial. Several states have preserved public safety while releasing the majority of individuals before trial.

A final key feature of a narrow detention net is a high standard of proof required by the government to detain an accused before trial if a hearing is held. A narrow detention net sets high release goals and allows detention only where the government proves, by clear and convincing evidence, that a defendant is unable to be safely released.<sup>281</sup> Clear and convincing evidence has always been the standard for detention when bodily liberty is at stake, according to the

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detention has little effect on adjudication of guilt—presumably because there is sufficient evidence from alcohol tests in most cases to convict.”).

<sup>279</sup> The set of crimes for which pretrial detention may be imposed in Illinois includes: (1) all non-probation eligible, forcible felonies (murder, armed robbery, vehicular hijacking, etc.); (2) all sex crimes (criminal sexual assault and abuse, child pornography, etc.); (3) all domestic violence charges (misdemeanor and felony domestic battery and violation of orders of protection); and (4) all non-probation eligible gun-related felonies (all forms of discharge or sale of a firearm, and most forms of possession of a firearm). Public Act 101-0652, art. 10, § 110-61(a).

<sup>280</sup> Section 23-1332 of the D.C. Code allows detention for a category for violent felony offenses, but in actuality judges detain in fewer circumstances than required.

<sup>281</sup> The government bears the burden to prove that a defendant should not be released before trial by a clear and convincing evidence standard. The default in bail hearings should be release before trial. See Nicole Zayas Fortier, *Unfettered, Unchecked, Unopposed: The Need for Accountability and Limits*, in *CAN THEY DO THAT? UNDERSTANDING PROSECUTORIAL DISCRETION* 25, 38 (Melba V. Pearson ed., 2020) (“When pursuing charges is necessary, prosecutors should presume that they should recommend people are released before trial without conditions and alternative-to-prison sentencing options upon conviction, such as community service or probation.”). It is not enough for prosecutors to refrain from making these favorable recommendations. See Douglas L. Colbert, “*With a Little Help from My Friends: Counsel at Bail and Enhanced Pretrial Justice Becomes the New Reality*,” 55 *WAKE FOREST L. REV.* 795, 801 (2020) (explaining that pretrial detention reform suffered when “[a]t initial appearances, prosecutors refrained from making favorable recommendations for pretrial release” and instead “chose the ‘neutral’ path and took no position, stating only that ‘the People submit’ and leaving it for the judge to decide”). See generally Rachel Smith, *Condemned to Repeat History? Why the Last Movement for Bail Reform Failed, and How This One Can Succeed*, 25 *GEO. J. ON POVERTY L. & POL’Y* 451 (2018) (considering role of government actors on changing bail imposition policies).

Supreme Court<sup>282</sup> and many state courts.<sup>283</sup> When pretrial detention is necessary, the detention period should be limited to twenty-four or forty-eight hours.<sup>284</sup> In the instances where release is not appropriate, prosecutors should consider

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<sup>282</sup> See *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) (“This Court has mandated an intermediate standard of proof—‘clear and convincing evidence’—when the individual interests at stake in a state proceeding are both ‘particularly important’ and ‘more substantial than mere loss of money.’” (quoting *Addington v. Texas*, 441 U.S. 418, 424 (1979))); see also sources cited *supra* note 82. Though some courts have made a distinction and used clear and convincing evidence for public safety cases and preponderance of the evidence for flight risk cases. See generally U.S. DOJ, 1 CRIMINAL RESOURCE MANUAL (2019).

<sup>283</sup> *Simpson v. Owens*, 85 P.3d 478, 487-88 (Ariz. Ct. App. 2004) (contrasting “clear and convincing evidence” with “strong, clear evidence”); *In re Humphrey*, 482 P.3d 1008, 1018 (Cal. 2021) (holding under Federal Constitution a person can be detained if court finds by clear and convincing evidence that no nonfinancial condition of release can reasonably protect public); *Kleinbart v. United States*, 604 A.2d 861, 870 (D.C. 1992) (“A defendant’s liberty interest is no less—and thus requires no less protection—when the risk of his or her flight, rather than danger, is the basis for justifying detention without right to bail.”); *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 313 (E.D. La. 2018) (holding Due Process Clause requires government prove by clear and convincing evidence pretrial detention is necessary to mitigate risk of flight, due to “vital importance of the individual’s interest in pretrial liberty recognized by the Supreme Court”); *Wheeler v. State*, 864 A.2d 1058, 1065 (Md. Ct. Spec. App. 2005) (“The requirement that the court be persuaded by ‘clear and convincing evidence’ of the danger a defendant presents is a strong procedural protection.”); *Mendonza v. Commonwealth*, 673 N.E.2d 22, 35 (Mass. 1996) (holding “clear and convincing” evidence standard is required for pretrial detention decisions based on predicting future dangerousness); *Valdez-Jimenez v. 8th Jud. Dist. Ct. of Nev.*, 460 P.3d 976, 987 (Nev. 2020) (“[G]iven the important nature of the liberty interest at stake, the State has the burden of proving by clear and convincing evidence that no less restrictive alternative will satisfy its interests in ensuring the defendant’s presence and the community’s safety.”); *State v. Furgal*, 13 A.3d 272, 274 (N.H. 2010); *State v. Ingram*, 165 A.3d 797, 800 (N.J. 2017); *State v. Groves*, 2018-NMSC-009, ¶ 36, 410 P.3d 193, 199 (N.M. 2018) (“The clear and convincing evidence standard is a recognized term of art in our jurisprudence.”); *Brill v. Gurich*, 1998 OK CR 49, ¶ 13, 965 P.2d 404, 408 (Okla. Crim. App. 1998).

<sup>284</sup> UNIF. PRETRIAL RELEASE & DET. ACT § 308(a) (UNIF. L. COMM’N 2020).

At the conclusion of a release hearing, the court may issue an order to detain the arrested individual temporarily until a detention hearing, or may impose a financial condition of release in an amount greater than the individual is able to pay from personal financial resources not later than [24] hours after the condition is imposed [in certain circumstances]. *Id.*

alternatives to detention<sup>285</sup> such as an unsecured bond,<sup>286</sup> deposit bail, conditional release,<sup>287</sup> electronic monitoring,<sup>288</sup> or diversion programs. If the jurisdiction does not require representation at the bail determination, it should adopt a mandated release program. Such a program would make release the default unless the government demonstrates with clear and convincing evidence that the person presents a substantial risk of violence to a specific individual. Incarceration is the last resort in a narrow detention scheme that aims for jail elimination.

#### CONCLUSION

If we can learn anything from the ongoing debates about bail or the prior failed waves of bail reform,<sup>289</sup> it would be that reform efforts do not actually

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<sup>285</sup> No release option is superior to release on recognizance for a defendant. Substantial monetary costs to a defendant can be incurred through “attendance requirements” (which require the accused to return to court on a regular basis) or electric home monitoring (which requires a “hook up” fee” and regular internet service). Carroll, *supra* note 145, at 187-88. Restrictions on a defendant’s physical liberty with conditional release can also place a substantial burden on a defendant, potentially restricting their ability to find housing or work. *Id.* at 188-90.

<sup>286</sup> See BARADARAN BAUGHMAN, *supra* note 6, at 43 (“An unsecured bond is where a defendant is released after he contracts to appear before the court on a specified date and promises to pay a set bail amount later if he fails to appear.”).

<sup>287</sup> Conditional release may be a “low-cost option for releasing individuals pretrial, with tailored precautions to ensure the safety of the public.” *Id.* at 52 (noting risk assessment programs may guide the conditions, including “mandatory drug testing or substance abuse programs, counseling, or admittance to a rehabilitation facility,” that are applied in any particular situation). Judges must carefully consider certain costs to the defendant associated with conditional release; otherwise, it can perpetuate detention. Carroll, *supra* note 145, at 184. This is not to say that drug testing should not be a condition of release in some situations as this may be a critical piece of the success of the D.C. program for many years. See *Court Support*, *supra* note 165.

<sup>288</sup> See BARADARAN BAUGHMAN, *supra* note 6, at 52-53 (“Other precautions that may be considered with conditional release include electronic monitoring, where a defendant’s travel is monitored to ensure that either he does not leave the jurisdiction or avoids certain prohibited locations.”); see also Ava Kofman, *Digital Jail: How Electronic Monitoring Drives Defendants into Debt*, PROPUBLICA (July 3, 2019, 5:00 AM), <https://www.propublica.org/article/digital-jail-how-electronic-monitoring-drives-defendants-into-debt> (“When cities cover the cost of monitoring, they often pay private contractors \$2 to \$3 a day for the same equipment and services for which [private companies] charge defendants \$10 a day.”).

<sup>289</sup> Alexa Van Brunt and Locke Bowman have pointed out that in “jurisdictions where financial conditions have become less central to the pretrial process (a key tenet of recent reforms), the balance has tipped toward a greater acceptance of preventive detention,” which has not reduced detention rates. Van Brunt & Bowman, *supra* note 48, at 709; see also Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction*,

decrease pretrial detention but tend to make matters worse. One approach would be to avoid reform altogether. Another less fatalist option is to try a wholly unorthodox approach to bail reform: near-complete elimination of pretrial detention. This Article has demonstrated that a detention net statutory scheme can achieve the goal of near-complete pretrial abolition among states and the federal system. This involves allowing most defendants a presumption of release (without a hearing), setting a narrow detention net to detain the few who are unsafe to release, and setting a release target of 90% by statute to create external accountability for judges making these individual decisions.<sup>290</sup> Judges maintain discretion in individual cases but there is more control over the overall outcomes. This detention net scheme is more likely to enhance pretrial liberty, as informed by constitutional and Supreme Court dictates that require that the majority of defendants are released before trial. Setting a target percentage of 90% for release will help reduce pretrial detention rates, as on its own, no bail reform scheme guarantees certain or higher release rates. Bail reform is one of areas where, without carefully articulated constitutional rights, statutory schemes have created a muddled mess. Rather than making progress, the last three waves of bail reform over the last sixty years have only increased detention, sacrificed public safety, and reduced liberty in both the federal and state realms. Having these rights protected within a statutory scheme that articulates a narrow detention net with release targets would provide hope for bail reform to be the case study for jail abolition. Nearly complete pretrial abolition will also better protect public safety as pretrial detention has proven to increase future crime. Robust empirical data demonstrates that around 90% of felony and misdemeanor defendants can be released pretrial,<sup>291</sup> with an improvement in public safety. Indeed, it might actually be possible to nearly eliminate pretrial detention in the United States.<sup>292</sup>

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*Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 236 (2018).

<sup>290</sup> Van Brunt & Bowman, *supra* note 48, at 708 (“We see a risk that the latest set of bail reforms will widen the net of detention by failing to fully eradicate the traditional money bail system while also encouraging more intentional forms of preventive detention.”); *see also* UNIF. L. COMM’N, *supra* note 215 (explaining how detention eligibility nets are extremely important to limit pretrial detention).

<sup>291</sup> Baradaran & McIntyre, *supra* note 17, at 557 (finding approximately 80% of defendants could be released pretrial with minimal threat to public safety); Heaton et al., *supra* note 3, at 718 (releasing more misdemeanor defendants pretrial improves public safety).

<sup>292</sup> There is a lot of room for abolitionist reforms in other aspects of the front end and of course on the back end of criminal justice. For other great programmatic supports and principles to follow for further increasing pretrial liberty, see *Beyond Bail: A Holistic Framework for Pretrial Justice*, C.R. CORPS, <https://cdn.buttercms.com/H1fmZHQMuJb771jysKSw> [<https://perma.cc/W7MK-DMSK>] (last visited Sept. 27, 2024); and *Bail Reform: Basic Statutory Principles*, *supra* note 227.